STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BROWN COUNTY SHELTER CARE EMPLOYEES LOCAL 1901-F, AFSCME, AFL-CIO, Complainant, vs. BROWN COUNTY, Respondent.	Case 482 No. 48350 MP-2659 Decision No. 27553-D

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 936 Pilgrim Way #6, Green Bay, Wisconsin 54304, appearing for Brown County Shelter Care Employees Local 1901-F, AFSCME, AFL-CIO, referred to below as the Union.

Mr. John C. Jacques, Assistant Corporation Counsel, 305 East Walnut, P. O. Box 23600, Green Bay, Wisconsin 54305-3600, appearing for Brown County, referred to below as the County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The procedural history of the complaint until December 8, 1993, is summarized in Brown County, Dec. No. 27553-B (McLaughlin, 12/93). The procedural history of the complaint from December 8, 1993, through January 31, 1994, is summarized in Brown County, Dec. No. 27553-C (WERC, 1/94). On February 14, 1994, I issued a Notice of Hearing setting hearing for March 29, 1994. On February 21, 1994, the County filed a Motion to Dismiss the complaint. In a letter to the parties dated February 22, 1994, I stated:

> I write to confirm receipt of the County's Motion to Dismiss. Argument and evidence on the Motion may be presented at the March 29, 1994 hearing. I will affirm the County's statement that their participation at the hearing will not be considered "a waiver of any . . . defenses previously asserted in this matter."

Hearing on the matter was held on March 29, 1994, in Green Bay, Wisconsin. A transcript of that hearing was provided to the Commission on April 20, 1994. The parties filed briefs and reply briefs by July 14, 1994.

FINDINGS OF FACT

1. Brown County Shelter Care Employees, Local 1901-F, AFSCME, AFL-CIO, (the Union) is a labor organization which maintains its offices in care of 936 Pilgrim Way #6, Green Bay, Wisconsin 54304.

2. Brown County, (the County) is a municipal employer which maintains its offices at 305 East Walnut, P.O. Box 23600, Green Bay, Wisconsin 54305-3600.

3. Brown County, among its functions, operates Brown County Shelter Care (the BCSC). Among the services provided by BCSC is the provision of housing for youths requiring social services. The County staffs that housing twenty-four hours per day, seven days per week, using full-time, regular part-time and on-call employes. Clients of the BCSC are youths between the ages ten and eighteen who are having family problems and are involved in the juvenile court system. The Commission conducted an election of the regular full-time and regular part-time employes of what was then referred to as the Brown County Youth Home, and certified the results of that election in Decision No. 20337, issued on April 21, 1983. On-call employes did not participate in that election.

4. The County and the Union are parties to a collective bargaining agreement which, by its terms, "shall become effective as of January 1, 1991, and remain in force and effect to and including December 31, 1992." Among the terms of that agreement are the following:

> Article 2. RECOGNITION AND UNIT REPRESENTATION
>
> The Employer recognizes the Union as the exclusive collective bargaining representative for the purposes of conferences and negotiations with the Employer, or its lawfully authorized representatives, on questions of wages, hours and conditions of employment for the unit of representation consisting of all employees of the Employer employed as follows:
>
> > All regular fulltime and regular part-time nonprofessional employees of the Brown County Shelter Care, excluding supervisors, confidential, managerial, executive, professional and probationary employees and all other employees of the Employer as certified by the Wisconsin Employment Relations Commission, dated April 21, 1983.
>
> . . .

ARTICLE 25. GRIEVANCE PROCEDURE - DISCIPLINARY PROCEDURE

Any grievance or misunderstanding which may arise between the Employer and an employee (or employees) or the Employer and the Union, shall be handled as follows:
STEP ONE: The aggrieved employee, the Union Committee and/or the Union representative shall present the grievance within fourteen (14) calendar days of knowledge of occurrence to the Administrator.

STEP TWO: If a satisfactory settlement is not reached as outlined in Step One within one (1) week, the Union Committee and/or the Union Representative shall present the grievance to the Personnel Director . . .

STEP THREE: If a satisfactory settlement is not reached as outlined in Step Two, either party desiring arbitration must submit a request that the matter be submitted to arbitration . . .

DISMISSAL: No employee shall be discharged except for just cause . . . Any employee who has been discharged may use the grievance procedure . . .

Attached to this collective bargaining agreement is a series of memoranda of understanding. One of those memoranda governs "On-Call Employees." That memorandum of understanding (the Memorandum) reads thus:

The following agreement has been reached between AFSCME, AFL-CIO, representing Shelter Care employees, and Brown County. For the purposes of this memorandum of understanding, on-call employees shall be considered as a separate bargaining unit associated with Local 1901F.

1. DEFINITION:

   An on-call employee shall be defined as a qualified individual hired for the purpose of relief coverage (sick, vacation, personal leaves, etc.) of a regular fulltime or regular part-time position(s), or a temporary posting needed for special staffing requirements to meet facility needs.

2. PROBATIONARY PERIOD:

   A. An on-call employee shall serve a probationary period of 416 worked hours or 3 months (whichever is later) to be calculated from the date of hire or transfer to on-call status. Probationary period completion or a partially completed period in a regular fulltime or regular part-time posted position of Local 1901F shall be transferrable to meet this

requirement.

B. A completed 416 worked hours probationary period of an on-call employee shall be transferable to a regular part-time or regular fulltime posted position of Local 1901F. A second probationary period with a posted position of Local 1901F shall not be needed to be served. Such an individual shall be required to serve a fourteen (14) day trial period according to Article 23 (Seniority) of the bargaining agreement with Local 1901F.

C. Currently employed individuals classified as on-call employee shall serve a probationary period of 416 worked hours commencing on date of hire.

. . .

3. SENIORITY:

An on-call employee shall accumulate temporary seniority according to actual hours worked per payroll period. The formula shall be:

. . .

4. BENEFITS:

Fringe benefits and/or other benefits not listed in this memorandum of understanding shall not be available to on-call employees.

5. WAGES:

It is understood that night shift differential and overtime pay are considered wages and therefore, on-call employees will receive night shift differential and overtime pay when they qualify under the labor agreement language.

6. TEMPORARY POSTINGS:

. . .

B. Temporary postings shall be awarded according to necessary qualifications and seniority in the following order:

1. Regular fulltime and part-time members of Local 1901-F

2. On-call employees

3. Individuals outside of the employment of the Facility

. . .

This memorandum of understanding has been agreed to in whole as a part of the bargaining process of the labor contract with Local 1901F.

5. On-call employes do not pay union dues, and the Union maintains no independent financial or administrative structure for a bargaining unit of BCSC on-call employes.

6. The Brown County Youth Home reopened as BCSC in 1988. The Union and the County negotiated a predecessor to the Memorandum in 1989, and attached it to the 1989-90 1901-F agreement. The predecessor to the Memorandum contained what appears as the prefatory paragraph, Sections 1, 2, 4 and the final paragraph of the Memorandum. In the bargaining for the initial memorandum covering on-call employes, the parties specifically addressed seniority and posting issues. The parties did not, at any time in the bargaining for the Memorandum or for its predecessor, discuss access of on-call employes to the grievance procedure or to the just cause provision contained in Article 25 of the 1901-F agreement. During the collective bargaining in 1989, Debbie Bowman, the Administrator of BCSC, asked the spokesman for the Union what should be done about an on-call employe who had accumulated roughly seventy-three hours of work in a one-year period. She believed he knew which employe prompted her question. She understood his response to be that the County should not retain such an employe on its call-in roster.

7. Julie Sowers worked at the Brown County Youth Home from 1981 as a regular, part-time employe. Her employment status, when the County reopened the Youth Home as BCSC, was summarized in a letter, dated December 28, 1987, from then-incumbent Personnel Director Gerald Lang to Sowers, which read thus:

> Brown County will be utilizing part-time employees in the (BCSC) facility . . . Shelter Care Administrator Debbie Bowman contacted you by telephone and discussed with you the part-time Shelter Care Worker position and the corresponding work schedule. You declined the part-time Shelter Care Worker position because the schedule of work hours was not acceptable to you. In the future it may be necessary to call a Shelter Care Worker in on an "on-call" basis. In that event, it is understood that you may be interested in being "on-call" if it does not conflict with your other activities . . .

Sowers accepted on-call status, and the County confirmed her employment "as an on-call Shelter Care Worker" in a letter from its Personnel Department to Sowers dated January 13, 1988. That letter also noted: "As an on-call employee, you are not entitled to any fringe benefits." Sowers was, throughout her employment as an on-call employe, involved in establishing her own interior design business.

8. While in on-call status, Sowers could be called for work at any time, on any shift. She was not required to give a reason for turning down work. During the term of Sowers' employment as an on-call employe, the BCSC employed three female on-call employes. When it was necessary to call an on-call employe, BCSC staff would always call the most senior on-call employe first. Sowers was the most senior female on-call employe. If she declined the work, the next senior employe would be called, then the least senior if that employe declined the work. If no on-call employe would take the work, BCSC would fill the work on an overtime basis. If the cause of the underlying absence requiring on-call coverage was a discretionary leave request from a regular employe, the County would, on occasion, deny the leave to avoid the overtime cost.

9. In April of 1992, Sowers was injured in a car accident. She talked to BCSC staff about her injuries, but did not formally notify BCSC administration of the accident. She asked BCSC staff to continue to call her because her recuperation was gradual, and she hoped to be able to work shortly after the accident. She did not, however, feel sufficiently recovered to comfortably accept work until August of 1992. She continued, however, from April through September of 1992, to be the first female on-call employe called when work was available. She was aware the County was calling her before other employes throughout this period.

10. On July 7, 1992, Bowman phoned Sowers at her place of business. Sowers was busy, and stated she would call back. She did not. On July 8, 1992, Bowman again called Sowers, and insisted they talk about her status as an on-call employe. Bowman told Sowers she was concerned that Sowers had gone roughly four months without accepting any of the hours offered her. She also informed Sowers she was concerned Sowers had not shown up for four shifts Sowers had been

scheduled to work. She also informed Sowers that Sowers had missed two mandatory staff meetings. She also informed Sowers that she had not received an injury report from Sowers. Sowers supplied that report to Bowman the next time Sowers worked.

11. From July 8 through September 26, 1992, BCSC offered Sowers hours for at least forty-three different shifts. Sowers accepted three. Both Bowman and BCSC staff were concerned with the number of hours Sowers accepted and with the difficulty it posed to call her first for available hours.

12. On-call employes are expected to attend, and are paid for attending, certain staff meetings. Notices of staff meetings are mailed to employes, or else BCSC staff phone employes to advise them of such meetings. Bowman has verbally reprimanded employes for missing these meetings. Sowers missed two staff meetings between July and the end of September, 1992. In March of 1990, Sowers left Bowman a handwritten note stating: "Please excuse me from the staff mtg. Mar. 13th as I will be out of town . . ."

14. BCSC does not have any written rules governing how many hours an on-call employe is expected to work. If Bowman had concerns with the number of hours an on-call employe worked, she would counsel the employe. Prior to Sowers, each such instance ended with the employe agreeing to be dropped from the call in list.

15. In a letter to Sowers dated September 23, 1992, Bowman stated:

> This letter is to inform you that you are not meeting the expectations of an on-call worker at Shelter Care. Therefore, you are being dropped from the call-in list effective 10/1/92.

Sowers worked at least one shift following September 23, 1992. She picked this letter up at BCSC in early October of 1992.

16. On October 12, 1992, the Union filed a grievance regarding Bowman's September 23, 1992, letter. The grievance form states the reason for the grievance was "termination of employment without just cause." Wayne Pankratz, the County's Human Resources Director, responded to the grievance in a letter dated October 30, 1992, which reads thus:

. . .

> First, we do not believe that the employee possesses any rights to the grievance procedure or any other provisions of the agreement. Therefore her grievance is not allowable or arbitrable under the agreement. It is our position that the memorandum of understanding

that is attached to the agreement clearly reflects all of the provisions and benefits provided to on-call employees.

Second, although Ms. Sowers was a regular EPT employee and completed her probationary status while the facility was still the Youth Home, we believe when she was offered regular part-time status at the Shelter Care Facility and declined that regular part-time status, preferring instead to be placed on-call, then at that point she voluntarily removed herself from the bargaining unit . . .

Third, Ms. Sowers had an automobile accident in April of 1992 but did not indicate to the County that she wanted to be placed on leave; moreover, she insisted that she be called even though she fully realized that she was unable to work thus necessitating her declining of all work offered. We believe she was misleading and misrepresenting her condition to the County and it was a serious waste of County employees' time when she needed to be called each time there was an available position for her, yet only to have her decline the assignment.

Fourth, on July 7 Ms. Bowman contacted Ms. Sowers by phone, but Ms. Sowers was unable to talk. She said she would call Ms. Bowman right back. She did not call back. On July 8 when Ms. Bowman again contacted Ms. Sowers by phone, Ms. Bowman clearly articulated to her four areas of deficiency which she maintained as an employer were serious areas of concern. These areas of concern were:

1. She had declined all hours since March without indicating any problems or extenuating circumstances. She also missed her shifts on several occasions.

2. She had missed the last two mandatory staff meetings and had still not reviewed or signed minutes which had posted for eight weeks.

3. On five occasions she was requested to complete and return an injury report from an incident which occurred March 21, 1992 and as of July 8 the report still had not been received.

4. On many occasions Ms. Bowman and her staff have offered Ms. Sowers hours. She consistently indicated that she will call back with an answer yet never responds. This necessitated calling her and also causes difficulty throughout the entire process of covering shifts.

It was after that time when Ms. Sowers again started working at the facility. However, her attendance continued to be sporadic, she continued to decline openings, and she did not attend mandatory staff meetings on September 18 and September 24. Ms. Bowman did draft a letter indicating to Ms. Sowers that she would be removed from the on-call list. Ms. Sowers indicated she never received the first or second letters that were mailed out but did finally pick up a copy on October 12. We believe this employee was given due notice in July of areas of concern by her supervisor. Those areas continued to be concerns through the month of September. Therefore, we believe it was appropriate that Ms. Bowman notified Ms. Sowers that she was being terminated and her name was being removed from the on-call list.

17. The Memorandum is a collective bargaining agreement covering BCSC on-call employes. Section 4 of the Memorandum denies access of on-call employes to any of the benefits listed at Article 25 of the Local 1901-F agreement.

CONCLUSIONS OF LAW

1. The Union is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

2. The County is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

3. Sowers was, as an on-call employe of BCSC, a "Municipal employe" within the meaning of Sec. 111.70(1)(i), Stats.

4. Because Section 4 of the Memorandum denies access of on-call employes to the grievance procedure contained in the Local 1901-F agreement, Sec. 111.70(3)(a)5, Stats., is an available mechanism to enforce the terms of the Memorandum.

5. Bowman's removal of Sowers from the call-in roster did not violate the Memorandum, and thus did not violate Secs. 111.70(3)(a)1 or 5, Stats.

ORDER 1/

The complaint is dismissed.

Dated at Madison, Wisconsin, this 13th day of September, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

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

Section 111.07(5), Stats.

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

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The background of this matter was set forth in Dec. No. 27553-B (McLaughlin, 12/93), and need not be repeated. The complaint asserts County violations of Secs. 111.70(3)(a)1 and 5, Stats., but the parties' arguments focus on Sec. 111.70(3)(a)5, Stats. Any Sec. 111.70(3)(a)1, Stats., violation is derivative in nature. The County has again reasserted its Motion to Dismiss. That motion poses no issues not addressed in prior decisions.

THE PARTIES' POSITIONS

The Union's Initial Brief

After a review of the procedural background of the complaint, the Union contends that Section 2, B, of the Memorandum sheds light on the significance of an on-call employe's passing the probation period. Section 2, B, establishes that an on-call employe who has passed their probation period, and has moved into a "posted position of Local 1901F," need not serve "(a) second probationary period." This language, the Union argues, "does more than give on-call employees access to posting rights, it opens the door to a non-probationary status with procedural rights to just cause in terms of discipline." Sowers cannot, under any view of the evidence, be considered a probationary employe, according to the Union.

As a non-probationary employe, Sowers had access to just cause protection, the Union argues, and adds that the County's three stated bases for the termination must be assessed under that standard. The Union then asserts that Sowers notified the County of the accident that caused the injuries limiting her ability to take hours; that the County had no set rules requiring an on-call employe to request a medical leave; that the County never clearly asked her to document the extent of her injuries; and that the County had an inconsistent, if any, expectation of the number of hours to be worked by an on-call employe. Against this background, the Union concludes the County's concern for Sowers' failure to take hours cannot supply cause for her termination.

That Sowers missed staff meetings cannot supply cause for the termination, according to the Union. The Union asserts that the County failed to demonstrate either that it notified Sowers of such meetings or that such meetings are mandatory for on-call employes.

That Sowers failed to turn in an incident report is, the Union contends, "de minimis in terms of the Respondent's arguments against her job performance." That the County never attempted to counsel or to warn Sowers about this concern totally undercuts this purported basis for the termination. The Union also questions how the County's articulated concern for Sowers attendance can be balanced against the fact that on-call employes "are apparently not expected to work any set number of hours or shifts." Past examples of how the County treated on-call employes who worked too few hours have, the Union asserts, no bearing here.

The Union concludes that the primary basis for the termination was Sowers' failure to work as many shifts as the County expected. This expectation, the Union concludes, cannot be given significant weight. As a matter of fact, the Union notes that the expectation was never clearly communicated to Sowers. As a matter of contract, the Union notes that Sowers was not an "at-will employe . . . once (she) passed the contractual probationary period in the Memorandum of Understanding." Her termination must, therefore, meet a just cause standard, and the Union asserts that the County has failed to meet that standard. Because grievance arbitration is not available to Sowers, the Union asserts that the Commission's exercise of discretion under Sec. 111.70(3)(a)5, Stats., is appropriate and should include "such relief as it deems appropriate."

The County's Initial Brief

The County argues that the "sole purpose" of the hearing "was to provide complainant the opportunity to prove that the On-call Memorandum provision as to probationary status was violated by the employer." The County contends that the Union has failed to produce any evidence on this point, other than Sowers' testimony attempting to justify her poor attendance and work record.

This evidence must be given no weight, the County asserts, because the "Courts in Wisconsin have long recognized the employment at will doctrine in Wisconsin." Granting Sowers employment rights under Sec. 111.70(3)(a)5, Stats., would ignore this law and the Commission's own precedent, according to the County. Even if this law was inapplicable, the County argues that the evidence shows that the Memorandum was negotiated to secure access only to the posting procedure, not to employment security provisions.

The County next contends that a review of the Memorandum demonstrates that "(j)ust cause rights were not listed, nor were any limitations on the employer's right to discharge listed in the document." Even if the Memorandum required cause for a discharge, the County contends it had cause to discharge Sowers based on her work record. Viewing the record as a whole, the County concludes that the complaint should be dismissed.

The Union's Reply Brief

The Union asserts that the March 29, 1994, hearing "had two purposes: first, to determine if the On-Call Memorandum of Understanding provided on-call employees with just cause rights, and second, to examine the fact situation involving Ms. Sowers." The County's brief, according to the Union, fundamentally ignores the second purpose.

The Union then rebuts the County's contention that the record demonstrates the parties never intended to afford just cause rights to on-call employes. Since the record establishes the contrary, and since the County has failed to establish the existence of any "regular expectation of total hours to be worked by on call employees," it follows, according to the Union, that the County's discharge of Sowers was "arbitrary and capricious." This, the Union concludes, violates the contract and Sec. 111.70(3)(a)5, Stats.

The County's Reply Brief

The County contends that the "sole purpose, meaning and intent of the language relating to posting into regular positions was that on-call workers were given the right to post into regular positions." This contention, the

County argues, is essentially uncontroverted. That the status of on-call employes changes with the passage of a probation period can be granted, according to the County. The change, however, reflects only the right to post into unit positions, and has nothing to do with "'just cause' employment status." The Memorandum is silent on just cause, and the County argues "no reasonable interpretation" of the "unambiguous language" of the Memorandum can yield the just cause rights the Union seeks.

The County then contends that the Union's reading of Section 2, B, of the Memorandum denies any meaning to Section 4. The County contends that just as Section 4 denies Sowers the right to grievance arbitration, it denies Sowers the right to the just cause provision stated at Article 25 of the Local 1901F agreement. A review of the record establishes, according to the County, that Sowers was an at-will employe throughout her employment as an on-call employe. To conclude otherwise would, the County argues, lead "to the absurd conclusion that on-call employes could remain employed as on-call employees even when continually refusing hours." The County concludes that the "complaint should be dismissed as failing to state a claim and as beyond the jurisdiction of the Commission."

DISCUSSION

Dec. No. 27553-B set the stage for the March 29, 1994, hearing thus:

> Evidence at the hearing can include the facts surrounding the termination, including whether or not Sowers completed a probationary period. If she had, the hearing can extend to the receipt of any relevant evidence which might clarify how, if at all, her completion of a probationary period enhanced her employment status under the Memorandum.

That decision underscored the significance of this evidence thus:

> The Union's contention that Sowers is more than an at-will employe must, however, be considered persuasive. The Memorandum provides for a probationary period for on-call employes. Typically, a probation period is considered a trial period during which an employe can be terminated without any stated reason. If Sowers has passed her probationary period, her employment status was in some sense changed, and presumably enhanced. If it did not change, the language concerning a probationary period is arguably rendered meaningless. The Memorandum does not, however, directly address how, if at all, her employment status changed.

The County does not dispute that Sowers had passed her probation period. The issue posed is, then, how Sowers' employment status changed.

Evidence adduced at the March 29, 1994, hearing underscores that the only change in Sowers' employment status was the acquisition of posting and related rights. More specifically, the parties, in their 1989 bargaining, established that a non-probationary on-call employe who successfully bid into "a posted position of Local 1901F" did not need to serve "(a) second probationary

period." Rather, such an employe would be governed by "a fourteen (14) day trial period" established at Article 23 of the Local 1901-F agreement. Lang's and Bowman's uncontroverted testimony establishes that the probation period was drafted for this limited purpose only.

This does not deny any meaning to the probation period. Without it, no on-call employe could claim any more rights under the Local 1901-F agreement than "(i)ndividuals outside of the employment of the Facility."

Nor does the existence of the Memorandum's Probationary Period grant Sowers access to just cause under Article 25 of the Local 1901-F agreement. Dec. No. 27553-B established that Section 4 of the Memo denies on-call employes access to the grievance procedure of Article 25. The analysis underlying that conclusion also applies to the just cause rights of Article 25, and will not be repeated here. It is, however, important to note that Section 2 of the Memorandum underscores that analysis. Subsection B specifically states that Article 23 applies to on-call employes who have posted into a Local 1901-F position. This statement is necessary because, in its absence, Section 4 of the Memorandum would deny such coverage.

Nor can any substantive employment rights be implied from the Memorandum to be applied to Sowers' termination. As noted in Dec. No. 27553-B, the Commission lacks authority to create common-law. 2/ Even if the Commission could apply existing common-law, exceptions to the employment at will doctrine turn on the existence of a violation of "a clear mandate of public policy." 3/ No such considerations exist here. As a practical matter, even if a just cause standard existed, the County has met it. Pankratz' October 30, 1992, justification of the termination stands essentially unrebutted. Sowers' contention that she was unaware of mandatory staff meetings is suspect, given her March 30, 1990, note and Bowman's credible testimony. That she was not required to give a reason for turning down work does not explain why she insisted on being called for shifts she was unfit and unwilling to work.

In sum, Dec. No. 27553-B set the stage for the March 29, 1994, hearing by seeking proof on "how, if at all, her completion of a probationary period enhanced her employment status under the Memorandum." That decision also highlighted the possibility that the proof might not afford her the rights the Union seeks:

> Since access to Sec. 111.70(3)(a)5, Stats., does not confer rights not contained in the underlying collective bargaining agreement, it is arguable the Union has no rights to enforce regarding the Sowers termination.

The evidence indicates that the parties negotiated Section 2 of the Memorandum to exempt on-call employes from an additional probation period if the employe successfully posted into a Local 1901-F position. The parties granted no other job security rights to on-call employes. The Memorandum thus stands as a

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2/ See Dec. No. 27553-B at 21 and the authority cited at Footnote 6.

3/ Brockmeyer v. Dun & Bradstreet, 113 Wis.2d 561, 574 (1983).

document designed to afford on-call employes a means to move out of on-call status. Sowers seeks to use it to secure her on-call status without regard to her availability or willingness to work. This stretches the Memorandum beyond its negotiated purpose. Her termination violated neither the Memorandum nor Secs. 111.70(3)(a)1 or 5, Stats.

Dated at Madison, Wisconsin, this 13th day of September, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner