STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DISTRICT COUNCIL 48, AFSCME, AFL-CIO, and its Affiliated LOCAL 594, Complainant, vs. MILWAUKEE COUNTY, Respondent.	Case 376 No. 50983 MP-2893 Decision No. 28063-C

Appearances:

Podell, Ugent & Cross, S.C., by Ms. Nola J. Hitchcock Cross, 611 North Broadway, Suite 200, Milwaukee, Wisconsin, 53202, for the Complainant.

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, Milwaukee County, 901 North Ninth Street, Room 303, Milwaukee, Wisconsin, 53233, for the Respondent.

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

On October 9, 1995, Examiner Jane B. Buffett issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein she concluded that Respondent Milwaukee County had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats. She therefore ordered the Respondent County to cease and desist from such violations and to take certain affirmative action. The Examiner dismissed those portions of the complaint alleging violations of Secs. 111.70(3)(a)2 and 5, Stats.

Respondent Milwaukee County timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. Parties thereafter filed written argument in support of and in opposition to the petition. The record was closed on December 11, 1995.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER 1/

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

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

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

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(footnote 1 continues on page 3)

(b) The petition shall state the nature of the petitioner's interest, the facts showing

The Examiner's Findings of Fact, Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 21st day of March 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

(footnote 1 continued from page 2)

---

that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

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

MILWAUKEE COUNTY

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

THE EXAMINER'S DECISION

The Examiner concluded that Respondent Milwaukee County had interfered with employes' exercise of rights guaranteed under Sec. 111.70(2), Stats., by failing to release a specific union officer to conduct union business on the same basis as it released other union officers. More specifically, the Examiner found that union officer Kropp was the only officer whose release time required the approval of the County's Director of Labor Relations. The Examiner determined that a reasonable employe would conclude that he or she would receive better access to representation if he or she elected an officer whose ability to represent employes was not so restricted. She concluded that the Respondent County's actions therefore interfered with employes' free choice of union officers and thereby inhibited employes in the exercise of their rights under the Municipal Employment Relations Act.

The Examiner dismissed the alleged violation of Sec. 111.70(3)(a)2, Stats., because she concluded there was no evidence that the County was supporting the functioning of the Complainant Union.

The Examiner also dismissed the alleged violations of Sec. 111.70(3)(a)5, Stats. Because the parties' collective bargaining agreement provided for grievance arbitration of alleged violations of the agreement, she therefore declined to assert Commission jurisdiction over the alleged contract violations.

DISCUSSION

Examiner's Findings

Respondent Milwaukee County asserts that the Examiner committed certain errors of fact. We will review each specific allegation.

Examiner's Finding of Fact 4 stated as follows:

> 4. At sometime prior to October 1, 1990, the parties reached a grievance settlement which provided in pertinent part:
>
> And by this settlement the parties further agree:
>
> 2. The president of Local 594 shall be released

from County work. To the extent other officers need to be released, the Collective Bargaining Agreement shall apply.

3. This Agreement shall become effective October 1, 1990.

4. This settlement applies only to Local 594.

The Respondent County asserts that while the Examiner correctly pointed out that the contract provides a mechanism for releasing employes for union business, her decision has the effect of creating new contract rights which the parties have not bargained.

Complainant contends that the Examiner's Finding is nothing more than a correct recitation of the settlement agreement reached regarding release time. Complainant Union urges the Commission to reject the County's claim of error as to Examiner Finding of Fact 4.

We have reviewed Finding 4 and find it to be fully supported in the record and devoid of any "contract reformation." Thus, we affirm this Finding.

Examiner Finding of Fact 7 states:

> 7. On May 10, 1993 Mr. Kropp was elected Vice President of Local 594. On or about May 13, 1993, there was a meeting between Mr. Kropp, Union Chief Steward Mike Andrews and Chester Kuzminski and Department of Aging Director Sue Stein during which released time for Mr. Kropp to conduct Union business was discussed. Ms. Stein told Mr. Kropp that permission for his released time would have to be approved through the Director of Labor Relations. The Union has filed approximately 20 grievances alleging that the County has violated the collective bargaining agreement by failing to provide released time for Mr. Kropp to conduct Union business. The grievance and arbitration procedure has not been exhausted as to those grievances.

Respondent County contends that the Examiner erred when she concluded Kropp needed the approval of the County's Director of Labor Relations to be released for union business. The County asserts that this finding is based on the "self-serving and gratuitous comments of an unreliable witness, Kropp" and that the Examiner erred in allowing Kropp's hearsay testimony when there was no showing that the declarant was in any way unavailable.

Complainant Union contends that the Examiner's Finding is proper. It argues that the Finding is based upon testimony of Andrews and that the County waived any heresay objection by not raising same at the time of the hearing. Complainant asserts that it is the Examiner's prerogative to determine the credibility of witnesses and that the Examiner's decision to find

witness testimony credible was appropriate in this case. Complainant further argues that Andrews' testimony was corroborated by Kropp's testimony and also by Exhibits 4, 5, and 6 which indicate the need to seek approval from the Director of Labor Relations. Complainant also contends that Kropp's statements are not heresay under Sec. 908.01(4), Stats. inasmuch as the parties against whom Kropp offered his statements are essentially "party opponents." Complainant further notes that Respondent did not offer any testimony or evidence at the hearing to contradict the testimony of Andrews and Kropp and the inferences to be drawn from Exhibits 4, 5, and 6.

The Examiner's Finding of Fact is fully supported by the record. Both Kropp and Andrews testified without any heresay objection from the County that County Manager Stein told them that Kropp needed permission from the Director of Labor Relations before he could be released from work to pursue union business. In addition, Union Exhibits 5 and 6 fully reflect the requirement found to exist by the Examiner in her Finding. Union Exhibit 5 reflects Kropp's request that he be released from work to attend a grievance arbitration. The County responded by stating:

> "You are not realesed (*sic*) by the Dept on Aging. If Dist Council 48 wishes to request your realease (*sic*) from the Dept of Labor Relations that is their choice.

Union Exhibit 6 indicates that Local 594 President sought Kropp's release for Union business while the President was on vacation so that Kropp could "carry out the duties allowed under contract in my absence." The County responded:

> Please address this request to Labor Relations; Mr. Kropp is not realesed (*sic*) by this Dept. for unspecified business.

Thus, we have affirmed this Finding of Fact.

Examiner Finding of Fact 8 states:

> During the time that Mr. Kropp was Vice President, he was denied released time to attend to Union business. On some of those occasions he decided not to attend the meeting in questions. On other occasions he attended the meeting and took vacation time to allow for his absence from the worksite.

Respondent County asserts that this Finding is "flawed" because Kropp was never denied release for union business, but was rather denied release on County-paid work time to conduct union business. Respondent County argues the Examiner failed to find any contractual provision authorizing payment to Kropp for conducting union business during work time. Respondent County further contends that there is no evidence to support the Examiner's Finding that Kropp used vacation time to conduct union business. Respondent asserts the Examiner erred by failing to note that Kropp, at times, simply left his job leaving a note indicating that he was pursuing union

business.

Complainant Union contends that the record fully supports the Examiner's Finding. Complainant notes Kropp testified that he would use his "personal time, vacation, accumulated compensatory time, holiday time" to perform union business when he was denied "union release time." Complainant contends that Respondent is disputing what is, in essence, left unsaid by the Examiner. In this regard, Complainant notes that the Examiner made no finding regarding the applicability of any labor agreement to the issue of release time.

We affirm the Examiner's Finding as being fully supported by the record. It is apparent from the record that Respondent County denied some of Kropp's requests that he be released during work time to perform union business without loss of pay or the need to use personal leave. Kropp's testimony about his use of personal leave time, such as vacation, so that he could attend to union business stands unrebutted. Thus, we are satisfied that the Examiner's Finding should be affirmed.

Examiner's Findings of Facts 9-11 state:

> 9. Lois Chapple is an Economic Support Specialist in the County's Department of Human Services. She was Vice President of the Union for the period immediately proceeding (*sic*) Mr. Kropp's tenure as Vice President. When she had to be absent from her worksite for Union business, she would notify her supervisor that she was going out of the building and the length of time she would be gone. Upon her return she would again notify her supervisor. Her supervisor is not aware that such absences were recorded in any way.
>
> 10. Lee Henderson-Hortman is an Economic Support Specialist. Early in 1994 Henderson-Hortman become (*sic*) the Union's Chief Steward. When she had to be absent for Union business she would tell her supervisor, or her section supervisor or the section secretary when she was leaving and when she could be expected to return. During the department-wide conversion of the case files to the CARES program, which increased the workload for all the economic support specialists, Henderson-Hortman was not able to accomplish the conversion as quickly as the management desired. A special arrangement was reached in which her workload temporarily reduced and she agreed to try to schedule her Union business at the beginning or end of the workday.
>
> 11. Michael Andrews is an Emergency Coverage Worker for Protective Service Intake beginning in 1992. During 1993 and 1994 he was Chief Steward for the Union and had to be absent from the

> worksite in order to perform Union business. At those times he would notify his supervisor that he had to be gone, where he would be, and would notify his supervisor upon his return. Sometimes this notification was by writing the information on the supervisor's calendar. Emergency Coverage Workers occasionally have to be paged when they are working in the field, but Andrews' supervisor never called him when he was on Union business. Occasionally, he would leave without first getting permission, but his supervisor did not discipline him or criticize him for his absence.

Respondent County argues that these Findings are "factually deficient." Respondent County asserts that the Findings fail to note the differing departments and job responsibilities of the union officials in question. Respondent County contends there is no evidence to support a finding of Chapple's use of County-paid time to perform union business. Respondent County further argues the Examiner erred by failing to note the efforts by the County to closely regulate use of union release time by the employes in question. Lastly, Respondent County asserts that Kropp is distinguishable from the other union officials because Complainant Union never established that Kropp performed his job responsibilities.

Complainant Union asserts that the Findings of Facts 9-11 are fully supported by the record. Complainant notes that the Examiner found differences between the treatment of union release time for various employes. However, Complainant Union notes that the Examiner correctly concluded that these differences were insignificant in the context of the legal issue being litigated. Complainant Union further contends that there is evidence in the record to support the Examiner's Finding that Chappel conducted union business on County-paid time.

We have reviewed the record and concluded that it fully supports the Examiner's Findings of Fact as to the manner in which various union officials were allowed to conduct union business on County-paid time. Thus, we affirm the Examiner's Findings.

Examiner Finding of Fact 15 states:

> Mr. Kropp was the only Union officer whose released time for Union business had to be approved by the Director of Labor Relations.

Respondent County argues that Finding of Fact 15 is contrary to the evidence. It asserts that Cathy Muir also specifically had release time approved by the Director of Labor Relations. Respondent County further argues that the testimony of Muir was not credible and thus does not provide a valid basis for any Finding of Fact.

Complainant Union asserts that Finding of Fact 15 is fully supported by the record. Complainant Union contends that the testimony of County witnesses is supportive of the

Examiner's conclusion that Kropp was the only employe whose request required approval by the Director of Labor Relations. Complainant Union argues that the evidence as to Muir's release time does not establish the need for specific approval by the Director of Labor Relations.

We affirm Examiner's Finding 15. While Muir's supervisor consulted her superiors (but not the County's Labor Relations office) from time to time seeking advice on whether to approve Muir's release requests, Muir's requests did not require approval of the Director of Labor Relations. The record fully supports the Examiner's determination that Kropp was the only union official whose release requests required approval from the Director of Labor Relations.

Examiner's Finding of Fact 16 states:

> The County was more restrictive in responding to Mr. Kropp's requests for released time for union business than in responding to such requests from other Union officers.

Respondent County asserts that Finding of Fact 16 ignores the clear and unambiguous weight of the evidence offered by the County. Respondent County argues that it established that there was no basis in the collective bargaining agreement for Kropp to be released for union business. Respondent County thus contends that there was no basis for treating Kropp like everyone else. Indeed, given the evidence that all union officials were treated differently, Respondent County asserts that its treatment of Kropp was consistent with its practice as to all other employes performing union business. Respondent County further argues that the Examiner's Finding ignores the uncontroverted evidence regarding the bad relationship between Kropp and the Director of Labor Relations. Given the foregoing, the County asks that this Finding be corrected.

Complainant Union asserts that the Examiner's Finding of Fact is correct. It argues that the record clearly establishes that the approval procedure for Kropp was more restrictive than the approval procedure that applied to other union representatives who wished to conduct union business during work time. Complainant Union contends that the poor personal relationship between Kropp and Zielinski is irrelevant to the issues at hand and thus that the Examiner did not err by failing to make a finding as to said relationship.

We find the record clearly supports the Examiner's Finding of Fact. Kropp's need to get approval from the Director of Labor Relations was a restriction which was not imposed on any other union official's ability to conduct union business on County-paid time.

Examiner's Conclusions of Law and Memorandum

The County asserts that the Examiner's Conclusions of Law and the analysis in her Memorandum are incorrect. In its petition for review, the County argues as follows:

> Conclusion of law #1 is wrong. No evidence in the record,

> nor any finding earlier proffered by the examiner stands for the proposition that any union leave time was for any right guaranteed under Sec. 111.70(2), Stats. Union leave time is a creation of, and provided for, in the labor agreement (Ex. 1). As noted in Kropp's own testimony, such leave is without pay. Milwaukee County is under no obligation, either under the terms of the labor agreement or under Sec. 111.70 to pay Kropp when he unilaterally decides to quit working and take off for parts unknown to do the unknown.
>
> But, as is shown in the record, Kropp was accorded paid time (Tr.-I, page 129) (personal time under the labor agreement). The union would argue against itself and its contract interests to have everyone treated the same as that flies in the fact of existing practice. The Commission must either void the labor agreement or vacate the findings and conclusions of the examiner. The former would certainly create a substantial issue of law and/ or administrative policy by any necessary legal conclusions in the examiner's order. The latter would protect the interest of fundamental fairness.
>
> The examiner's holding run (*sic*) contrary to both the mutually agreed to collective bargaining agreement and the mutual practice of the parties in this regard. To confirm the holding raises the specter of the Commission intruding upon the rights and contractual obligations of the parties during the term of an extant agreement. To confirm this holding would require the county and union to abandon practices and contract terms during the term of an existing, and as afar (*sic*) as the parties know, a valid collective labor agreement. Certainly this is as substantial a question of law and/ or administrative policy as can be raised.

The County also argues that the Examiner did not provide the County with a fair hearing. The County contends that the Examiner failed to require Complainant Union to adequately identify the issues to be litigated. Respondent County asserts that the passage of time between the first and second days of hearing cannot serve to make the complaint more definite and certain, and only established the Complainant Union's continuing disregard for the obligation to establish the issues to be litigated with specificity.

Complainant Union asserts that the Examiner's Conclusions of Law and her conduct during the hearing were correct. Contrary to the argument of Respondent County, Complainant Union contends that it provided sufficient specificity as to the issues being litigated when it amended its complaint. Contrary to the claim of Respondent County, Complainant Union also argues that the passage of time between the first and second days of hearing provided the Respondent County with an ample opportunity to prepare. Therefore, Complainant Union urges the Commission to affirm the Examiner's Conclusions of Law and find her conduct to have been appropriate.

The Examiner's Conduct/Fair Hearing

The complaint filed by Complainant Union on May 9, 1994, states:

> 1. Complainant, Milwaukee District Council 48, AFSCME, AFL-CIO is a labor organization within the meaning of Section 111.70(1)(j), Stats. and has its principal office located at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208.
>
> 2. Complainant Local 594, AFSCME, AFL-CIO is a local union affiliated with Complainant Milwaukee, District Council 48, AFSCME, AFL-CIO and is a labor organization within the meaning of Section 111.70(1)(j), Stats. and has its principal office located at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208.
>
> 3. Respondent Milwaukee County is a municipal employer within the meaning of Section 111.70(1)(a), Stats. and has its principal offices located at 901 North Ninth Street, Milwaukee, Wisconsin, 53233.
>
> 4. At all material times, Complainants have been certified by the Wisconsin Employment Relations Commission (WERC) as the exclusive agent of approximately eleven hundred of Milwaukee County social service employees.
>
> 5. At all material times, the said labor organizations and Milwaukee County have been parties to a collective bargaining agreement which governed certain aspects of release of employees for union business.
>
> 6. At present, Milwaukee County has refused to arbitrate disputes and thus deferral to arbitration is not appropriate for the issues raised herein.
>
> 7. At all material times John Kropp has been an employee of Milwaukee County and a member of the Complainant Local 594 and, during various time periods, he has held various offices with Local 594.
>
> 8. On information and belief, from time to time various officials and representatives of Respondent Milwaukee County have

indicated their disapproval of John Kropp as a representative of members of Local 594.

9. Following a period of time when he held no office at all with Complainant Local 594, in May, 1993 John Kropp was elected Vice President of Local 594.

10. Thereafter, on information and belief, various officials and representatives of Respondent Milwaukee County indicated their disapproval of the selection of John Kropp as Vice President of Local 594.

11. Since May, 1993 when Kropp was elected Vice President of Local 594, Milwaukee County has singled Kropp out as an individual and from time to time, failed and refused to meet with him or to allow him to engage in activities or provide him with information necessary to represent the members of Local 594.

12. Since May, 1993, Respondent Milwaukee County has attempted to dictate which officers of Local 594 should participate in various activities necessary for the representation of members of Local 594, rather than allowing Local 594 and its members to make such decisions.

13. On information and belief, Respondent Milwaukee County has prohibited Kropp from engaging in union activities without prior written approval from the Direction of Labor Relations, Henry Zielinski, and the Respondent Milwaukee County has not placed such requirement on any other representatives of Local 594 or any other local union affiliates of Complainant Milwaukee District Council 48, AFSCME, AFL-CIO.

14. By its conduct set forth in paragraphs 5 through 13 above, Respondent has violated Section 111.70(3)(1) 1, 2 and 5, Stats.

WHEREFORE, Complainants respectfully requests that the Commission order that Respondent Milwaukee County:

a. Cease and desist from failing and refusing to meet, provide information to, adjust grievances, collectively bargain, or otherwise carry out their statutorily required duties with John Kropp as

representative for Complainants.

b. Cease and desist from violating the collective bargaining agreement between the parties as it related to release time for union activity.

c. Post notices at appropriate locations, stating that it has violated the Wisconsin Municipal Employment Relations Act and the parties' collective bargaining agreement and that it will not do so in the future.

d. Effectuate such other, further and different relief as this Commission may deem necessary and proper.

By letter dated May 23, 1994, the County advised the Commission that :

> With respect to the recent complaint of prohibited practice that you have referred to Milwaukee County, it is requested that, pursuant to your rules, that *(sic)* the allegations in the complaint are so indefinite as to hamper the respondent in preparing its answer to the complaint. Accordingly, by this letter, I request that the Commission order the complainant to file a statement supplying specified information to make the complaint more definite and certain.
>
> Thank you in advance for your cooperation.

On June 3, 1994, the Commission appointed Jane B. Buffett to act as Examiner in the case. That same day, Examiner Buffett issued an Order Granting Motion to Make Complaint More Definite and Certain which stated:

> The County asserts that the complaint is so indefinite as to hamper it in preparing its answer. The Wisconsin Administrative Code, Sec. ERB 12.02(2)(c) provides that a complaint must contain, inter alia:
>
> A clear and concise statement of the facts constituting the alleged prohibited practice or practices including the time and place of occurrence of particular acts and the sections of the statute alleged to have been violated thereby.

> Review of the complaint reveals that it lacks such specificity so as to enable the County to identify the alleged unlawful acts. Accordingly, the Complainant is hereby ordered to make the complaint more definite and certain.

By letter dated June 7, 1994, the Complainant Union responded to the County's May 23 letter as follows:

> This is in response to Opposing Counsel's May 23, 1994 request for more specificity. Milwaukee County is keenly aware of the bulk of the specificity in this case and grievances have been filed contesting many of the illegal practices which are the subject of the complaint. Unfortunately, because of the County's wholesale disregard for the parties' collective bargaining agreement, both by the subject conduct and their refusal to arbitrate <u>any</u> matters, this instant dispute is not appropriate for deferral to arbitration.
>
> The following are outstanding grievances and are examples of the illegal conduct alleged in the referenced complaint.
>
> Grievance #
>
> 24407 Memo of May 23, 1993 Joanne Donahue to Kropp: Places bar on all release time and threatens discipline for participation in Union activities. Interference with bargaining unit, and exceeds managements rights.
>
> 24414 Meeting on May 13, 1993 Stephanie Stein, Director of Dept on Aging: Kropp told he would not be released without proper written authorization from Henry Zielinski. Memo of May 17, 1993 Stephanie Stein, supporting discussion topics of May 13, 1993 meeting.
>
> 32201 Letter of May 25, 1992 Stephanie Stein, Director of Dept of Aging to Caban: Notify Caban of bar to union business without prior permission. Describes order in which to obtain approval 1) Supervisor 2) Long term support unit Manager 3) Director or Designee. Other stewards were not barred from involvement for Union business.

32202 Kropp was denied release to attend disciplinary hearing for which his presents *(sic)* was requested by the employee. J.L.O. Jones (Medical Examination Office May 26, 1993). Kropp took 1.5 Hours *(sic)* personal time to attend. Joanne Donahue answered request for release-"you are not released on County time to conduct Union business."

32203 Kropp denied release to attend Union/management meeting on June 10, 1993 held by Dick Buschmann. Kropp attended through use of 2.0 hours of personal time. Previous vice president of Local 594, Lois Chappel attended Union management meetings without *(sic)* of personal time.

32204 Kropp denied release to attend Union/management meeting on June 17, 1993. Memo requesting release (Caban) and answer were exchanged June 15, 1993. Meeting on June 17, 1993 was held by Eva Davis. Lois Chappel attended previous union management meetings on County time.

32205 Kropp denied release to attend Union/management meeting on June 24, 1993, held by Tom Brophy, Director of Department *(sic)* Human Services. Kropp attended through use of 2.0 hours of personal time. Memo requesting release (Caban) and answer Stephanie Stein, Director of Dept of Aging were exchanged June 15, 1993.
Chief steward, Mike Andrews, was regularly released for these meetings schedule by Tom Brophy.

32259 Written Reprimand August 30, 1993

32258 Memo of September 20, 1993 Joanne Donahue regarding changes policy/procedure for request of release time.

32257 Denial of request to attend County Board Committee (Human Needs & Services) meeting September 19, 1993. Request made to Stephanie Stein September 14 by Caban (who was involved in contract Negotiations *(sic)* all week). Caban memo

designated Kropp as his designee for week of September 13 to September 19.

29017 Kropp denied release to attend Union/management meeting held by Stephanie Stein, Director of Dept of Aging Kropp used 2.0 hours personal time to attend. Other members such as Val Kaiser and Mike Andrews attended this meeting on County time.

29018 Kropp denied release - Union/management meeting July 12, 1993. Held by Pat Towers. Kropp used 1/2 hour personal time to attend.

29019 Kropp denied release - Union/management meeting June 28, 1993. Held by Childern's (*sic*) Court Center management. Kropp used 2.0 hours of personal time to attend.

29020 Kropp denied release - County Board committee meeting (Human Needs/Services) June 28, 1993, Kropp used 2.0 Hours *(sic)* of personal time to attend.

29021 Kropp denied release to attend step 3 grievance hearing July 28, 1993. Kropp used 1.0 hours *(sic)* of personal time to attend.

29022 Kropp denied release to attend Union/management meeting in, department *(sic)* on Aging held by Stephanie Stein on July 28, 1993. Kropp used 2.0 hours Personal time. Other officers, and stewards attended on release paid by County.

29023 Kropp denied release to attend Union/management meeting July 26, 1993 at Childern's (*sic*) Court Center Kropp used 2.0 hours of personal time.

32196 Kropp denied use of County time to attend Union/management meeting May 20, 1993 held by Tom Brophy. Request was made May 19, 1993.

29024 Kropp denied release to attend August 18, 1993 Union/management meeting called by John Kostan,

Acting Director of Psychiatric Social Work, Mental Health Center. Local 594 Steward Kathy Krill, Local 645 Steward Robert Phelps and Local 645 Vice President Bruce Ratzman were released from their work to attend. Kropp used 2.0 hours of vacation time to attend.

29025 Denial Notice (memo August 17, 1993) from 594 President Jose Caban to Stephanie Stein regarding Kropp acting in Caban's place as president while Caban is on vacation August 19th and 20th, 1993.

29188 Kropp denied release to attend Union/management meeting at Childern's (*sic*) Court Center. Local 594 Steward K. Krill and 645 Steward B. Phelps and Vice President B. Ratzmann (*sic*) were released to attend. County paid to respond to a release request in a timely manner. Kropp was therefore unable to attend.

29148 Kropp denied release to attend Union/management meeting with Brophy (DHS) on January 20, 1994. This meeting was attended by Local 594 Chief Steward Mike Andrews and Local 1055 Chief Steward Rose McDowell & Local 1055 Vice President Bernie Freckman as well as the presidents of, Locals 594, 645, and 1654.

Following this meeting Tom Brophy authorized a memo to D.C. 48 that future meetings were to be attended by presidents.

29190 Kropp denied release to attend hearing to vacate arbitration award February 7, 1994. Kropp was acting in the capacity of president's designee at the time in pursuant to a memo from Caban dated January 27, 1994 Caban was on vacation.

32265 Stephanie Stein sent memo without date to Caban which is not clear to date of reference. This appears to be a response (denial) to the release of Kropp on Jan 4, 1994 as requested by Caban in a memo dated January 1, 1994.

> Please set this matter on for hearing as soon as possible, of course, any settlement assistance your agency can provide would be most welcome.

By letter dated June 21, 1994, the Complainant Union advised the Examiner as follows:

> It is my understanding that your order of June 2, 1994 and my letter of June 7, 1994 "crossed in the mail" and that you now have the requested specificity. If more is needed, please let me know immediately. If not, please set the matter on for hearing as expeditiously as possible.

The Examiner did not seek any additional information from Complainant Union and issued a Notice of Hearing on July 14, 1994, scheduling hearing for September 7, 1994.

On August 25, 1994, Respondent County filed its Answer which states:

> The respondent, Milwaukee County as and for an answer to the complaint of prohibited practices in the above reference matter show to the Wisconsin Employment Relations Commission as follows:
>
> 1. Answering paragraph 1, admit.
>
> 2. Answering paragraph 2, admit.
>
> 3. Answering paragraph 3, admit.
>
> 4. Answering paragraph 4, admit.
>
> 5. Answering paragraph 5, deny and affirmatively allege that for a period of time from January 1, 1994 until May 1994, complainants had failed and/or neglected to execute the agreed upon collective bargaining agreement between the parties.
>
> 6. Answering paragraph 6, deny.
>
> 7. Answering paragraph 7, admit that John Kropp has been an employee and from time to time may have been a member of complainant Local 594 but lack sufficient information to form a belief relative to any internal office holding he might have had with respect to Local 594, accordingly deny and put complainants to their

proof thereon.

8. Answering paragraph 8, the allegation fails to specify either the identification of such officials and representatives as alleged or what the term "disapproval" means, accordingly respondent lacks sufficient information to form a belief, deny and put complainant to their proof thereon and move to dismiss as to the *(sic)* so lacking in basic information as to fail to put respondents to their defense and move to dismiss as the allegation being so wholly inadequate as to fail to put respondent to its defense.

9. Answering paragraph 9, lack sufficient information to form a belief as to when John Kropp may have been elected vice president of Local 594 as to the specific date when he was elected.

10. Answering paragraph 10, the allegation is so imprecise as to time, date, location and identification of the various anonymous officials and what the term "disapproval" means. That respondent lacks sufficient information to form a belief, deny, put complainants to their proof thereon and move to dismiss as the allegation being so wholly inadequate as to fail to put respondent to its defense. Further affirmatively allege that the (*sic*) any alleged "thinking" or "indications" do not in and of themselves represent a violation of Chapter 111.

11. Answering paragraph 11, this allegation lacks any specificity or identification of individuals or representatives who may have acted in the fashion set forth in the allegation. Accordingly deny and put the complainants to their proof and move to dismiss on the basis that the allegation is so wholly inadequate as to factual foundation and specificity as to fail to require respondents to be put to their proof.

12. Answering paragraph 12, deny and affirmatively allege that the memorandum of agreement extant between the parties and such other mutual understandings control the participation of persons in various activities requiring union representation in that the identification of specific individuals to carry out representation issues in one governed by the collective bargaining agreement and past practices which has been mutually entered into by the parties. Accordingly deny, put complainants to their proof and move to dismiss that the matters complained of in allegation 12 are governed by the memorandum of agreement and the resolution of disputes mechanism contained therein and accordingly move to dismiss as the

Wisconsin Employment Relations Commission lacks jurisdiction over this matter.

13. Answering paragraph 13, deny and affirmatively allege that the practices between the various other local unions which comprise complainant AFSCME District Council 48 and their dealings with Milwaukee County have varying requirements from local union to local union and from department to department within the governing structure of Milwaukee County. Accordingly deny and put complainants to their proof thereon.

14. Answering paragraph 14, deny.

AS AND FOR AFFIRMATIVE DEFENSES

The respondent sets forth which bar the action brought by the complainants.

1. Failure to state a claim upon which relief can be granted.

a. The claims lack specificity as required by the rules of the Wisconsin Employment Relations Commission.

b. The complaint lacks a clear and concise statement of the facts constituting alleged prohibited practice(s) including the time and place of occurrence in particular acts and the sections of the statute alleged to have been violated thereby.

2. The complaint is barred by the doctrine of latches *(sic)*.

3. The Wisconsin Employment Relations Commission lacks jurisdiction over the subject matter of the claims raised in the allegations specified in the complaint.

4. The complaint is silent relative to the required statement concerning a filing fee mandated by the terms of ERD 22.02(2)(e).

5. The complainants are barred from pursuing this claim on the basis of the "clean hands doctrine."

> 6. The complainants are barred from pursuing these baseless claims in that their action constitute (*sic*) harassment in violation of the rights of the employer to be enjoyed under the terms of the collective bargaining agreement as that conduct violates section 111.70 of the Wisconsin Statutes.
>
> 7. The complainants should be barred due to its *(sic)* failure to comply with the order of the Wisconsin Employment Relations Commission to make its complainant *(sic)* more definite and certain.
>
> Wherefore, the respondent Milwaukee County requests that the Commission enter an order directing that: a) the complaint be dismissed; b) the complainants cease and desist from their conduct of harassment of Milwaukee County and its representatives; c) the complainants cease and desist from violating the collective bargaining agreement between the parties; d) the complainants be required to post notices at appropriate locations on union bulletin boards stating that they have violated the Wisconsin Municipal Employment Relations Act and the collective bargaining agreement extant between the parties and that they will not do so in the future; 3) effectuate such other further different relief as the Commission may deem necessary and proper.

On September 7, 1994, the parties unsuccessfully attempted to settle their dispute with mediation assistance from the Examiner. The parties and the Examiner met again on November 30, 1994, in an unsuccessful effort to settle the dispute.

On December 14, 1994, the first day of hearing on the complaint was held. At the commencement of the hearing, the following statements were made by Complainant Union, Respondent County, and the Examiner:

> EXAMINER BUFFETT: Thank you. At this point I will give the parties an opportunity to make opening statements. For the union.
>
> MS. CROSS: The issues that are presented in this case are the violation of chapter 111.70 of the Municipal Employment Relation Act. And the issue is open on the question of the discrimination against Mr. John Kropp. But the issues go much deeper than that and go to the interference with the administration of the union itself, specifically, Local 594 affiliated with District Council 48 AFSCME AFL-CIO. The issues breached to Milwaukee

County attempting to dictate the Local 592, Local 594 who it may select as its representatives, to dictate further to the rank and file who it should and should not elect. Thus, for reasons of animus against Mr. John Kropp resulting from his aggressive union representation and unceasing challenge to management violations of law, contract and fairness, Milwaukee County has decided that it will not allow John Kropp to be released from work to represent the union. And they have singled him out in that regard, treating him differently in that regard than other representatives of the union including those of Local 594 both past and present.

And Milwaukee County has further decided that it will not deal with the union if John Kropp is involved in a meeting or will not deal with the union in the same manner if John Kropp is involved in the meeting. By involved, I just mean present.

We will show as the testimony comes in an overt animus by Milwaukee County and in some cases specifically by Henry Zielinski, formerly an officer of Local 594, against Mr. John Kropp. And we will show in the testimony a refusal to deal with the union in the same manner when John Kropp is involved. And we will show Milwaukee County's refusal to treat John Kropp the same as other representatives selected by the rank and file of Local 594. That conduct constitutes prohibited labor practices and must be remedied by the Wisconsin Employment Relations Commission.

We rarely come to the Wisconsin Employment Relation Commission because of its limited powers. But we feel in this case that those powers such as they are must be utilized against Milwaukee County to correct the injustices and to allow the rank and file of Local 594 to select their representatives and conduct their business without interference of discrimination by Milwaukee County.

And as remedies, we have set forth those in the complaint as filed. And specifically to reiterate, to restore John Kropp's liquidated time which he was required to take in order to represent the Local 594 for attorneys fees and costs and to post very carefully worded notices throughout all locations of Milwaukee County, not just those frequented by members of Local 594 but by all of the locals and all of the employees of Milwaukee County so that this type of injustice cannot continue and that employees will know that Milwaukee County cannot engage in this kind of behavior as well of course as

orders that Milwaukee County is to cease and desist from such illegal conduct.

EXAMINER BUFFETT: Thank you. And for the county?

MR. SCHOEWE: Just briefly, Madam Examiner, I think several things need to be noted. First, when last we were here on the record I had proposed several objections which I reiterate by reference. And the defenses raised in our answer we would reiterate by reference as well. Beyond that in listening to the opening remarks of counsel opposed, I think several things need to be noted.

First of all, the things referred to by counsel opposed are found nowhere in the complaint. You will not find the word animus in the complaint, you will not find any allegations regarding Mr. Zielinski in the complaint or in the supplemental material that is sent. And to the extent that that's what's going to be attempted to be proved here, first, we would argue surprise, second, that we have no notice of any of this stuff and think it's unfair to the county to now at the last moment to come up with something that we should have to defend when it's been months or even years in some instances that the opportunity had been there to raise these things in this form.

It should be noted that initially when the complaint was filed, the county filed with the commission a request to make more definite and certain allegations. Subsequently, the commission issued an order to the union that that be done, that times, dates, places, et cetera, be provided. The only thing that the county has received and when the examiner gave counsel, both counsel an opportunity to review the official record, the only thing in the record that is available is a mere recitation of several grievances which I don't think is responsive to the order of the commission. But it also points up still another problem with these proceedings, that the union and the county are parties to a collective bargaining agreement which has a dispute resolution mechanism calling for final binding arbitration of disputes between the parties.

And I think the mere fact that the only supplemental response to the commission's order was this delineation of some grievances illustrates that there is a collective bargaining agreement, that the union knows about it, and that mechanism which is to be followed has not been. It's the county's view that the collective bargaining agreement controls, that the mechanisms therein ought to be

followed and have not been.

Further, the relief requested, specifically attorneys fees, for example, is found nowhere in the complaint. So to the extent that the commission lacks jurisdiction and to the extent that there is surprise and new allegations raised for the first time in opening argument today, we would object. And we would further again move for the dismissal of these charges.

However, at a minimum, ask again that the commission either dismiss this case or request that the union be more definite and certain as to what the specific allegations are. The county does deny any wrongdoing. And to that extent, we await your ruling.

EXAMINER BUFFETT: Thank you. As to the reference the county made to other objections that are in the record, let me make it clear that the record, those objections stand in the county's answer to the record, but the opening statements that were made at the last time we met were not transcribed because none of that hearing was transcribed. And that hearing then as you recall proceeded to mediation attempts. Therefore, right now, record as to the county's objections consists of the county's answer and nothing that was in the county's opening statement. If you would like an opportunity to amplify your opening statement based on that.

MR. SCHOEWE: If I could. I thought that portion had been transcribed.

EXAMINER BUFFETT: No.

MR. SCHOEWE: Well, there are several. First of all, it's our view if you read the four corners of the complaint, that's what we're looking at here, and examination of that document which is really all we have to go on, illustrates there is a failure on the part of the complainants, the complainants are only the union, to state a claim upon which the commission can grant any relief.

Second, we believe that the delay in bringing these matters constitutes laches. Third, it's our belief that because these matters are covered by specific portions of the memorandum of agreement, that the commission, your commission, lacks jurisdiction. And that the entering into of an agreement between the county, Sherwood Malamud, a permanent arbitrator, and the union I think shoots holes

in what is in the complaint which illustrates that the county has refused to arbitrate which is absolutely false.

In fact, today was supposed to be an arbitration today, one of many, and that agreement is in effect. And these matters could and should be resolved in the form agreed to by the parties. And because of that, we also believe the commission lacks jurisdiction as well.

In terms of technicalities, the complaint is silent as to the requirement in ERD 22.02(2) regarding the payment of the filing fee. Fifthly, we believe that the union's actions which would be shown factually in terms of their violation of not coming to you with clean hands affords an offense that they ought not be granted relief because of their conduct.

Next, it's our belief that this action is nothing more than harassment of legitimate rights of the county and its appointees and managers and violates the rights available to the respondents under 111.70 of the statutes.

The complaint I believe lacks a factual statement as required by the administrative rules. Further, there has been as I pointed out earlier a failure on the part of the complainants to comply with the commission's order to make their allegations more definite and certain.

Based on those matters, we believe the commission lacks jurisdiction and that the county ought not be required to prepare a defense for things that it is not aware of and things which are to be resolved as agreed to by the parties.

EXAMINER BUFFETT: Thank you. I hear the objections voiced by the county, and I will hold them in abeyance. And we will proceed to the taking of evidence. Let me just say that the internal records of the commission show that the $25 was received when this complaint was filed.

Ms. Cross, will you present your first witness, please?

At the conclusion of the December 14 hearing, the Complainant Union rested its case and the following statements were then made by the Respondent County, Complainant Union and the Examiner:

EXAMINER BUFFETT: On the record. I understand the

county is going to make some motions.

MR. SCHOEWE: Yes. Initially, Madam Examiner, I would like to move to dismiss the charges in their entirety. And as I noted at the beginning of the proceedings, the county had raised several issues regarding jurisdiction and the failure we believe of the union to come forward and respond to the order to make more definite and certain. The only thing that we had received was a recitation of a number of grievances. None of those grievances were dealt with with specificity today. There is nothing in the record to support them as being violations of anything, the contract or the law.

Given that the specificity of those was not given or provided to or proven up by evidence, we think that they ought to be -- that we ought not to be required to put on a defense for those things.

Additionally I think it's clear there is arbitration between the parties and that these matters are part of the arbitration process and point of fact, and Mr. Kropp testified that his grievances are in that process. So that is inappropriate I think for the commission to deal with them in the first instance.

Further, if you look at the complaint itself, what seems to be the case here is that this is really Mr. Kropp's personal complaint against Mr. Henry Zielinski. And if Mr. Kropp has a gripe, a personal gripe, then those two fellows should hash it out. But in point of fact between the union and the county, you look at the complaint that's in front of us, there are no allegations involving Mr. Zielinski. And we ought not to be put to some amorphous charge for which one, we had no notice and two, was not included in the charges and three, would constitute only at best a personality dispute between two individuals and has nothing to do with the relationship between the county and AFSCME District Council 48 Local 594.

It's our belief that in terms of the disputes relative to the grievances that the parties have an ongoing memorandum of agreement which controls and that arbitration process must be adhered to or it's worthless to either party.

Looking at the complaint, if you like, I'll go through this, it's clear in terms of No. 6 that no evidence has been presented regarding Milwaukee County's refusal to arbitrate and in point of fact, there is arbitration. There was supposed to have been arbitration dates today

and yesterday and there have been I know, because I participated with them, in fact, with Ms. Cross.

Further, we still have not had any concrete evidence to bear up the allegation under paragraph 8 about some unnamed officials and representatives indicating their disapproval. The fact that persons might have an opinion of Mr. Kropp or anybody else is entirely their business. And the WERC is not in the business I believe of being the thought or personality police.

Following that, the allegations that follow in paragraphs 10, 11, 12 and 13 don't hold water given the state of this record. I think an examination of this record will indicate that section 304, and you can read this because it's part of the record now, the contract, is leave without pay. 402 is the grievance procedure and doesn't talk about leave with pay at all. That's what Mr. Kropp referred to.

Section 403 talks about access to work locations for investigation and the like. And that doesn't -- that talks about release from business but not release with pay. So none of the things that are in here bring out a violation of 111.70.

It's also clear from Mr. Kropp's own recitation that in fact even though he was denied being off on county time, he did in fact participate in these proceedings on his own time. To the extent that he did not participate in other proceedings at his own personal volition was his own business. And I think as we put into the record with exhibit -- there is a letter here from Mr. Caban or Mr. Taylor which indicates that Mr. Kropp is his designee is that that didn't occur until November of 1993, well after any of the events alleged occurred.

So I think this is much ado about nothing. There is probably a long standing personality dispute between the individuals. But looking at the complaint between the union and the county, you won't find Mr. Zielinski's name in there. And in point of fact, you won't find them in the grievances that are referenced nor has there been any documentary evidence shown by the union to put us to our defense.

Now, we would move for the dismissal of the complaint in its entirety. Alternatively, I don't know what the ruling of the examiner is going to be. We heard things today which had never

been brought out before, either in any documents in the complaint or the responsory pleadings or in our earlier mediation. And if we are to put in a defense as to charges about Mr. Zielinski which were broached for the first time today, then including in the grievance procedure, the defense that we will have to be putting in will be quite extensive and exhaustive. We'll have to put a defense together having today heard for the first time what the union's charges are.

So we would initially move for a dismissal in toto of the complaint. And I guess depending on how the examiner might rule, I may have a following motion.

EXAMINER BUFFETT: Ms. Cross, would you like to respond at this time?

MS. CROSS: Oh, I suppose it seems appropriate. The allegations of the complaint are that Milwaukee County has interfered with the internal workings of the local by dealing with certain of its representatives in a different fashion than others of its representatives and that it has refused to meet and denied the ability of release time to Mr. Kropp.

I don't know how much more specific we would be than we were with the listing that was supplied to the opposing counsel with the detail of release time. I've never seen a prohibitive practice complaint with that much specificity.

The facts that -- there is background to that dating a ways back, is not part of -- is not the actionable part of the complaint. That's the background which proves up the motivation and the animus and shows to the Wisconsin Employment Relations Commission the reason for the action on the part of the county.

Mr. Ballas testified that Zielinski said he would get Kropp. Ms. Muir testified that Zielinski said he had spoken to the department head for Mr. Kropp's department and told her that Kropp wasn't going to go anywhere. Mr. Andrews testified that three days after the election the department head said that Kropp would have to check with -- that labor relations would have to be consulted before Kropp was released.

But I think the most important part of this case is the testimony of Ms. Chapple, the vice president of local 594 just prior

to the -- the day prior to Mr. Kropp took that office. She testified that she was released 50 percent of her time, that she never asked, she never said where she was going, she never said when she was coming back, she never said what she was going for. She never said whether it was a court hearing, it was a county board hearing, whether it was a grievance investigation or anything else.

And she never said when she was coming back nor did the employer ever ask except she said a couple times they said when she was going to be gone all day that, you know, what if there was a family emergency in her family, they might want to know where she was located if she wasn't going to be back for the whole day.

That was the only concern that management ever expressed to her on her leaving work and going wherever for whatever reason when she identified solely as union business and no other specificity. And that's how the vice president of Local 594 was treated under this contract which is Exhibit No. 1.

And under Exhibit 2 which is the excuse me, 3, which is the 1990 settlement agreement. Those two documents were identically in force during the entire term that Lois Chapple was vice president of Local 594. You get John Kropp. He's elected vice president of 594. Same contract, same agreement. He doesn't get released. That's the case. It's against the law. They can't treat Mr. Kropp differently because they don't like him. They want to tell the rank and file of 594 that if they elect John Kropp, they're not going to be able to get representation. But if they elect Lois Chapple, they are.

EXAMINER BUFFETT: Thank you. I am not at this time granting the motion to dismiss. The county, I will treat that as a county reservation of the right to argue that motion later. I am, however -- correction. I am asking again to make sure that I understand the county's position on deferral. Are you saying that this whole complaint should be deferred to arbitration?

MR. SCHOEWE: I'm saying that the complaint, this is different than -- the complaint is different than the union's response to the motion to make more definite and certain. Everything in the response to make more definite and certain is strictly within the authority of the collective bargaining agreement and the permanent arbitrator. The WERC has no authority over that whatsoever. And that will take care of itself as we have a process to deal with that.

And I don't think there is any dispute between the parties about that.

The complaint which does not reference those grievances, okay, is an entirely different matter. And I don't believe that the complaint has anything to do with deferral. I believe that the deferral issue rests only with the response to the motion to make more definite and certain. And it's, of course, the county's contention that the union did not comply with the commission's order in their reply to that. But all of those grievances that are cited in the collective bargaining -- in the response to make more definite and certain should and we believe have to be processed through the collective bargaining agreement mechanism and only there.

EXAMINER BUFFETT: I am granting -- I am taking this as a motion for the county to receive more time to prepare a response to the case in chief put in by the union. And I will then cancel Friday's hearing, and we will set another hearing date, probably six weeks from today. We will have to get our calendars. Is there any other matter that should come before the hearing examiner at this time?

MR. SCHOEWE: Yes, I believe so, Madam Examiner. I believe that given the record, it doesn't get any better than this. The county would need some direction in terms of preparing a defense, what we respond to. For example, do we have to put on the grievance arbitrations now for each one of those grievances that were listed in the union's response? It's our belief that, and I would so move, that that matter be excluded in these proceedings because of the remedies we believe are exclusive under the collective bargaining agreement. And we would appreciate some direction from the examiner as to what issues the county needs to put a defense in on.

Right now we have these vague suppositions. The grievances can be dealt with through that process. That's what it exists for. But the complaint as I said, is rather amorphous and trying to wrestle a balloon. What do we prepare a defense to, the record that was put in today or all of the grievances none of which were spoken to with specificity and which we believe are handled only through the terms of the collective bargaining agreement?

EXAMINER BUFFETT: At this point the complaint stands, and the county must respond to the complaint as elucidated by the evidence put in by the union today.

> MR. SCHOEWE: Given the scheduling then, I suppose we should put this on the record, it will be necessary then for the examiner and counsel to have a conference call to schedule another hearing date. Is that what you were --
>
> EXAMINER BUFFETT: I'm hoping we can do that when we go off the record, the three of us can pull out our calendars today.

The second day of hearing was held March 20, 1995, at which time the County presented its case.

In her decision, the Examiner stated the following as to whether the Respondent County had appropriate notice of the allegations against it:

The Order to Make More Definite and Certain

> The County asserted that the complaint should be dismissed because the Union failed to comply with the Examiner's June 3, 1994 Order to make the complaint more definite and certain, and asserts that the complaint and the amended complaint did not satisfy the requirements of ERB. 22.02(2)(c) *(sic)* which provides that a complaint of prohibited practices shall contain:
>
> > A clear and concise statement of the facts constituting the alleged prohibited practice or practices, including the time and place of occurrence of particular acts and the sections of the statute that have been violated thereby.
>
> The original complaint contained, inter alia, the following paragraphs:
>
> > 10. Thereafter, on information and belief, various officials and representatives of Respondent Milwaukee County indicated their disapproval of the selection of John Kropp as Vice President of Local 594.
> >
> > 11. Since May, 1993 when Kropp was elected Vice President of Local 594, Milwaukee County has singled Kropp out as an individual and from time to time, failed and refused to meet with him or to allow him to engage in activities or provide him with information necessary to represent the members of Local 594.
> >
> > 12. Since May, 1993, Respondent Milwaukee

> County has attempted to dictate which officers of Local 594 should participate in various activities necessary for the representation of members of Local 594, rather than allowing Local 594 and its members to make such decisions.
>
> 13. On information and belief, Respondent Milwaukee County has prohibited Kropp from engaging in union activities without prior written approval from the Director of Labor Relations, Henry Zielinski, and the Respondent Milwaukee County has not placed such requirement on any other representatives of Local 594 or any other local union affiliates of Complainant Milwaukee District Council 48, AFSCME, AFL-CIO.
>
> 14. By its conduct set forth in paragraphs 5 through 13 above, Respondent has violated Section 111.70(3)(a)1, 2 and 5, Stats.

> The Union responded to the County's request for an order that the complaint be made more definite and certain on June 7, 1994, by listing 24 grievances by date with a description of each grieved action. I conclude that the original complaint and the June 7, 1994 response were sufficient to give the County fair notice of the allegations to which it was called to respond. Additionally, the hearing at which the Union put on its case was held December 14, 1994. Because of scheduling problems, the second day of hearing, at which the County had opportunity to defend itself, did not take place until March 20, 1995. The time period between the two hearing dates gave the County an opportunity to gather evidence in response to the evidence earlier presented by the Union. The County, therefore could not be found to be prejudiced by any lack of notice.

We concur with the Examiner's view that Complainant's response to the Order Granting Motion to Make Complaint More Definite and Certain met the requirements of ERC 12.02(2)(c) and that, in any event, the sequence of hearing eliminated any possible lack of notice/prejudice to Respondent. While it would have been preferable for the Examiner to specifically advise Respondent County during the hearing that she was satisfied with Complainant Union's response to her Order, her failure to do so did prejudice the County's ability to defend itself. Had she not been satisfied with the Complainant Union's response, she presumably would have ordered Complainant to provide additional information. Because she made no such additional order, Respondent County should have and presumably did understand, that in effect, the Examiner had rejected Respondent's claim that additional information was needed.

Interference

In her decision, the Examiner set forth the following analysis of the alleged violation of Sec. 111.70(3)(a)1, Stats.:

Alleged Violation of Sec.111.70(3)(a)1, Stats.

Section 111.70(3)(a)1, Stats., provides that it is a prohibited practice for a municipal employer:

> To interfere with, restrain or coerce employes in the exercise of their rights guaranteed in sub. (2)

The referenced Subsection provides:

> (2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employes shall have the right to refrain from any and all such activities except that employes may be required to pay dues in the manner provided in fair-share agreement.

This case involves the alleged interference with employe rights by the employer when it treated a particular Union officer more restrictively than it treated other Union officers. The Union argues that by placing severe limitations on Mr. Kropp in his representation of Union interests, the County was sending an implicit message to the Union membership that it would have greater Union representation if it elected an officer other than Mr. Kropp. In the Union's theory, the County was thereby exerting influence over the Union's selection of its representative.

In considering a similar situation, the Commission has held that it is improper for an employer to attempt to influence the union's choice of its officers. In West Allis-West Milwaukee School District, the employer threatened to return the custodians' steward, who had newly posted into the position of storekeeper, to his former position of custodian because it asserted only a custodian could represent custodians. In finding the employer had committed a prohibited practice, the Commission noted:

> Section 111.70(2), Stats., states on its face that among the rights of municipal employes are "the right to self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives

> of their own choosing, . . ." In our view, the right to determine the identity of stewards, the shop-floor level of union representation, is clearly encompassed within those rights.

Similarly, in, Milwaukee Board of School Directors, the Commission said,"[The employer's] refusal to recognize [the employe's] status as Building Representative is precisely the kind of conduct which Sec. 111.70(3)(a)1, Stats., seeks to deter." The choice of Union officers then, is to be insulated from the employer's influence.

In the instant case the Union alleges that the County sought to discourage the Union from electing Mr. Kropp as a union officer by impeding his representation of the Union.

The County does not deny that Mr. Kropp's released time had to be approved by the Director of Labor Relations; nor does it dispute that he was denied released time for Union business; the County, instead, defends itself by asserting that there was a great variety in the amount of released time granted Union officers, as well as in the procedures for obtaining it. According to the County's theory, since there was not a uniform method and basis for granting released time, it cannot be concluded that Mr. Kropp was singled out for disparate treatment.

The record, to the contrary, shows that although there was some variety in the access that different Union officers had to released time, the similarities were much more significant than the differences.

Union officers Chapple, Henderson-Hortman and Andrews were all allowed released time to attend to Union business. This evidence is especially noteworthy since Lois Chapple was the Union Vice President immediately preceding Mr. Kropp, therefore offering a clear comparison to Mr. Kropp's experience in receiving released time. Those officers had to notify their supervisor of the time and location of the union business, but they were not denied the requested time. This pattern held true for officers of another AFSCME local, Local 1654. Local 1654 officers Cathy Muir and Sigurd (Butch) Skare also were granted such released time. There were a few exceptions concerning Ms. Muir, the President of Local 1654. Ms. Muir was denied released time when she sought permission to attend a first step grievance meeting because her supervisor believed her presence was not necessary at such a meeting and she was denied released time on some occasions in 1990, 1991 or 1992 when the office was exceptionally busy.

Those few exceptions only serve to underline the predominance of the rule: in the overwhelming preponderance of occasions, union officers were granted

released time for union business. In some departments, the supervisor understood the procedure as requiring the employe to seek permission, but as a matter of fact, permission was rarely denied. In other departments, the employe only had to inform his or her supervisor, prior to leaving the worksite, of the time and purpose of absence and the destination.

This pattern of granting of released time to other union officers is dramatically different from the restrictions imposed on Mr. Kropp, who on several occasions after his election to Vice-President after May 10, 1993 was denied the requested time. Additionally, the evidence shows that he was the only employe for whom permission had to be granted by the Director of Labor Relations. That differential treatment was so extreme that it could be reasonably understood by employes as an indication that Mr. Kropp's activities on behalf of the Union would be more restricted than those of other officers.

It is immaterial whether the County was motivated by hostility toward the Union. It is equally immaterial whether the County deliberately sought this chilling effect on employe's exercise of their rights. Unlawful interference is measured by an objective standard. In light of this treatment of Mr. Kropp, a reasonable person could conclude that the Union would receive greater representation if it were to elect an officer who would not be so closely limited and scrutinized. In this way, the County's actions interfered with the union's free choice of its officers, thereby inhibiting employes in their exercise of their rights under the statute. The disparate treatment of Mr. Kropp regarding released time for Union business, then, violated Sec. 111.70(3)(a)1., Stats.

We find this analysis persuasive and affirm same with the following additional comments.

Respondent County is critical of the Examiner for failing to state which specific portion of the bargaining agreement gave Kropp the right to leave his work station to perform union business on County-paid non-personal leave time. In the County's view, there is no such provision. In our view, the County is missing the point of the Examiner's analysis. The Examiner in effect determined that whatever the standard applied by the County for releasing union officials, that standard was applied in a disparate manner to Kropp. She did not need to determine whether the general standard applied by the County was contractually proper. Indeed, had she done so, she would have been improperly invading the province of the parties' grievance arbitration process which the County successfully argued should be allowed to decide the contractual issues. 2/

2/ In her decision, the Examiner correctly dismissed the Sec. 111.70(3)(a)5, Stats., allegations because of the presence of grievance arbitration to resolve the contractual issues.

Confronted with this claim of disparate treatment, the County had the opportunity to persuade the Examiner that it had some valid business reason for its treatment of Kropp. 3/ Had that effort been successful, no violation would have been found.

However, Respondent County did not establish a valid business reason for the requirement that Kropp alone needed approval from the County's Director of Labor Relations. General allusions were made to the need to balance an employe's individual work responsibilities with the ability to leave the work site to conduct union business. Yet, no specific evidence was presented as to the relationship between Kropp's approval requirement and his specific job responsibilities. Indeed, it is difficult to envision how the need for Director approval could relate to Kropp's job responsibilities inasmuch as the Director would be far removed from any specific awareness of Kropp's day to day workload.

Instead, it seems apparent that personal hostility between Kropp and the Director was the basis for the approval requirement. Personal animosity does not constitute a valid business reason for disparate treatment which has a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights.

Thus, we affirm the Examiner.

Given under our hands and seal at the City of Madison, Wisconsin, this 21st day of March 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

3/ We have held that where a valid business reason exists for conduct which nonetheless had a reasonable tendency to interfere with employes' exercise of Sec. 111.70(2), Stats., rights, no interference violation will be found. Brown County, Dec. No. 28158-F (WERC, 12/96); City of Brookfield, Dec. No. 20691-A (WERC, 2/84).