

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYEES
UNION (WSEU), AFSCME, COUNCIL
24, AFL-CIO,

Complainant,

vs.

THE STATE OF WISCONSIN,

Respondent.

Case 366
No. 51109 PP(S)-215
Decision No. 28196-A

Appearances:

Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, by Mr. Richard V. Graylow and Bruce M. Davey, on behalf of the Complainant.

Ms. Holly Ann Georgell, Attorney/Labor Relations Specialist, Division of Collective Bargaining, and Mr. David Vergeront, Legal Counsel, Department of Employment Relations, State of Wisconsin, 137 East Wilson Street, Madison, Wisconsin 53707-7855, on behalf of the Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On June 16, 1994, Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission alleging that the State of Wisconsin had violated Sections 111.84(1)(a) and (c), Stats., by disciplining an employe based in part on his having engaged in protected activity. On April 10, 1995, the Respondent State of Wisconsin filed an answer denying it had committed any unfair labor practices and asserted as affirmative defenses that a grievance had been filed by the Complainant regarding the subject discipline and had been appealed to arbitration and, therefore, the matter should be held in abeyance pending the outcome of the arbitration, and that in imposing the discipline the Respondent acted within its management rights under the parties' collective bargaining agreement. The Commission appointed a member of its staff, David E. Shaw, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the

No. 28196-A

matter. Hearing in the matter was held before the Examiner in Madison, Wisconsin on May 9 and September 6, 1995. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs by November 28, 1995. Having considered the evidence and the arguments of the parties, the Examiner now makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, hereinafter the "Union", is a labor organization with its offices located at 8033 Excelsior Drive, Madison, Wisconsin 53717-1903. The Union is the exclusive collective bargaining representative for the state employees in a number of statutorily-created bargaining units. At all times material herein, Martin Biel has been the Union's Executive Director, and Ronald Orth has been employed by the Union as a Staff Representative responsible for representing employees in the Northeast District of Wisconsin represented by the Union in the grievance process and grievance arbitration. Local 1215 is a local union affiliated with the Complainant Union that, at all times material herein, has represented approximately 145 Conservation Wardens employed by the State's Department of Natural Resources. In 1993, and at all times material herein, Joel McOlash was the President and an acting steward of Local 1215 and employed as a Conservation Warden.

2. The Respondent State of Wisconsin, hereinafter the "State", is an employer and is represented in collective bargaining and labor relations matters by the State's Department of Employment Relations (DER) which has its offices located at 137 East Wilson Street, Madison, Wisconsin 53707.

3. The Wisconsin Department of Natural Resources (DNR) is an independent State agency with statutorily-described duties and responsibilities and has its main offices located at 101 South Webster Street, Madison, Wisconsin 53703. At all times material herein, the Secretary of the DNR has been George E. Meyer. Since March of 1971, and at all times material herein, Joel C. McOlash has been employed by the DNR as a Conservation Warden 3, and since October of 1978, has been working in that capacity in Sturgeon Bay, Wisconsin in the Marine Enforcement Unit in the DNR's Lake Michigan District. At all times material herein, McOlash's immediate supervisor was Warden Supervisor 2 Thomas R. Hansen, who was in charge of the Marine Enforcement Unit and was stationed in Green Bay, Wisconsin. At all times material herein, Larry Kriese has been the supervisor of the DNR's Law Enforcement Program in the Lake Michigan District and as such, Hansen reported to Kriese.

4. As a Conservation Warden for the DNR, McOlash is in the Security and Public Safety bargaining unit which is represented by the Union and covered by a collective bargaining agreement which contains a provision for final and binding grievance arbitration. In 1993, McOlash was the President and Acting Steward for Local 1215. McOlash had also been a member of the Union's bargaining team for the negotiations for the 1983-1985 and 1987-1989 collective

bargaining agreements between the Union and the State. As President of Local 1215, McOlash ran the Local and also conducted several labor/management meetings at which work rules and working conditions were discussed. McOlash has filed grievances on behalf of himself and on behalf of the Union and has assisted and represented other Conservation Wardens in grievance matters and his activity on behalf of the Union is known to his supervisors and DNR management.

5. On Sunday, December 12, 1993, at approximately 7:15 p.m., Orth called McOlash at his home and asked McOlash to obtain the date of birth and social security number of the Sturgeon Bay Police Chief, Michael Nordin, so that Orth could find out if Nordin had any "skeletons in his closet". Orth had talked to McOlash previously about a pending grievance arbitration involving an employe in the Professional Social Services bargaining unit represented by the Union, Don Cole, who had been transferred from his position as a Parole and Probation Agent stationed in Sturgeon Bay to a Social Worker position in the State's correctional facility in Green Bay. McOlash had also had a previous conversation with Cole and was aware that Chief Nordin had some involvement in Cole's case, and McOlash assumed that Orth wanted the information on Nordin for use in the Cole arbitration. Orth had been asked by the Union's attorney in the Cole arbitration to obtain the information on Nordin. Orth told McOlash to leave the information on Orth's answering machine if Orth was not in, but not to mention Nordin's name.

6. On December 12, 1993, after Orth's call to him, McOlash called the Door County Sheriff's Department at approximately 8:10 p.m. to speak to Deputy Mark Schwartz. Schwartz knew McOlash from his previous work as a Park Ranger in the area and as a part-time Conservation Warden working with McOlash. McOlash then had the following conversation with Schwartz:

Schwartz: Sheriff's Office, Deputy Schwartz.

McOlash: Schwartzie.

Schwartz: Yeah.

McOlash: You working tomorrow?

Schwartz: Um, no, I'm not, but I got a meeting with an insurance guy, but --

McOlash: Okay.

Schwartz: -- I can probably get that changed.

McOlash: No, that's all right. Don't, don't worry about that. Is there a bug on this line?

Schwartz: Yeah.

McOlash: Is there any that you can call me on that aren't bugged?

Schwartz: Yeah.

McOlash: Why don't you call me back? I'm at home.

Schwartz: Okay.

McOlash: Okay.

Schwartz: 'Bye.

McOlash: 'Bye.

McOlash wanted Schwartz to call him on an unrecorded line so that others in the Sheriff's Department would not know he was seeking information about Chief Nordin. Schwartz then went into the jail office and called McOlash at home. McOlash asked Schwartz if he would be able to find the birthdate and middle initial for Chief Nordin. Schwartz told McOlash he would check the Department's in-house computer and call him back. Schwartz checked the computer and then called McOlash back on an unrecorded line to inform him that he could not find the information. Schwartz also advised McOlash that Officer Randy Tassoul of the Sturgeon Bay Police Department was in that Department's squadroom and might be able to help McOlash. McOlash asked Deputy Schwartz to call Officer Tassoul to see if he would provide the information he had requested and also Chief Nordin's social security number. Schwartz then called Tassoul and asked him if he could provide McOlash with the information he wanted and Tassoul asked Schwartz why McOlash wanted the information. Schwartz told Tassoul that he did not know why McOlash wanted the information, that it was confidential, and Tassoul said he needed to know what the information was for. Schwartz then connected Tassoul with McOlash and Schwartz hung up after making the connection. Schwartz did not know the purpose of McOlash's request and assumed he was calling in his capacity as a Conservation Warden. Tassoul asked McOlash why he wanted the information and McOlash told Tassoul that a union subject had asked him to obtain the date of birth and social security number of Chief Nordin in preparation for a union matter involving Don Cole. Tassoul told McOlash he could not give him that information, but asked McOlash if he would like him (Tassoul) to contact Chief Nordin to see if he could give McOlash that information. McOlash responded in the affirmative as to Tassoul's contacting Chief Nordin. Tassoul then called Chief Nordin at his residence and advised him of McOlash's request and Nordin asked Tassoul why McOlash wanted the information. Tassoul advised Nordin that McOlash's request had something to do with the upcoming Don Cole hearing. Chief Nordin advised Tassoul that he would take care of

it and hung up.

Chief Nordin then called McOlash, upset at his inquiry, and McOlash informed Nordin as to the reason for his request. Nordin then asked McOlash for the name and phone number of his supervisor.

7. At approximately 9:15 p.m. on December 12, 1993, McOlash called his supervisor, Warden Supervisor Thomas Hansen, and informed him of Orth's call and request, and McOlash's subsequent phone call to the Sheriff's Department and his conversations with Deputy Schwartz and Officer Tassoul. McOlash then advised Hansen that Chief Nordin had then called him and was very upset and had asked for the name and phone number of his supervisor and Hansen could expect a call from Nordin in the morning. Hansen asked McOlash if he had represented himself as a Conservation Warden when he called the Sheriff's Department and McOlash responded that he could not recall for sure, but thought he had only identified himself by name. Hansen advised McOlash it was obvious that the requested information was for union, rather than law enforcement, purposes and that it was therefore inappropriate of McOlash to have made the inquiries to the Sheriff's Department and Police Department. Hansen advised McOlash that they would discuss the matter further the next day when Hansen would be in Door County for a meeting.

On December 13, 1993, Hansen met with McOlash and another Conservation Warden, Michael Bartz, who works with McOlash, prior to a meeting at Whitefish Dunes State Park with other area DNR staff. Bartz told Hansen that Chief Nordin had called him earlier that morning and indicated he was very upset about an incident the prior evening involving McOlash. Bartz said he told Nordin to contact Hansen and advised him that Hansen would be in the area that day. Bartz told Hansen that Nordin asked him to have Hansen stop at the Police Department if he had time.

Approximately one hour later, Hansen met with McOlash and went over what had taken place the night before. Hansen advised McOlash that it was inappropriate for him to access law enforcement channels to obtain information for non-law enforcement or personal purposes for use by the Union or anyone else. Hansen also indicated his concern about Orth's attempt to obtain Nordin's social security number as its confidentiality is protected by federal law. McOlash indicated he understood, but had simply acted on a request from a friend without giving it a lot of thought. Hansen advised McOlash that he would be giving him a verbal reprimand for this incident.

At approximately 1:00 p.m. on December 13, 1993, Hansen met with Chief Nordin to discuss the matter. Nordin gave Hansen a brief history of the Don Cole matter. Nordin indicated he had no problems with McOlash and had very little contact with him other than exchanging pleasantries when they happened to meet. Nordin also indicated he was not interested in getting McOlash in trouble, but that he was concerned about why the Union was interested in him and that he felt the Union's tactics were unethical. Hansen asked Nordin for his understanding of the events of the prior evening, and their sequence, and Nordin recounted what he understood to have taken

place. Nordin indicated that it was his understanding that his officer refused to give McOlash the information, and that McOlash had asked the officer to keep knowledge of his request from Nordin. Nordin also indicated that McOlash seemed very surprised and sounded defensive when Nordin called him on December 12th. Nordin told Hansen that he asked McOlash why he wanted the information and that McOlash told him that Orth was looking for "skeletons in his closet". Nordin gave Hansen a written list of questions to which he wanted written responses from McOlash and Hansen promised to deliver them to McOlash.

8. After meeting with Chief Nordin, Hansen delivered Nordin's questions to McOlash the afternoon of December 13, 1993, and advised McOlash that Nordin wanted written responses and that McOlash should personally deliver the responses to Nordin and discuss the situation. McOlash indicated he would do that.

Hansen asked McOlash why he did not try to get Nordin's date of birth by running a "DHAS" through the State Patrol, and McOlash responded he thought the Sheriff's Department would run the computer checks. Hansen then asked McOlash why he asked for Deputy Schwartz and McOlash stated that Schwartz answered the phone when he called the Department and that the call should be recorded. Hansen asked McOlash what exactly Orth had indicated he was going to look for with Nordin's date of birth and social security number. McOlash responded that Orth only told him that he was checking for any skeletons Nordin might have. McOlash also stated that they had not discussed the types of information or checks Orth would be running. Hansen then returned to his office in Green Bay.

9. Hansen met with District Warden Supervisor Larry Kriese the morning of December 14, 1993, and informed him about McOlash's attempts to obtain information regarding Nordin and the details he had learned about the matter and advised Kriese that he had verbally reprimanded McOlash for the incident. Kriese informed Hansen that his action did not conform to District procedure and that any discipline was not appropriate at that point, since all of the facts were not yet known, and that any discipline must involve the District Director and himself and requires their approval. Kriese then directed Hansen to obtain an incident report from McOlash and to prepare reports on his investigation and contacts as well. Hansen telephoned McOlash and advised him that he (Hansen) had discussed the matter with Kriese who advised him that he should not have been issuing a reprimand at that time and that McOlash should consider their previous discussion as counseling and part of the investigation into the matter. Hansen also asked McOlash to prepare a detailed incident report of the matter and to send him a copy of his (McOlash's) responses to Nordin's questions, which he would pass on to Kriese. McOlash responded that he would follow through on the requests. Hansen then advised Kriese that he had called McOlash and informed him that he (Hansen) should not have issued any type of discipline at that point. Kriese had informed Rick Henneger, an attorney in the DNR's Madison office, of the matter. At around noon on December 14, 1993, Kriese received a phone call from an attorney at DER, Thomas Kwiatkowski, asking Kriese what he knew about the matter and whether he had attempted to learn more about it. Kriese told Kwiatkowski what he had learned and said he would pass along information as he

received it to Henneger. Kwiatkowski asked that Kriese also pass such information along to DER. That same afternoon or the next day, Kriese called Chief Nordin to tell him he was looking into the matter and to apologize. Nordin told Kriese what he knew about the matter.

On December 15, 1993, Hansen prepared memoranda documenting his telephone conversation with McOlash the evening of December 12, 1993; his meeting with Bartz and McOlash the morning of December 13, 1993; his subsequent discussions with McOlash and his meeting with Chief Nordin on that date; his meeting with Kriese on December 14, 1993; and his follow-up telephone conversation with McOlash on that date. Hansen copied Kriese on all of said memoranda. That same day, Chief Nordin telephoned Attorney Henneger in the DNR's personnel office in Madison and provided the information he had on the matter. Kriese was also advised that the DNR and DER had been in communication on the matter.

10. McOlash met with Chief Nordin on the morning of December 21, 1993 and delivered his written responses to Nordin's questions and apologized to Nordin. McOlash sent the following memorandum on December 21, 1993 to Hansen describing his meeting with Chief Nordin and attached Nordin's questions with McOlash's responses:

Date: December 21, 1993
To: Thomas R. Hansen
From: Joel C. McOlash
Subject: Chief Nordin Matter.

I met with Chief Nordin at 11:30am this morning, and provided him with my written answers to the questions which he presented to you on December 13, 1993. Chief Nordin thanked me for my candor in answering the questions.

Chief Nordin accepted my apology and assured me that this matter would not affect my ability to work with him or any member of the Sturgeon Bay Police Department in the future.

Attached you will find a copy of Chief Nordin's questions, and a copy of my written response to each of the questions.

If you have any questions concerning this matter, please feel free to contact me.

Joel C. McOlash

Joel /s/

...

(Attached Questions and Responses)

Q1. A detailed synopsis of his entire conversation with Ron Orth on December 12th, and any other conversations (before or since) that he may have had with Orth that pertained to me. I would also like to know if he has had similar conversations with Don Cole.

A1. On December 12th, 1993 at approximately 7:15 PM (some time during the first half of the Packers/Chargers football game) JOEL C. MCOLASH received a telephone call at home from Council 24 Field Representative RON ORTH. ORTH stated that he needed "Noreens" birth date and social security number.

MCOLASH was not sure who ORTH was referring to, and asked ORTH "Who's that?" ORTH replied to MCOLASH "the police chief up there." MCOLASH realized that ORTH was referring to CHIEF NORDIN.

MCOLASH asked ORTH why ORTH needed the information. ORTH stated that he needed to know if "NORDIN had any skeletons in his closet". MCOLASH assumed that this was related to the pending DON COLE arbitration. MCOLASH informed ORTH that the Social Security Number (SSAN) would be harder to obtain than the date of birth (DOB). ORTH asked MCOLASH if they (meaning the DOB and SSAN) were public records. MCOLASH told ORTH that he did not know for sure.

ORTH requested MCOLASH to call him when MCOLASH had obtained the DOB and SSAN. ORTH directed MCOLASH to just leave the DOB and SSAN (on ORTH's answering machine) if ORTH was not in his office when MCOLASH called. ORTH stated that MCOLASH need not leave the name on the answering machine, only the DOB and

SSAN, because ORTH would know what they were in reference to.

MCOLASH and ORTH did not discuss NORDIN, DON COLE or the COLE arbitration case any further. MCOLASH and ORTH did briefly discuss several other topics totally unrelated to the matter before concluding the conversation.

On one occasion, COLE contacted MCOLASH regarding COLE being placed on medical leave by his employer. COLE indicated to MCOLASH that he felt NORDIN had been involved in the action, which COLE felt was unjust. MCOLASH relayed the substance of that conversation to ORTH, when ORTH took over the case. MCOLASH has not contacted ORTH since December 12th, at the request of NORDIN.

- Q2. What checks was he going to conduct (criminal history, credit, prior employment, driving record, etc.) and what information was he expecting or hoping to gain?
- A2. MCOLASH was not requested to, nor had he intended on conducting checks of any kind. MCOLASH has no knowledge, other than as stated in 1 above, as to what information ORTH was expecting or hoping to gain.
- Q3. Is he aware of any contacts or records checks that have already been completed and, if there have been, who conducted them?
- A3. MCOLASH is not aware of any other contacts or records checks on NORDIN by the Union or any other person.
- Q4. What was the exact nature and extent of his conversation(s) with and requests made to Deputy Schwartz and Officer Tassoul? What was the result of those requests?
- A4. MCOLASH asked Deputy SCHWARTZ if SCHWARTZ could get the date of birth (DOB) and social security number (SSAN) of NORDIN for MCOLASH. Deputy SCHWARTZ advised MCOLASH that he would try to, and then call

MCOLASH back. Deputy SCHWARTZ called MCOLASH back a short time later, and advised MCOLASH that other than the name of NORDIN there was nothing more on "our" computer (I assumed Deputy SCHWARTZ was referring to the DCSO computer records). MCOLASH asked Deputy SCHWARTZ if he had run a DHAS. Deputy SCHWARTZ replied that he had not (run the DHAS). Deputy SCHWARTZ asked MCOLASH if he had run a DHAS with the State Patrol. MCOLASH advised Deputy SCHWARTZ that he had not. MCOLASH asked Deputy Schwartz if he would be able to get a DHAS at this time (a Sunday evening). Deputy SCHWARTZ replied that he could. MCOLASH asked Deputy SCHWARTZ to run a DHAS. Deputy SCHWARTZ replied that he would, and stated to MCOLASH that the city officer downstairs might be able to help MCOLASH. MCOLASH has no knowledge of Deputy SCHWARTZ having run a DHAS on NORDIN. MCOLASH asked Officer TASSOUL if he could get the DOB and SSAN of NORDIN for MCOLASH. Officer TASSOUL asked MCOLASH what the information was needed for. MCOLASH informed Officer TASSOUL that the Union representative handling the DON COLE arbitration had requested the information. MCOLASH informed Officer TASSOUL that MCOLASH did not want TASSOUL to do anything that was wrong or would get Officer TASSOUL into trouble. Officer TASSOUL informed MCOLASH that Officer TASSOUL could ask the CHIEF (NORDIN) for that information for MCOLASH. MCOLASH asked Officer TASSOUL to talk to NORDIN.

- Q5. Why did he ask Deputy Schwartz to contact him on a non-secure telephone line?
- A5. MCOLASH requested Deputy SCHWARTZ to call MCOLASH back on a line on which the conversation would not be recorded, because MCOLASH did not want other members of the DCSO to know that MCOLASH had requested information about NORDIN.
- Q6. If derogatory information was obtained, how was it going to be used.

A6. MCOLASH believed that the information would be used to aid DON COLE with his arbitration concerning his former position as a Probation and Parole Agent at Sturgeon Bay.

11. On December 22, 1993, Kriese contacted the Sheriff of Door County, Sheriff Brann, regarding McOlash's call to Deputy Schwartz on December 12, 1993. By letter of December 23, 1993 to Sheriff Brann, Kriese requested that the Department preserve any recording it might have of McOlash's telephone conversations with any members of the Sheriff's Department on December 12, 1993.

12. On February 2, 1994, a pre-disciplinary hearing was held at the DNR's Lake Michigan District offices in Green Bay, Wisconsin and attended by McOlash, Orth, Henneger and Kriese. At that meeting Orth stated that McOlash had been acting in his capacity as a Union officer when he made the telephone call to the Door County Sheriff's Department and Sturgeon Bay Police Department seeking the information on Chief Nordin Orth had requested, and that by telling Hansen about it, McOlash had breached what was confidential Union business. Orth indicated that McOlash was a Union official doing a Union investigation and that it should be considered protected activity, and that if it had been anyone other than Hansen involved in reprimanding McOlash, the Union would have taken action. McOlash conceded he had not told Schwartz he was calling on Union business, but he stated he did tell Tassoul. McOlash also indicated that Hansen had said he was giving him a reprimand and considered the matter closed, and that although Hansen called him and said he had been "chewed out" about giving McOlash an oral reprimand, he had not said he was retracting it. Orth stated that he still had people looking for information on Nordin and that he (Nordin) had secrets that might come out.

13. The afternoon of March 11, 1994, Hansen met with Officer Tassoul at the Sturgeon Bay Police Department and asked Tassoul to describe his conversation with McOlash the evening of December 12, 1993.

Hansen filed the following report of his March 11, 1994 interview of Tassoul:

Date: March 12, 1994

To: Larry Kriese

From: Thomas R. Hansen

Subject: McOlash/Nordin Incident - Interview of Randy Tassoul

At approximately 3:40 PM on 3/11/94, Warden Supervisor Thomas R. Hansen interviewed Officer Randy Tassoul of the Sturgeon Bay

Police Department. This interview took place in an office at the Police Department. The interview was conducted in regards to the conversation that took place on 12/12/93 between Officer Tassoul and Joel McOlash.

Warden Hansen asked officer Tassoul to describe the conversation between himself and McOlash. Officer Tassoul stated that he was at the Police Station on the evening of 12/12/93, when he received a telephone call at approximately 8:10 PM from Door county Deputy Mark Schwartz. Deputy Schwartz asked Officer Tassoul if he (Tassoul) had the Date of Birth and Social Security Number for Police Chief Mike Nordin. Deputy Schwartz stated that Joel McOlash was looking for this information.

Officer Tassoul asked Deputy Schwartz why McOlash wanted this information. Deputy Schwartz said that he (Schwartz) did not know since McOlash had stated it was confidential. Officer Tassoul advises that he (Tassoul) said something to the effect, "This is not right." Officer Tassoul then asked Deputy Schwartz that if McOlash wanted the Date of Birth, why didn't he just run an "Alpha" check. Deputy Schwartz responded that he (Schwartz) did not know, but would call back to Officer Tassoul after checking with McOlash.

A very short time later, Deputy Schwartz called Officer Tassoul back and asked to set up a conference call with McOlash. Officer Tassoul was then connected with McOlash on the telephone. Officer Tassoul (sic) there was then a conversation between himself and McOlash. Officer Tassoul did not know if Deputy Schwartz remained on the line or not. Officer Tassoul asked McOlash why he (McOlash) wanted Chief Nordin's Date of Birth and Social Security Number?

McOlash advised Officer Tassoul that "A union subject had asked him (McOlash) to get the Date of Birth and Social Security Number on Nordin in preparation for a union matter with Don Coel (sic)."

Officer Tassoul stated that he (Tassoul) advised McOlash that he (Tassoul) could not give out that information. Officer Tassoul then asked if McOlash would like him (Tassoul) to call Chief Nordin and see if Tassoul could give that information to McOlash. McOlash advised Officer Tassoul that there would be no problem with Tassoul contacting Chief Nordin. Officer Tassoul stated that McOlash was very polite and open with his request. Officer Tassoul

stated that there was no indications of deceit in McOlash's voice and no attempts to conceal the request. Officer Tassoul advised McOlash that he (Tassoul) was going to call Chief Nordin.

Officer Tassoul then called Chief Nordin at Nordin's residence by telephone. Officer Tassoul advised Chief Nordin that McOlash had called requesting his (Nordin's) Social Security Number and Date of Birth. Chief Nordin inquired as to why McOlash would want that information. Officer Tassoul advised Nordin that it had something to do with the Don Coel (sic) hearing coming up. Chief Nordin advised Officer Tassoul that he (Nordin) would take care of it and then hung up.

Later that evening (12/12/93), Chief Nordin called Officer Tassoul back and advised him (Tassoul) that they were obviously looking for skeletons in his closet.

Officer Tassoul stated that in his (Tassoul's) mind, McOlash was clearing (sic) requesting information as a private citizen during the phone call on 12/12/93. Officer Tassoul stated that he (Tassoul) was of the impression that McOlash was acting as a union steward (sic) in this request. Officer Tassoul stated that he had this impression by the nature of McOlash's question and comments during the call and that McOlash had immediately made it clear to Tassoul that this was a union matter. Officer Tassoul stated that McOlash never identified himself as a Conservation Warden or state employee during the conversation. Officer Tassoul advises that he (Tassoul) has not spoken with McOlash since the call on 12/12/93.

During the interview, Warden Hansen observed that Officer Tassoul was consulting a report. Officer Tassoul advised that the report was the one prepared after the telephone conversation on 12/12/93. Warden Hansen requested and received a copy of Officer Tassoul's incident report.

At that interview, Hansen obtained a copy of a statement Tassoul had written the evening of December 12, 1993 following his conversation with McOlash, which report stated, in relevant part, as follows:

On 12 Dec 93 at approx. 8:30 pm I was contacted by Deputy Schwartz who asked me if I could provide him with Chief Nordin's date of birth and social security number. Deputy Schwartz then went

on to state that this information had been requested by Joel McOlash. R/O asked Deputy Schwartz why McOlash was requesting this information and Deputy Schwartz stated that McOlash had told him it was confidential. Deputy Schwartz stated he would contact McOlash and attempt to find out why McOlash was requesting this information. A few minutes later R/O was again contacted by Deputy Schwartz and R/O had a conference call with Deputy Schwartz and McOlash. McOlash stated that he had been requested by a union subject to attain this information. McOlash stated that he had been requested to attain this information reference a hearing involving Don Cole. R/O advised McOlash that R/O would not give him this information but R/O would contact Chief Nordin.

14. Following his interview with Officer Tassoul on March 11, 1994, Hansen went to the Door County Sheriff's Department where he met with Deputy Schwartz to interview him regarding his conversations with McOlash on December 12, 1993. During that interview, Hansen also received a copy of Schwartz's statement he had written up regarding those conversations, and a copy of the Department's tape recording of the first conversation between McOlash and Schwartz on December 12 that Kriese had requested. Schwartz's statement regarding the December 12 conversations with McOlash was as follows:

At approximately 8:15 pm on Sunday December 12, 1993 R/O was working at the Door County Sheriff's Department dispatch center when R/O received a call from Conservation Warden Joel McOlash. Warden McOlash asked R/O if he was working the next day and R/O said he had a prior engagement in the morning but could cancel it. Warden McOlash asked R/O if he was on a line that was "bugged" and R/O replied "yes". Warden McOlash asked R/O if he could call back on a secure line. R/O stated he could in a short while. R/O then went into the jail office and called Warden McOlash back. Warden McOlash asked R/O if R/O would be able to find a date of birth and middle initial for a Michael Nordin, the Chief for the Sturgeon Bay Police Department. R/O said he would check the in-house computer. R/O checked the in-house computer name inquiry and there was no middle initial or date of birth for Michael Nordin. R/O then called Warden McOlash back and informed him. R/O then told Warden McOlash that Officer Randy Tassoul of the Sturgeon Bay Police Department was in their squad room and he may be able to help him out. Warden McOlash asked R/O if he could call Officer Tassoul and see if he would be able to provide him with the information and also a social security number. R/O then called Officer Tassoul and asked him if he could provide

Warden McOlash with that information. Officer Tassoul said he would need to know what it was for. R/O called Warden McOlash back and conferenced Officer Tassoul and Warden McOlash together on the telephone.

----End----

Hansen filed the following report with Kriese regarding his interview with Deputy Schwartz, along with the copy of Door County Sheriff's Department tape recording of McOlash's first conversation with Schwartz on December 12, 1993 and a copy of Schwartz's statement regarding the matter:

Date: March 12, 1994

To: Larry Kriese

From: Thomas R. Hansen

Subject: McOlash/Nordin Incident - Interview of Mark Schwartz

At approximately 4:15 PM on 3/11/94, Warden Supervisor Thomas R. Hansen interviewed Deputy Mark Schwartz of the Door County Sheriff's Dept. This interview was conducted at the Door County Sheriff's Dept. and was in regards to the telephone Conversation of 12/12/93 between Deputy Schwartz and Joel McOlash. Per an open records request from District Warden Larry Kriese, Warden Hansen was provided with a copy of Deputy Schwartz's incident report and a tape recording of the telephone conversation from that evening (12/12/93).

Warden Hansen asked Deputy Schwartz to describe the telephone conversations of the evening in question. Deputy Schwartz stated that he (Schwartz) received a telephone call at the sheriff's (sic) Dept. about 8:00 PM on 12/12/93 from McOlash. Schwartz received the phone call direct since he (Schwartz) was answering the phone. McOlash asked "if the line was bugged". Deputy Schwartz said "yes" and McOlash asked to be called back on a secure line. Deputy Schwartz stated that he (Schwartz) assumed that McOlash wanted to discuss working together.

Deputy Schwartz then called McOlash back on an unrecorded line.

McOlash asked Deputy Schwartz to check for a Date of Birth and a middle initial on Chief of Police Mike Nordin. Deputy Schwartz advises that he (Schwartz) checked their in-house computer and came up with no information on Nordin. Deputy Schwartz called McOlash back and advised him (McOlash) that there was no information in the Sheriff's Dept., but that Randy Tassoul (Sturgeon Bay Police Officer) was in the City P.D.s squad room and they might have the information that McOlash was looking for. McOlash advised Deputy Schwartz that it would be okay to ask Officer Tassoul for the information. At this point, McOlash directed Deputy Schwartz to also ask Officer Tassoul for Nordin's Social Security Number in addition to the Date of Birth and middle initial.

Deputy Schwartz then called Officer Randy Tassoul by telephone. Deputy Schwartz could not recall whether he put McOlash "on hold" or called him back after talking with Tassoul. Deputy Schwartz advised Officer Tassoul that McOlash was looking for the Date of Birth, Social Security Number and Middle Initial of Chief Mike Nordin. Officer Tassoul asked Deputy Schwartz what McOlash wanted this information for. Deputy Schwartz advised Tassoul that he (Schwartz) did not know. Deputy Schwartz then offered to set up a conference call between McOlash and Officer Tassoul. Deputy Schwartz stated that he then connected McOlash and Officer Tassoul by a conference call and hung up his phone and was not part of the subsequent conversation.

Deputy Schwartz stated that the next morning (12/12/93), he (Schwartz) advised his immediate supervisor, Jail Sergeant Al Buehler, of the conversation with McOlash. Buehler stated that he (Buehler) would advise chief (sic) Deputy Gary Bies. The afternoon of 12/12/93, Deputy Schwartz discussed the situation with Chief Deputy Bies who directed Schwartz to write an incident report on the telephone calls.

Deputy Schwartz stated that Chief Nordin did call him (Schwartz) the evening of 12/12/93 and asked what his (Schwartz) conversation had been about with McOlash. Deputy Schwartz stated that this call came into the Sheriff's Dept about 9:00 to 9:15 PM. Deputy Schwartz stated that the Chief sound (sic) "curious" and then asked for a written incident report on the conversations.

Warden Hansen asked Deputy Schwartz if McOlash had stated what

he (McOlash) wanted the information for on Chief Nordin? Deputy Schwartz stated that McOlash did not state the reason for the request and Schwartz did not ask for a reason. Deputy Schwartz stated that he (Schwartz) assumed the information was for law enforcement purposes. Schwartz stated that he had worked with McOlash and viewed McOlash as a professional law enforcement officer so it was not for him (Schwartz) to know what the information was for. Deputy Schwartz stated that he assumed that McOlash only wanted him (Schwartz) to check the internal Sheriff's Dept files for the information and not run any radio checks for the information through Dept. of Transportation computers. Deputy Schwartz stated that he (Schwartz) would not have provided the same information to a private citizen calling in to the office. Deputy Schwartz stated that his Department's policy states that information can only go to another law enforcement agency for Law Enforcement purposes.

Warden Hansen inquired how it happened that McOlash was referred to Officer Tassoul. Deputy Schwartz stated that he (Schwartz) was on the radio that night and had heard Officer Tassoul check out at the Sturgeon Bay Police Department. So when McOlash called, Deputy Schwartz knew that Officer Tassoul was available and simply suggested that McOlash talk with Tassoul who was in the P.D.'s squad room.

Warden Hansen inquired if Deputy Schwartz had any subsequent conversation with McOlash regarding the situation that developed on 12/12/93. Deputy Schwartz stated that he had only one conversation with McOlash a few weeks ago on this subject. McOlash took him aside and asked him (Schwartz) if he (Schwartz) had gotten in any trouble at the Sheriff's Department over McOlash's request. McOlash continued to state that he "had used poor judgement" and apologized for getting Schwartz involved. McOlash briefly explained that this was a union matter involving a Don Coel (sic). This is the only conversation that Schwartz and McOlash had on the subject.

15. Subsequent to Hansen filing his reports of his interviews with Tassoul and Schwartz, Kriese participated in discussions as to the appropriate level of discipline that should be imposed on McOlash for his actions of December 12, 1993, which discussions resulted in a decision to suspend McOlash without pay for three days. Kriese concurred in that decision based upon his belief that McOlash's inquiries regarding Chief Nordin were made through channels normally available only to law enforcement officers and were made for non-law enforcement

related purposes, and that by doing so McOlash had discredited himself and the DNR in the eyes of local law enforcement officers in Door County and had violated the following provisions of the DNR's "Code of Ethics" for its personnel:

Personnel of the Department of Natural Resources will at all times:

...

6. Refrain from any acts or relations which will violate their public trust and reflect discredit on themselves or the Department.
7. Refrain from using their official position to secure special privileges for themselves or others.

...

16. On March 25, 1994, DNR Deputy Secretary Ronald Semmann issued McOlash the following letter notifying him he was being suspended without pay:

March 25, 1994

Mr. Joel C. McOlash
Department of Natural Resources
110 South Necedah Avenue
Sturgeon Bay, WI 54235

Dear Mr. McOlash:

This letter is to advise you of your suspension for a period of three (3) days. Your suspension will be served on May 23, 24 and 25, 1994.

This disciplinary action is based on the following incident and your behavior which violated the Department's Code of Ethics (Manual Code 9121.1(6) - Refrain from any acts of relations which will violate their public trust and reflect discredit on themselves or the Department; and 9121.1(7) - Refrain from using their official position to secure special privileges for themselves or others.).

On December 12, 1993, you received a telephone call from Ron Orth, field representative for Council 24, Wisconsin State

Employees Union. Mr. Orth asked you to get the birth date and social security number of the Chief of Police for Sturgeon Bay (Mike Nordin) in order to determine if Chief Nordin had any "skeletons in his closet". It was your understanding that this information would be used in the pending Don Cole arbitration.

Therefore, you contacted Deputy Mark Schwartz with the Door County Sheriff's Department and asked "if the line was bugged." Deputy Schwartz answered in the affirmative and you asked him to call you on a secure (unrecorded) line. When Deputy Schwartz returned your call, you requested Chief Nordin's date of birth and social security number. Deputy Schwartz was unable to provide you with the requested information, but he suggested that you contact the on-duty Sturgeon Bay police officer (Officer Tassoul). You proceeded to contact Officer Tassoul in order to obtain the subject information, but he refused.

Your classification is included in the Security and Public Safety Bargaining Unit, which is covered by a collective bargaining agreement between the State of Wisconsin and the Wisconsin State Employees Union. If you believe this action was not based on just cause, you may appeal through that contractual grievance procedure.

Sincerely,

Ronald L. Semmann /s/
Ronald L. Semmann
Deputy Secretary

McOlash received Semmann's letter several days later and served the three-day suspension without pay for his actions of December 12, 1993. McOlash subsequently grieved his suspension, which grievance was pending at the time this complaint was heard.

17. The DNR's Code of Ethics, paragraph 21.1(6) and (7), are based upon a reasonable concern for protecting the integrity of the DNR and its employees and maintaining public trust in that agency.

18. McOlash's telephone conversations with Deputy Schwartz and Officer Tassoul were from his home on non-work time. By telephoning the Door County Sheriff's Department the evening of December 12, 1993 for the purpose of obtaining the information Orth had requested regarding Chief Nordin, without identifying the purpose for which he was calling and that he was

calling in an unofficial capacity, McOlash utilized his status as a DNR Conservation Warden in an attempt to obtain information from a law enforcement agency for non-law enforcement related purposes in a manner that would not otherwise have been available to him absent his law enforcement status, and thereby violated the Code of Ethics for DNR personnel and was not engaged in lawful, concerted activity.

19. McOlash, in his telephone conversation with Officer Tassoul on December 12, 1993, and in response to Tassoul's question, immediately made clear that he was requesting the information on Chief Nordin for union business related to the upcoming Don Cole grievance arbitration, thereby making clear to Officer Tassoul that he was not calling in his law enforcement capacity and that his request was for non-law enforcement purposes, and made no attempt to deceive Tassoul in those regards. Both Hansen and Kriese were aware of this through Hansen's interviews of Tassoul and McOlash and his reports of those interviews. McOlash, by his telephone conversation with Officer Tassoul on December 12, 1993, in which he requested the date of birth, middle initial and social security number of Chief Nordin on behalf of the Union, was engaged in lawful, concerted activity and did not use his official capacity as a DNR Conservation Warden to secure special privileges for himself or the Union and did not violate his public trust.

20. The decision of District Warden Supervisor Kriese and other DNR management personnel to discipline McOlash was based upon his having contacted both the Door County Sheriff's Department and the Sturgeon Bay Police Department on December 12, 1993, and his requests for the date of birth, middle initial and social security number of Sturgeon Bay Police Chief Michael Nordin on behalf of the Union. That decision was based on the belief that McOlash was using his official status as a DNR Conservation Warden to attempt to obtain information from local law enforcement agencies for non-law enforcement related purposes, and was not based upon anti-union animus.

21. The imposition of the discipline against McOlash, based in part on his requesting information from Officer Tassoul of the Sturgeon Bay Police Department regarding Chief Nordin on behalf of the Union, after having made it clear to Tassoul that he was not acting in his law enforcement capacity, but was acting on behalf of the Union, had a reasonable tendency to interfere with, restrain or coerce McOlash in the exercise of his rights under Sec. 111.82, Stats.

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

CONCLUSIONS OF LAW

1. McOlash's telephone conversations with Deputy Schwartz of the Door County Sheriff's Department the evening of December 12, 1993, in which McOlash failed to inform Deputy Schwartz that he was not calling in his official capacity as a DNR Conservation Warden and that the purpose of his request was unrelated to his law enforcement responsibilities, did not constitute lawful, concerted activity within the meaning of Sec. 111.82, Stats., and by disciplining McOlash,

in part, on the basis of that conduct, the State, its officers and agents, did not violate Sec. 111.84(1)(a) or (c), Stats.

2. McOlash's telephone conversation with Officer Tassoul of the Sturgeon Bay Police Department the evening of December 12, 1993, in which McOlash made clear to Tassoul that he was calling on behalf of the Union and requesting the information on Chief Nordin for Union-related purposes, constituted lawful, concerted activity within the meaning of Sec. 111.82, Stats., and by disciplining McOlash, in part, on the basis of that conduct, the State, its officers and agents, violated Sec. 111.84(1)(a), Stats., but did not violate Sec. 111.84(1)(c), Stats.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned makes and issues the following

ORDER 1/

The State of Wisconsin, its officers and agents, shall immediately:

(Footnote 1/ appears on page 22.)

- (a) Cease and desist from interfering with, coercing or restraining Joel McOlash or any of its employes in the exercise of their rights guaranteed in Sec. 111.82, Stats.
- (b) Take the following affirmative action which the Examiner finds will effectuate the purposes of the State Employment Labor Relations Act:
 - 1. Immediately remove the three (3) day suspension letter dated March 25, 1994, and all references to that suspension, from Joel McOlash's personnel file, and make him whole for the pay and benefits lost as a result of serving the three (3) day suspension, to be paid at the rate he was receiving at the time he served the suspension, plus interest at the applicable rate of twelve percent (12%) per annum from the date he should have received the pay to the date he is made whole.
 - 2. Notify all of its employes represented by Local 1215, AFSCME, by posting in conspicuous places where notices to employes are posted in its places of business, where such employes are employed, copies of the Notice attached hereto and marked Appendix "A". That Notice shall be signed by the Secretary of the Wisconsin Department of Natural Resources and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent State to ensure that said notices are not altered, defaced or covered by other materials.
 - 3. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20)

days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin, this 21st day of June, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner

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- 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).

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin State Employment Labor Relations Act, we hereby notify our employees that:

1. WE WILL immediately remove the three-day suspension without pay issued to Joel McOlash on March 25, 1994 from his personnel file, as well as any mention of such suspension, and make him whole for any loss of pay and benefits that resulted from that suspension.
2. WE WILL NOT interfere with the rights of Joel McOlash or of any other employees pursuant to the provisions of the State Employment Labor Relations Act.

By _____
Secretary, Department of Natural Resources

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

STATE OF WISCONSIN

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Union alleges in this complaint that the State violated Secs. 111.84(1)(a) and (c), Stats., by imposing a three-day suspension without pay on Warden Joel McOlash for having attempted to secure information for the Union in preparation for a then-pending grievance arbitration. The State, in its answer to the complaint, denies that it committed any violation by disciplining McOlash. The State also asserts as affirmative defenses that McOlash has filed a grievance regarding the suspension, which has been appealed to arbitration, and therefore, under the doctrine of deferral, this matter should be held in abeyance until McOlash has exhausted his contractual remedies. As a second affirmative defense, the State asserts that management has the right under Article III of the parties' Agreement to take appropriate disciplinary action against its employees, and that the State acted consistent with its right with respect to suspending McOlash for three days.

POSITIONS OF THE PARTIES

Union

The Union contends that by disciplining McOlash, the State violated Sections 111.84(1)(a) and (c), Stats. It asserts the Commission has held that violations of Section 111.84(1)(a) Stats., occur when the State's conduct has a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Section 111.82 rights, even if the Employer did not intend to interfere, and even if the employee(s) did not feel coerced or was not in fact deterred from exercising their rights. State of Wisconsin, Dec. No. 26642-C (Yaeger, 4/92).

Disciplining an employee from engaging in protected, concerted activity has been held to violate Section 111.84(1)(c), Stats. State of Wisconsin, Dec. No. 25893-A (Dobish, 2/89). The conduct for which McOlash was suspended was protected under Section 111.82, Stats. He was assisting his Union in obtaining information in preparation for an arbitration, i.e., he was engaging in concerted activity for the purpose of collective bargaining and other mutual aid and protection. Investigating grievances, including obtaining information about individuals involved in arbitration proceedings, is at the core of protected, concerted activity. While there do not appear to be cases under State law in this area, there are numerous cases under the federal labor law holding that stewards and employees are protected while handling and processing grievances, unless their conduct is extraordinary, obnoxious, or wholly unjustified. Citing, Union Fork and Hoe Company,

241 NLRB No. 140 (1979), 101 LRRM 1014; Prescott Industrial Products Company, 205 NLRB No. 15 (1973), 83 LRRM 1500; Blue Circle Cement Company, 311 NLRB No. ____, 143 LRRM 1194 (1993); F.P.C. Holdings, Inc., 314 NLRB No. 185 (1994), 147 LRRM 1127; and Boise-Hilburn Electric Svc., 313 NLRB No. 30 (1993), 145 LRRM 1091.

The Union asserts that McOlash did nothing to forfeit the protections provided by SELRA. His conduct was lawful and on his own time and from his own home, McOlash sought information which could lead to information relevant to issues involved in the Cole arbitration. The information he sought from Deputy Schwartz, Nordin's middle initial and birthdate, is public information which could be obtained from the Department of Transportation or a local sheriff's department. McOlash asked for the same information from Officer Tassoul, as well as Nordin's social security number. McOlash was open and frank as to the purpose for his inquiry, telling Tassoul he was seeking information for use in the Cole arbitration. This is supported by Hansen's report of his interview with Officer Tassoul. McOlash did not attempt to utilize his position improperly to obtain the information. He merely asked people who were likely to have the information if they would provide him with it for a specific, identified purpose, and they were free to provide it or refuse.

The State's contention that McOlash's inquiries violated public trust, reflected discredit on himself or the Department, or constituted a use of his official position to secure a special privilege is without merit. McOlash did not misrepresent the purpose of his inquiry, and even told Tassoul he should not provide the information if he felt it was inappropriate, and that if he wanted to ask Chief Nordin for the information, he should. Such frankness enhances public trust rather than detracts from it. The officers in the Sturgeon Bay Police Department recognize that they can count on McOlash's honesty in any future interactions, and McOlash testified he has had no problems working with local law enforcement since making his inquiries. McOlash also did not use his position to secure special privilege. He called the Sheriff's Department because he believed they would have the information. According to the Union, the investigation of grievances is done by contacting individuals the investigator knows or by having others contact individuals they know. That is the most efficient and expeditious way to obtain the information which frequently must be obtained in a short period of time. Further, grievances are handled by laymen, not lawyers. If a union cannot have its representatives and those assisting them, contact employees, or others they know who might have information relevant to grievances, free from the fear of reprisal, discovery of relevant information will be significantly impaired. Stewards, and those assisting them, will be reluctant to ask persons likely to have information and those individuals would be even more reluctant to provide it. Thus, McOlash's efforts to obtain information to assist in the handling of another State employee's arbitration is protected, concerted activity and disciplining McOlash for engaging in that activity violated both Sections 111.84(1)(a) and (c), Stats.

The Union also asserts that this case should not be deferred to arbitration. Where the complaint alleges a violation of the statute, and the labor agreement contains a provision which provides that the alleged activity may also constitute a violation of the agreement, the Commission

considers the following in determining whether deferral is appropriate:

- "1. The parties must be willing to arbitrate and renounce technical objections which would prevent a decision on the merits by the arbitrator;
2. the collective bargaining agreement must clearly address itself to the dispute; and
3. the dispute must not involve important issues of law or policy."

State of Wisconsin, Dec. No. 26214-B (WERC, 9/90). Allegations of actions of the State which were allegedly motivated in part by anti-union animus are peculiarly within the Commission's power to determine. The Union cites State of Wisconsin, Dec. No. 25893-A, supra, as not deferring allegations that a steward was transferred to a different job and disciplined on two occasions for engaging in protected, concerted activities. Similarly, the NLRB also refuses to defer in cases alleging disciplinary action against individuals involved in processing grievances. Nissan Motor Corp., 226 NLRB No. 56 (1976) 93 LRRM 1249; U.S. Postal Service Svc., 239 NLRB No. 21 (1978) 99 LRRM 1515. Since this case alleges activities peculiarly within the Commission's power to determine, and which involve important issues of law and policy, the Commission should not defer to arbitration.

In its reply brief, the Union responds to the contention that McOlash's conduct was not concerted activity "based on the status required to make the information request, the method used to make the information request, the nature of the information request and the purpose of the information request." The claim that McOlash used his status improperly is premised on a contention that he misrepresented the purpose of his request for the information, however, McOlash made no such misrepresentations. While he did not tell Schwartz the reason for the requested information, Schwartz knew McOlash was calling from home in the evening and wanted to talk to him on a secure line, all of which clearly indicates that the request was not for law enforcement purposes. As to Officer Tassoul, McOlash informed him that the request was for Union purposes, rather than law enforcement purposes. Tassoul told Hansen that McOlash "immediately made it clear. . . that this was a Union matter. . ." and there was no effort to deceive him. The claim that the only way the Union could obtain the information was to improperly utilize law enforcement channels is not true. The date of birth and middle initial are a matter of public record which anyone can obtain from the motor vehicle records or other records from the police department. Only the social security number is afforded any protection by law. McOlash did not ask Schwartz for Nordin's social security number, and while he did ask Tassoul, he did so after telling him the purpose for which he was seeking the information. McOlash simply asked Tassoul if he could make certain information available and Tassoul said no. Any citizen could have made the same request. Thus, the nature of the information requested cannot serve as a basis for finding McOlash's

conduct was not protected. McOlash's conduct also did not become unprotected simply because the information sought might be obtained from other sources. Grievance processing and arbitration are not the equivalent of a civil lawsuit. Information is obtained informally by stewards who do not have sophisticated training in gathering information for litigation. Typically, they contact individuals they know who are likely to have the information. That there may be other methods by which the information may be obtained, should not cause McOlash's conduct to lose its protected status.

The Union takes great issue with the State's contention that the Union had no legitimate purpose for the information being sought, and that its real purpose was to intimidate a witness. The contention is implausible on its face as it is difficult to believe that the Union would be able to intimidate the Chief into not being a witness for the State. Further, the State does not offer any explanation of how this alleged intimidation would occur. Secondly, the State knows that the information was not sought for such a purpose. It is undisputed that the information was requested by the Union's attorney for his use in the Cole arbitration. While there was no testimony in this proceeding concerning Chief Nordin's role in the Cole arbitration, other than that he was a witness, the State was well aware of the Chief's role and knows that the request made by McOlash had entirely legitimate purposes. In that regard, the Union requests that the record be reopened for the purpose of showing that the State has advanced an argument it knows has no validity and makes an offer of proof to show how the information sought would have been relevant to that arbitration. The Union asserts that it is apparent that the State's real concern about McOlash's conduct was not that he contacted law enforcement agencies for information, but that he would obtain information that would have exposed the invalidity of the State's actions against Cole. Thus, the State's real objective in disciplining McOlash was to prevent individuals from assisting the Union in obtaining information that would be used against the State.

As relief, the Union requests that the State be ordered to make McOlash whole for all lost wages and benefits, remove all references to the incident giving rise to the discipline, and the discipline itself, from McOlash's personnel file and to cease and desist from such conduct in the future.

State

The State first asserts that it did not violate Sections 111.84(1)(a) and (c), Stats. when it suspended McOlash for three days for attempting to obtain confidential and protected information regarding Chief Nordin for use in an upcoming arbitration through restricted law enforcement channels by virtue of his position as a DNR law enforcement officer. It is well-established that the Union has the burden of proving the violations by a clear and satisfactory preponderance of the evidence. State of Wisconsin, Dec. No. 26642-C (Yaeger, 4/92); State of Wisconsin, Dec. No. 26739-B (Engmann, 11/91); aff'd, Dec. No. 26739-C (WERC, 3/92). To prove a violation of Section 111.84(1)(a), Stats., the Union must demonstrate that the State's activities were likely to, or had, a reasonable tendency to interfere with, or restrain or coerce employees in the exercise of their

protected rights. To prove a violation of Section 111.84(1)(c), Stats., the Union must establish the following elements:

- (1) The employe engaged in conduct protected by Section 111.82, Stats.;
- (2) The State was aware of that activity and was hostile to it;
- (3) The conduct of the State or its agent complained of was, at least in part motivated by that hostility.

State of Wisconsin, Dec. No. 26642-C, supra.

The State asserts that this is a case of first impression, and that the dispositive issue is whether the Union is able to demonstrate that McOlash's conduct constituted protected, concerted activity. While grievance processing and investigation constitute protected, concerted activity, there are limits to which the law protects pursuit of those activities. Citing, The Developing Labor Law, Volume 1, pages 150-151 (3rd Edition, 1992); and State of Wisconsin, Dec. No. 27511-A (McLaughlin, 4/93). A Union official can lose the protection of the law where his conduct "departs from the res gestae of the grievance procedure." The Developing Labor Law, supra.

The State asserts that McOlash's conduct was not concerted activity based on the following:

- (1) The status required to make the information request;
- (2) The method used to make the information request;
- (3) The nature of the information request;
- (4) The purpose of the information request.

McOlash used his law enforcement status and his ability to obtain information from local law enforcement agencies to obtain the information for the Union. The testimony of Warden Supervisor Hansen described the local law enforcement information network utilized by Conservation Wardens like McOlash. Hansen described how law enforcement officers can access information from other law enforcement agencies that is not accessible to the general public and how a Conservation Warden who is well known in the area could request information from local law enforcement agencies by simply giving their name and they would not be asked to explain the reason they were requesting the information. McOlash's actions were consistent with the general procedures Hansen outlined for making information requests from local law enforcement agencies. McOlash called the Door County Sheriff's Department with the intention of speaking to Deputy

Schwartz who was one of his personal local law enforcement contacts, and McOlash acknowledged that if someone else had answered other than Schwartz, he would have asked to speak to Schwartz. McOlash asked Schwartz to call him back on an unrecorded line so that no one would know he was requesting information on Chief Nordin and asked Schwartz for Nordin's date of birth, social security number and driving record and never offered an explanation for his information request. The State asserts that without McOlash's known law enforcement status in Door County as a Warden, he would not have been able to request, let alone obtain, the information he sought from the Sheriff's Department and the Sturgeon Bay Police Department. McOlash's own testimony was that if his neighbor asked him to get the driving record on another person, he would have to ask for the reason, and that if the neighbor gave no reason, he would not give him that information. Thus, acknowledging the restricted nature of the local law enforcement information network. The State also asserts that Orth all but directly admitted in his testimony that the only way the Union could obtain the information was to improperly utilize law enforcement channels, i.e., that Orth used McOlash's status to obtain the restricted information. Thus, McOlash's conduct is not protected activity.

The State also cites the nature and purpose of the information request as further indication of McOlash's misuse of law enforcement information channels. The State disputes the argument that McOlash's conduct constituted protected, concerted activity because he told Officer Tassoul that he needed the information for a Union arbitration. McOlash failed to explain the purpose of his request to Deputy Schwartz in his first attempt to obtain the information, hoping instead to be able to rely on his friendship with Schwartz without having to explain the purpose of his request. Secondly, regardless of the reason for the request, law enforcement information channels are to be used only for law enforcement purposes, and that does not include assisting the Union. Improperly accessing law enforcement information channels to assist the Union is beyond any legitimate purpose of the grievance procedure.

Further, the nature of the information requested (social security number and date of birth) and the amount of personal information that can be obtained by use of that information, reinforces the illegitimacy of the Union's assertion that McOlash was engaged in protected, concerted activity. A person's social security number is protected under Federal law, 42 U.S.C.S., Section 405 and the Privacy Act, 5 U.S.C.S., Section 552(A). Under the law, the social security number can be released only for extremely limited purposes, i.e., law enforcement, and is not available to the general public. With a person's social security number and date of birth, and utilizing law enforcement channels, one can obtain an individual's state and federal criminal history checks, state and federal arrest records, state driver's license and registration records, federal and state tax records, civil court records, credit history records and personal financial records. Given the vast amount of information available, coupled with the Union's admitted purpose for seeking the information, i.e., to determine if Nordin had any "skeletons in his closet", it is obvious that the Union's intent was to intimidate a management arbitration witness with information obtained through restricted law enforcement channels. Hence, it cannot be argued that the conduct of Orth and McOlash constitutes protected, concerted activity. Further, the Union had other legitimate methods available to obtain the

information it sought, such as filing an open records request under Sec. 19.21, Stats., filing a request with the Department of Transportation regarding the individual's driver's registration, asking friends and family of Chief Nordin for the information, and asking Chief Nordin himself. Rather than pursuing those legitimate options, the Union instead used a "easy, covert and entirely inappropriate method designed to intimidate the subject of the information request."

The State also asserts that the existence of protected, concerted activity was irrelevant to the decision to issue Warden McOlash a three-day suspension. After a thorough investigation, the DNR determined that McOlash had improperly accessed the restricted law enforcement information network to obtain information for the Union in an upcoming arbitration case and McOlash in fact, admitted to such misconduct. Based on the evidence, the DNR concluded that McOlash had violated its Code of Ethics, Sections 91.21.1(6) and (7). Accordingly, McOlash was issued the three-day suspension in accord with the severity of the violations and agency practice and the issue of protected, concerted activity was never a factor in the decision to discipline McOlash. Hence, it is clear that the DNR acted properly in the exercise of its management rights under Article 3 of the parties' Agreement. Citing, Yokohama Tires, 138 LRRM 1155 (NLRB, 1991); Chicago Tribune Co. v. NLRB, 140 LRRM 2286 (7th Circuit, 1992); and Lawson Drayage, Inc., 135 LRRM 1110 (NLRB, 1990). The State concludes that the evidence demonstrates that the Union attempted to improperly use restricted law enforcement information channels to secure information otherwise denied to it, with the intent to harass and intimidate a key management witness in an arbitration case. As a result, McOlash was issued a three-day suspension for violating the Code of Ethics and reasonable work rules. The Union's claim is unsupported by the evidence and the Union has therefore failed to meet its burden of demonstrating that the DNR engaged in an unfair labor practice and disciplined McOlash because of his alleged concerted activity.

In response to the Union's arguments, the State takes issue with the claim that McOlash was given an oral reprimand by Hansen and therefore was disciplined twice for his alleged misconduct on December 12, 1993. The testimony of Hansen and Kriese established that while Hansen did issue McOlash a verbal reprimand in a preliminary investigatory meeting on December 13th, Kriese later advised Hansen that he did not have authority to issue such discipline and ordered him to rescind the oral reprimand, which Hansen in fact did later that same day. The oral reprimand having been properly rescinded, there is no merit to the Union's claim and given the short duration of the reprimand, it is hard to argue that McOlash's employment interests suffered any harm.

The State also disputes the Union's characterization of McOlash's conduct as protected, concerted activity. McOlash's conduct was well beyond any legitimate, concerted action related to the contractual grievance procedure. Without McOlash's known law enforcement status as a Conservation Warden, he would not have been able to request, let alone obtain, the information he sought, and this was admitted by both McOlash and Orth in their testimony. Improperly accessing law enforcement information channels via one's law enforcement position to assist the Union in digging up skeletons on a witness is well beyond any legitimate purpose of the grievance procedure. Contrary to the Union's claim, McOlash was disciplined for improperly using his official status in

accessing the restricted law enforcement information network to obtain information for the Union in order to intimidate a witness in an upcoming arbitration, and not for engaging in protected, concerted activity. McOlash's conduct was found to have violated the DNR's Code of Ethics. The rules involved directly address situations where an employee uses his official position to gain a special privilege for others which violates the public trust and embarrasses the DNR. It was for that reason that the DNR exercised its rights under Article 3 to discipline McOlash. The State also disputes a claim that McOlash was using the information network because it could "lead to information relevant to issues in the Cole arbitration." It asserts the Union did not pursue legitimate avenues for requesting information about the witness such as subpoenaing information relevant to the issues at the arbitration, because that was not the Union's interest. Instead, the Union undertook a "covert rummaging" into the witnesses' personal life, with the goal of discovering skeletons it could later use to intimidate the witness from testifying.

The State also disputes the Union's assertion that McOlash's conduct was protected, concerted activity because he was open with both Officer Tassoul and Warden Hansen as to the reasons for his request for information. The Union ignores McOlash's initial contact with Deputy Schwartz. McOlash called Schwartz because he was a personal friend and asked him to call him back on an unrecorded line and never told Schwartz the reason for his requested information. That first information request was "clandestine and covert" rather than "frank and open". As to McOlash's "frank discussion" with Warden Hansen, the State asserts it was nothing more than a clear admission of wrongdoing and that the public interest and trust was not served by his owning up to misconduct once he was caught red-handed. With regard to the Union's claim that the requested information was easily obtainable from any motor vehicle accident report or police report upon request, the State argues that even if Chief Nordin's social security number and birth date could have been obtained through legal methods, the Union ignores the fact that it had no right to obtain the social security number, let alone to use it. Further, the Union did not utilize legal sources to obtain the information because such methods would not serve its real purpose of invading the Chief's right to privacy in his social security number and birth date. Given the desire to intimidate Chief Nordin, the information the Union really sought was available only through restricted law enforcement channels in which the social security number and date of birth of an individual would be starting points to obtaining a vast amount of personal information. The Union, standing alone, does not have law enforcement status that would entitle it to that array of personal information.

Finally, the State asserts that the Union attempts to minimize the serious, adverse impact of McOlash's misconduct on his ability to carry out his duties. The only evidence the Union offered in that regard was McOlash's own testimony that he has had no problems working with local law enforcement officials since his contact with Deputy Schwartz and Officer Tassoul. Just saying it is not so does not prove the non-existence of the adverse impact. Hansen and Kriese testified as to the DNR's dependence on local law enforcement agencies for obtaining criminal information, using jail facilities and personnel as support in emergency situations and that McOlash's misconduct has endangered that network of trust and mutual cooperation between the DNR and local law enforcement agencies. The State asserts that McOlash's misconduct undermined the DNR's trust

and confidence in his ability to continue the effective performance of his job duties as a warden. The State concludes that the peace and stability of the parties' labor relationship is seriously damaged when, under the pretext of protected, concerted activity, the Union requests that State employees, such as McOlash, abuse their law enforcement positions to covertly assist the Union in harassing and intimidating arbitration witnesses and requests that the complaint be dismissed on its merits.

DISCUSSION

Deferral

First to be addressed is the State's motion to defer this matter to grievance arbitration. The Commission has considered the following criteria in determining whether deferral is appropriate:

The commission will abstain and defer only after it is satisfied that the legislature's goal to encourage the resolution of disputes through the method agreed to by the parties will be realized and that there are no superseding considerations in a particular case. Among the guiding criteria for deferral are these: First, the parties must be willing to arbitrate and renounce technical objections, such as timeliness under the contract and arbitrability, which would prevent a decision on the merits by the arbitrator. Otherwise, the commission would defer only to have the dispute go unresolved. Second, the collective bargaining agreement must clearly address itself to the dispute. The legislative objective to encourage the resolution of disputes through arbitration would not be realized where the parties have not bargained over the matter in dispute. Third, the dispute must not involve important issues of law. An arbitrator's award is final and ordinarily not subject to judicial review on questions of law. Further, questions of legislative policy and law are neither within the province nor the expertise of arbitrators. On the other hand, the legislature has entrusted to the commission in the first instance the responsibility to resolve questions of law and legislative policy and has made commission decisions subject to further judicial review.

State of Wisconsin, Dec. No. 15261 (WERC, 1/78), at pp. 8-9 (Citations omitted).

The complaint alleges that the State interfered with McOlash's rights under Sec. 111.82, Stats., and discriminated against him for exercising his rights under that provision when it imposed a three-day suspension on him due to his attempts to secure information for the Union, and that, thereby, the State violated Secs. 111.84(1)(a) and (c), Stats., respectively. While the parties' Agreement contains a provision pertaining to discipline and requires there be "just cause" for the discipline imposed, resolution of that contractual issue will not necessarily address the issues raised by the alleged statutory violations, e.g., whether McOlash's requests on December 12, 1993 to the Door County Sheriff's Department and the Sturgeon Bay Police Department constituted "lawful, concerted activity" within the meaning of Sec. 111.82, Stats., so as to be protected. As this case involves what the Examiner perceives are important questions of law, deferral would not be

appropriate.

111.84(1)(a) (Interference)

Sec. 111.84(1)(a), Stats., provides that it is an unfair labor practice for the State as an employer:

(a) To interfere with, restrain or coerce state employes in the exercise of their rights guaranteed in s. 111.82.

Sec. 111.82, Stats., provides the following with regard to the rights of employes:

111.82 Rights of state employes. State 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 under this subchapter, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Such employes shall also have the right to refrain from any or all of such activities.

The Commission has consistently held that it will find interference on the part of an employer in the following circumstances:

Violations of Sec. 111.70(3)(a)1, Stats., occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. If, after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employe(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights. 2/

While the above holding references statutory provisions of the Municipal Employment Relations Act (MERA), those provisions are substantively identical to Secs. 111.84(1)(a) and

2/ Jefferson County, Dec. No. 26845-B (WERC, 7/92), aff'd, 187 Wis. 2d 647 (Ct.App. 1994), citing WERC v. Evansville, 69 Wis. 2d 140 (1975) and Beaver Dam Unified School District, Dec. No. 20283-B, (WERC, 5/84); City of Brookfield, Dec. No. 20691-A (WERC, 2/84); Juneau County, Dec. No. 12593-B, (WERC, 1/77).

111.82 of SELRA, respectively, and the same test for whether interference occurred applies under both statutes. 3/

McOlash was disciplined for making the requests for information on Chief Nordin to the Door County Sheriff's Department and Sturgeon Bay Police Department on December 13, 1993. If either of those requests constituted "lawful, concerted activity" within the meaning of Sec. 111.82, Stats., disciplining McOlash for making the request would have a reasonable tendency to interfere with, restrain or coerce him and other employes in exercising their rights.

On its face, a union officer assisting the labor organization in obtaining information to be used in a grievance arbitration constitutes concerted activity for mutual aid or protection. The determinative issue in this case is whether McOlash's concerted activity was "lawful", and thus, protected activity. The State asserts that the Union's real purpose in seeking information on Chief Nordin was to intimidate him to the point he would not testify for the State in the Cole arbitration, and thus, was not legitimate, and not protected. 4/ There is not sufficient evidence in the record to support such a finding. The only evidence in that regard consists of the admission that the Union was looking for "skeletons in his (Nordin's) closet" and a comment by Orth during the predisciplinary meeting that Nordin had "secrets" that might come out in the Cole arbitration. The record indicates that Chief Nordin was a potential witness for the State in the Cole arbitration. There could just as well have been legitimate reasons for the Union's looking for such information on Chief Nordin, e.g., to discredit a key management witness or to refute assertions made by the State. The Examiner will not assume that the Union had a more sinister purpose than those, and the State has not clearly established that the Union had any other purposes for seeking the information.

The State also asserts that McOlash's activity was improper and thus, was not protected, in that he improperly used his official status to access the restricted law enforcement information network in order to obtain the information for the Union in violation of the DNR's Code of Ethics. To the extent that assertion implies that McOlash had a duty to disclose to the law enforcement agencies that he was not calling for purposes related to his Conservation Warden responsibilities, but was calling in his private citizen capacity for purposes unrelated to law enforcement, the Examiner agrees. The State (DNR) has a legitimate interest in protecting the integrity of its agency and the ability of its wardens to work with law enforcement agencies. With regard to his request to Schwartz, under the circumstances, it was likely that Deputy Schwartz would have assumed McOlash was calling the Sheriff's Department in his official capacity. McOlash was well-known to Schwartz as being one of the local Conservation Wardens and there is no indication in the record of

3/ State of Wisconsin v. WERC, 122 Wis. 2d 132, 143 (1985).

4/ The Union requested in its reply brief that the record be reopened in order to permit it to submit evidence to rebut the State's assertions in this regard. Given that both parties were well aware of each other's contentions in this case and had sufficient opportunity during the two days of hearing to submit the evidence they deemed necessary, reopening the record is deemed inappropriate.

McOlash having called the Sheriff's Department in the past for non-law enforcement purposes. The evidence as to McOlash's conversations with Deputy Schwartz on December 12th indicates that Schwartz assumed McOlash was calling as "Warden McOlash", and Schwartz testified to that effect when asked about his looking for the information McOlash had requested:

Q. Did you have any qualms about making that check?

A. No. Joel is a law enforcement officer and we give that information to law enforcement officers. We get -- a lot of times when, you know, the wardens call or a state trooper or a city officer calls requesting information, you know, date of birth and middle initial from a party they ask us frequently to look those things up in the computer and we do that. (Tr. II, p. 13).

Schwartz did not ask about the purpose of the request and McOlash did nothing to inform Schwartz that he was not calling on official business. For that reason, the Examiner has found that McOlash's request to Deputy Schwartz was in violation of the DNR's Code of Ethics and could be a legitimate basis for discipline.

McOlash's conversation with Officer Tassoul is, however, dissimilar from his conversations with Deputy Schwartz on December 12th in a critical aspect. Officer Tassoul immediately asked McOlash why he wanted the information regarding Chief Nordin and McOlash made it clear that he was requesting the information on behalf of the Union. Hansen's report of his interview with Tassoul includes the following:

Officer Tassoul stated that in his (Tassoul's) mind, McOlash was clearing (sic) requesting information as a private citizen during the phone call on 12/12/93. Officer Tassoul stated that he (Tassoul) was of the impression that McOlash was acting as a union steward (sic) in this request. Officer Tassoul stated that he had this impression by the nature of McOlash's question and comments during the call and that McOlash had immediately made it clear to Tassoul that this was a union matter. Officer Tassoul stated that McOlash never identified himself as a Conservation Warden or state employee during the conversation. . .

(State Exhibit No. 10)

Officer Tassoul's report of his conversation with McOlash on December 12th was prepared that same evening shortly after the conversation and states, in relevant part:

A few minutes later R/O was again contacted by Deputy Schwartz and R/O had a conference call with Deputy Schwartz and McOlash. McOlash stated that he had been requested by a union subject to attain this information. McOlash stated that he had been requested to attain this information reference a hearing involving Don Cole. R/O advised McOlash that R/O would not give him this information but R/O would contact Chief Nordin.

(State Exhibit No. 11).

Based on Officer Tassoul's version of the conversation between he and McOlash, the objection of Kriese and Hansen, and others at the DNR, to McOlash's request is reduced to his having contacted the Sturgeon Bay Police Department seeking information for the Union to use in the pending Cole arbitration, i.e., a purpose unrelated to his law enforcement responsibilities. Such a proscription is overbroad. McOlash has the same right as any other citizen to contact a law enforcement agency to request information for private purposes, as long as he does not attempt to use his official status to obtain information that is not otherwise available to him or to be treated differently than the general public. The record does not indicate that McOlash made such an attempt in his conversation with Tassoul.

The State notes that federal law protects the privacy of citizens by restricting access to a person's social security number, and asserts that McOlash's requests for Nordin's social security number amounted to an attempt to use his law enforcement status to obtain information for the Union that is not available to the general public. Again, there is not sufficient evidence to support such a finding. At best, the testimony indicates that McOlash was aware that it is more difficult to obtain a person's social security number than it is to obtain their birth date or full name. It was not established that McOlash had been informed that access to a person's social security number is restricted to law enforcement purposes. More importantly, McOlash made no attempt to deceive Officer Tassoul, nor in any way led him to believe he was calling on official business, so as to gain unauthorized access to that information.

The State has also asserted that McOlash's attempts to obtain the information regarding Chief Nordin for the Union violated his public trust and brought discredit upon himself and the DNR to the extent that it has hampered his ability to work with the local law enforcement agencies. The evidence presented on this point, however, was limited to the testimony of Hansen and Kriese. To a large extent, Hansen's testimony in this regard was about perceived possible retaliation by another warden against a deputy in the Door County Sheriff's Department for releasing the tape of McOlash's conversation with Deputy Schwartz. Kriese's testimony was limited to what he felt would likely be the impact of McOlash's requests for information on his and other wardens' ability to have a cooperative relationship with the local law enforcement agencies. Such a likely impact on McOlash's relationship with local law enforcement agencies is of legitimate concern, and where it occurs as a result of his having misused his official status and violated the public trust, may be a

basis for imposing discipline. However, it must also be pointed out that the same cannot be said where McOlash made clear the purpose of his request for the information. The Examiner gets the sense from the testimony of Hansen and Kriese that they were concerned McOlash's inquiry had upset and offended Chief Nordin, which could result in a strained relationship between McOlash and Chief Nordin and his Department. If McOlash's inquiry is deemed to be lawful, concerted activity, which it has been with regard to his conversation with Officer Tassoul, the possible or even actual impact of making such an inquiry cannot be a basis for discipline. 5/ It is an unfortunate reality that at times a union steward's attempts to pursue or investigate a grievance will place that employe at odds with a supervisor or third party with which the employe must work and create a strain on their working relationship. Yet that result, of concern though it may be, cannot be a basis for discipline so long as the steward is engaging in lawful, concerted activity.

For the foregoing reasons, McOlash could reasonably infer that he was being disciplined, at least in part, because he had attempted to assist the Union by obtaining the information regarding Chief Nordin. For that reason, along with the conclusion that McOlash's conversation with Officer Tassoul did not violate the DNR's Code of Ethics and was lawful, concerted activity, the Examiner has concluded that the Union has shown by a clear and satisfactory preponderance of the evidence that the imposition of the suspension, based in part on his contact with Officer Tassoul, had a reasonable tendency to interfere with the exercise of McOlash's rights under Sec. 111.82, Stats.

Sec. 111.84(1)(c) (Discrimination)

The Union also alleges that the DNR's imposition of the suspension on McOlash violated Sec. 111.84(1)(c), Stats. That provision provides that it is an unfair labor practice for the State:

To encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment. This paragraph does not apply to fair-share or maintenance of membership agreements.

In order to establish a violation of Sec. 111.84(1)(c), Stats., the Union must establish by a

5/ It should be noted, however, that if the actual impact is such that the employe is no longer able to carry out his job responsibilities, the employer may take reasonable measures to address that problem. Employer conduct which may well have a reasonable tendency to interfere with employe exercise of Sec. 111.70(2) rights will not be found violative of Sec. 111.70(3)(a)1, Stats. if the employer has valid reasons for its actions. Cedar Grove-Belgium Area School District, Dec. No. 25849-B (WERC, 5/91); citing City of Brookfield, Dec. No. 20691-A (WERC, 2/84).

clear and satisfactory preponderance of the evidence that (1) the employe had engaged in protected, concerted activity, (2) that the employer was aware of said activity and hostile thereto, and (3) that the employer's action was based at least in part upon said hostility. 6/

For the reasons discussed above, the Examiner has concluded that McOlash's telephone conversations with Deputy Schwartz did not constitute lawful, concerted activity, while his telephone conversation with Officer Tassoul did. It is clear that Kriese and others in DNR's management were aware of McOlash's telephone conversations with Deputy Schwartz and Officer Tassoul on December 12th in which he requested information on Chief Nordin on behalf of the Union. It is also clear that Kriese and Hansen were hostile to McOlash's "activity" of December 12th in contacting the Door County Sheriff's Department and Sturgeon Bay Police Department for the purpose of requesting information for the Union on Chief Nordin. However, the evidence indicates that hostility was not based upon anti-union animus, but the fact that McOlash made the attempts to obtain the information through those departments for purposes unrelated to law enforcement duties. There has been no showing that either Kriese or Hansen, or anyone else involved in the DNR's decision to suspend McOlash, bore any animus towards him because the non-law enforcement purpose for which he sought the information was to help his Union. Absent proof of that necessary element, the Examiner cannot conclude that the State discriminated against McOlash in violation of 111.84(1)(c).

Remedy

With regard to the remedy ordered, the Examiner has found that the suspension was based in part upon McOlash's lawful, concerted (protected) activity (request to Officer Tassoul), and in part upon conduct that did not constitute protected, concerted activity (request to Deputy Schwartz in violation of DNR's Code of Ethics). Given the manner and the dual bases of the discipline imposed on McOlash, the discipline cannot simply be reduced to the extent it was based upon his protected, concerted activity, but must instead be rescinded in its entirety. The question of what discipline, if any, would be appropriate on the basis of the unprotected activity is not before the Examiner and may not properly be decided in this case.

Dated at Madison, Wisconsin, this 21st day of June, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

6/ State of Wisconsin Department of Employment Relations v. W.E.R.C., 122 Wis. 2d 132, 140 (1985).

By David E. Shaw /s/
David E. Shaw, Examiner