STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RICHARD J. SHAWL, Complainant,

vs.

ONEIDA COUNTY, a Municipal Corporation, and WISCONSIN PROFESSIONAL POLICE ASSOCIATION - LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION, Respondents.

Case 103
No. 51630
MP-2944

Decision No. 28240-B

Appearances:

Mr. Michael F. Roe, in c/o O'Melia, Schiek & McEldowney, S.C., Attorneys at Law, 4 South Stevens Street, P. O. Box 1047, Rhinelander, Wisconsin 54501, with **Mr. Richard J. Shawl**, 802 Mason Street, Rhinelander, Wisconsin 54501, appearing on behalf of Richard J. Shawl.

Mr. Kevin E. Wolf, with **Ms. Cari L. Hoida** on the brief, Ruder, Ware & Michler, S.C., Attorneys at Law, 500 Third Street, P. O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of Oneida County.

Mr. Gordon E. McQuillen, Cullen, Weston, Pines & Bach, Attorneys at Law, 20 North Carroll Street, Madison, Wisconsin 53703, appearing on behalf of Wisconsin Professional Police Association - Law Enforcement Employee Relations Division.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The procedural history of this case through August 25, 1995, is set forth in forth in DEC. NO. 28240-A (MCLAUGHLIN, 8/95), in which I ordered the Complainant to make the complaint more definite and certain. In a letter filed with the Commission on August 29, 1995, the Association sought "to have a specific date for the filing of such an amended complaint." In a letter to the parties dated September 14, 1995, I requested any amendment of the complaint to

be filed by September 29, 1995. In a fax filed with the Commission on September 29, 1995, Complainant requested an extension of the filing deadline until October 4, 1995. In a letter filed with the Commission on October 12, 1995, the Association renewed its motion to dismiss the complaint. In a fax filed on October 12, 1995, Complainant requested another extension of the deadline to file an amended complaint until October 13, 1995. In a fax filed October 13, 1995, Complainant filed an amended complaint. On October 16, 1995, Complainant filed its amended answer via regular mail. I accepted this amendment. On November 2, 1995, the County filed its answer to the amended complaint. With the consent of the parties, the initial hearing date was set for January 16, 1996.

At the start of the hearing on January 16, 1996, Complainant filed a motion requesting that the Association be deemed to have waived right to hearing based on its failure to file an answer to the amended complaint. I denied this motion at hearing and permitted the Association to enter its answer on the record on January 16.

Hearing on the complaint was conducted in Rhinelander, Wisconsin, on January 16, 17, 18 and May 16, 1996. Transcripts of those days of hearing were supplied to the Commission by June 28, 1996. The parties established a mutually agreeable briefing schedule at the close of the final day of hearing. Disputes concerning Complainant's filing of an initial brief ensued. In a letter to the parties dated November 20, 1996, I stated:

> I have not received a brief from Mr. Roe and presume that he has waived his right to file a brief. If either Mr. Wolf or Mr. McQuillen wish to file further argument, you should so advise me. If not, I will close the record based on the argument filed to this point.

In a letter filed with the Commission on December 9, 1996, Mr. Roe stated:

> Please be advised that I will no longer be representing Mr. Shawl in the above matter, effective today's date, due to the fact that my license to practice law in this state has been suspended. Attorney John F. O'Melia will be representing Mr. Shawl.
>
> . . . At this time, I would indicate that Mr. O'Melia will complete the Brief and Mr. Shawl will assist him in writing the portion of the Brief that relates to all claims against the defendant union. The Brief will be submitted on December 11, 1996. Under these circumstances, I would hope that the commission would accept this Brief as filed.

Via fax on December 12, and via regular mail on December 16, 1996, Lawrence J. Wiesneske filed "the Brief on behalf of the Complainant, Richard Shawl." In a cover letter attached to the brief,

Wiesneske stated:

. . .

> Please be advised that the foregoing Brief was dictated by Attorney Michael F. Roe of our firm prior to his suspension from the practice of law. Because Mr. Roe was the only member of this firm with the necessary background and experience to be able to handle a case of this nature, it will be necessary for this firm to withdraw from further representation of Mr. Shawl in this matter.
>
> We were informed by Mr. Roe that the enclosed Brief was the combined work-product of both attorneys but we have been unable to contact Mr. Shawl to obtain his input on the final version. Therefore, as our last act before withdrawing we respectfully request that Mr. Shawl and or his successor attorneys be allowed leave to request a further extension of time to file a supplemental Brief if that should be necessary.

The County and the Union objected to consideration of the Complainant's brief. In a letter to the parties dated December 18, 1996, I stated:

. . .

> If I am to consider Complainant's brief, it would seem to me it necessarily follows that the Respondents acquire a right of response. . . .
>
> If Mr. Shawl or his advocate is willing to face the additional delay of reopening the argument phase of the record, I may consider his brief. I would ask Mr. Shawl to advise me of his position on this point. . . .

Shawl filed a response with the Commission on December 30, 1996. In a letter to the parties dated January 3, 1997, I stated:

> In a letter dated December 23, 1996, Mr. Shawl raises a number of points, and requests that I indicate "the O'Melia firm's status."
>
> My earlier correspondence had presumed the withdrawal of that firm was not a disputed point. Mr. Shawl's letter makes that presumption untenable.
>
> It does not, however, follow from this that I, through the statutes my agency administers, can compel the O'Melia firm's continued involvement in this litigation.

> I would ask any of you who has an interest in the resolution of this point to submit any authority you can to establish whether or not I can play any role the attorney/client relationship underlying litigation before the Commission.

After receiving responses from the Association and the County, I sent a letter to the parties dated January 23, 1997 which states:

> . . . I am satisfied that Mr. Shawl and the O'Melia firm have had sufficient time to respond to my January 3 letter.
>
> I do not believe I have the authority to address the status of the O'Melia firm regarding any ongoing presentation of Mr. Shawl's complaint. More significantly, I am not convinced this issue needs to play a noteworthy role in my consideration of the record.
>
> While I believe Mr. McQuillen and Mr. Wolf have the technically superior arguments concerning my consideration of the untimely brief, I am unwilling to close the record without its receipt. The finality concerns noted by Mr. McQuillen and Mr. Wolf are well stated and persuasive, but are not, in my opinion, dispositive. In the circumstances of this case, denying consideration of the brief punishes Complainant for the actions of his counsel. It must be remembered that the case is on remand from a court, and that I represent the bottom of the appellate food chain. The significance of this fact is more easily overstated than understated, but I think it highlights the need to insure that Complainant is permitted the fullest reasonable opportunity to "tell his side of the story."
>
> As noted in my letter of January 3, 1997, this conclusion dictates a right of response on Respondents' behalf. I stress both Respondents may file a responsive brief. The original briefing schedule contemplated two months for this filing, and I would ask that Respondents file their responses within two months from receipt of this letter. I stress also that the filing of each Respondent's brief or waiver of a brief will complete the argument process.
>
> The finality concerns articulated by Respondents can, perhaps, be addressed by a waiver of the brief permitted above or by an agreement to shorten the briefing schedule. I leave this, however, to the Respondents. The delay in this litigation is not traceable to them, and I am reluctant to deny them the benefit of a briefing schedule they have honored. The original briefing schedule, however, contemplated a final response from Complainant. I am unwilling to extend the course of this litigation that far. The delay already built into this litigation precludes this. These conclusions should also address any issue concerning Mr. Shawl's representation at this level of litigation.

> Complainant's case has already been sketched out through the pleading process and through oral argument at hearing. I believe, however, that the consideration of the untimely filed brief can bring an appropriate closure to Complainant's case. The response afforded Respondents should afford them an equivalent opportunity for the closure of their cases.

The County waived its right of reply in a letter filed with the Commission on February 20, 1997. I received no further responses to the January 23, 1997 letter and formally closed the record in a letter to the parties dated May 1, 1997.

FINDINGS OF FACT

1. Richard J. Shawl is an individual who resides at 802 Mason Street, Rhinelander, Wisconsin.

2. Oneida County, referred to below as the County, is a municipal employer which maintains its principal offices at the Oneida County Courthouse, P.O. Box 400, Rhinelander, Wisconsin 54501.

3. Wisconsin Professional Police Association, referred to below as the Association, is a labor organization which maintains its principal offices at 7 North Pinckney Street, Madison, Wisconsin 53703.

4. The Union and the County are parties to a collective bargaining agreement which was "in effect beginning January 1, 1993 through December 30, 1994." That agreement includes, among its provisions, the following:

> ARTICLE 1 - RECOGNITION
>
> The County hereby recognizes the Union as the exclusive bargaining agent for all regular full-time and regular part-time employees of the Oneida County Courthouse covered by this Agreement, but excluding all elected personnel, supervisory personnel, confidential personnel and managerial personnel, as defined by the Act.
>
> . . .
>
> ARTICLE 6 - SENIORITY - PROMOTIONS - LAYOFF
>
> . . .
>
> Section B: Seniority shall be lost by any of the following acts:

(1) A proper discharge . . .

. . .

ARTICLE 7 - VESTED RIGHTS OF MANAGEMENT

> Section A: The right to . . . discipline and discharge employees . . . is reserved by and exclusively in the Oneida County Board through its duly appointed Personnel Committee and duly appointed department heads. (The reasonableness of the exercise of the aforementioned vested rights shall be subject to the grievance procedure) . . .

Article 4 of that agreement establishes a formal grievance procedure which culminates in final and binding arbitration of disputes falling within its scope.

5. Since 1974, Lawrence R. Heath has served the County as its Corporation Counsel. Sometime in the mid 1980's, the County authorized Heath to employ, on a part-time basis, an Assistant Corporation Counsel. On March 11, 1991, Heath hired Shawl to serve as the County's Assistant Corporation Counsel. At the time of his hire, Shawl's position was .8 of a full time equivalent (FTE) position. In January of 1992, Shawl became a full-time employe.

6. At the time of his hire, Shawl's position was not among those courthouse positions represented by the Association. As an unrepresented employe, Shawl's terms and conditions of employment were set unilaterally by the County. Under County policy, Shawl was to be formally evaluated by Heath, as the Department Head, before the completion of a six-month probation period. Those policies called for a formal evaluation to occur on an annual basis commencing on the date Shawl was moved off of probationary status. The County codified certain of its policies in a written document entitled "PERSONNEL POLICIES." This written policy permitted the appeal, by an individual employe, of "all matters affecting employment which the individual believes to be unjust." The internal appeal procedure started with the employe's immediate supervisor, then proceeded to the Department Head, then to the Personnel Director and finally to the County Board's Personnel Committee. The Personnel Policies also included the following "DISCIPLINARY PROCEDURES":

> (a) The following procedure outlines, in general, the steps to be taken by departments in administering employee discipline. These procedures are not all inclusive and therefore departments may pursue other discipline methods as they deem appropriate.
>
> (b) The following procedures constitute a progressive disciplining process. The principle objective of this process is to correct the inappropriate or unacceptable behavior of an employee. Though this method is progressive, departments have the authority, should they determine the conduct of the employee warrants it, to take more severe disciplinary action without first employing the lesser discipline options

available to them. However, employee discharge must be preceded by a suspension "pending discharge" and consultation with the Personnel Office.

. . .

(d) The following procedures constitute the County's employee discipline procedures:

1. Oral Reprimand . . .
2. Written Reprimand . . .
3. Suspension . . .
4. Discharge. In all cases where all previous disciplinary action has been unsuccessful or if extreme or unusual circumstances warrant, a discharge should be issued. The action to discharge shall be initiated by a suspension "pending discharge" to provide adequate time for additional investigation. If the facts continue to warrant discharge the notice of the discharge shall be issued in order to effectuate the discharge. Before issuing a notice of discharge the Personnel Office must be consulted.

7. Heath did not formally evaluate Shawl during Shawl's first six months of employment. At some time near the end of Shawl's probation period, Heath noted to Shawl that he had not observed Shawl's performance to the degree he would like to, but had concerns about it. He also noted to Shawl that he was considering extending Shawl's probation period to observe Shawl's performance in greater detail. Heath shared this concern in a discussion with the County's Personnel Director, Carey Jackson. Heath ultimately decided not to extend Shawl's probation period, thus permitting Shawl to become a non-probationary employe. Jackson's office periodically reminded Heath of the need, under County policies, for Heath to formally evaluate Shawl. Heath did not, however, do so until January of 1993.

8. Although Heath did not formally evaluate Shawl until January of 1993, he periodically informed Shawl of his concern with Shawl's work performance. Shawl was no less concerned with Heath's work performance, and periodically informed Heath of those concerns. For example, within the first two months of Shawl's employment, Heath had assigned Shawl a file, known as the MA CHIPS case, which involved the alleged sexual abuse of an infant and which, at that time, appeared to be headed for trial to a jury. Shawl was not convinced he had the trial experience or substantive knowledge of the applicable law necessary to properly handle the file and so informed Heath. Prior to July of 1992, Heath had communicated to Shawl that he was concerned with the amount of work Shawl performed, the quality of his research and writing skills, the quality of his trial work and his ability to cooperate with staff, including clerical staff, within the Corporation Counsel's office. These concerns prompted Heath to demand periodic reports from Shawl concerning the status of the cases under Shawl's control. Heath also reviewed incoming mail to monitor Shawl's performance. Jackson shared at least some of Heath's concerns regarding Shawl's performance. Shawl accompanied Jackson to a meeting with the administrator of the

County's self-funded health insurance plan concerning a potential County liability for a procedure costing roughly $250,000. Shawl had researched the County's potential liability under the self-funded plan, but did not discover that the governing document excused the County from funding experimental procedures. Heath later removed Shawl from the case, and established that the County could not be compelled to pay for the

disputed procedure. Prior to July of 1992, Shawl had communicated to Heath that he was asked to work hours in excess of his .8 or 1.0 FTE authorization, was asked to perform duties beyond the scope of his job description, such as the insurance issue, and was suffering under Heath's unduly critical oversight of his case work.

9. By late March or early April of 1992, Shawl was sufficiently concerned with his relationship with Heath that he contacted Attorney Richard Thal of Cullen, Weston, Pines & Bach. Shawl did not realize, when he first contacted Thal, that the law firm also represented the Association. After considering the matter, Thal informed Shawl that the Association could, without a conflict of interest to Thal, file a unit clarification petition with the Commission, seeking to have Shawl's position included in the courthouse employe bargaining unit represented by the Association. By this process Shawl could be brought within the protection of a collective bargaining agreement.

10. Shawl's and Heath's relationship continued to deteriorate. In May or June of 1992, Jackson heard Shawl and Heath discussing something so loudly that Jackson could hear the conversation from his own office. The conversation was sufficiently loud and distracting that Jackson felt compelled to investigate the matter and terminate the dispute. He ultimately separated the two attorneys. Each of them sought Jackson's assistance in resolving the dispute, which turned on their conflicting perspectives on Heath's management style. In a memo to Heath dated June 10, 1992, Shawl sought to have Heath reconsider the assignment of a paternity case, reconsider a requirement that Shawl give him a weekly, verbal case update and reconsider the inequitable distribution of litigation responsibilities. His memo noted, among other points, the following:

> . . . (Y)ou specifically request a verbal update on a weekly basis on this case. If you desire weekly verbal updates, I request that you place the matter on both of our calendars . . . The only way an employee in my position can be protected is to correspond. Especially in light of the current tension between us, I intend to continue the practice for my own safety, whether or not you also choose to personally discuss the matter . . .
>
> There is another very pressing reason why I prefer memoranda and why I request that you take responsibility for this case. At various times in the past, I have brought the problem of the volume of my caseload to your attention . . . At our last discussion of this topic, over May 11 and 12, I repeated my request to have an objective case load standard, which you refused. I repeat again my request that an objective performance standard be established for my position, and I request that this be done as soon as possible . . .

In this memo, Shawl stated his review of their respective caseloads established that "I have had more than two-times the number of hearing responsibilities than you have had." Heath responded in a memo dated June 17, 1992, which noted, among other points, that he would not change the

assignment of the paternity case, continued to expect weekly, verbal case updates and

"will continue to review the balance of your memorandum." At roughly this same time, Heath obtained written statements he had requested from two clerical staff in his office, documenting their concerns with Shawl. Heath understood Shawl's conduct to have been a cause of the resignation of one of those clerical employes. He did not specifically discuss these memos with Shawl, but continued to ask other County employes if they had concerns with Shawl's work performance. In separate memos dated June 25, 1992, Heath documented his concern with Shawl's handling of two cases. In one, Heath voiced concern that Shawl had asked him to sign a letter of complaint, prepared by Shawl, to the Minocqua Police Department concerning the conduct of an officer involved in a Chapter 51 proceeding. The officer principally involved in that proceeding was not, however, an officer of the Minocqua Police Department. Shawl responded to these memos in a memo dated June 29, 1992. In his response, Shawl acknowledged responsibility for improperly identifying the department of the officer whose conduct was at issue, but he noted "I in no way suggested a letter of complaint be sent." In a memo to Heath dated July 6, 1992, Shawl expressed concern over a number of office and case management issues. He also included in the memo the following:

> Enclosed with this memorandum is a statement of procedure which I desire for secretarial work within this office. Most of what is contained in it is, or should be, standard. Additionally, large portions of it have been requested in one form or another within the past year. It would be helpful to resolve what is expected in this regard.
>
> I request a meeting with the entire office to help us arrive at office procedures and objectives which we can all follow and expect of each other. Such a meeting is essential to the best interests of this department and the County, as it is unrealistic to expect a resolution of our conflicts in the absence of direct effort toward the same. I request you to schedule such a meeting as soon as possible and to inform me immediately of your intentions in this regard.

The attached memorandum was five pages long and covered "Files & Filing; Sending Correspondence; Dictation; Telephone Calls; Notes; and Errors."

11. On July 16, 1992, the Association filed a unit clarification petition with the Commission. The petition sought to have the position of "Assistant Corporation Counsel" included in the bargaining unit noted in Finding of Fact 4. The Commission mailed a copy of this petition to Heath, who received it on July 21, 1992. This copy was the first notice Heath, or other County supervisory personnel, had of Shawl's desire to join the courthouse bargaining unit. Heath filed the following response, dated August 25, 1992, to the petition:

> . . . It is the position of the County that the Assistant Corporation Counsel position continues to be a professional position that is professional, managerial

> and confidential in nature and that the status of the position has not changed in any significant manner since the establishment of the position . . . which predates the last certification of the bargaining unit.
>
> The County further wishes to assert that its review of the performance of the incumbent prior to the anticipated hearing on the Petition to Clarify Bargaining Unit and, at a minimum, prior to the County's receipt of the Petition to Clarify Bargaining Unit, should not be infringed upon.

The second paragraph refers to Shawl's annual evaluation which, under County Personnel Policy, was to be done in September of 1992. Hearing on the petition was conducted on October 28, 1992. At that hearing, Shawl was the only witness to testify. The County did not introduce any evidence beyond Shawl's position description. Prior to the hearing, Heath and Jackson consulted outside labor counsel to determine if the position could be excluded from the unit. They understood the opinion of their outside counsel to be that in all probability the position would be included, but that the factual nature of the determination permitted the possibility of the position's exclusion. Heath and Jackson discussed this and their own views with the County Board's Personnel Committee before the hearing on the petition. At the October 28, 1992 hearing the court reporter scheduled to transcribe the hearing did not appear. As a result, the Examiner took notes, which the parties agreed to verify as the record for the proceeding. In a letter dated November 2, 1992, Thal supplied Shawl with the Examiner's "typewritten version of his notes of your testimony." Thal requested that Shawl "let me know if these notes are accurate." In a letter dated December 21, 1992, Thal informed Shawl that the Examiner "is waiting for us to sign and return his notes so that he may issue a decision." He asked Shawl to "let me know if his notes are accurate at your earliest convenience."

12. Shawl did not receive a formal evaluation in September of 1992. Rather, he received a formal, written evaluation form from Heath on or about January 11, 1993. On that form was a post-it note from Heath asking Shawl to meet with him on January 11, 1993, to discuss the evaluation. The evaluation was recorded on a form which required an evaluator to assess the following indicia of work performance: knowledge of work; quantity of work; quality of work; ability to learn; initiative; cooperation; judgment and common sense; dependability; and planning. The form required that these indicia be rated on the following scale: exceeds requirements; competent; needs improvement; and unsatisfactory. Heath entered six of the nine indicia of performance under "needs improvement." One of those indicia, initiative, was rated at between "competent" and "needs improvement." The "quality of work" indicia was rated as "unsatisfactory." The "cooperation" indicia was rated at between "unsatisfactory" and "needs improvement." Attached to the evaluation form was a three page document entitled "Comments Relating to Performance Appraisal of Richard J. Shawl." The comments relating to the three indicia not rated as "needs improvement" read thus:

. . .

3. QUALITY OF WORK
   a. In a number of instances when Rick has been given an assignment to research an issue, his analysis has been incorrect.
   b. On a too frequent basis correspondence, pleadings and briefs are prepared for final distribution that contain errors in spelling, grammar and, more importantly, thought processes.

. . .

5. INITIATIVE
   a. In the area of mental health law Rick has taken the initiative on occasion to prepare appropriate memos concerning suggestions for changes in forms and procedures. Rick has also suggested an update of certain paternity forms.
   b. In other areas Rick has generally not come forward with a request in advance for time to work on initiatives.
   c. On occasion Rick has been reluctant to accept assignments which would require initiative in developing new ideas and methods.
6. COOPERATION.
   a. On occasion Rick has acted inappropriately with courthouse staff outside of the Corporation Counsel office.
   b. Rick has also acted inconsistently with Office staff, asserting secretaries should be undertaking responsibilities they do not have, seeking input in professional matters where the secretary has no responsibility, complaining to secretaries of his workload.
   c. Rick has complained of office policy by which I review incoming mail and misstated to me the position of other personnel in the Office concerning the implementation of this policy.
   d. Rick has questioned the Office policy by which new inquiries are to be directed to me before being assigned.
   e. Only after repeated directions from me to assume responsibility for certain URESA cases, would Rick accept an assignment.
   f. Rick has refused to provide a weekly "Case Load" report although he has been directed to do so on numerous occasions.
   g. Rick has refused to schedule appointments with me to review his Case Load reports and, frequently, when I have provided memos or notes asking for updates on certain files, insisting that it is my responsibility to schedule such appointments.
   h. Rick has objected to my decision as department head on occasion to consult with others working on a matter rather than always relying upon him.

. . .

Also attached to the formal evaluation was the following attachment, headed "RICHARD J. SHAWL PERFORMANCE EVALUATION OBJECTIVES":

1. Assess assigned matters in the context of the objectives which must be met by the County. Define the issues, identify the applicable case and/or statutory law. ascertain (sic) the proofs that must be met for the County to prevail, and the manner in which the County's position will be presented. This approach should be utilized in preparation for trials, correspondence, briefs, etc. If questions exist, there should be a willingness to discuss and resolve the same with me.

2. Implement office directives in a professional manner, including completion of and submittal of Case Load reports on a weekly basis. Schedule weekly meetings and reschedule them if necessary so that Mr. Heath has a clear understanding of status of assigned matters and any difficulties that are being encountered. Respond in a similar professional manner to specific requests for status updates requested by Mr. Heath.

   Promptly refer new matters which come to his attention to Mr. Heath for review and assignment as necessary. This includes new matters in previously assigned cases.

3. Carefully proof read all correspondence, pleadings, briefs (sic) etc. for accuracy in spelling, grammar and the development of the position being advocated in behalf of the County. Until further notice all correspondence addressing significant issues, pleadings which address out-of-the-ordinary issues, and briefs should be submitted to Mr. Heath for review and approval.

4. If it is necessary to prepare more than two drafts of any correspondence, pleadings, briefs, etc., the same shall be first brought to the attention of Mr. Heath before proceeding.

5. Office staff, other County personnel, personnel from other agencies involved in an assigned matter, parties and their respective counsel, court personnel and the general public shall always be treated courteously and otherwise in a professional manner (sic)

In preparing the formal evaluation, Heath prepared a ten page memorandum, replete with specific instances documenting his concern on the nine indicia of performance set forth in the evaluation form. Heath and Shawl discussed the evaluation form on January 11, 12 and 13, 1993, but did not discuss any of the specific instances listed on Heath's ten page memo. The discussion of the evaluation was heated. Shawl perceived the evaluation as a personal attack, so informed Heath, and

refused to sign the evaluation form.

13. Heath's and Shawl's professional and personal relationship did not improve after the evaluation. For example, Heath issued a letter to a member of the County's Department of Social Services, dated January 15, 1993. In that letter Heath noted that he was reviewing the incoming mail on two case files Heath had assigned to Shawl. One of those letters had been authored by John M. Sharp, the Coordinator of Program Services for the Kenosha County Department of Community Programs, and contained material of interest to Heath regarding issues such as guardianship and protective placement. Heath called Sharp to discuss the letter, and summarized his reaction to this conversation thus:

> Mr. Sharp and I also discussed the fact that it might be appropriate for both counties to again try to go after the State of Wisconsin to accept the underlying responsibility which it should have to administer these cases and assume fiscal responsibility for the same. At this time I am suggesting that you, Tara Vandenberg, Rick Shawl and myself meet to discuss the foregoing. Please respond at your earliest convenience.

Heath gave a draft of this letter to Shawl and attached a post-it note to the draft which stated "pls review." Shawl responded on a post-it note which stated:

> I believe your telephone call violates protocol and interferes with my ability to assist. At least you showed me the letter before sending it. If you and Mr. Spencer and Tara work out a new policy, implementation of which would settle these cases, that's great. If you wish to discuss these cases in particular with them, I will need explicit instructions in advance regarding what our position is, if I am expected to attend. The instructions would not have been needed had I been a part of your telephone call.

In a memo to Jackson dated February 3, 1993, Shawl filed his "appeal of Mr. Heath's Performance Appraisal." The appeal, with the cover memo, was nine pages long and Shawl issued Kluss and Thal a copy of each document. The written appeal states, among other points, the following:

> I am appealing Mr. Heath's performance appraisal which was concluded January 13, 1993. I contend it is in violation of the County Code and the County Job Classification and Pay Plan, and their specific mandatory procedures and objectives.
>
> . . .
>
> My appraisal is four months late, as the date on the forms shows. This delay is contrary to several of the objectives. It has delayed my receiving the step pay

increase to which I am entitled, as of September 11, discouraged me from making my best efforts and discouraged me from sustaining my performance. This delay hinders rather than improves communication between supervisor and employee. Despite the fact that I had an oral performance review in advance of my six month employment anniversary of September 11, 1991, this apparently is intended to be a "first" appraisal, and as such it is not four months late, but sixteen. This delay hinders the establishment of measurable performance objectives, information for staffing, and integrating personal objectives with those of the Department and the County.

Additionally, the appraisal is in violation of my Due Process rights, including those of notice and opportunity to be heard. First and most obviously, the delay in this appraisal is so significant as to make it extremely difficult to provide specific facts in rebuttal. I believe the above mentioned delays have been deliberate, and are abusive. Mr. Heath has had the most recent appraisal paperwork for at least four months, and even wrote correspondence indicating he was aware of the appraisal. The appraisal itself is very nonspecific as to time frames, standards, and alleged incidents, some of which have been raised for the first time and are not described specifically enough to identify. I have not been given opportunity to respond to them in any fashion - including by correcting my supposedly faulty behavior in advance of appraisal. Furthermore, the appraisal has deprived me of notice by being conducted in the absence of specifically measurable criteria, making it impossible to determine the level of my performance except by comparison to others in similar situations. The performance appraisal and the delaying thereof are fundamentally unfair.

I shall now address the specific categories of the appraisal.

. . .

CONCLUSION

Mr. Heath's appraisal should be disregarded as untimely.

There is no question I would, in a timely and fair review, deserve at minimum an overall rating of "Competent."

Mr. Heath's evaluation is so severe that it alleges what may amount to a violation of County Code in terms of minimum work performance, but it does so in vague terms, rarely identifying the subject matter of the alleged violation, the duties involved, or the other or others involved. It cannot provide meaningful or timely notice of the allegations. The criticisms are generally unwarranted.

Mr. Heath's methods of assigning work and providing criticism must not continue

unchanged. Continuing them without change suggests that instead of striving to achieve the goals of the Job Classification and Pay Plan, Mr. Heath may be

> perceived as attempting to remove me by forcing errors through overwork, undermining others' confidence in me through ignoring the authority of my position and directly involving himself with the contact people on my assignments, and through making onerous and awkward oral and written reporting requirements which ignore the utility of time management, calendars, memos, and of recognizing the distinction between my functions and a secretary's functions.

The appeal does not specifically allege Heath was hostile to Shawl's interest in becoming a part of the courthouse bargaining unit.

14. Heath met with Jackson on March 16 or in the morning of March 17, 1993, and showed Jackson a series of memos Shawl had issued him. Heath asked Jackson for Jackson's interpretation of the memos. Heath inquired about the procedures under the County's Personnel Policies and how, if at all, progressive discipline would apply to the situation reflected in the series of memos. Jackson informed Heath that he interpreted the memos as insubordinate. When Heath inquired about the procedures governing a termination, Jackson informed him that if he wished to discharge Shawl, he should first suspend Shawl pending an investigation. Jackson did not offer to assist in the investigation, viewing that as Heath's responsibility. In a memo to Shawl dated March 17, 1993, Heath informed Shawl:

> This letter is being provided to you as written notice of your immediate suspension pending discharge from the position of Assistant Corporation Counsel for Oneida County. I have determined that this action is warranted as a result of extreme or unusual circumstances. Effective immediately you are suspended from your position as Assistant Corporation Counsel for Oneida County pending discharge to provide adequate time to me to undertake additional investigation.
>
> If at the completion of the investigation, I determine that the facts continue to warrant discharge, a notice of the discharge shall be issued in order to effectuate the discharge. Prior to issuing such a notice of discharge, I will consult with the Personnel Office. In anticipation that a notice of discharge may be issued following the completion of my investigation, I have scheduled a meeting in my office at 1:30 p.m. on Thursday, March 18, 1993, at which time you should personally appear. Your suspension pending discharge shall remain in effect between now and the time of the scheduled meeting.
>
> . . .

15. In a memo dated March 18, 1993, Heath issued Shawl a "Notice of Discharge."

> By letter dated March 17, 1993 which I delivered to you on that date, you were

provided notice of immediate suspension pending discharge from the position of

Assistant Corporation Counsel for Oneida County. In the March 17, 1993 letter, I scheduled a meeting in my office at 1:30 p.m. on Thursday, March 18, 1993, at which time I asked you to personally appear. You did appear at that time with legal counsel, attorney Michael F. Roe. This morning and, again at the beginning of the meeting, I indicated to Mr. Roe that I would not proceed with the meeting if either he or you insisted that it be recorded. Mr. Roe then informed me that your position was that the meeting should be recorded. At that point I informed Mr. Roe, as I had this morning, that the purpose of the meeting was to review the factual circumstances that I believed warranted discharge and to consider your response, after an opportunity to confer with legal counsel if you so requested. I further indicated that because of your position that the meeting would have to be recorded, that I would review the matter and provide you with my written determination.

I have undertaken additional investigation of the matter and I have consulted with the Personnel Office. I continue to believe that extreme or unusual factual circumstances warrant discharge and, accordingly, by this letter hereby notify you of your discharge from the position of Assistant Corporation Counsel for Oneida County, effective immediately.

The extreme or unusual factual circumstances which warrant this action include the following:

1. I have received your memorandum of March 15, 1993 in which you addressed my conduct in a matter involving special taxation.

a. It is my determination that your work performance with respect to the preparation of that memorandum constituted insubordination, disobedience, and failure or refusal to follow written or oral instructions of supervisory authority or to carry out work assignments.

. . .

2. I have received your memorandum of March 15, 1993 concerning modifications and amendments of paternity judgments.

a. It is my determination that your action of preparing the said memorandum and the positions which you have taken therein constitute, several times over, acts of insubordination, disobedience, failure or refusal to follow a written or oral instruction of supervisory authority or to carry out work assignments.

. . .

3. I have received your memor

andum
of
March
15,
1993
concer
ning
the
subject
of
workin
g
hours.

a. It is my determination that your preparation of the said memorandum and the actions which you indicate you would initiate as set forth in the said memorandum constitute insubordination, disobedience, failure or refusal to follow a written or oral instruction of your undersigned as supervisor and to carry out work assignments.

. . .

4. I have reviewed the employee bi-weekly time record which you have submitted for the work period ending March 12, 1993.

a. It is my determination that you have identified and attempted to work hours which you have identified as overtime without seeking prior authorization from your undersigned, as your supervisor as required by previous directive.

. . .

c. It is my further determination that in the preparation of the said bi-weekly time record you have intentionally falsified or given false information to employees responsible for recordkeeping.

5. I have received your memorandum of March 15, 1993 concerning the D.W. CHIPS matter.

a. It is my determination that in the preparation of the said memorandum you have been insubordinate.

b. It is my further determination that in the preparation of the said memorandum you neglected the job duties and responsibilities of the position of Assistant Corporation Counsel and attempted to assume managerial and supervisory duties and responsibilities.

c. It is my further determination that in the preparation of the said memorandum you have provided false information.

. . .

6. I have reviewed the B. v. C. file previously assigned to you and which file is presently on appeal before the State of Wisconsin, Court of Appeals, District III. I have further considered my memorandum to you of February 3, 1993 in the said file. I have further reviewed the memorandum in draft form which you had prepared dated March 17, 1993 concerning the file.

a. It is my determination that your work performance concerning the said file constitutes insubordination, disobedience, failure or refusal to follow the

written or oral instructions of supervisory authority or to carry out work assignments.

b. It is my further determination that you have neglected job duties and responsibilities concerning this file.

. . .

d. It is my further determination that in the preparation of the draft of the memorandum dated March 17, 1993, you made false or malicious statements concerning your undersigned as your supervisor.

7. I have further considered the R.D. Chapter 51 case. In that case which was assigned to me I was informed by adversary counsel for the subject that you had visited the subject while she was still on the Human Support Unit at St. Mary's Hospital in Rhinelander without informing me beforehand. I spoke with you and expressed my concerns that in the future it would be appropriate for you to advise me if you sought to have personal contact with a subject person that this office could potentially be involved with in litigation. I have reviewed your handwritten draft of a memorandum concerning the same. It is my determination that your reaction to my stated concerns which were made orally to you and your subsequent preparation of hand-drafted notes concerning the same reflect an attitude of insubordination and an attitude of refusal to follow written or oral instructions of supervisory authority. It is my further determination that in devoting time to the preparation of such handwritten notes, you have neglected other job duties and responsibilities of the position of Assistant Corporation Counsel.

8. I have considered the H.H. juvenile file. The file indicates you sent an ex parte communication to the Judge assigned to the case inviting the re-appointment of a guardian ad litem for the subject which, if approved by the Court, would have resulted in the additional expenditure of County funds.

a. It is my determination that the said inquiry made by you to the Court in an ex parte manner without previously discussing the same with me as your supervisor is an act of insubordination, disobedience, failure or refusal to follow the written or oral instructions of supervisory authority.

b. In the said ex parte letter to the Judge, you further indicated your intention to include as a standard part of dispositional orders a paragraph which would automatically extend the appointment of a guardian ad litem in a juvenile case without discussing this policy with your undersigned as your supervisor before hand.

c. It is my determination that the said work activity is one of insubordination, disobedience and a failure or refusal to follow the written or oral instruction of supervisory authority.

9. I have considered your conduct relating to the Cell D Construction dispute at the Oneida County Landfill involving the contractor and the engineering

firm providing services to the County.

> a. It is my determination after considering your performance and reaction to discussion in closed session with the Planning & Zoning Committee that your work performance reflected an attitude of insubordination and a failure or refusal to adjust to the instructions or determinations of supervisory authority.
>
> 10. I have undertaken preliminary consideration of the B. v. B. child support case assigned to you. It is my determination that you have failed to keep your undersigned, as your supervisor, apprised of important issues in the case and you have neglected job duties and responsibilities concerning the case.
>
> 11. I have undertaken consideration of the S.(K) v. G., child support case assigned to you. It is my determination that you have failed to keep your undersigned, as your supervisor, apprised of important issues in the case and you have neglected job duties and responsibilities concerning the case.
>
> 12. I have further considered the Performance Appraisal and Progress Analysis Guide provided to you on or about January 11, 1993. It is my determination that the pattern of work performance referenced in the Performance Appraisal and Progress Analysis Guide has continued subsequent to the said date of January 11, 1993. It is my further determination that you have failed to meet the performance evaluations objectives which were made a part of the said Performance Appraisal and Progress Analysis Guide and I am incorporating the said Performance Appraisal and Progress Analysis Guide herein by reference as though fully set forth.
>
> Based upon the foregoing, please be advised by this letter of notification that you are discharged . . .

After the discharge, Jackson dismissed Shawl's appeal of the performance evaluation as a moot issue.

16. Shawl's March 15, 1993 memorandum referred to in Paragraph 1 of the discharge letter states, among its assertions, the following:

> On February 18, 1993, I submitted to you a signed draft memorandum directed to Mr. Osterman, Ms (sic) Huber, and you. On the same day, February 18, you sent me a memorandum on the same matter, suggesting the same general course of action as had already been suggested in my memorandum.
>
> . . .
>
> Your letter to Mr. Schuck, dated February 25, 1993 is simply outrageous. You indicate that your intention is to clear up a potential misunderstanding. You write

that you

> "received an internal memorandum indicating that the County Treasurer and my Assistant had concluded that counties did not have any authority to act under Section 66.05, Wis. Stats. Taking this wording as correct, I began to look into the matter...."
>
> "Subsequently, however, I again examined Section 66.05, Stats., and observed that subsection (9)(a)2 does define a county as a "municipality" under this subsection."

The first paragraph in the above statement is incorrect in virtually its every thought. I did not conclude, and my memorandum of February 18 did not conclude that "counties did not have any authority to act under Section 66.05." My Memorandum states:

> "I believe an argument can be made that Section 66.05 does include counties. However, the problem remains as to how to assess and collect the special tax. That is an issue to which I simply have no answer."

Even before my memorandum was written, I orally informed Ms (sic) Huber and you of my position. Some time later you reported to me you had found subsection 66.05(9)(a) 2, which includes counties in the definition of municipality "for this subsection."

You therefore never "took the above wording as correct." You even correctly quoted a different portion of my memorandum in your response to me of February 23, only two days before you mischaracterized it to Mr. Schuck.

You "began looking into the matter" not as a result of this memo; you have been involved in this matter throughout and understood this to be a test case. . . .

The "internal memorandum" is not an internal memorandum at all, but a memo intended to convey information to Mr. Osterman and Ms (sic) Huber as well as to yourself.

. . .

Last, none of this so-called background information was related to the supposed purpose of your letter, which you state is to clear up a possible misunderstanding and provide some (relevant) background information. I have had no relationship with whatever transpired between you and Ms (sic) Huber regarding chapter 146, other than being informed in your February 23 memorandum that she was going to contact the someone working for the State for some kind of help in identifying a mechanism to make a charge against a specific parcel. The only purposes your letter

could have had are two: to indicate to Mr. Schuck that you do not presently believe that Chapter 146 applies to Ms (sic) Huber's requests of the previous day,

> and to indicate to both Ms (sic) Huber and Mr. Schuck how your Assistant and Ms (sic) Huber have erred in assessing Section 66.05, and that you have corrected the error.
>
> In sum, the above quotation from your letter is so completely wrong that it's (sic) untruth could not have been hidden from you. Rather than clearing up a possible misunderstanding, you have instead created a major misunderstanding as to your Assistant's opinion and your involvement in this case, and you have done so without any legitimate purpose. You have continued working on a file assigned to me and have deliberately precluded me from sending and receiving legal communications thereon. You have falsely characterized my memorandum as internal and have also deliberately mischaracterized its contents. You insinuate that your knowledge, involvement and responsibility in this case is recent when it is not. Worst, you unnecessarily communicated the above not only to an Oneida County elected official, but to an employee of the State of Wisconsin as well.
>
> I will no longer be working on this matter as it relates to taxation, other than by sending this memorandum, including a copy of my memorandum of February 18, appropriately edited to protect the County and others from disclosure of file contents. It is perfectly clear that it would be counterproductive and wasteful for me to attempt to be responsible for the conduct of this matter. . . .

The March 15, 1993 memorandum referred to in Paragraph 2 of the discharge letter states:

> . . .
>
> The last sentence of your second memo is "Please advise what the practice is to bring about these requested changes." It is an inappropriate request. It is your responsibility to not only be aware what the practice is, but also to determine what the practice should be. It is also your responsibility to inform your Assistant and the rest of your staff what the practice should be, rather than lying in wait for an error. . . .
>
> Past experience has shown that oral discussion clarifies little, requires a great deal of time, and creates tension and animosity between us. Therefore, as you requested, now I request: "Please advise what the practice is to bring about these requested changes." You must inform me in writing how you want each of Mr. Jarvais' memos to be handled. If you want to have a judgment amended, so indicate and specify which judgment and how. If you answer in general terms, I will return you memo for clarification. If you provide options, I will not exercise them, and I will return your memo unless you have unequivocally endorsed each option. If you ignore a question, I will not proceed and your memo will be returned. I will not further answer either of your memos and I will not further answer Mr. Jarvais,

except as indicated above.

> You may not, within your office, withhold your preferred practice from your Assistant. I am not asking you to repeat instructions. I am requiring that you provide instructions in the first instance, pursuant to your own request. I believe the appropriate response to each of Mr. Jarvais' memos is a relatively simple matter. It is so simple, in fact, that there appears to be no case-related reason for you to be concerned about either of Mr. Jarvais' memos. Memos such as these two by Mr. Jarvais may be eliminated altogether with a simple and obvious procedural change, which would eliminate errors, tension and disagreement. It is a procedure which I would prefer, have suggested before and will not further repeat. It is up to you to make any change in that regard.

The "procedure" referred to in the last quoted paragraph was to submit proposed judgments to the social worker handling the file prior to submission to the court. The "working hours" memorandum referred to in Paragraph 3 of the discharge letter states:

> The responsibilities of my position and my cases continue to regularly require time beyond the scheduled 37 1/2 hour work week. In recent weeks, I have endeavored to limit my efforts to ordinary working hours and to the late-running court cases and committee meetings. The result has been a growing backlog on a number of cases which can no longer be safely ignored. As I cannot, except at the risk of my License, ignore my responsibility to be prepared on my cases, I am now being forced to work additional hours whether or not you approve of the same in advance.
>
> Please be advised that as of this pay period I shall be reporting my actual hours to the Finance Department. This is contrary to the instructions you provided me in January of 1992. It is only equitable that I be afforded the rights of other similarly situated Oneida County employees with regard to overtime pay or compensation time, and I intend to exercise these rights, commencing immediately. I request that you adjust my case assignments to allow me to complete my work in the allotted time. Please refer to the most recent case list memo. Please note I did not have time to prepare the memo scheduled for Monday, March 8.

Shawl submitted with this memo time records stating hours worked in excess of his regularly scheduled hours. Heath had earlier instructed Shawl to submit time records reflecting no more than scheduled, straight-time hours, and to seek his prior approval before working any overtime. Heath did so based on his view of Board budget requirements. The County did, at the time, afford comp time to non-represented employes. The "CHIPS" memorandum referred to in Paragraph 5 of the discharge letter states:

> It appears that your concern regarding the mother's desire for additional visitation rights was entirely unfounded. The mother's attorney, Richard Voss, indicated that his position was always in favor of an extension under the same terms as the previous Dispositional order, and that you only had to contact him in order to determine this. If you had done so, the foster parents and Dr. Koeppl would not have had to waste their time in attending the hearing which, by the way, did not commence until 4:10 p.m. At hearing's end, Dr. Koeppl asked me to relate her question to you "why did you want me to be here?" Also, I would not have had to waste time becoming familiar with the file on a day in which I had five other court hearings scheduled. I never even had time to discuss this case with the social worker.
>
> This hearing was scheduled for March 10, 1993 as of approximately February 4, and I know you had placed the matter on my calendar before March 1st. Shari had previously told me that she thought there was no contest for this hearing, and the first I heard about the matter being contested was at about 6:00 p.m. on March 9th, the night before the hearing. Yesterday I was told you were in Chippewa Falls for a deposition regarding a guardianship. Why didn't you: a) try to reschedule the deposition and/or the hearing; b) get an attorney in Chippewa Falls to do the deposition in your place, at a fraction of the cost of you traveling there and back, c) try to resolve the matter by contacting Richard Voss; d) provide me with the file in sufficient advance time to try to resolve it myself?

The memorandum referred to in Paragraph 6 of the discharge letter had not been issued by Shawl to Heath. Heath discovered a draft of the memo while searching through case files in Shawl's office after he left on March 17. The conduct referred to in Paragraph 9 of the discharge letter was addressed by Shawl in a memo dated March 17, 1993, which Shawl had hoped to send to Jackson, all County Department Heads and all Board members. He had not sent the memo at the time of his suspension. He had, however, prepared it in final form for issuance and it was among the papers Heath found while searching through Shawl's files on March 17. The memo reads thus:

> In response to your instruction that you do not want to or need to sign joint letters, I signed a letter to the Planning and Zoning Committee Chairman which recommended a specific course of action. This letter was written after discussions with you regarding what the Planning and Zoning Administrator desired, and what action you and I agreed would be appropriate. I obtained your review and approval of several drafts and the final letter before it was delivered to the Planning and Zoning Committee on Wednesday, March 3. The letter was intended at all times to present this office's position on the matter.
>
> We were both present at the Committee's closed session on that subject, however, and you attempted to mislead the Committee into believing the letter was entirely

my responsibility. You advised the Committee not to follow certain

> recommendations of that letter, pointing out what you stated were flaws in the position outlined in "Rick's letter." I properly informed the Committee of the truth, that the letter was prepared jointly with you and represented a position in which you had concurred. You then admitted to the Committee that I was correct, but you offered no explanation of your actions. Rather than attempt to explain yourself, you continued to address and contradict the last sentence in the letter. Unknown to the Committee members, this sentence reflected your own assessment whether filing a lawsuit would be worthwhile. Because your action was inappropriate and you did not explain it, it is reasonable to suspect that your motive may also have been inappropriate. Regardless of both your motive and the correctness of your advice, however, your attempt to conceal the extent of your involvement is a disservice to your own office, to the Planning and Zoning Committee, and to the Planning and Zoning Administrator.
>
> It is an extreme risk for the Committee to adopt a recommendation from an advisor who tried to conceal his role with other persons in formulating a different recommendation, especially when those others include the one who must to (sic) implement the Committee's decision. The risk is that the advisor's goal in concealing himself may possibly not be to aid the Committee in resolving an issue.
>
> Therefore, please be advised that I will no longer be responding to Department Head's (sic) requests to submit recommendations to Committees, unless the response is by letter on which your signature appears.

Prior to the closed session meeting covered in this memo, Heath and Shawl agreed that although the County might have a potentially considerable cause of action against a consulting firm, the value of the action would be outweighed by the cost of asserting it, including a probably irreparable split between the County and the engineering firm. Their agreed-upon recommendation was to forego litigation, but aggressively negotiate a settlement. Heath perceived Shawl's defense of the letter to lack confidence. He feared that lack of confidence could only subvert a negotiation effort. Shawl perceived Heath to be backing away from their joint recommendation in light of resistance from the Board committee members, and attempting to focus that resistance on him.

17. In a letter to Thal dated March 23, 1993, Shawl's attorney, Michael Roe, stated:

> As you may recall, I spoke to you last week concerning the matter of Richard Shawl, who is Assistant Corporation Counsel for Oneida County. I informed you that he had been suspended from his employment and was awaiting further action by the County in compliance with its own personnel policies.
>
> I now wish to inform you that Mr. Shawl has now received a Notice Of Discharge in the form of a letter under date of March 18, 1993. I enclose

herewith a copy of that letter for your review. Needless to say, this action takes place while Mr. Shawl is awaiting a decision from the Wisconsin Employment Relations Commission on his unit clarification action.

I would be interested in discussing this matter with you as soon as you've had a chance to review this letter. I'm particularly interested in what steps the Union will now take to protect Mr. Shawl's interests in this matter. I'd appreciate it if you'd give me a call at your earliest convenience.

I'm providing a copy of this letter to the local Union President.

18. On March 30, 1993, the Commission issued ONEIDA COUNTY (COURTHOUSE), DEC. NO. 24844-C. That decision states:

. . . A hearing was held before the Commission's Examiner Christopher Honeyman on October 28, 1992 in Rhinelander, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, and the parties agreed to waive briefs and to rely on the notes of Examiner Honeyman concerning the testimony of Assistant Corporation Counsel Richard Shawl, the sole witness to testify. Both parties subsequently reviewed a typed version of Examiner Honeyman's notes, and by February 5, 1993 stipulated that they were correct. The record was thereupon closed.

. . .

CONCLUSION OF LAW

The occupant of the position of Assistant Corporation Counsel in the Corporation Counsel's office, currently Richard Shawl, is neither a supervisory employe within the meaning of Sec. 111.70(1)(o)(1), Stats., nor a confidential employe within the meaning of Sec. 111.70(1)(i), Stats., and therefore is a municipal employe within the meaning of Sec. 111.70(1)(i), Stats.

. . .

ORDER CLARIFYING BARGAINING UNIT

The bargaining unit set forth in Finding of Fact 3 above is clarified by the inclusion of the Assistant Corporation Counsel in the Corporation Counsel's office.

The "bargaining unit" referred to by the Commission is the unit represented by the Association.

19. In an eight page memorandum dated April 13, 1993, Shawl formally filed with the County an appeal of his discharge. That memorandum details Shawl's dispute with each allegation of the March 18, 1993 discharge letter and includes, among its assertions, the following:

> Mr. Heath's notice of discharge is a prima facie unfair labor practice, as my Petition for clarification was pending at the time of my discharge. It is also a violation of my due process rights in both the notice and procedural aspects thereof. Mr. Heath has abused his office for his personal gain and has, on behalf of the County, breached its contract, and wrongfully terminated me.

This is the sole express reference to rights protected by the Municipal Employment Relations Act in the memorandum.

20. In a letter to Thal dated July 6, 1993, Shawl stated:

> I have carefully considered our conversation of several weeks ago, and I also have, again, carefully considered my own situation. I decline to pay your bill. Here is the reason.
>
> When I first contacted you more than a year ago, you informed me that you represented the very Union I was inquiring about joining, and I informed you of my opinion that Mr. Heath was trying to remove me from office without legitimate reason. You located a case indicating it was indeed possible, and in fact very likely that one in a position such as mine could obtain protection from a Union. It was agreed that your Union would be contacted by you. After a long delay, I met with Mr. Kluss and a petition was filed to include my position in the Bargaining Unit. Oneida County opposed the petition but offered no legitimate reason for doing so other than claiming I was a managerial and confidential employee, an assertion which was completely unsupported. And so a hearing was held, at which the County offered no evidence and did not even cross examine the only witness, me. Its only purpose, since there was no defense, must have been to delay Clarification. Pending the decision on that hearing, I received an untimely and wholly inadequate "performance review," which was factually unsupported and was appealed. Pending that appeal, I was discharged by Oneida County through a procedure that was in violation of Oneida County's own Code and in violation of my rights to Due Process. The stated reasons for the discharge were false, conclusory, factually unsupported and legally insufficient. I was discharged without legitimate purpose, which as you must know, raises the inference that the purpose is an impermissible one. Even the sheer number of the stated reasons and the timing of the County's action raise the inference of an impermissible purpose for my discharge.

> Now, through you, I have been informed that the Union which I sought to join is not willing to be involved in obtaining redress for me from the activities of Oneida County, BECAUSE THE COUNTY'S FINAL AND ULTIMATE RETALIATION OCCURRED 3 WEEKS BEFORE MY POSITION WAS OFFICIALLY ADDED TO THE BARGAINING UNIT, AND MAY INVOLVE PRE-EXISTING ILLEGITIMATE REASONS?
>
> The practicality of this position is that no person who is eligible to join the Bargaining Unit will dare (should dare, in my experience) to even suggest a petition, because the Union will not lift a finger to protect them from the wrath of the County if they do. The County has declared "open season" on individuals trying to protect themselves by organizing, and the Union is responding, "that's fine, unless the County admits that its reasoning is retaliatory." This response is foolishness, if the Union's purpose is truly to have strength and protection in numbers.
>
> You have offered nothing, and I offer nothing, on the subject whether the Union's position is legally justified. For your sake, it had better be.
>
> The bottom line is, Mr. Thal, I will not pay your bill. I believe it should be the responsibility of your other client on account of the identity of our interests. Your efforts have failed to serve me, and only may have served your other client.
>
> I request that you carefully reconsider the Union's position with regard to the injuries I am suffering at the hands of Oneida County.

Thal responded in a letter dated July 12, 1993, which states:

> This letter is in response to your letter dated July 6, 1993 regarding "billing and representation." Because your bill is relatively small, I assume that your primary concerns are with representation. I will, however, first briefly explain why you were billed for some legal services prior to WPPA paying for legal services associated with the unit clarification case. I will also clarify the Association's reasons for not now being involved in your legal challenges to the County's termination of you.
>
> You were billed for legal services I performed in April, 1992 because you--not the WPPA--authorized me to research whether your former position should be a bargaining unit position. On April 15, 1992 I sent you the WERC decision you referred to in your letter. That was before I had discussed your situation or your position with any WPPA representative. Since you as an individual asked me to provide you with that legal service, you were billed on an hourly basis for the services I provided.

> At some point after you contacted the WPPA, the Association filed the bargaining unit clarification petition. It appears that you may have been billed $6.23 that could have been billed to the WPPA. That amount will be subtracted from any future bills you receive.
>
> Concerning your request that the Association reconsider its position with regard to your claims against the County, the only potential claim discussed where WPPA efforts might supplement your other challenges was a potential prohibited practice complaint. To prevail in such a complaint requires that the Association prove that the County terminated you because of your activity in Association affairs. In a prohibited practice case it is the complainant's burden to prove that an employer's stated reasons for a discharge are pretextual and that one of the employer's reasons for its action was the fact that the employee was active in union affairs. Based on the information I am aware of, the Association would not be able to meet this burden. I will, of course, look at whatever supplemental evidence of anti-union motivation which you provide me with.
>
> Based on the information at hand, it appears that the County's reasons for terminating you are related or similar to the performance-based reasons that led you to contact me and the WPPA in the first place. Hence, the WPPA will reconsider its decision not to file a prohibited practice complaint if you provide it with credible evidence which shows that your termination was motivated by your efforts to have your position included in the WPPA or by other union activity protected by sec. 111.70(2), Stats. I did call Michael Roe after he sent me the initial notice of discharge on March 23, 1993. Mr. Roe never returned that call. I am, of course, still willing to talk to Mr. Roe.
>
> A prohibited practice action must be filed within a year of the date of the alleged unlawful conduct. In your case, a prohibited practice complaint must be filed before March 17, 1994.

Shawl did not contact Thal or the Association after his receipt of this letter.

21. Shawl filed an action against the County and the Association in the Circuit Court for Oneida County on March 17, 1994.

22. Shawl's contact with the Association regarding the filing and the processing of a petition to bring the position of Assistant Corporation Counsel within the bargaining unit represented by the Association is lawful, concerted action. The County was not hostile to Shawl's exercise of lawful, concerted action. The County's discharge of Shawl is based on its support of Heath's position that the professional and performance based conflicts between himself and Shawl were traceable to work related deficiencies in Shawl's performance as his Assistant. The County's discharge of Shawl is not based, even in part, on hostility to his exercise of lawful, concerted

activity. The Association did not have, at any time preceding or following Shawl's discharge, any duty, under the Municipal Employment Relations Act, to

represent him in his conflict with Heath. The Association's duty to represent the members of the bargaining unit noted in Finding of Fact 4 extends only to the processing of the unit clarification petition filed by the Association on Shawl's behalf. The Association's conduct toward Shawl, including its decision not to represent him in his attempt to overturn his discharge, does not reflect arbitrary, discriminatory or bad faith conduct.

CONCLUSIONS OF LAW

1. Throughout his employment as an Oneida County Assistant Corporation Counsel, Shawl was a "Municipal employe" within the meaning of Sec. 111.70(1)(i), Stats.

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

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

4. Shawl's conduct in prompting the Association's filing and processing of a petition to have his position included within the scope of the bargaining unit mentioned in Finding of Fact 4 is "lawful, concerted" activity within the meaning of Sec. 111.70(2), Stats.

5. The County's discharge of Shawl did not violate Sec. 111.70(3)(a)1, Sec. 111.70(3)(a)3 or Sec. 111.70(3)(c), Stats.

6. The Association's conduct in seeking to have the position formerly held by Shawl to be included within the bargaining unit mentioned in Finding of Fact 4, and the Association's conduct in refusing to represent Shawl in his attempt to overturn his discharge did not violate Sec. 111.70(3)(b)1, Stats., or Sec. 111.70(3)(c), Stats.

ORDER

The complaint, as amended, is dismissed.

Dated at Madison, Wisconsin, this 7th day of October, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

ONEIDA COUNTY

**MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

BACKGROUND

In an amended complaint filed in response to DEC. NO. 28240-A (MCLAUGHLIN, 8/95), the Complainant alleged County violations of Secs. 111.70(3)(a)1 and 3, Stats., and Association violations of Sec. 111.70(3)(b)1, and Sec. 111.70(3)(c), Stats. The Association's duty to fairly represent employes for which it is the exclusive bargaining representative is enforced by the Commission under Sec. 111.70(3)(b)1, Stats., see LOCAL 950, INTERNATIONAL UNION OF OPERATING ENGINEERS, DEC. NO. 21050-C (WERC, 7/84). The application of Sec. 111.70(3)(c), Stats., against the Association presumes "any act prohibited by par. (a) or (b)." Thus, the existence of any merit to the complaint demands proof of a County violation of Sec. 111.70(3)(a), Stats., or an Association violation of Sec. 111.70(3)(b), Stats. The DISCUSSION section below is structured around those allegations.

THE PARTIES' POSITIONS

The Complainant's Position

The Complainant asserts that a review of the evidence and the law governing the review of that evidence establishes "that, under the facts of this case, both of the respondents engaged in prohibited practices." The County "violated the Statute when it terminated Mr. Shawl following his decision to join a labor union, an exercise of rights protected under Section 111.70(2)." As the Wisconsin Supreme Court has noted, cases of this nature rarely turn on express hostility, but must turn on "inference and logical necessity."

Contrary to the assertion that Shawl behaved in an insubordinate and contemptuous manner "in the week or ten days before his firing," the evidence establishes that "the amazingly uncivil relationship between Mr. Shawl and Mr. Heath" . . . "changed but little from the earliest days of Mr. Shawl's tenure." Nothing significant changed in that relationship as it wound down to Shawl's termination "except for Mr. Shawl's pending petition for Union status." Heath's contention that the termination rests on the twelve performance related bases set forth in the letter of termination fails to explain why Heath took no action on these deficiencies until after Shawl had commenced the process to become a member of the unit represented by the Association. Nor can the assertions of the termination letter explain why Heath and Jackson opposed the unit clarification initiated on Shawl's behalf or why they failed to offer any evidence to substantiate their opposition. Even if the County's contention that Shawl's conduct warranted discipline can be credited, it cannot account for why the position of Assistant Corporation Counsel is not included in the bargaining unit represented by the Association. The reasons for that omission belie the merit of the County's and

the Association's position regarding Shawl's termination.

Shawl passed his probationary period only to discover he was "required to work on cases and issues outside of his job description . . . vastly in excess of the number of hours allotted" for his position. By March of 1992, Shawl had contacted the law firm representing the Association regarding "how to end the County's abuse of him." In consultation with that firm, it was decided that the most effective means was for the Association to claim to represent him. On this point, Shawl had been assured that he "and the Union had completely congruent goals, no conflict of interest was present." Inexplicably, the Association waited nearly three months to file the unit clarification petition then ignored his plight after the County terminated his employment, contending only that he "was not a member of the bargaining unit." These acts of omission and commission constitute an Association violation of Sec. 111.70(3)(c), Stats. That the Association misled Shawl into believing he had their protection denied him the opportunity to seek other redress and "aided the County in its goal" of removing Shawl from his position. An examination of the evidence manifests, according to the Complainant, both proscribed hostility by the County and bad faith on the Association's part. To ignore the complicity of the Association and the County would serve to chill employe exercise of rights protected by Sec. 111.70(2), Stats.

Whether Shawl's termination punished Shawl individually or unit members collectively is irrelevant to the prohibited practices alleged here. The County's failure to follow its own evaluation procedures manifests the pretextual nature of its reasons for terminating Shawl. The failure of due process apparent in the evidence damns both the County and the Association. The County's violation of Sec. 111.70(3), Stats., is apparent. The Association's violation is more subtle, but no less compelling. It failed to act on Shawl's behalf after inducing him to rely on its protection. The law firm representing the Association failed to alert Shawl to the conflict of interest between his personal interests and those of the Association it continued to represent. The Association's first attempt to represent Shawl established its duty to represent him. That he was terminated before his unit status became clear has no impact on this. To conclude otherwise elevates form over substance.

Both respondents should be held accountable, under Sec. 111.70(3), Stats., for their acts of omission and commission concerning Shawl's termination.

The County's Position

After a review of the evidence, the County contends that the alleged violation of Sec. 111.70(3)(a)3, Stats., turns on four well-established elements. Only two of those elements can be considered in dispute, and the Complainant has failed to establish either of them. More specifically, the County argues that there is no evidence it was hostile "toward the Complainant because . . . he sought to have his position included in the courthouse bargaining unit." "Hostility" in the labor relations sense connotes more than personal or performance based disagreements, and the evidence does not manifest anything other than that type of conflict between Complainant and Shawl.

A detailed review of the evidence will not support even an inference of proscribed hostility.

The County's assertion of its legal right to a Commission determination of the unit

status of Complainant's position cannot support such an inference. Heath's neutrality in the process undercuts the persuasive force of making the inference Complainant asserts. What the evidence will support is the conclusion that "any hostility toward the Complainant was due to his poor job performance and his unwillingness to acknowledge and respond to his supervisor's constructive criticism." That conflict between Heath and the Complainant predate the filing of the unit clarification petition supports this conclusion.

Nor will the evidence support a conclusion that the Complainant's termination was based, even in part, on the exercise of protected activity by Complainant. A review of the record manifests, according to the County, that the Complainant has challenged only one of the twelve stated bases for his termination. The contention that an improper motivation on one of twelve bases for a discharge can void the discharge is, standing alone, "attenuated." More significantly, the County argues that the twelfth reason is, no less than the others, firmly rooted in the Complainant's poor performance. The contention that the unit clarification petition can shield the Complainant against poor work performance is as weak factually as it is legally. The evidence, according to the County, establishes that Complainant's filing of the unit clarification petition "was merely an effort to forestall his termination." The basis for that termination preceded the filing of the petition, and cannot afford the Complainant with any defense to the insubordinate memos which were the "straws that broke the camel's back."

The County then asserts the evidence fails to support any County violation of Sec. 111.70(3)(a)1, Stats. The "only protected activity engaged in by the Complainant was his effort to have his position included in the bargaining unit." That the Complainant "engaged in admittedly insubordinate conduct on a repeated basis" establishes that the County had a "valid business reason for its actions." That the Complainant was aware, prior to the filing of the unit clarification petition, that his job was in jeopardy precludes finding any chilling effect on employe exercise of protected activity. There is no evidence other employes were aware of, or could reasonably be expected to be concerned with the conflict between the Complainant and his supervisor.

Viewing the record as a whole, the County asks that the complaint be dismissed.

The Association's Position

The Association did not file written post-hearing argument, but has, from the initiation of the complaint before the Commission, urged that the complaint be dismissed. In its motions to dismiss, the Association has contended that the Complainant has failed to offer proof that the Association has behaved in an arbitrary, discriminatory or bad faith manner. Complainant was not misled by the Association, but was candidly advised on the reasons a complaint of prohibited practice could not overturn his termination. When asked to provide additional information concerning his termination, Complainant did nothing.

Beyond this, the Association contends it was under no obligation to file a unit clarification

on Complainant's behalf or to file it at any particular time. Whatever delay is traceable to Commission action on that petition is as traceable to the Complainant's conduct as

to the Association's. Even if he had been a unit member at the time of his discharge, the contractual rights he asserts would have had to have been negotiated before he could have claimed them. Since he had a "cause" type of protection under County personnel policies, it is by no means apparent that the Association could have afforded him a greater level of protection than he could claim as an unrepresented employe. More fundamentally, however, the Association contends that the complaint must be dismissed because it never had any duty to represent the Complainant.

DISCUSSION

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

Section 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer to "interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed" by Sec. 111.70(2), Stats. Those rights are "to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

An independent violation of Sec. 111.70(3)(a)1, Stats., requires that the Complainant meet, by a clear and satisfactory preponderance of the evidence 1/ the following standard:

> 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. . . . (E)mployer 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. 25849-B (WERC, 5/91) AT 11-12.

The CEDAR GROVE standard distinguishes those cases in which employer intent is not relevant from those in which it is. Independent violations of Sec. 111.70(3)(a)1, Stats., look beyond evidence of employer intent due to the significance of the public policy declared in Sec. 111.70(6), Stats., and implemented through Secs. 111.70(2) and (3), Stats. The chilling of the exercise of rights protected by Sec. 111.70(2), Stats., thus can assume a significance independent of an employer's desire to interfere in the exercise of those rights. CEDAR GROVE sets a standard to distinguish the cases which have such significance.

The final sentence of the CEDAR GROVE standard creates a "valid reasons" exception to the "reasonable tendency to interfere" rule stated in the second sentence. The "reasonable tendency to interfere" rule addresses the chilling effect on the exercise of employe rights which

employer actions can have even if that effect is unintended. The "valid reasons" exception sets limits to Sec. 111.70(3)(a)1, Stats., to check against unwarranted intrusion into the exercise of an employer's rights. To give meaning to each sentence of the standard, it is first necessary to establish the existence of lawful, concerted activity. Then, the conduct of the employer must be evaluated to determine "under all the circumstances" whether employer conduct has a reasonable tendency to interfere with employe exercise of rights protected by Sec. 111.70(2), Stats. If such a tendency is found, then the competing interests of the employe and the employer must be weighed. If the employer's "valid" business interests outweigh the Sec. 111.70(2), Stats., employe interests, the employer has established a defense to the independent application of Sec. 111.70(3)(a)1, Stats. If employe interests predominate, an independent violation of Sec. 111.70(3)(a)1, Stats., has been established.

It is undisputed that Shawl's attempt to become a member of the bargaining unit represented by the Association represents lawful, concerted activity. Shawl's involvement in concerted activity is, however, restricted to the processing of the unit clarification petition. His interest in that process is individual and attenuated. He first contacted Thal in a personal effort to preserve his position. That contact and the resulting processing of the unit clarification petition was of primarily personal significance, designed to shield him from the then-potential ramifications of his personal/professional dispute with Heath. This is apparent in his advocacy. His approach to Thal and the Association was indistinguishable from his approach to Jackson. In each case, he was seeking an ally in his conflict with Heath. His written advocacy of his position never mentions the collective bargaining process or the interest of any other employe. Rather, as manifested by his April 13, 1993 appeal, he employed the unit clarification petition as a personal shield against Heath.

Nor is there persuasive evidence of organizational effort on Shawl's part. His conflict with Heath was known throughout the courthouse. It was, however, known through the rippling effects of a professional conflict that involved intra-office shouting, and inter-office differences of opinion openly displayed to members of the County Board and Social Services Department, among others. There is no persuasive evidence any County employe knew of the petition beyond its being another chapter in the ongoing conflict between Heath and Shawl. There is no persuasive evidence that the petition had any impact, even a perceived impact, on any County employe. Even within his office he did not assume an organizational role in bringing employe concerns, beyond his own, to the collective bargaining process. Employes within his office were spectators to his conflict with Heath.

Beyond this, Shawl's personal interest in the processing of the unit clarification petition is attenuated. Then governing Commission case law did not automatically apply the provisions of a collective bargaining agreement to an accreted position, see SCH. DIST. MAINTENANCE UNION V. WERC, 157 WIS.2D 315 (CT.APP., 1990). Thus, whatever protection Shawl sought from the collective bargaining agreement covering courthouse employes required successful collective bargaining on the Association's part after the petition for inclusion had been granted. In sum, Shawl's attempt to become a member of the bargaining unit represents concerted activity. The processing of the unit clarification petition is, however, the sole manifestation of that activity.

The County conduct alleged to have interfered with this process is minimal. The County offered token resistance to the petition. At most, this resistance delayed the processing of the petition. The delay of the processing of the unit clarification petition is, on this record, unremarkable as applied to Sec. 111.70(3)(a)1, Stats. The unit clarification process was created as a non-adversarial fact-finding type of process intended to relieve bargaining parties of potential disputes, see CITY OF GREEN BAY (CITY HALL), DEC. NO. 21210-A (WERC, 3/84); and CITY OF GREEN BAY, DEC. NO. 12682 (WERC, 5/74). Against this background, the delay is less than significant. In any event, the delay has not been shown to have been solely attributable to County conduct. Shawl's delay in verifying the Examiner's notes delayed the decision by two months or more.

In sum, County conduct does not manifest a reasonable tendency to interfere in Shawl's exercise of lawful, concerted activity. That activity is, as an allegation of an independent violation of Sec. 111.70(3)(a)1, restricted to his role in the processing of the unit clarification petition. Complainant has attempted to characterize the discharge as an independent violation of Sec. 111.70(3)(a)1, Stats., but the evidence will not support addressing this issue as anything other than an act of retaliation against Shawl as an individual. The absence of broader employe interest in the matter demands consideration of the issue of intent, and thus must be addressed under Sec. 111.70(3)(a)3, Stats. Because, under all the circumstances, the County's token resistance to Shawl's attempt to become a member of the bargaining unit did not have a reasonable tendency to interfere with that activity, there is no independent violation of Sec. 111.70(3)(a)1, Stats.

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

Sec. 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to "encourage or discourage a membership in any labor organization by discrimination in regard to . . . tenure or other terms or conditions of employment." To prove a violation of this section the Association must, by a clear and satisfactory preponderance of the evidence, establish that: (1) Shawl was engaged in activity protected by Sec. 111.70(2), Stats.; (2) Heath was aware of this activity; (3) Heath was hostile to the activity; and (4) Heath acted, at least in part, based upon his hostility to Shawl's exercise of protected activity. MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 WIS.2D 540 (1967), which is discussed at length in EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985).

As noted above, the first two elements of proof have been met. The evidence will not, however, support a conclusion that Complainant has met either of the two remaining elements. The "hostility" demanded by the third element must be linked to rights protected by Sec. 111.70(2), Stats. The Commission, as an administrative agency can only act to the extent authorized by statute, see BROWNE V. MILWAUKEE BOARD OF SCHOOL DIRECTORS, 83 WIS.2D 316 (1978). The Municipal Employment Relations Act does not generally authorize the Commission to rectify performance based conflict. The avowed hostility between Shawl and Heath must be given roots in labor relations if it is to fall within Sec. 111.70(3)(a)3, Stats.

No such roots exist. The hostility between Heath and Shawl was pervasive, personal and professional, but not rooted in labor relations. Significantly, Shawl's written expressions of disagreement with Heath, up to and including his April 13, 1993 appeal, stop short of directly accusing Heath of hostility toward Shawl's assertion of concerted rights. Rather, his advocacy points to mismanagement and incompetence on Heath's part.

On the other hand, there is no persuasive evidence that Heath behaved any differently toward Shawl due to Shawl's assertion of a desire to join the bargaining unit. Heath did not learn of Shawl's desire to become a member of the unit until late July of 1992. By that time, however, his personal and professional conflict with Shawl was open and consistently focusing on similar performance issues. By May of 1992, Jackson had to intervene in a shouting match. There is no evidence the hostility manifested by this confrontation had any labor relations component. By the time Heath learned of Shawl's desire to become a member of the unit, the bulk of the concerns Heath noted in the January, 1993 evaluation had already been voiced.

Nor is it apparent that Heath's conduct toward Shawl varied appreciably after his receipt of the unit clarification petition. Significantly, Heath's August 25, 1992 response to the unit clarification petition openly acknowledged his intent to formally evaluate Shawl. That the evaluation would be less than favorable is apparent. This points less to anti-union hostility than to the recurrence of a common theme of performance based problems. Heath's failure to evaluate Shawl until January of 1993 says less about anti-Union hostility than it does about workload or efficiency. If Heath was conspiring to discharge Shawl, his failure to conform to County evaluation policy did nothing to further the conspiracy.

The strongest evidence asserted by Complainant to support the inference of anti-union hostility is Heath's failure to conform to County policy. Heath failed to afford Shawl progressive discipline, failed to comply with the County's evaluation policy, and failed to meaningfully investigate the allegations ultimately put into writing in the letter of discharge. Hyperbole is apparent in a number of those allegations. Labelling Shawl's time cards as "false" in Paragraphs 3 and 4 of that letter spins a dispute over office policy into a dubious implication of fraud. The allegations of Paragraph 7 of that letter are, charitably put, debatable.

It is neither necessary nor appropriate to determine the validity of Heath's or Shawl's expressed concerns with each other, however, to note that none of their ongoing dialogue can provide a meaningful basis to support an inference of anti-union hostility. Whatever hyperbole can be traced to the letter of discharge cannot obscure the insubordination apparent in Shawl's series of March, 1993 memos. It was a Circuit Judge, not Heath, who voiced a concern with ex parte communications which, in turn, became the basis of Paragraph 8 of the discharge letter. To take as fact the assertions made by Shawl in the series of March, 1993 memos cannot obscure that fundamental differences in policy separated Heath and Shawl. Those policy differences have no evident basis in MERA.

Nor can the discharge be meaningfully linked to any part of the unit clarification process. That Heath would openly express his desire to evaluate Shawl after receipt of the petition affords,

as noted above, no support for the assertion of pretext. That the County would offer only token resistance to the petition affords scant support for the assertion. Once Heath was

aware of the petition, Shawl's discharge could be alleged to be pretextual. The timing of the discharge, however, had little independent significance once Heath became aware of the petition. Complainant can offer no persuasive explanation why Heath waited until March of 1993 to terminate Shawl, if he wished to retaliate against Shawl for attempting to become a member of the bargaining unit. The County, however, can persuasively point to the memos of March of 1993, and an increasingly bitter feud between Shawl and Heath as the basis for the discharge. Those events were, significantly, within Shawl's control. Heath's response to them was undeniably provoked.

Whatever can be said of the merits of the ongoing dispute between Heath and Shawl which culminated in the March 18, 1993 discharge, that dispute does not manifest hostility proscribed by Sec. 111.70(3)(a)3, Stats. Thus, neither the third nor the fourth element of proof to establish a violation of that section has been established.

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

The Commission, in MARATHON COUNTY, DEC. NO. 25757-C, 25908-C (WERC, 3/91, AT 49) stated the standard governing a union's duty to fairly represent employes thus:

> The duty of fair representation imposes upon a union the obligation to make good faith determinations when determining whether to process employe grievances (citing MAHNKE V. WERC, 66 WIS.2D 524 (1974).) To make a good faith determination, a union must evaluate the merits of the grievance by considering the monetary value of the claim to the grievant, the effect of the alleged contractual breach upon the grievant and the likelihood of success in arbitration (citing MAHNKE AT 534). However, the burden to establish that a union did not honor its obligation rests upon the employe (citing MAHNKE AT 535). Section 111.07(3), Stats., which is made applicable to this proceeding by Sec. 111.70(4)(a), Stats., requires that this burden of proof be met by "a clear and satisfactory preponderance of the evidence."

Strictly speaking, Shawl was never a member of the bargaining unit represented by the Association, and was thus not in a position to demand the filing of a grievance. The unit clarification proceeding was advanced on his behalf, however, in an attempt to bring his position within the scope of the courthouse bargaining unit. Presumably, the duty imposed on the Association to process a unit clarification petition to secure representative status over his position would not vary from the duty imposed on it to otherwise represent an employe's interest in litigation.

The evidence will not support a conclusion that the Association breached its duty in processing the unit clarification petition. Complainant points to a delay in the initial filing of the petition. The duty imposed on the Association is not, as noted in DEC. NO. 28240-A AT 9, a negligence standard. Even if it was, the delay was no longer than the delay traceable to

verifying the Examiner's notes. Shawl played a role in that delay. Whatever the delay, the processing of the unit clarification petition has not been shown to have played a causal role in Shawl's discharge. In any event, Association representatives made a good faith evaluation of the claim for representation and advanced that claim. In fact, the Association's petition successfully secured the placement of his position in the bargaining unit. Nothing in the processing of the unit clarification petition can be seen to manifest arbitrary, discriminatory or bad faith conduct.

Complainant contends the more serious determination surrounds the Association's refusal to challenge his discharge. The Association persuasively argues it owed no duty to Complainant to represent him, since his discharge preceded the placement of his position in the bargaining unit it represents. Even assuming such a duty could be implied, 2/ the most significant fact in evaluating its discharge of that duty would not be that it failed to represent him, but that it refused to represent him. As noted above, the Association's duty to evaluate requested litigation requires of it a good faith evaluation of the merit of the claim and of the costs and benefits of asserting it. Such an evaluation did occur. Whatever doubt might exist on this point is addressed in Thal's July 12, 1993 letter to Shawl. That letter establishes that the Association considered his claim and rejected it on its merit. That Shawl did not respond to Thal's request to "provide (the Association) with credible evidence" of anti-union hostility cannot be held against the Association. More significantly, the evidence produced at hearing establishes such evidence does not exist.

In sum, the Association fairly represented Shawl in the unit clarification process. It had no demonstrable duty to represent him regarding his discharge. If it did, it discharged that duty by evaluating his claim in good faith, and deciding to reject it on its merits.

The Alleged Violation of Sec. 111.70(3)(c), Stats.

As noted above, the operation of this section demands proof of conduct violating Sec. 111.70(3)(a) or (b), Stats. No such conduct has been proven, and no violation of Sec. 111.70(3)(c), Stats., can be found on this record.

The Order entered above dismisses the complaint, as amended. This is not the determination on the merits of their professional disputes which Complainant has sought. The Commission is not, however, empowered to review the professional disputes of employes and their supervisors. Such disputes must be given a labor relations basis under Sec. 111.70(3), Stats. This dispute has no such basis.

Dated at Madison, Wisconsin, this 7th day of October, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

ENDNOTES

1/ Sec. 111.07(3), Stats., made applicable by Sec. 111.70(4)(a), Stats.

2/ As noted in DEC. NO. 28240-A AT 9, language from CITY OF OAK CREEK, DEC. NO. 27074-C (WERC, 5/93), might indicate a Commission willingness to imply contractual coverage of employe positions prior to any express determination by the bargaining parties or by the Commission that the position is within the scope of a bargaining unit description. The OAK CREEK decision concerned access to interest arbitration. That analysis need not be applied to resolve the issues of this complaint, as noted above.

The analysis should not, in any event, be made a basis to determine the imposition of a duty of fair representation in this case. Initially, it can be noted the OAK CREEK decision came after the conduct posed in this case. Beyond this, the position of Assistant Corporation Counsel was not "newly created and . . . within the bargaining unit" as were the positions involved in OAK CREEK. The dicta of that case is not, in any event, a solid basis upon which to impose a duty on unions or employers. The imposition of a duty should, presumably, rest on as clear a basis as possible. When, prior to the Commission's determination of the unit clarification petition, should either the Association or the County have treated Shawl as a member of the unit? The Commission has consistently permitted bargaining parties the freedom to define their units. It would be hard to reconcile this longstanding policy with an assertion that a union can be compelled to represent employes it never knew were in the unit or that an employer could be compelled to arbitrate a claim it had, in good faith, treated as that of an unrepresented employe.

RBM/mb

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