STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RICHARD M. DeSPEARS, Complainant,

vs.

MILWAUKEE COUNTY, Respondent.

Case 333
No. 47748
MP-2623

Decision No. 28951-B

Appearances:

Boynton, Earle & Colon, by **Attorney Peter Guyon Earle**, 2266 North Prospect Avenue, Suite 550, Milwaukee, Wisconsin 53202, appearing on behalf of the Complainant, Richard DeSpears.

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, appearing on behalf of the Respondent, Milwaukee County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel J. Nielsen, Examiner: Richard M. DeSpears (hereinafter referred to as the Complainant) filed a complaint with the Wisconsin Employment Relations Commission on July 14, 1992, alleging that Milwaukee County (hereinafter referred to as either the Respondent or the County) had discriminated against him by suspending him pending discharge for lacking a valid drivers license. The complaint alleged that this action constituted interference with protected rights and discrimination on the basis of activity on behalf of a labor organization, in violation of Section 111.70(3)(a)1 and 3, Stats.

After conciliation efforts by a member of the Commission's staff, the matter was assigned to the Examiner, and dates were offered to the parties. The Complainant requested that the matter be held in abeyance pending the outcome of related litigation. In October of 1993, the Examiner wrote to the parties asking if the complaint could be dismissed. The

Complainant requested that the matter continue to be held in abeyance, and on December 8, 1993, a letter confirming this was sent to the Complainant and counsel for the Respondent. In May of 1996, the Complainant asked that the contents of the Examiner's file be shared with representatives of his Union, and the materials were forwarded via facsimile. In October, the Complainant again contacted the Examiner and asked that a hearing be scheduled. A letter offering hearing dates was sent to the parties on October 31.

On November 4, the County filed a Motion to Dismiss, asserting that the Respondent should be precluded from proceeding with his complaint based on (1) the equitable doctrine of laches owing to the passage of time, (2) failure to exhaust his contractual remedies in that he failed to file a grievance, and (3) claim and issue preclusion in that he pursued the same complaint in other forums and failed to appeal the adverse decisions rendered against him. The Complainant responded, asserting that the complaint should not be dismissed. The Examiner denied the Motion on December 17, 1996.

On March 4, 1997, a hearing was held in Milwaukee, at which time the parties were provided full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. A transcript was prepared, and was received by the Examiner on March 16, 1997. The parties submitted post-hearing briefs and reply briefs, the last of which were exchanged through the Examiner on June 9, 1997, whereupon the record was closed.

Now having considered the evidence, the arguments of the parties, the statutes and the record as a whole, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

FINDINGS OF FACT

1. Milwaukee County, hereinafter referred to as either the County or the Respondent, is a municipal employer providing general governmental services to the people of Milwaukee County in southeastern Wisconsin. At the time this dispute arose, one of the services provided by the County was the operation of a public hospital, the Milwaukee County Medical Complex. In 1992, the hospital was privatized and its operations were taken over by Froedert Memorial Lutheran Hospital.

2. Richard M. DeSpears, hereinafter referred to as the Complainant, is a municipal employe. From October of 1985 through his suspension in March of 1992, he was employed as a Maintenance Worker at the Milwaukee County Medical Complex. He was a member of a bargaining unit represented by Local 1055, District Council 48 of the American Federation of State, County and Municipal Employees, AFL-CIO, hereinafter referred to as the Union. Throughout his employment with the Medical Complex, he received satisfactory evaluations.

3. Michael Zylka was, at all relevant times, the Director of Plant Operations at the Milwaukee County Medical Complex. Gerald Hausman was, at all relevant times, the Operations Superintendent at the Milwaukee County Medical Complex. Hausman was the Complainant's direct supervisor.

4. In late May or early June of 1991, the Complainant was selected via petition of his co-workers to act as a steward for his department. This selection was not formally confirmed by the Union until February of 1992. In the meantime, however, he functioned as a steward and became involved in a dispute over the overtime equalization policy in the department. The overtime policy had been a point of contention within the department for some time. Hausman had told a previous steward, Ted Cornuth, that he would go along with a system devised by employes, and as a result the department informally adopted an hours-based system for equalizing overtime. In April of 1991, however, an employe named Robert Stout filed a grievance complaining that he had been denied his fair share of overtime because he had been out on sick leave. In settlement of the grievance, Hausman agreed to offer Stout all of the overtime until he reached 56.6 hours. A second element of the settlement called for representatives of the Union and the maintenance staff to meet and agree on a fair overtime equalization policy for the department.

5. No agreement was reached on a new overtime equalization policy, and in June Hausman directed that the existing policy be set aside and that all overtime be offered to employes in order of seniority, without regard to equalization. On August 1, DeSpears filed a grievance, demanding that the old policy be restored. On August 12, following a meeting with officers of Local 1055, Hausman directed that the maintenance department follow the negotiated overtime policy in effect at the Mental Health Complex. This created an uproar among the department's workers, who were divided over the issue. Hausman, officers of the Local, and DeSpears continued to discuss the overtime issue, although Hausman sometimes refused to deal directly with DeSpears. In October of 1991, DeSpears proposed a system of rotation through the seniority list, an option that Hausman rejected. On November 6, DeSpears proposed a modified version of this system, using rotation in the first instance and then offering overtime to the person with the least number of overtime hours. Hausman again rejected it, taking the position that he would not agree to any policy that did not have 100% support among the members of the maintenance staff. The issue lingered for a period of time, and in the Spring of 1992, DeSpears demanded that the Union advance it to the third step. On May 12, 1992, Henry Zielinski, the Director of the Department of Labor Relations, issued his third step answer on DeSpears' August grievance and ruled that Hausman exceeded his authority by altering the old equalization system. Zielinski ordered that the old policy be reinstated, and the Union accepted this disposition.

6. As noted in Finding No. 5, above, Hausman was reluctant to deal directly with the Complainant on the overtime issue during the late summer and the fall of 1991. He told DeSpears that this was based on the fact that he had never been formally notified of his appointment as steward, although he told Carol Stegall, the Secretary of Local 1055 that it was due to the experiences that he had had with DeSpears becoming abusive in meetings on the

overtime issue. Other managers complained to Stegall that they had the same experiences with DeSpears and also refused to meet alone with him. Hausman did, however, deal with DeSpears directly in October and November. When Hausman rejected the November 6 proposal, and demanded 100% agreement among the employes on any new policy, DeSpears filed another grievance against him, asserting that this interfered with the Union's right to represent the employes.

7. The job description for maintenance worker sets forth the requirements of the position. Included among those requirements is possession of a valid drivers license.

8. The maintenance department had one county vehicle assigned to it. This vehicle was used for picking up supplies, and for driving to and from the gates in the parking lot when they had to be opened or closed. During the first shift on weekdays, there are in excess of thirty maintenance employes, housekeeping employes and tradespeople available to drive the vehicle. On weekends, maintenance employes are scheduled to work alone, and this duty rotates among the maintenance staff.

9. DeSpears had a long-standing drinking problem, and was convicted of driving while intoxicated four times. He lost his drivers license to a several month suspension for drunken driving at the end of 1987, and regained it in February of 1988. His license was suspended again in January of 1990. In each of these instances, he advised the Hospital of the suspension and told them he would seek an occupational license. He was not disciplined, although he was advised he was not to use any County vehicles when working alone on a weekend without a license. He did not obtain an occupational drivers license after his 1990 suspension, and in June of 1991, he was notified that his license was revoked for five years when he was adjudicated as a habitual traffic offender. As a habitual offender, he was not eligible to apply for an occupational license for at least a year following revocation.

10. Prior to 1992, the Hospital did not have a systematic method for checking whether maintenance employes had a valid drivers license. Instead, they relied on employes to keep them advised, and on occasional visual checks by supervisors. Zylka and Hausman became aware that DeSpears' license was revoked in June of 1991. Zylka was directed by the Hospital's administration not to allow him to work alone on weekends until he had a license. During this period of time, DeSpears indicated to Hausman that he would be able to get an occupational license, but he did not obtain such a license. In January of 1992, Hausman brought charges against DeSpears, asserting that he did not have a valid license as required by his job description. In response to these charges, Zylka sent a memo to DeSpears directing him to get an occupational license by March 1 or face termination. DeSpears' attorney wrote to Hausman after this memo was issued, indicating that he would apply for the license. He was not able to obtain an occupational license, and Zylka initiated discipline against him. While the discipline was pending, Zylka offered him the option of accepting a demotion to a job not requiring a valid drivers license. The Complainant refused this option, and Zylka recommended his discharge.

11. A hearing was held before Assistant Hospital Administrator Minnie Linyear on March 13. Linyear issued a written report on March 18, summarizing the arguments made before her and recommending termination for failure to meet the requirements of the job description. Charges to this effect were filed with the Personnel Review Board on March 26, and DeSpears was suspended without pay pending the PRB's decision.

12. The Personnel Review Board conducted a hearing and took testimony on the discipline at its November 24, 1992 meeting. The PRB determined that the Complainant should not be discharged, but should be demoted to Custodial Worker I and placed at the top pay range of that classification, as soon as a then-existing hiring freeze was lifted. The PRB's order was issued on November 24, 1992. A Custodial Worker I position came open in the housekeeping department at the hospital in December, and DeSpears was given the job. He was allowed to use accumulated leave time to cover the time between the PRB decision and the December 21 starting date in the new job. Thus the effect of the PRB's order was to suspend DeSpears without pay from March 26, 1992 through November 29, 1992, and demote him effective November 30. Although he had the right to appeal via a writ of certiorari, DeSpears did not seek review of the PRB order in circuit court within the six-month appeal period.

13. After the PRB issued its decision, the Complainant filed a suit against the County in federal district court, alleging a violation of the Americans with Disabilities Act in that he was being discriminated against on the basis of his alcoholism. The District Court for the Eastern District of Wisconsin granted the County's motion for summary judgment on November 22, 1994. On August 15, 1995, the Seventh Circuit Court of Appeals affirmed the district's court's decision.

14. The instant complaint was filed on July 14, 1992, prior to the PRB's decision to suspend and demote the Complainant, rather than discharge him. It was held in abeyance pending the outcome of the PRB and federal litigation. In October of 1996, DeSpears asked that a hearing be scheduled. The County filed a Motion to Dismiss based upon issue and claims preclusion. The Motion was denied. A hearing was held on March 4, 1997.

15. The Milwaukee County Personnel Review Board does not have jurisdiction over complaints of discrimination in violation of Sec. 111.70.

16. The U.S. District Court for the Eastern District does not have jurisdiction over complaints of discrimination in violation of Sec. 111.70.

17. The substance of the Complainant's claim of discrimination in violation of Sec. 111.70 was not litigated before either the Personnel Review Board or the U.S. District Court.

18. The Complainant, Richard DeSpears, was engaged in concerted activity when he acted as a steward in the maintenance department in 1991 and 1992.

19. The County, through Hausman and Zylka, was aware of the Complainant's protected concerted activity as a steward.

20. Although there was personal friction between Hausman and DeSpears as a result of DeSpears' abrasive style, Hausman was not hostile to DeSpears' protected concerted activity.

21. Zylka was not hostile to DeSpears' protected concerted activity.

22. The discipline imposed upon DeSpears was motivated by his failure to possess a valid drivers license, contrary to the requirements of his job description, and not by hostility to his involvement in protected concerted activity.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. The Respondent, Milwaukee County, did not interfere with the exercise of protected rights of the Complainant, Richard DeSpears, in violation of Sec. 111.70(3)(a)1.

2. The Respondent, Milwaukee County, did not discriminate against the Complainant, Richard DeSpears, in violation of Sec. 111.70(3)(a)3.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

The instant complaint is hereby dismissed in its entirety.

Dated at Racine, Wisconsin, this 23rd day of July, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Examiner

MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

ARGUMENTS OF THE PARTIES

The Complainant takes the position that the County discriminated against him because of his involvement in protected concerted activity. The Complainant was a shop steward, actively and aggressively engaged in representing his co-workers. The County's claim that he was never formally appointed is beside the point, since his supervisor admits that DeSpears was functioning in that capacity and was treated as a steward in the department. He filed grievances, and proposed settlements of employe disputes, most notably a series of grievances connected with the County's effort to change the overtime policy. His supervisor, Hausman, was clearly shown to have been hostile to the Complainant's activity on behalf of his fellow employes. Hausman refused to meet alone with the Complainant, constantly changed his positions, and admitted that meetings about the overtime policy degenerated into shouting matches. Hausman attempted to undermine the grievant by ceasing to do business with him.

Hausman's hostility is further shown by the fact that his stated reason for suspending the Complainant -- lack of a valid drivers license -- is clearly a pretext. While there was a rule on the books (in the form of the job description) requiring maintenance personnel to have a drivers license, this rule has not been enforced and the ability to drive is not an essential part of the job. Other cases in which an employe's license was suspended did not result in disciplinary action, including a prior instance involving the Complainant. In this case, the County knew for two years that the Complainant did not have a drivers license, and still he was judged a satisfactory employee in his evaluations. There was no job function that the Complainant could not perform without a license. The County did not launch any investigation into the driving status of employees until after it imposed discipline on the Complainant, and it did so then only as cover for the action against the Complainant. The only identifiable cause for the County's abrupt decision to enforce the drivers license requirement was Hausman's increasing hostility to the Complainant's Union activism.

The Complainant rejects the County's claim that this complaint is precluded by the litigation before the PRB or the federal courts. The PRB is an arm of the County, and its rules do not allow representation of the accused by counsel, unless the PRB consents to such representation. The due process rights of the Complainant before the PRB are clearly not the same as they are before the WERC. Moreover, the Complainant did not need to raise his Sec. 111.70 claims to the PRB. The instant complaint was already pending when the PRB hearing was held, and the PRB does not have jurisdiction to decide union animus complaints.

Instead it is limited to determining whether an employe is fit for duty. Thus there can be no preclusion as a result of the PRB proceedings, since they do not allow for full litigation of claims and they did not and could not have addressed the substantive claims of the Complainant. Likewise, the federal courts dealt with the Complainant's handicap discrimination claims through summary judgment, without making any factual findings, and thus the disputed issues in this case cannot have been conclusively determined in the federal case.

Inasmuch as the County clearly violated Sec. 111.70, the Complainant argues that he should be made whole for his losses by virtue of the suspension and demotion he suffered, be reinstated to the level of maintenance worker, and have his record cleared of all reference to this discipline.

The County asserts that the Complainant has failed to make out any case. While he complains that management did not deal with him as a Union representative, the fact is that they did, even though the Union never bothered to inform the County that he had any standing as a steward until February of 1992, well after he anointed himself to act in this capacity. It is true that the supervisors took steps to avoid meeting with him alone, but this was done only to avoid his abusive conduct and was a reasonable response to that behavior. Thus the County is obviously innocent of the refusal to bargain charge.

The discrimination charge is likewise unproved. First the County notes that the Complainant had full due process in his hearing before the Personnel Review Board, which routinely hears cases involving employes who have lost their drivers licenses. Indeed, this is the second most common offense heard by that Board. He did not dispute the substance of the charges, nor did he deny that possession of a license is a requirement of his job. The suspension and demotion he received are customary responses to this offense. He did not grieve his demotion or suspension, and his complaint should be barred as he has failed to exhaust his contractual remedies. Moreover, he did not even challenge the PRB decision, electing instead to go to federal court on a handicap discrimination charge. He lost. The instant claim is an effort to get a third bite at the apple, and should be barred by the doctrine of preclusion. Preclusion applies where an agency adjudicates a disputed fact properly before it, and the parties are provided with an adequate opportunity to litigate. The PRB is the appropriate body for this type of dispute, the parties have had an opportunity to litigate the issues, and the PRB has ruled. The discipline was upheld and the decision was not appealed. Under claim preclusion, the Complainant had an obligation to raise all of his substantive theories involving the transaction before the PRB, and the fact that he failed to raise anti-union discrimination there or in his federal suit effectively bars him from raising the issue now. Issue preclusion also applies, in that the issue of the County's motive for disciplining the Complainant has already been litigated both before the PRB and in federal court. The WERC cannot act without regard to the statutory role of the PRB or the uniformly applicable principles of preclusion. Thus the Examiner should reject the Complainant's efforts to collaterally attack the findings of the PRB, and should dismiss this complaint in its entirety.

DISCUSSION

Preclusion

The Examiner has previously considered and denied the County's efforts to dismiss this action based upon the prior history of the litigation:

LACHES

The assertion that the passage of time bars the complaint is not persuasive, since the basis for holding the complaint in abeyance was known to the Respondent and, if the Respondent wished to proceed with a hearing, it could have invoked its rights to a prompt hearing under Section 111.07(2)(a):

> The commission shall fix a time for a hearing on such complaint, which shall be not less than 10 nor more than 40 days after the filing of such complaint...

Either party may at any time assert the right to a speedy hearing, as was noted in the General Counsel's July 15, 1992 letter to the Chairman of the Milwaukee County Board forwarding a copy of the complaint and inviting the parties to participate in conciliation efforts. In 1992 and 1993, the Respondent was notified of the Complainant's intention to keep the prohibited practice complaint alive before the Commission, and to defer prosecution of the claim pending the outcome of his other cases.

FAILURE TO EXHAUST CONTRACTUAL REMEDIES

The County asserts that the Complainant may not pursue his discrimination claim before the Commission unless he has first exhausted his avenues for redress under the collective bargaining agreement. Even though the discrimination claim may overlap to an extent with the claims available under a just cause standard, it is rooted in the statute and not in the contract. The Commission has long held that it has the authority to make determinations and order relief in cases involving non-contractual unfair labor practices, even despite, contrary to, or concurrently with the arbitration of the same matters. An employee can pursue grievance arbitration alleging a contractual violation by the employer while contemporaneously citing the same employer action as the basis for a finding of an unfair labor practice by the Commission. Given that the claims may be pursued independently, it follows that failure to file a grievance will not preclude the filing of a complaint.

ISSUE AND CLAIMS PRECLUSION

> Issue and claim preclusion require an identity of issues and parties. The claim in this case is that the County sought to interfere with the Complainant's exercise of protected rights, and to discriminate against him on the basis of his membership or activity in a labor organization. Under Wisconsin law, an otherwise valid action may still be found violative of MERA if it is motivated in part by Union animus. The elements of a successful claim under Section 111.70 (3)(a)3 include:
>
> (1) that the employe has engaged in protected, concerted activity;
>
> (2) that the employer was aware of such activity;
>
> (3) that the employer was hostile to such activity; and
>
> (4) that the employer's complained of conduct was motivated at least in part by such hostility.
>
> The conclusion of the Personnel Review Board that the grievant violated Rule VIII, Section 4(l) and (t) of the Civil Service Rules of Milwaukee County does not answer the question of whether, as alleged, the County's decision to enforce the rule against the Complainant was motivated "at least in part" by hostility towards him for protected activity. Likewise, the conclusion that the Complainant was not discriminated against on the basis of some handicap or membership in a suspect classification does not settle the question of possible Union animus.
> DESPEARS V. MILWAUKEE COUNTY, Dec. No. 28951-A (NIELSEN, 12/17/96) (Footnotes omitted)

Having once again considered the County's preclusion arguments, the Examiner remains unpersuaded. Claim preclusion is the term now applied to what used to be known as res judicata. This doctrine establishes that "a final judgment between the parties is conclusive for all subsequent actions between those same parties, as to all matters which were, or which could have been, litigated in the proceeding from which the judgment arose." DANE COUNTY V. AFSCME LOCAL 65, 210 WIS.2D 268, 565 N.W.2D 540 (CTAPP, 1997). Claim preclusion generally requires an identity of parties.

Issue preclusion is the term now applied to what was formerly referred to as collateral estoppel. It is "a flexible doctrine that is bottomed in concerns of fundamental fairness and requires that one must have had a fair opportunity procedurally, substantively and evidentially

to litigate the issue before a second litigation will be precluded." DANE COUNTY, SUPRA. Although issue preclusion does not require an identity of parties, it does require actual litigation of an issue necessary to the outcome of the first action.

Both claim preclusion and issue preclusion are recognized and accepted doctrines before the Commission. See, for example, WISCONSIN TELEPHONE COMPANY, DEC. NO. 4471 (WERB, 5/57); MARK BENZING V. WEAC, DEC. NO. 28543-A (MCGILLIGAN, 9/16/97). Having said that, neither of these doctrines is applicable to the case at hand. Granting that the Complainant has brought several other actions related to the discipline imposed upon him, this is the first time he has appeared in a forum having jurisdiction to hear, decide and remedy a claim based upon discrimination for Union activity. Even though the Wisconsin courts have adopted a "transactional" approach to determining whether there is an identity of cause of action for the purpose of claims preclusion, the doctrine requires a final judgment by a tribunal of competent jurisdiction. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29184 (SHAW, 11/25/97) CITING NORTHERN STATES POWER CO. V. BUGHER, 189 WIS.2D 541, 550 (1995). The WERC's jurisdiction to hear Sec. 111.70(3)(a)3 claims is not exclusive. It is concurrent with the jurisdiction of the circuit courts of this state, should a party invoke the courts' jurisdiction. RACINE UNIFIED SCHOOL DISTRICT, SUPRA. The Complainant has not taken recourse to the circuit courts to this point. The County's Personnel Review Board does not have a statutory mandate to hear prohibited practices, nor do the courts of the federal system. Thus there has been no final judgment by a court of competent jurisdiction that has addressed or could have resolved the question of whether the County's actions were motivated in part by anti-union animus.

Discrimination

The Complainant was initially discharged, and on review was suspended and demoted, on the grounds of not having a valid drivers license as required by his job description. The Complainant asserts that the County disciplined him for his aggressive representation of other workers on an overtime dispute, and that the lack of a valid drivers license is nothing but a pretext. As noted above, in order to succeed on a claim of unlawful discrimination, a Complainant must show by a clear and satisfactory preponderance of the evidence that:

(1) the employe has engaged in protected, concerted activity;

(2) the employer was aware of such activity;

(3) the employer was hostile to such activity; and

(4) the employer's complained of conduct was motivated at least in part by such hostility.

In this case, there is no question but that the Complainant was engaged in protected activity when he functioned as a steward and pursued the overtime equalization issue with Hausman. Neither is there any doubt that management was aware of his activities. With respect to the third element, the record shows little evidence of hostility to the Complainant's protected activity. The alleged evidence of hostility falls into three categories: (1) Hausman's changes in position on the overtime equalization policy; (2) Hausman's refusal to meet alone with the grievant; and (3) the discipline against the grievant.

The changes in the overtime policy were triggered by a successful grievance brought by one of the Complainant's co-workers in April of 1991. The Complainant did not become the steward until late May or early June. At the end of June, Hausman unilaterally changed the equalization system in response to the failure of the employes and the Union to agree upon a replacement policy. There is no evidence that this change had anything to do with the Complainant. Indeed the evidence is that his relationship with Hausman was good at the outset. The subsequent change, in August, came after DeSpears filed a grievance over the June change, but it came as a consequence of a meeting between Hausman, officers of the Local and maintenance department employes, not as retaliation for the grievance. (See, Complainant's Exhibit #5, and transcript, pages 54-55). In late October, Hausman raised objections to the settlement proposed by the Complainant, and when a modified proposal was submitted in November he said he would not agree to any system that was not agreeable to all of the members of the department staff. This was precisely the same position he had taken when the old system was originally adopted, and essentially the same position that was agreed upon in the settlement of the Stout grievance. The Complainant might have felt that Hausman was failing to respect his position as steward by insisting that the employes agree to the system, but that does not show hostility. Instead, it reflects the fact that the overtime equalization issue had frustrated several attempts at resolution, in large part because the workers could not agree amongst themselves.

The second item offered to show hostility is that Hausman refused to meet alone with the Complainant after August or so, and insisted that other Union officers be present. Hausman conceded that he did not wish to meet with DeSpears. He attributed this to the need for higher level Union involvement, and to the fact that DeSpears was not formally confirmed as a steward at that time. However, he told Stegall that it was due to DeSpears' abusive attitude in discussions over the issue. Both Hausman and DeSpears conceded that some of the meetings degenerated into shouting matches. I conclude that Hausman's reluctance to meet with the Complainant was attributable to both a desire for higher level involvement and a distaste for the manner in which he pursued his arguments. Distaste for his personal manner is not the same as hostility to the activity. It must also be said that DeSpears himself testified that he and Hausman did meet in October and early November to discuss DeSpears' proposal for resolving the overtime issue. Thus it is not factually correct that Hausman flatly refused to deal directly with DeSpears.

The third item of evidence offered to show hostility is the fact that the Complainant was disciplined for not having a drivers license in January of 1992, when he had been without a license for two years, and that in the past employes, including the Complainant, had been accommodated for the loss of a license. The Complainant also asserts that the ability to drive is a very minor part of the job. These items of proof are more properly characterized as going to the question of whether there was animus underlying the decision to discipline him. In determining whether a decision is motivated by unlawful animus, the Commission must determine whether the reasons given for that decision are genuine or are instead pretextual. CESA 4, DEC. NO. 13100-E (YAFFE, 12/29/77) AT PAGE 43. Here there is no dispute that the Complainant's job description required him to possess a valid drivers license, nor is there any dispute that employes are required to abide by the requirements of their job descriptions. (See transcript, pages 32-34)

While failure to possess a drivers license is the second most common basis for charges before the Personnel Review Board (transcript, page 217), the record shows that no one had been disciplined for this in the maintenance department prior to the Complainant's case. The record also shows, however, that the Complainant was the first employe in the department who was adjudged a habitual traffic offender, and the first to lose his license for five years. Hausman and Zylka both testified that employes who lost their licenses would usually be able to get an occupational permit within a reasonable period of time, and thus the degree of accommodation required for those employes would be substantially less than that required for the Complainant. As a habitual offender, the Complainant would not even become eligible for an occupational license until mid-1993. (See, Complainant's Exhibit #19, page 2, item 7). Hausman testified that one reason he took no action after the Complainant lost his license in 1990 was that he kept saying that he would be getting an occupational permit, and that his court date was continuously adjourned. The Complainant denied telling Hausman he would get an occupational permit, but I find Hausman the more credible witness on this point, in part because his version would be consistent with what appears to have been the policy in prior instances.

The Complainant also sought to prove that having a drivers license was not relevant to the vast majority of his duties, and the record generally supports this contention. Hausman conceded that there were ample employes on the first shift during the week to cover any driving needs. The problem identified for the Complainant was his ability to work alone on weekends, when a vehicle was needed for opening and closing parking lot gates, so that the maintenance employe could still promptly respond to pages. Zylka testified without contradiction that in 1991, after it was learned that the Complainant's license had been revoked, he had been directed by the hospital administration not to allow the grievant to work alone on weekends without a license. Zylka also explained that permanently exempting him from weekend coverage would have created problems with all of the other employes, who would as a consequence be required to work additional weekends. While there is evidence that the Complainant had been scheduled for weekends without a license in the past, some of this

work was overtime when he would not have been there alone. Also, as noted above, there is a rational difference between making a relatively short-term accommodation and entering into an arrangement that might stretch for a period of five years.

In evaluating the claim of pretext, I have taken into account several points which are actively inconsistent with a desire to simply be rid of the Complainant. The evidence of hostility in this record is weak, but to the extent that it exists, it primarily focuses on Hausman. Yet it was Zylka who actually issued the ultimatum to him in January to get an occupational license or be disciplined. Zylka did so on Hausman's recommendation, but in the end it was he who pursued discipline. I further note that he did not summarily impose discipline, even though the Complainant was clearly out of compliance with the job description. Instead, he gave the Complainant two and a half months to obtain an occupational license. There is no evidence in the record to suggest that Zylka knew the Complainant could not obtain a license, and in fact the Complainant's attorney wrote to him after the memo was issued, telling him the Complainant would obtain the license. In addition, the department held the Complainant's job open for a period of eighteen months after he was suspended. According to Zylka, the latter portion of this eighteen-month period was attributable to budget restrictions, but initially it was held open so that he could return if he obtained a license. None of these factors are consistent with a plot to discharge the grievant for some reason other than his lack of a drivers license.

The Complainant bears the burden of proof, and viewing the record as a whole, I conclude that he has failed to carry that burden. The Complainant was clearly engaged in protected concerted activity in 1991, and the County was aware of his activities. There is scant evidence that the County was hostile to his activities, although his personal style did lead to a degree of friction with Hausman. The discipline imposed upon him was in response to an admitted violation of his job description, the lack of a drivers license. While the department had accommodated persons in the past for the loss of their licenses, there is no evidence that the County ever knew of anyone having their license revoked and being unable to obtain an occupational license. While driving is a very small portion of the job, it is necessary if an employe is going to work alone on weekends, and exempting the grievant from that duty would have generated an additional controversy within the department's other employes. The evidence is not completely clear-cut, 1/ but taking the record as a whole, I cannot find that the loss of his drivers license was merely a pretext for discriminating against the Complainant. Accordingly, I have dismissed the complaint in its entirety.

1/ In arriving at the overall conclusion in this case, I have considered the fact that there are a variety of inconsistencies between the testimony of Zylka and Hausman. However, I do not find these inconsistencies bear on their overall credibility or their motives for imposing discipline on the Complainant. The fact is that the complaint was filed a year after some of the critical conversations, and the Complainant then asked that this case be held in abeyance for some five

(footnote continued on Page 15)

(footnote continued from Page 14)

more years, so that he could pursue other litigation. Hausman had retired by the time that the hearing was held, and Zylka had moved on to the Department of Public Works. With the passage of that much time, it is inevitable that memories will fade and inconsistencies will appear in the record.

Dated at Racine, Wisconsin, this 23rd day of July, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Examiner

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