STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BROWN COUNTY SHELTER CARE EMPLOYEES,
LOCAL 1901-F, AFSCME, AFL-CIO, Complainant,

vs.

BROWN COUNTY (SHELTER CARE), Respondent.

Case 592
No. 53535
MP-3110

Decision No. 29094-A

Appearances:

Shneidman, Myers, Dowling, Blumenfeld, Ehlke, Hawks & Domer, by **Attorney Bruce Ehlke**, P.O. Box 2155, Madison, Wisconsin 53701-2155, appearing on behalf of Brown County Shelter Care Employees, Local 1901-F, AFSCME, AFL-CIO.

Mr. Kenneth Bukowski, Brown County Corporation Counsel, P.O. Box 23600, Green Bay, Wisconsin 54305-3600, by **Mr. John Jacques**, Assistant Corporation Counsel, and **Mr. James Kalny**, Human Resources Director, appearing on behalf of Brown County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel J. Nielsen, Examiner: On December 12, 1995, Brown County Shelter Care Employees, Local 1901-F, AFSCME, AFL-CIO (hereinafter referred to as either the Union or the Complainant) filed a complaint with the Wisconsin Employment Relations Commission asserting that Brown County (hereinafter referred to as either the County or the Respondent) was committing a prohibited practice within the meaning of Sec. 111.70(3)(a)1, 4, and 5 of the Municipal Employment Relations Act (MERA), by refusing to arbitrate a grievance over the discharge of Dallas Maass, Jr. from the Brown County Shelter Care facility, and by discharging Maass without just cause as required by the contract. On April 29, 1996, the County filed an answer denying any violations, and moved to dismiss the claim of a refusal to

arbitrate, noting that the contract requiring arbitration was in a hiatus period when this grievance arose. James E. Miller, Staff Representative for AFSCME, thereafter amended his pleadings to eliminate the claim of a refusal to arbitrate and to seek a determination of the merits of the discharge. The effect of this amendment was later confirmed in correspondence between the Examiner and Michael Wilson, who succeeded Miller as the Staff Representative responsible for this litigation.

The Commission appointed Daniel J. Nielsen, an examiner on its staff, to conduct a hearing on the matter and to make and issue appropriate Findings of Fact, Conclusions of Law and Orders. A hearing was scheduled for July 29 and 30, 1996, in Green Bay, Wisconsin. Subsequently the parties submitted a signed stipulation, requesting that the matter be held in abeyance pending the outcome of related criminal proceedings, and the hearings were canceled. On April 11, 1997, the Union advised the Examiner that it wished to proceed to hearing. In June of 1997, Attorney Bruce Ehlke was retained to represent the Complainant. A hearing was scheduled for July 16 and August 13, 1997, but was postponed at the request of the parties. A series of conference calls were held with counsel for the parties, during which, among other things, it was agreed that each party would be allowed to submit polygraph evidence, with the Examiner reserving the right to assign such weight to the evidence as he deemed appropriate, and that JB, the juvenile whose complaint led to the discharge of Mr. Maass, would be allowed to testify via video-teleconference from his new residence in another state. Subsequently the County notified the Examiner and the Complainant that JB would instead appear in person at the hearing.

Hearings were held on November 12, 13 and 24, and December 2, 1997, and on January 19, 20 and 21, 1998, in Green Bay, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. JB did not testify at the hearing, initially because of a hospitalization and subsequently because his psychologist recommended against his appearance. In the course of the hearings, information was admitted to the record which is under judicial seal and/or which is otherwise privileged and confidential. The Examiner ordered that the record of this proceeding be placed under seal in order to preserve the confidentiality of juvenile court, medical and other records, and directed the parties to treat such information as privileged and confidential. Transcripts of the hearings were prepared, with the names of all juveniles expressed in initials in order to preserve their privacy. The last of the transcripts was received by the Examiner on March 20, 1998. The parties submitted post-hearing briefs and reply briefs. The Union submitted exceptions to certain factual assertions in the County's reply brief, and the Examiner extended an opportunity to the County to submit any exceptions to the Union's reply, with a deadline of August 28, which passed without additional submissions, 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. Brown County, hereinafter referred to as the County, is a municipal employer providing general governmental services to the people in the general area of Green Bay in northeastern Wisconsin.

2. Among the services provided by the County is the operation of a shelter care facility for juveniles, Brown County Shelter Care. At the times relevant to this matter James Hermans was the Superintendent of the Shelter Care and Debbie Bowman was the Administrator.

3. Brown County Shelter Care Employees, Local 1901-F, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization, representing the non-exempt employes of the County's shelter care facility.

4. The Union and the County are parties to a labor agreement which provides, inter alia, that any discharge must be for just cause.

5. Dallas Maass, Jr. was employed by the County as a Shelter Care Worker from 1988 to 1994 as an on-call and part-time employe. In August of 1994, he posted to a full-time position on the midnight to 8:00 a.m. shift.

6. The Shelter Care is a 24 hour per day, seven day per week operation running three shifts: Midnight to 8:00 a.m., 8:00 a.m. to 4:00 p.m., and 4:00 p.m. to 12 midnight. On the midnight to 8:00 p.m. shift, the normal staffing pattern is one male and one female worker. The facility has two wings, one for boys and one for girls, with a common room in the middle. Staff offices are in an open area of the common room, with a view down both wings.

7. The Shelter Care maintains various rules and procedures to insure the security and privacy of residents, including rules regulating physical contact and procedures to be followed for intake of new residents. Physical contact between staff members and residents is prohibited, although incidental contact is fairly commonplace. Shelter Care procedures for intake on new residents require that staff members accompany the residents to the shower rooms and have them strip to their underwear. The residents are examined for scrapes, bruises and other signs of abuse, and also for any other infirmities. They then go behind a privacy screen, remove their underwear and take a shower. Proper procedure would preclude staff members from viewing any resident naked. Another Shelter Care rule strictly prohibits sleeping on duty, and the facility has discharged at least one employe for sleeping. Notwithstanding this, employes do sometimes fall asleep on the midnight to 8:00 a.m. shift.

8. JB, a 14 year old male with severe emotional and mental problems including both suicidal and homicidal tendencies, was a resident at Shelter Care on nine occasions in 1994 and 1995. In 1995, JB stayed at Shelter Care from January 28th through February 19th, February 20th through February 25th, and March 1st through March 23rd. He was again a resident at Shelter Care beginning on April 6th of that year, and from April 14th through April 17th.

9. JB was the object of an on-going and bitter custody dispute between his parents. He had previously been the victim of sexual abuse by a roommate while in a facility in a western state. He had been the subject of various placements by the juvenile authorities and the courts, including confinement in Secure Detention, the Brown County Mental Health Center, and Shelter Care. While in Shelter Care, Maass was his favorite worker, and he customarily greeted Maass in the morning by coming into the common area and throwing his arms around him in a hug. Maass would respond by directing JB not to hug him. JB was also in the habit of greeting Barb Dorner, another of his favorite workers, with hugs, and she too would have to reprimand him for this.

10. JB was a small child, and was in the habit of provoking the larger boys. As a result, he was frequently assaulted by them. He would move furniture in his room to barricade the door while he slept in order to prevent the other boys from coming in late at night and attacking him. On several occasions, he was moved to a room on the girls wing to protect him from the larger boys, including one occasion on March 13, 1995, when he asked to be moved to Secure Detention because the other kids were threatening to kill him.

11. On April 6, 1995, JB was sent back to Shelter Care from school because he was out of control. He threatened to stab Shelter Care Worker Stephen Felter, and subsequently ran away. He was placed in Secure Detention, but attempted to commit suicide by tying socks around his neck, and ingesting some chemicals. On April 14th, a hearing was held before a court commissioner on an appropriate placement for JB. Maass attended the hearing on behalf of the Shelter Care. The court commissioner asked Maass about the appropriateness of returning JB to Shelter Care, and Maass said that JB had no respect for the rules at Shelter Care, regularly provoked the other residents, and had run away four of the nine times he had been placed there. Maass expressed skepticism about Shelter Care's ability to provide the level of supervision JB required. JB expressed an interest in returning to Shelter Care and promised to follow the rules, and the court commissioner ruled that Shelter Care was the preferable placement.

12. On April 16, Maass and Barb Dorner were working the 4:00 p.m. to midnight shift. At 7:30 p.m. Dorner noticed that JB was bleeding from his chin. JB said another resident had hit him, and a third resident confirmed his story. Dorner and Maass summoned the police but before the officers arrived, the other boy apparently persuaded JB to change his story. When the police arrived, JB recanted, saying that he had fallen while they were playing ball and he landed on the other boy's foot. Later that evening, Maass sent him to his room for

calling an Ashwaubenon police officer ugly. JB complained that he was being discriminated against, accused Maass of kicking him and splitting his lip open, and threatened to have Maass's job. Maass noted this behavior in the log, and the log entry from the worker on the next shift responded to it, observing "JB has a history of doing physical damage to himself and then blaming staff, he has done this to me in the past." The allegation against Maass was investigated and found to have been unsubstantiated.

13. On April 17, JB and two other boys ran away from Shelter Care.

14. On April 30, 1995, JB was a patient at the Brown County Mental Health Center. That evening, he spoke with Nurse Sally Ledvina, and told her that he was upset and wished to tell her something. She warned him that anything he told her would not be confidential, and JB said that his favorite worker at the Shelter Care had fondled his penis. At the time he was telling her this, he was also complaining of an upset stomach, and later in the shift he vomited. Ledvina charted JB's statements and reported the conversation.

15. The County is required by Section 48.981, Wis. Stats., to investigate reports of child abuse and neglect, and to determine, within 60 days of the report, whether neglect has occurred. Where the allegation is made against an employe of the County, the County is required to have an independent investigation conducted:

> **48.981 Abused or neglected children.**
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> 4. The county department shall determine, within 60 days after receipt of a report, whether abuse or neglect has occurred or is likely to occur. The determination shall be based on a preponderance of the evidence produced by the investigation. A determination that abuse or neglect has occurred may not be based solely on the fact that the child's parent, guardian or legal custodian in good faith selects and relies on prayer or other religious means for treatment of disease or for remedial care of the child. In making a determination that emotional damage has occurred, the county department shall give due regard to the culture of the subjects and shall establish that the person alleged to be responsible for the emotional damage is unwilling to remedy the harm. This subdivision does not prohibit a court from ordering medical services for the child if the child's health requires it.
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(d) Independent investigation. 1. In this paragraph, "agent" includes, but is not limited to, a foster parent, treatment foster parent or other person given custody of a child or a human services professional employed by a county department under s. 51.42 or 51.437 who is working with the child under contract with or under the supervision of the county department under s. 46.215 or 46.22.

2. If an agent or employe of a county department or licensed child welfare agency under contract with the county department required to investigate under this subsection is the subject of a report, or if the county department or licensed child welfare agency under contract with the county department determines that, because of the relationship between the county department or licensed child welfare agency under contract with the county department and the subject of a report, there is a substantial probability that the county department or licensed child welfare agency under contract with the county department would not conduct an unbiased investigation, the county department or licensed child welfare agency under contract with the county department shall, after taking any action necessary to protect the child, notify the department. Upon receipt of the notice, the department or a county department or child welfare agency designated by the department shall conduct an independent investigation. If the department designates a county department under s. 46.215, 46.22, 46.23, 51.42 or 51.437, that county department shall conduct the independent investigation. If a licensed child welfare agency agrees to conduct the independent investigation, the department may designate that agency to do so. The powers and duties of the department or designated county department or child welfare agency making an independent investigation are those given to county departments under par. (c).

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16. The County has an agreement with Manitowoc County under which allegations of abuse leveled against County employes are referred to a social worker from Manitowoc for investigation. On receiving reports of the allegation against Maass, Roger Tepe, the Child Protective Services coordinator for Brown County invoked this agreement and referred the case to Linda Schroeder, a social worker with the Manitowoc County Department of Human Services. In conjunction with Sergeant Kenneth Brodhagen of the Green Bay Police Department, Schroeder conducted an investigation of the allegations, interviewing JB, Maass, Debbie Bowman, and Jim Hermans. Brodhagen separately interviewed JB's father, Nurse Sally Ledvina, and two workers at the Shelter Care, Sandi Dudley and Sheri Konitzer, and he shared the results of those interviews with Schroeder.

17. On June 15, 1995, Schroeder filed her report, substantiating the allegations:

DATE AND METHOD OF NOTIFYING REPORTER:

06/05/95, phone call with Roger Tepe and a written report to follow for Roger and the appropriate personnel to review.

People interviewed by social worker: JB - alleged victim;
Dallas Maass alleged perpetrator; Debbie Bowman, facility supervisor; and
Jim Hermans superintendent at Brown County Shelter Care.

People interviewed by Sgt. Brodhagen: People listed above; DB - father to JB; Sally Ledvina - worker at Brown County Mental Health to whom JB initially revealed this information; Sandra Dudley - worker at Brown County Shelter Care; Sheri Konitzer - worker at Brown County Shelter Care.

ASSESSMENT

ALLEGED MALTREATMENT & SURROUNDING CIRCUMSTANCES:

On 05/02/95, our department received a request from Brown County Human Services to do an independent investigation regarding allegations of sexual abuse of JB while he was a resident at Brown County Shelter Care. JB was reporting recent, but not current sexual contact by Brown County Shelter Care staff member, Dallas Maass, while he was a resident of the shelter care between February and April of 1995. JB indicated that while he was staying at Brown County Shelter Care, Dallas would come into his bedroom at night when he thought JB was sleeping and would fondle his genitals. JB is no longer at the shelter care facility, so he is not having contact with the alleged perpetrator. On 05/05/95, this worker received a phone call from Jim Hermans, superintendent of Brown County Shelter Care, indicating that Dallas has been suspended from his job effective immediately and would have no contact with residents, pending the outcome of the investigation.

CHRONOLOGICAL SUMMARY OF CONTACTS:

On 05/04/95, at 9:40 a.m., this worker and Sgt. Brodhagen from the Green Bay City Police Department went to Brown County Mental Health Center and interviewed JB. JB stated that when he thinks about what happened, he can't sleep and he "pukes". He told us that while he stayed at Brown County Shelter Care, he was touched on his penis by Dallas Maass. He stated the last time he

had been at the shelter care was over the weekend of Easter 1995, but that nothing happened that time. He stated that in February 1995, he was also in shelter care. He said that it wasn't the first time he was in shelter care in February that something happened, but the second time that month when he went back to shelter care.

JB reported the incidents would occur on the week days, not on the weekends. He said the first time it happened, he was sleeping in bed with "just boxers" on and he did have covers over him. He said he realized his penis was being touched, but he was afraid to open his eyes. He told us that he was on his back; then rolled over to his stomach so he couldn't be touched. He noticed that his penis was sticking out of the fly of his shorts and in the morning, he noticed that the door to his room was open. He told us that he did not tell anyone of this incident. JB stated it happened at least three times more, but it could have happened even more with him not waking up. He indicated this was not a dream, but really happened.

JB stated that the next time it happened, he was in a private room at shelter care. He said he woke up to someone touching his penis and opened his eyes right away because he wanted to see who it was and wanted to report it to staff. He said he thought it could be another resident, and he was very surprised when it was a staff member, Dallas. JB said he looked to see if it was Dallas; then rolled over and pretended to be asleep. He said he counted to five; then looked back and saw that Dallas was gone. He said he again didn't tell anybody what happened because he wasn't sure if people would believe him or would be angry with him. He said he also wanted Dallas to still be his friend.

JB stated that it happened another night when he was sleeping alone in a double room in the girl's wing at shelter care. He said that Dallas came in and this time, he rubbed JB's penis. JB stated that he could see it was Dallas by the light that was coming from the window and stated that when he moved and looked at Dallas, Dallas stood quiet and was gone when JB rolled over.

JB also told us that Dallas would give him "grundies", where Dallas would pull his underwear way up from the back. Afterwards, Dallas would sometimes help him straighten his pants, then around other staff members would say "let me know if I make you feel uncomfortable. You don't want to be touched." JB stated that there was another time when Dallas straightened his pants because the pockets were out and the pants were twisted. JB said that Dallas touched his penis, but he thought it could have been accidental. JB stated that one day after one of the incidents, Dallas stated to him "them are nice boxers you got". JB spoke of another time when JB was taking a shower and Dallas came in and was

asking if he had shampoo and soap; JB had them and showed him, but Dallas grabbed it. JB had to grab it back. JB stated he felt uncomfortable because he felt that Dallas was looking at his body in an inappropriate way and was taking the opportunity of JB being in the shower to do so.

To protect himself, JB stated that the used to barricade his door to his room at shelter care so that Dallas could not get in the room. He also stated he used to sleep from 3:00 - 6:00 p.m. so he could stay awake when Dallas would come to work. He stated he used to run away from shelter care so he wouldn't have to sleep there. He said he told Sally, a staff member at Brown County Mental Health, about what had happened at shelter care and he felt better about telling, but every time he talks about it now, his stomach hurts and he vomits. He said that he got sick after telling Sally and also got sick the following two nights after disclosing the information. He said he slept in the closet the night before we not with him because nobody could get him that way.

JB told us several times during the interview that he liked Dallas and did not want to get him in trouble. He said that he was his friend and felt guilty about saying something. JB said that maybe it was his fault because he never told Dallas to stop - that he didn't like it. He said that he wished that it had been Todd who did this to him because he does not like Todd and would not feel badly at all for getting him into trouble. When asked what JB would like to see happen, he stated that perhaps Dallas should work during the days so he couldn't do this to other residents. He does not necessarily think that Dallas should lose his job.

On 05/08/95, at 9:00 a.m., this worker and Sgt. Brodhagen met with Dallas Maass. Dallas stated that he generally worked the midnight to 8:00 a.m. shift during the week at Brown County Shelter Care. He said that he occasionally does trade or pick up a shift of the 4:00 p.m. to midnight hours. He told us that he usually works with Sandy Dudley, but does occasionally work with Barb McDaniels and Barb Dorner. He has also worked with Sheri Lederer. Dallas states he doesn't recall going into JB's room at night, although there is no rule about not going into the resident's rooms. He stated he will go in in the morning to wake him up. There are bed checks done at night and Dallas said the shelter's rules say that they should take place once an hour. Dallas, however, states that he does a bed check every 10-30 minutes. He states that there is a window in the door of the room, and he will shine a flashlight into the room to make sure the resident was in there. He said he looks for a hand, face, or leg. If this cannot be seen, he would step into the room and listen for breathing. He said sometimes he would have to go up to the bed to see if the

resident is there. Again, he stated he doesn't recall going into JB's room at all. He did state, however, that he had to go into JB's room to wake him in the morning.

Dallas then started talking about his own personal situation. He said that he had been married and is now divorced. He said that he was bi-sexual, and his ex-wife knew this when they got married. She had a child by another man when they got married, and he adopted him and treats him like his own son. Dallas stated that he is presently in a relationship with another man, but he kept this issue separate from his work at the shelter care. He said that although he is bi-sexual, he is not a pedophile and that there is a difference. He said he liked his job very much and he spent a lot of time and money to get his degree, so he would not do anything like this to jeopardize his career. The detective asked why JB would make such an allegation, and Dallas stated that JB had asked him if he was gay and that he did not answer the question. He said that JB made the complaint against him because Dallas had given JB "room time" for making a comment against the Ashwaubenon Police Department. He stated that JB had made an allegation that Dallas had kicked him in the face in April of 1995, but this was not true. He further stated that JB was angry with him because Dallas testified against him in a placement hearing, stating that JB should not be placed at shelter care. Although he was still placed there, he know that JB was not happy with his testimony.

Dallas stated he was worked at shelter care since working part time in 1989. He said that he had been accused of touching a boy's back in such a way to make him feel uncomfortable, but he said it was nothing sexual and the boy later recanted. He also told us of a time when he used bad judgement in that he used a marker to draw a face on a resident's stomach, using the belly button as the mouth. Dallas then told the resident to "make it whistle". Dallas further stated that there have been visitation problems with his son because the mother has accused him of doing inappropriate things, but that the investigation done by Brown County was unsubstantiated.

On 05/08/95, at 10:45 a.m., this worker and Sgt. Brodhagen went to Brown County Shelter Care and spoke with Jim Hermans and facility supervisor, Debbie Bowman. We were able to see the facilities and observe the rooms JB would have been in while he was at shelter care. We made note of where the lights were and verified the ability to see if the corridor lights were, in fact, off during the night. We also read through the files to note working times of Dallas and staff notes of JB (please see attached). We then spoke to Jim and Debbie regarding the situation. They stated some concerns that they had heard during

Dallas' time of employment. Debbie commented that Dallas has been pretty open about his sexual lifestyle and has asked at least one resident about his sexual "preference", then stated he meant "performance". He also allegedly made a comment to a resident about the resident having a nice body. We asked if there was the opportunity for Dallas to be alone with a resident long enough to touch them because Dallas stated he felt he was not left alone long enough for this to happen. Jim commented they have had some complaints about staff sleeping on the job and if, in fact, this took place when Dallas was working, he would have more than ample opportunity to have time to be alone with a resident and do inappropriate touching.

On 05/09/95, at 8:30 a.m., this worker spoke with Sgt. Brodhagen. He stated he met with JB again yesterday. JB had a court hearing in the morning and was supposed to be placed at Eau Claire Academy after the hearing. He, however, attacked his father in court and was placed back at Brown County Mental Health Center. When Sgt. Brodhagen spoke with him JB again insisted that he was telling the truth regarding the sexual abuse. He stated he did not want to report Dallas and wished it was Todd he could tell on because he does not like Todd. He stated it happened when he was staying in Room 8 and Room 9 at shelter care. He said there was plenty of light to see who was touching him. Sgt. Brodhagen stated he will speak to Sally who worked the day of JB's disclosure and was the one JB initially told.

On 05/09/95, at 10:00 a.m., this worker spoke with Debbie Bowman. She stated she found more information when looking through files at work. She stated when Dallas went through his divorce, it was a messy one. He wanted Debbie to testify to his job performance. He told Debbie that while he was married, he and his wife wanted to be foster parents to Ron Francis. He was accused of writing letters to Ron that might be deemed inappropriate by some people, and he told Debbie this was investigated and might be brought up. Again, I asked if there was any other resident that we should see. She felt there weren't many still in the area, but suggested that perhaps if NR were still in the area, we should try to see him.

On 05/09/95, at 11:15 a.m., this worker spoke with Roger Tepe, CPS supervisor from Brown County Human Services. I asked if any referrals came into the department regarding Dallas Maass. He stated that there were referrals regarding questionable behavior by Dallas towards his son. The reports stated that they showered and slept together. When the son was questioned by his staff, he did not state anything inappropriate happened. Roger stated he would check to see if there were any other reports and if there were, he would send them to me.

On 05/12/95, at 9:20 a.m., this worker received a call from Sgt. Brodhagen to update me on the investigation. He stated he reviewed the log from Brown County Shelter Care to note when Dallas worked. He had also seen JB again, and he wanted to compare some of the information. JB told him that the abuse did not occur while he was staying in Room 5. This would mean the abuse did not occur during his 01/28/95 stay. He was discharged on 02/19/95, and was readmitted again on 02/20/95. He stayed in Room 8 at this time. He was there until 02/25/95. Dallas worked on 02/20, 02/22, 02/23 and 02/24/95, during the midnight to 8:00 a.m. shift. JB again went to shelter care on 03/01/95, and stayed until 03/23/95. He stayed in Room 8 during this stay as well. However, on 03/20/95, he was moved to the girl's wing, but Dallas did not work this day. Dallas worked on 03/22/95 and 03/23/95. Dallas also worked on 03/02, 03/03, 03/08, 03/09, 03/10, 03/15, 03/16 and 03/17/95. Dallas worked with Sandy Dudley every day except 02/24/95. He worked that shift with Sheri Konitzer.

Sgt. Brodhagen stated he spoke with Sandy. She stated Dallas could have had the opportunity to be alone with JB. She stated that JB ended up on the girl's wing several times because he would get the other residents angry with him. She stated that while JB was on the girl's wing, Dallas would have been the one to check on JB. Sandy told Sgt. Brodhagen that she worked with Dallas since she began working at shelter care about one and one-half years ago. Dallas told Sandy that he was bisexual and was sexually assaulted when he was a kid. Sandy shared with Dallas that her son was also molested.

Sgt. Brodhagen said he also spoke with Sally Ledvina, the person JB initially told about the abuse. She told Sgt. Brodhagen it was after dinner on 04/30/95, that JB told her about the incident. She verified that he told her he had an upset stomach after he told her about the abuse, and she told Sgt. Brodhagen that JB did indeed get physically sick about two hours later.

Sgt. Brodhagen stated he also spoke with DB, JB's father. He told Sgt. Brodhagen that JB never made an allegation against him, but JB did report being sexually assaulted when he was 11 years old while he lived in a residential facility in Nevada. DB reported JB mentioned to him on Friday, 04/28/95, that something had happened to him at shelter care. JB did not give him any details at that time. DB stated that he believed JB about the sexual abuse allegations. He stated that JB told him about staff physically abusing him, and he did question that. However, JB had told his father that Dallas was a staff member at shelter care that he did like.

On 05/17/95, at 10:20 a.m., this worker spoke to Sgt. Brodhagen. He called stating he had just spoken to Dallas again. Dallas still denies any wrong doing, stating he would never jeopardize his job this way. He told Sgt. Brodhagen that

he had been reading his psychology books and stated the reason JB was saying this was because Dallas was close to him and now he sees Dallas as rejecting him because he testified against him at his court hearing.

On 05/22/95, at 2:40 p.m., this worker spoke with Debbie Bowman. Debbie called regarding the status of the case and stated she has to make plans regarding the scheduling of workers. I told her some things that needed to be done and that I was waiting for the final police report.

On 05/25/95, at 8:15 a.m., Sgt. Brodhagen called to state he is almost done with his report and he will send a copy to me. During our interview with Dallas, we had discussed the possibility of Dallas taking a polygraph test. Sgt. Brodhagen stated he could not tell me if Dallas had taken a polygraph test. He stated, however, that he is talking to Dallas one more time and then will finish his report and send it to the District Attorney's office. He told me he would forward a copy to me.

On 06/02/95, at 1:20 p.m., this worker spoke with Debbie Bowman. Debbie called to got an update as to the case status. I told her I had just received the information from Sgt. Brodhagen and had finished reading it yesterday. I told her that I would try to have my report done and to my supervisor next week. Again, she stated she had to decide what to do about Dallas' job and finding staff replacement for the shifts.

WORKER ANALYSIS:

This worker believes that JB was touched on his penis by Dallas Maass. JB had a difficult time telling somebody about the abuse. When he told a staff member at Brown County Mental Health Center, he got sick and vomited that night and the next two nights. When this worker and Sgt. Brodhagen spoke with JB, he was upset, initially reluctant to speak to us, and indicated he would have preferred not to have to take a statement. He felt sick with an upset stomach when we were interviewing him. He was near tears during part of the interview. JB reported Dallas to be his friend, saying he really likes him and wished it was staff member Todd that did this to him because he did not like Todd. JB stated he felt guilt because he did not tell Dallas that he did not like it when Dallas touched him. JB speaks of times when he would sleep during the day so he could stay awake on the nights that Dallas worked so this wouldn't happen again. He would occasionally sleep with the bed barricading the door so Dallas could not come in the room at night. JB also stated the abuse was one of the reasons that he ran from shelter care. When asked what JB wanted to see happen as a result of the investigation, he said that it might be better if Dallas

was given the first shift to work so the residents would not be in their beds and asleep while he was working. JB did not want to see Dallas fired from his job. Based on this, this worker does not believe the allegation is made from someone who is truly angry because of some sort of punishment Dallas may have given him.

When Sgt. Brodhagen spoke to JB on those occasions, JB's information was consistent. In speaking with DB and Sally Ledvina, Sgt. Brodhagen found the information also to be consistent.

Some of Dallas' information seemed to be different than that of collaterals. Dallas indicated he did not have enough time alone with the residents to ever sexually abuse them. When this worker and Sgt. Brodhagen spoke with Jim Hermans and Debbie Bowman, as well as when Sgt. Brodhagen spoke with Sherry Konitzer and Sandy Dudley, they all indicated there would have been plenty of time and opportunities for such contact to happen. Dallas told this worker and Sgt. Brodhagen that he was concerned that the allegation may stem from the fact he is bi-sexual and therefore, he is being pinpointed by someone because of this. He said he has been very discreet about his lifestyle and did not talk about this at work. However, after this worker and Sgt. Brodhagen spoke with Jim Hermans, Debbie Bowman, JB and Sandy Dudley, we found that he spoke openly about his lifestyle. There was also information in his file indicating that he spoke to a resident about sexual preference/sexual performance of this Male resident. Also, noted by Jim and Debbie was the issue that Dallas also made a comment about admiring a male resident's body. Dallas also reported an incident where he admittedly used poor judgement by using a marker to put a face on a resident's stomach and told the resident to make the face "whistle". JB also alleged incidents where Dallas would give "grundies" by pulling up the back of JB's underwear, then would straighten JB's pants. He also would tuck in the pockets to JB's pants if they were sticking out, and would "accidentally" rub against JB's penis. Certainly these issues raise concerns for Dallas to be working around minor children and many of these situations could have been handled differently (ie, having JB tucking in his own pockets). Given all of the information we have collected from JB and the collaterals, as well as given some questionable statements and behaviors by Dallas, this worker has concluded that the sexual abuse probably did occur.

INVESTIGATION RESULTS:

This worker is filing the investigation results of the sexual abuse as substantiated.

18. On May 22, 1995, Patrick Dwyer, the retired Chief Deputy of the Brown County Sheriff's Department, administered a polygraph examination to Maass at his attorney's request. Dwyer's interpretation of the test results led him to conclude that Maass was telling the truth when he denied touching JB's penis.

19. Also on May 22, 1995, Captain Bruce Hamilton of the Green Bay Police Department administered a polygraph examination to Maass at Sergeant Brodhagen's request, and with Maass's consent. Hamilton's interpretation of the test results led him to conclude that Maass was lying when he denied touching JB's penis.

20. As a condition of its license, the Shelter Care is required to report to the State of Wisconsin Department of Health and Family Services on the qualifications of its staff. Among the items it reports on are whether there is anyone on staff who has a substantiated report of physical or sexual abuse of a child, a criminal conviction for crimes involving a child, or pending charges for such a crime. If the answer to any of these inquiries is "yes," the agency is required to explain to the Department why it should not be held to be out of compliance with its licensing requirements:

> **HSS 59.04 Personnel.**
>
> (1) QUALIFICATIONS OF SHELTER CARE WORKERS, HOLD-OVER ROOM ATTENDANTS AND RELIEF HELP. (a) Personal qualifications. Shelter care workers, relief help, volunteers and hold-over room attendants shall be responsible, mature individuals of reputable character who exercise sound judgment and display the capacity to provide good care for children.
>
> . . .
>
> (6) PERSONNEL FILES. (a) Shelter care workers. A licensee shall maintain a personnel file on each shelter care worker, except relief help employed 10 or less hours per week, that includes the following:
>
> 1. Name and address.
>
> 2. Date of birth.
>
> 3. A statement of the employe's qualifications, including education, training and experience.
>
> 4. A report on references, a signed background verification form and criminal records check report from the crime information bureau that meet the requirements of par. (c).

5. Job description.

6. Duties, terms of employment and immediate supervisor.

7. Health record.

8. Training records.

9. Annual and termination evaluations.

. . .

(c) References and background checks. 1. The report on references under pars. (a) 4 and (b) 7 shall include:

a. Character references from at least 2 persons and references from previous employers.

b. Documentation of references either by letter or verification in the record of verbal contact, giving dates, individual making contact, individuals contacted and the content.

2. The background verification form under pars. (a) 4 and (b) 7 shall be a notarized department background verification form, DCS-64, signed by the shelter care employe, hold-over room attendant or volunteer, stating that the shelter care worker, hold-over room attendant or volunteer does not have a pending criminal charge or conviction relating to the care of children.

3. A state criminal records check on each applicant before allowing that person to work at the shelter care facility. If the person lived in another state, a criminal records check shall be requested from that state.

. . .

21. On June 23, 1995, County Human Resources Director Wayne Pankratz sent Maass a letter of termination:

Dear Mr. Maass:

Effective today, June 23, 1995, your employment as a Shelter Care Worker with Brown County is terminated. This termination is the result of an independent

> investigation regarding your behavior in your position as a Shelter Care employee with a former Shelter Care resident. This independent investigation was conducted by Manitowoc County Human Services Department. The results indicate "substantiated sexual abuse".
>
> You should also be aware that this case has been referred to the Brown County District Attorney's Office.

22. A grievance was filed on June 29, 1995, challenging Maass's termination. As the contract was in a hiatus period at the time, the County declined to submit the matter to arbitration, and the instant complaint was thereafter filed. It was held in abeyance pending the outcome of the criminal charges filed against Maass.

23. In May of 1995, JB was transferred to Eau Claire Academy in western Wisconsin. While he was there, he separately reported sexual abuse by his mother and by his father. These allegations of sexual abuse were determined to have been unfounded. The staff at Eau Claire Academy noted that he seemed to enjoy the undivided attention that reports of sexual abuse brought him.

24. On July 29, 1996, a preliminary hearing was held before Court Commissioner Lawrence Gazeley. The only witness was JB. At the conclusion of the hearing, Maass was bound over for trial on two felony counts. He remained free on bond.

25. In preparation for his testimony at the preliminary hearing, JB was transported from his new home in another state to Brown County and was housed in Secure Detention. While in Secure Detention, he encountered a female juvenile, JM. JM has also been a resident at both the Mental Health Center and Shelter Care from time to time, and knew JB from both places. JM was in Secure Detention for having run away from Shelter Care. JM approached JB in the common room at Secure Detention, just outside the jailers' office. She asked JB what he was doing there, and JB replied that he was there to testify against Dallas Maass for sexually assaulting him. JM asked if he had sexually assaulted him, and JB said that he had not, that he had made the charges to get even with Maass. JM rebuked him for this. The following morning, JB was returned to his new home state. Later that day, JM was placed in lock down for being too loud.

26. On her release from Secure Detention on August 9th, JM returned to Shelter Care. After her return she told other residents that JB had admitted he was lying when he accused Maass. Shelter Worker Jean Elliott overheard JM and told her not to discuss such matters with other residents. Elliott told JM she should speak with Sandra Dudley, another Shelter Worker who had worked with Maass. JM subsequently told Sonia Korth about JB's statements. Korth

told Dudley, and Dudley got JM's permission to tell the investigator working for Maass's attorney. Korth subsequently told Jim Hermans that there was a resident who wished to be interviewed by an investigator, but did not provide any more detail than that. None of the Shelter Care Workers specifically advised management of JM's claims.

27. On August 27, 1996, JM executed an affidavit for an investigator employed by Maass's criminal defense attorney:

> Your affiant, JM, being first duly sworn upon oath states as follows.
>
> My name is JM and my date of birth is ******. I am presently a client at the Brown County Shelter Care. I am in the shelter care for therapy and as a runaway risk. My mother's name is *** ******. I will be going home on a bracelet on September 12, 1996.
>
> In 1994, I was in Brown County Mental Health for Bluemia (sic), Anoerxia (sic), depression, drugs and alcohol. That is where I met JB. I knew who he was, but I tried to stay away from him. JB was always trying to get us in trouble. JB would make things up to make trouble for us. It is my opinion that JB is a habitual liar. There came a time when I was in and out of Shelter care on runaways. During this time, I would see JB there. I remember a time when Dallas Maass took a lot of us kids to Bay Shore Park and we would swim. Once JB asked Dallas to throw him into the water. I remember Dallas saying that he could not touch him due to the Shelter Care policy. JB was mad about that and pouted. Eventually, he got over it.
>
> Toward the end of July of 1996, I was in the juvenile portion of the Brown County Jail because I was a runaway from shelter care. I became aware that JB had come into the jail. I had nothing to do with him. He slept most of the time and would just come out for his food tray. There came a time when we were in Lock Down. After that, I saw JB and asked him what he was doing there. He said he was testifying against Dallas Maass. I asked what he meant by that.
>
> He said that Dallas was getting charged with sexual assault. I asked what Dallas had done. He said, "Nothing, I am just getting even with Shelter Care." He went on about not getting to go home or something like that. I told him that he was a retard and dumb. I was angry with him and walked away. For a few days, I struggled with whether to get involved. I did not feel that I should talk to the jailers and waited till August 9, 1996 when I came to Shelter Care. That is when I first started asking people about what I should do with this information.

28. JM's affidavit was provided to the District Attorney's office. On January 31, 1997, Assistant District Attorney Dana Johnson moved for dismissal of the criminal charges:

. . .

> Mr. Johnson: Your Honor, I don't believe it's necessary for Mr. Maass to be present. I'm going to dismiss the charges at this time. I just want to make a very brief record on why we're moving to dismiss.
>
> You may recall your Honor, you did an in camera inspection to look at several reports from treatment facilities involving this victim. He's been to several different treatment facilities. I have reviewed those reports, and many of those reports incident that the victim in this case does poor on reality testing, has a problem distinguishing from fantasy versus reality and often says things to shock people.
>
> There's also, besides that information from several of the treatment facilities, there's a statement of -- that was provided to me by Attorney Zuidmulder. And the statement is from a juvenile who's in the secure detention facility with the victim when the victim was here to testify at a preliminary hearing in this case. And this girl was going to testify, if this went to trial, that the victim told her that Dallas Maass did not sexually assault him, just getting even with Shelter Care.
>
> Based on all that information I had from the treatment facilities and this new witness who's going to indicate this victim is lying, the State did not believe it would be able to meet its burden of proof.

. . .

On this basis, the court dismissed the criminal charges against Maass.

29. On April 11, 1997, the Union contacted the Examiner, seeking to have the complaint set for hearing. A series of conference calls were held with Bruce Ehlke, counsel for the Union, and Brown County Assistant Corporation Counsel John Jacques. In the course of these discussions, the Examiner and the parties explored the possibility of traveling to another state to take the testimony of JB, but it was ultimately determined that he would be allowed to testify via video-teleconference. The parties also stipulated to the introduction of the results of the polygraph examinations of Maass, with the Examiner reserving the right to

assign appropriate weight to those examinations, including no weight. After these agreements were reached, the County notified the Examiner and the Union that JB would appear in person to testify.

30. Hearings were held on November 12, 13 and 24, and December 2, 1997, and on January 19, 20 and 21, 1998, in Green Bay. On November 24, 1997, JB's Guardian Ad Litem wrote to Jacques, advising him that JB would not be available to testify either in person or by teleconference:

> This letter is to inform you that JB will not be available for testimony in Brown County either in person or via teleconference. He is currently hospitalized in a local adolescent psychiatric treatment unit and it is unknown how soon he will stabilize.
>
> On Sunday, November 23, he did mention to his stepmother that he wanted to get to Wisconsin in order to testify, but was subsequently hospitalized. Based on his current status, it seems highly unlikely that he will be available anytime in the next 3-4 weeks.
>
> MK, JB's case worker in D----- County, is more familiar with the details of JB's status at this time. She will be out of her office this morning, but should be in this afternoon if you should like to contact her. . . .

JB's hospitalization was the result of an overdose of Tylenol. On January 13, 1997, one of JB's psychologists wrote to Harold Rivkin, a private investigator employed by the County, and advised him that JB would not appear to testify during the hearing:

> The following represents a brief note regarding JB's capacity to testify at the trial set for January 19, 1998. Although JB has expressed an interest in testifying and a genuine concern for bringing closure to this matter, I do not feel it would be in his best interests at this time. The issue and anticipation of testifying is quite anxiety-producing for JB and it's (sic) discussion has resulted in considerable regression.
>
> JB's recent adjustment has been marked by periods of improved achievement, relatedness and judgement. However, JB's adjustment has been interrupted by periods of disorganization, affective instability including self-injurious behavior, and running away. These episodes have been temporally coincident with the discussion and/or anticipation of his participation in the court proceedings.

> In light of the evocative nature of this situation, I think it would be wise to postpone JB's involvement until he is able to demonstrate increased affective management and more adaptive coping relative to this issue or simply utilize his past testimony.

Based upon JB's unavailability, the Examiner admitted JB's statements as reported in the report of Schroeder, the testimony of Ledvina and the transcript of the preliminary hearing into evidence for the truth of the matters asserted.

31. Having sexual contact with a resident constitutes just cause for discharge under the labor agreement.

32. The preponderance of the record evidence does not establish that Dallas Maass, Jr. had sexual contact with JB.

33. The finding of substantiated sexual abuse entered by Schroeder in June of 1995 was premised upon incomplete information.

34. A finding of substantiated abuse may be revised by the licensed agency, subject to review by the Department of Health and Family Services in its process of reviewing compliance with licensing requirements.

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

CONCLUSIONS OF LAW

1. That the Respondent, Brown County, is a municipal employer, within the meaning of Sec. 111.70 (1)(j), MERA.

2. That the Complainant, Brown County Shelter Care Employees, Local 1901-F, AFSCME, AFL-CIO, is a labor organization within the meaning of Sec. 111.70(1)(h), MERA.

3. That Dallas Maass, Jr. is a municipal employe within the meaning of Sec. 111.70(1)(i), MERA.

4. That the Respondent, Brown County, discharged Dallas Maass, Jr. without just cause, and thereby violated a collective bargaining agreement in contravention to Sec. 111.70(3)(a)5, MERA.

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

ORDER

1. The Complainant, Brown County Shelter Care Employees, Local 1901-F, AFSCME, AFL-CIO, its officers, agents and employes, the Respondent, Brown County, its officers, agents and employes, and Dallas Maass, Jr. individually and through his agents, will refrain from revealing any information identifying the juveniles involved in this case, and will refrain from disclosing any and all information contained in confidential medical records and juvenile court records, except as may be required in formal pleadings and written arguments related to the appeal or enforcement of this Order before the Commission or the courts, or as may be permitted by an order of a court of competent jurisdiction.

2. The Respondent, Brown County, will take the following affirmative actions which will effectuate the purposes of the Act:

a. Amend the records to reflect that the charges of child abuse against Maass are not substantiated;

b. Inform the appropriate officials of the Department of Health and Family Services of the amendment of the records and provide them with a copy of this decision.

c. Reinstate Maass to his former position, treating the period between his discharge and the date of this Order as an unpaid leave of absence.

d. Remove all references to this discipline from Maass's personnel file.

e. Notify the Wisconsin Employment Relations Commission within twenty days following the date of this Order of the steps taken to comply herewith.

Dated at Racine, Wisconsin, this 29th day of December, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/

Daniel Nielsen, Examiner

BROWN COUNTY (SHELTER CARE)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The underlying facts are set forth in the Findings. To briefly summarize, the County operates Brown County Shelter Care, a residential facility for troubled youths. Dallas Maass, Jr. was employed there as a Shelter Care Worker. Maass started as a relief worker in 1989, and went to part time in 1990. In 1994, he became a permanent full-time employe. As a Shelter Care Worker, he was a member of the bargaining unit represented by Local 1901-F. In late April of 1995, JB, a 14 year old boy who had from time to time been a resident at the Shelter Care facility, was a patient at the Brown County Mental Health Care Center. On April 30th, he told one of the nurses that between February and April, an unnamed male staff member at the Shelter Care had repeatedly come into his room at night and fondled his penis. Ledvina reported this to the police.

The County has a cooperative agreement with Manitowoc County, by which allegations of abusive conduct by one of the County's employes will be investigated by an employe of the other. Manitowoc County Social Worker Linda Schroeder was assigned to investigate the allegation. In conjunction with Green Bay Police Sergeant Kenneth Brodhagen, Schroeder interviewed a series of witnesses, including Maass, JM, Shelter Care Superintendent Jim Hermans, Administrator Debbie Bowman, Ledvina and two Shelter Care Workers. On June 15th, she submitted a report of her investigation, substantiating the charge of abuse against Maass.

Maass, who had been on a paid leave, was discharged after Schroeder's report was received by the County. A grievance was filed on his behalf, challenging the termination. Because the contract was in hiatus, the County declined to submit the matter to arbitration, and the instant complaint was filed. The complaint was held in abeyance, pending the outcome of criminal proceedings related to the case.

In late July of 1996, a preliminary hearing was held on two felony charges against Maas. JB testified that Maass had entered his room on four occasions and fondled him. Maass did not testify. The court commissioner found that there was probable cause to bind Maass over for trial.

In August of 1996, JM, a young woman who had also from time to time been a resident at Shelter Care, executed an affidavit for Maass's attorney. The affidavit stated that JM had

been in Brown County Secure Detention when JB was housed there, having traveled to Green Bay to testify at the preliminary hearing. According to JM, JB admitted that Maass had not molested him, and that JB had made the charges only as a means of getting even with Maass and Shelter Care.

On the strength of JM's affidavit and a review of JB's medical and psychiatric history, the District Attorney's office concluded that it could not bear its burden of proof, and moved for dismissal of the criminal charges. The charges were dismissed on January 31, 1997. The parties were not able to resolve the complaint case, and asked that it be set for hearing.

Prior to the hearings, the County had likely witnesses interviewed by Harold Rivkin, a private investigator. It also had former residents contacted and asked if they had any information on Maass's conduct as a shelter care worker. Since JB had moved to another state, the Examiner and counsel for the County and the Union conferred about options for taking his testimony. After initial discussions about convening in the other state, it was agreed that the hearing would be held in Green Bay, and the testimony would be taken by video-teleconference. After that agreement was reached, the County advised the Examiner that JB would be available to testify in person.

In the course of the hearing, JB did not appear to testify, either by video-teleconference or in person. When he was initially expected to appear, the Examiner was advised that he was confined to a psychiatric hospital for taking an overdose of Tylenol. Later in the hearing, the Examiner was advised that JB's psychologist was of the opinion that an appearance to testify would be against the best interest of the child. Over the objections of Union counsel, the Examiner received the hearsay report of Schroeder's interview with JB and the transcript of his testimony at the preliminary hearing for the truth of the matters asserted. He also heard testimony about past incidents in which the County believed Maass had violated rules against physical contact with residents, and rules insuring resident privacy.

Additional facts, as necessary, are set forth below.

ARGUMENTS OF THE PARTIES

A. The Arguments of the County

The violation alleged is a refusal to maintain the status quo during a contract hiatus, specifically a violation of the just cause provision of the contract. Whether just cause exists is a question of law, and the Examiner must draw appropriate conclusions of law on that question. The County takes the position that Dallas Maass was discharged for just cause, and points to two bases for this conclusion. First, Maass is guilty of sexually abusing JB, and of

violating Shelter Care policies with respect to other children under his care. Obviously these are cause for discharge in any care facility. The second basis for discharging Maass is that, once the independent investigator from Manitowoc County substantiated the allegations against him, the County was legally required to discharge him.

The standard of proof required under Sec. 111.70 is a preponderance of the evidence, and the evidence here clearly predominated in favor of discharge. The contract specifically allows for consideration of the seriousness of the charge in determining the appropriate penalty. The charge here is the most serious that can be leveled against a shelter care worker. In addition to this, Maass was clearly aware of the County's expectations as to his job performance, and was aware of the rules against physical contact with residents. Indeed, he had four prior involvements with the physical contact rules.

The record evidence establishes that Maass, contrary to his denials, did abuse JB. JB described four or more occasions on which Maass came to his room in the middle of the night and fondled him, touching his penis. While the Union proposed numerous explanations for JB to invent this story, those explanations do not hold water. This report was made reluctantly. JB was fond of Maass, and told the persons who interviewed him that he did not want to get Maass in trouble or see him lose his job. Even though he was a reluctant witness, his story was consistent in every interview and in testimony before the court commissioner at Maass's preliminary hearing. The Union suggests that JB wanted to "get even" with Maass for recommending in a court proceeding that he not be returned to shelter care. In fact, the record shows that JB repeatedly expressed the sentiment that he did not want to stay at shelter care, telling one intake worker in April of 1995 that he did not feel "safe" there. The Union also suggests that JB is not reliable because he has mental problems. However, JB was a competent reporter who has no history of making false allegations of sexual abuse and, according to expert testimony, was not likely to make up a claim such as this. The Examiner should conclude that JB made his allegation not because he was vengeful and not because he was confused, but because Maass repeatedly sexually abused him.

While JB did not appear in person to testify, the Examiner should accept his statements to other persons who did testify. The courts have been accepting of hearsay where young sexual abuse victims cannot testify, but nonetheless adequate indicia of trustworthiness exist to support their prior statements. Here JB was not able to testify because his emotional health was being damaged by the mere prospect of humiliating cross-examination. However, there is every reason to accept his prior statements to trained and disinterested health care professionals and investigators. His story was told with great detail and consistency, and was not prompted by the questioners. He had no reason to fabricate the story, and instead was a reluctant witness. At the preliminary hearing, he was placed under oath and subject to cross- examination. In every regard, his prior statements are competent evidence for the truth of the matter asserted -- that Maass abused him.

The likelihood of Maass having assaulted JB is greatly increased by a review of his prior actions. In the course of investigating this case, the County became aware of two youths, SW and AS, who were required by Maass to strip for his viewing. In addition, he drew a smiley face on AS's stomach and told him to make it whistle. He commented on another male child's anatomy, telling co-worker that he was "hung like a horse." In another instance, he asked a male child his sexual preference. The child replied that he wasn't that way, and Maass told him that he kept hoping. Another time he openly admired a male child's genitals in comments to a fellow staff member. These actions, independent of JB's accusations, are grounds for denying reinstatement. In conjunction with those accusations, they demonstrate a pattern of abusing his authority and preying on the children in his care.

Maass, of course, denies committing abuse, but his testimony is self-serving and filled with contradictions and demonstrable untruths. Obviously he has a powerful motive to lie, and he did so repeatedly. Maass suggests that he could not have gone to JB's room in the middle of the night, but that is flatly contradicted by the evidence. He was commonly on night duty. Even though there are two staff members on duty at night, Maass was in the habit of encouraging his partners to sleep on duty, and could easily have gone to JB's room while the other staff member was asleep. Even he ultimately conceded it would be possible to go to a child's room if he was willing to take the risk. On other points, Maass either denied or "could not remember" most of the other improper incidents with male children, but was contradicted by co-workers or the children themselves. The County notes that Maass failed a polygraph test on the central question of whether he had abused JB.

Others also lied on Maass's behalf, but again their testimony is contradicted by others and by business records of the Shelter Care facility and/or the Brown County Secure Detention facility. The most prominent of these is JM, the young girl who came forward with a tale of JB having recanted his story when they were both in Secure Detention in the summer of 1996. However, her story is constantly changing with each retelling, is in some respects impossible, and in every respect implausible. JM testified that she and JB were talking in Secure Detention on July 30th, when JB spontaneously admitted that he had made up the story about Maass to get even with Shelter Care. This is, on its face, unlikely. However, over the course of submitting an affidavit in August of 1996, being twice interviewed by the County's investigator, and testifying twice before this hearing, huge discrepancies appear between her versions on each occasion and between her versions and the external evidence:

> 1) JM claims that she heard JB threaten Maass's job while they were both at Shelter Care, and Maass had called the police on him. However, that threat took place on April 16, 1995, when JM was not in the Shelter Care facility, and she could not have witnessed it. Clearly someone else supplied her with this information.

2) JM contends that she became angry with JB when he told her about the false accusation. In her initial affidavit, she said she walked away from him. In her first interview with Rivkin, she said the jailers called JB into their office. In her second interview, she said she hit JB, and was threatened with a lockdown for being too loud. On her first day of testimony, she said she yelled at him, and she equivocated as to whether she hit him. On her second day of testimony, she said she raised her voice, and hit JB, and that she was later placed on a lockdown. Both jailers on duty testified that they observed no argument or confrontation between JB and JM, and that JM was never placed in lockdown for such a confrontation. Every lockdown is logged, and there is no record of JM being placed in lockdown on July 30th. These details were added to make a false story seem believable.

3) In her affidavit, JM contended that the male jailer, John Mitchell, overheard everything between her and JB. In her first interview with Rivkin, she repeated this, and noted that she did not discuss it with Mitchell. In their second interview, she told Rivkin she did discuss it with Mitchell, and was angry that he would not do anything about it. In her testimony at the hearing, she returns to her former story that she did not tell the jailers anything. Both jailers on duty testified that they observed no argument or confrontation between JB and JM, and that they never discussed any such confrontation with JM.

4) JM's various statements were completely contradictory as to when and to whom she disclosed JB's alleged recantation. In her affidavit, JM said she waited until August 9th when she returned to Shelter Care to ask people what to do with the information. In her first interview with Rivkin, she said she first told the information to Sandi Dudley. In their second interview, she claimed to have taken the information to Sonia Korth on her first day back at Shelter Care, and never to have talked with Jean Elliott about it. In her first day of testimony at the hearing, she says she first told either Sandi or Jean Elliott on August 9th. On her second day, she says she told Sandi, Sonia and Jean, but is sure that she told Sonia first, and did not do so until August 21st. Elliott and Dudley testified that they learned of this information on August 9th, but Dudley did not enter it into the log until August 22nd. Korth testified that she first heard this on August 21st. Barb Dorner testified that JM was soliciting her opinion of Maass's guilt or innocence as late as August 18th, telling her that "me and Ms. Korth don't believe that he could do that." Dorner also testified that JM could not look her in the face later on when she confronted her about her story of JB recanting. The delay in actually logging the story suggests that it was never told on August 9th. Yet there was no reason to keep it a secret if it actually happened as JM claims.

JM also claimed that JB may have lied because he was angry at Maass during an outing to Bayshore Park in the summer of 1994. Shelter Care records prove that no such outing took place when both JB and JM were residents at the Shelter Care facility. As with most of her testimony, this is merely a fabrication. The County points out that JM is a well known liar, who had a strong motive to lie in this case. She was on a last chance at Shelter Care and could have been sent to Eau Claire Academy if she got a bad report from the staff. Two days after she executed her affidavit, she was given a good conduct report by Korth, and 16 days later she was released on her own recognizance. The reason for the lapse of 12 days between her release to Shelter Care and the logging of JB's reported recantation is that it took some time for Korth and others to induce JM to invent such a report. Given the plethora of falsehoods and inconsistencies in her testimony, her claims should be completely ignored.

In connection with JM's false affidavit, Sonia Korth claimed that she informed James Hermans of the recantation in August of 1996. Hermans testified that he spoke with Korth, but that no child's name was mentioned, no staff member's name was mentioned and the JB/Maass case was never mentioned. The Shelter Care never became aware of the dismissal of the criminal charges until February of 1997.

Reviewing the substantive evidence against Maass, the Examiner must conclude that he did sexually abuse JB. JB has no reason to lie about this, and psychiatric testimony demonstrates that his actions are consistent with a child who has been sexually abused, and inconsistent with a child who is lying. JB's allegations are also consistent with prior acts of misconduct by Maass involving other male residents at Shelter Care. The evidence offered to refute JB's allegations is self-serving, contradictory and implausible. Thus the Examiner should enter a finding that Maass was guilty of abusing JB and was discharged for just cause.

No matter what the Examiner concludes as to Maass's conduct towards JB, the termination must be sustained. The charge against Maass was investigated according to the normal and accepted procedures for investigating allegations of abuse against shelter care workers. Based upon that investigation, coordinated by a disinterested professional employed by Manitowoc County, a finding of child abuse was substantiated against him on June 15, 1995. He was terminated eight days later, on June 23rd. That decision was clearly within the County's rights under the contract. State statutes and administrative rules prohibit licensed shelter care facilities from employing persons who have been the subject of substantiated findings of child abuse. Municipalities have an affirmative legal obligation to terminate the employment of persons convicted of an offense related to their employment, and a substantiated finding of abuse is analogous to a conviction. Moreover, municipalities are subject to civil liability if they employ persons who are dangerous or unfit caretakers or otherwise fail to protect a child's 14th amendment right to a safe and secure placement. All of these sound policy and legal considerations compelled the discharge of Mr. Maass.

The Examiner must reject the Union's invitation to revisit, revise, reinterpret or amend the rules of the Department of Health and Family Services. As an administrative agency, the Commission has limited jurisdiction and narrow expertise. The Commission's expertise does not extend to issues of child protection, and its jurisdiction does not trump that of the DHFS. The administrative agency responsible for regulating residential care has reasonably determined that a finding of substantiated abuse automatically disqualifies a person from employment, and that determination is embedded in the laws of the State of Wisconsin. It is beyond dispute that such a finding was made with regard to Maass, and that he was as of that moment not eligible to work for Brown County Shelter Care. The WERC cannot find that Brown County violated 111.70 by complying with the directives of the DHFS, directives which are now codified in Sec. 49.981, Stats.

Notwithstanding any conclusion the Examiner may draw based on testimony and evidence elicited in 1997 and 1998, the fact is that the Brown County Shelter Care facility was legally prohibited from employing Dallas Maass, Jr. once the substantiated finding of abuse was entered against him in August of 1995. Accordingly it had just cause to discharge him and the Examiner must so find.

B. The Arguments of the Union

The Union takes the position that the County violated the collective bargaining agreement by discharging Maass. The dispositive question is whether Maass sexually molested JB, and this question cannot be answered in the affirmative unless there is substantial evidence in the record to support that conclusion. Unsubstantiated hearsay is not substantial evidence. In this case, the only evidence that Maass did anything improper are the unsubstantiated hearsay statements of JB. These statements should not be given any weight in this proceeding. While the County repeatedly tried to portray JB as "unavailable," this is at best misleading. When the County raised concerns about having him travel back to Wisconsin, the Union agreed to have him testify by video-teleconference as an alternative to having the hearing convened in the state in which he currently resides. Instead of either of these alternatives, the County announced that JB would testify in person at the hearing in Brown County. The hearing stretched over seven days, across three months. JB did not appear, and there is no proof that the County diligently sought his appearance. His failure to appear is attributable to his fear of being cross-examined about his accusations. There is absolutely no basis for crediting his prior statements on the basis of his now being "unavailable," when his lack of availability is his own doing. The hearsay should not be admitted, and lacking this hearsay there is absolutely no evidence against Mr. Maass, much less "substantial evidence."

Although the County urges admission of the hearsay, asserting that courts support the use of hearsay for young sexual assault victims, the Union points out that the cited cases are not on point. All of the County's precedent involves very young children, who made statements to trusted adults while still under the stress of the assault. Here, the accuser is a

teenager of normal IQ, who waited six weeks or more after Maass's last night shift. Unlike the children in the cited cases, who had no knowledge of sexual matters and no ability to fabricate, the boy here was a victim of sexual assault before he came to Brown County, has a history of sexual experience and, as more fully developed below, has a history of fabrication. In contrast to the cases relied upon by the County, there are virtually no indicators of reliability that can salvage the hearsay statements of JB.

Even if the Examiner gives some weight to JB's hearsay statements, he should find that they are not substantiated by the remainder of the record. JB's story is that Maass came into his room in the middle of the night and fondled him. There is a theoretical chance that someone could do this, but that person would almost certainly be caught. The central office has a view of both wings, and at night even the sound of a door opening would carry to the female worker. While a co-worker might step outside for a cigarette or even doze momentarily, these interludes would be of unpredictable duration. Given this, the suggestion that Maass repeatedly went to JB's room, molested him, and was never detected is completely implausible.

The Union notes that JB is an unstable young man with a very troubled history. As Nurse Ledvina of the Mental Health Center explained it, JB became very attached to staff members and "was always searching out a new set of parents." There is no question that JB was very attached to Maass. Given this, the fact that Maass opposed JB's desire to return to the Shelter Care facility at a placement hearing in April of 1995 would have and did powerfully upset JB. Two days later, he falsely accused Maass of kicking him and cutting his lip, and told Maass he would "have his job." Less than two weeks later, he leveled these charges against Maass. This sequence is consistent with a false accusation being made against Maass, and is actively inconsistent with the notion that Maass was molesting JB. The Union points out that, if Maass was some type of predator preying on JB, it makes no sense that he would have recommended that he not be returned to Shelter Care. Instead he would have wanted his victim kept available to him.

In addition to the revenge motive, it must be remembered that JB was a seriously disturbed child, whose psychological evaluations at about this time indicated "weak allegiance to reality" and "latent psychotic processes." While he had earlier been the victim of an actual sexual assault at a group home in another state, he also has a history of making false allegations. He claimed that his mother had sexually abused him; that his father had sexually abused him; that Shelter Care workers physically harmed him; that Mental Health Care Center workers robbed him of his jacket and some money; and that children committed various transgressions against him. All of these accusations were found to be false. However, the mere making of these charges brought JB a great deal of attention, something he enjoyed. In light of this child's troubled mental condition and long history of lies aimed at getting others in serious trouble, his statements can hardly be accepted at face value.

Another reason for discounting JB's story is that he himself admitted it was a lie. While in Secure Detention on July 30th, waiting to testify against Maass at his preliminary hearing, JB had a discussion with a girl he knew named JM. JM also knew Maass, and when JB said he was going to testify against Maass for sexually molesting him, she asked if he had really done it. JB admitted that Maass had not molested him, and that he just wanted to get even. JM became very upset, yelled at JB, and hit him in the shoulder. They then parted ways. Once JM returned to the Shelter Care facility on August 9th, she kept quiet about JB's admission, not sure that she wished to become involved. About a week later, she quizzed Barb Dorner about the accusations, asking whether she believed them. Dorner cut off the conversation because she didn't wish to discuss it in front of others. A day of so later, JM told some other residents about the conversation with JB and was overheard by Jean Elliott. Elliott admonished her that she shouldn't be discussing such things with other residents. On August 21st, JM finally approached Sonia Korth and told her of JB's admissions. Korth had her repeat the story to co-worker Daniel Fournier. Korth told JM to take this information to her attorney, and noted it in the log. Korth subsequently advised Superintendent James Hermans of JB's revelation. Later that night, JM repeated the story to Sandra Dudley, who also logged the conversation. While the County devoted a great deal of space in its brief to trying to show inconsistencies in her statements, given over five different occasions, on close examination these discrepancies are minor and have no effect on JM's central point -- that JB confessed he had falsely accused Maass. On that she has been completely consistent.

The Union notes that the County has pursued the allegations against Maass vigorously, interviewing three dozen people and calling 24 witnesses. None of these witnesses had any first hand knowledge of the alleged abuse in JB's room. More significantly, however, none of them was even asked about the other charges JB made. In his interview with Sergeant Brodhagen of the Green Bay Police, JB claimed that Maass continuously yanked his underwear up from behind ("grundies") and then adjusted his pants for him sometimes contacting his penis, and also playing keep away in the shower room, taking his soap and shampoo. This conduct, if it occurred, took place in the public areas of the Shelter Care facility and must have been witnessed by someone. Yet there is absolutely no evidence whatsoever that anyone saw any of this. If these patently implausible charges were made in the very same report that led to Maass's termination, but cannot be proved, why should the balance of the charges be given any credit?

Turning to the County's claims that "after-acquired" evidence of misconduct should be considered, the Union dismisses these as unreliable and irrelevant. The vast majority of the incidents mentioned by the County were known to management at the time they happened, and cannot be litigated now. As for the claim of AS that he was unhappy about having a smiley face drawn on his stomach, this four year after-the-fact allegation is belied by the Shelter's own records. In addition to Maass's recollection that AS was all smiles on his birthday and got a kick out of the smiley face, another worker at the time noted in the log that AS enjoyed all of the attention he got on his birthday. AS claimed there was a strip search and a threat to

do it again, charges that Maass denies. This threat, which was supposedly uttered in the presence of all of the other residents, was not verified by any other witness. Given that a strip search is against the Shelter's rules, it is highly unlikely that Maass would have uttered it in front of so many witnesses, and very odd that, if it was uttered, no one but AS remembers it. Given that the threat was never made, it is not likely that the strip search occurred either. The other piece of "after-acquired" evidence is the claim by SW that Maass saw him in the shower when he first came to the Shelter Care. Maass has no recollection of this. If true, this may be attributable to the fact that there was no privacy screen in the boys' shower room at that time. In any event, given the exhaustive investigation conducted by the County of Maass's entire career, and their rather loose definition of what constitutes misconduct, it is striking that they were able to come up with so little in the way of other rule violations.

The allegations against Maass are simply not credible. JB himself is not a credible witness, given the implausibility of his story, his history of mental illness and dishonesty, and his strong motive for revenge against Maass. His credibility is completely eliminated by his failure to appear for this hearing. Absent any credible evidence that the alleged incidents even occurred, there cannot be just cause for discipline, and the grievant should be reinstated and made whole.

The Union dismisses the County's incredible theory that it was entitled to fire Maass even if he was innocent, merely because Schroeder reported that JB "probably" had experienced some sort of molestation. This argument ignores the purpose of the investigation and the effect of a finding of substantiation. The statutes define the purpose of the investigation as being "to determine if the child is in need of protection or services . . .," not to determine innocence or guilt of the employe. The County's own Child Protection Intake Unit Director issued a memo stressing that "substantiated" is a narrow social work term directed at the family's need for protective services, without any equivalent legal meaning. The thrust of Schroeder's investigation, then, was not to draw a conclusion as to whether Maass had done anything, merely whether something had happened to JB that triggered a need for services.

The fact that the finding is not intended as some conclusive legal determination is shown by the fact that this was a very brief inquiry, with no right to cross-examine, no taking of sworn testimony, and no right to representation. This report cannot be said to have standing equal to the judgment of an Examiner who has heard seven days of sworn testimony and examined hundreds of pages of exhibits. Even the DHFS acknowledged that given the choice between the two decisions, it would abide by the outcome of this administrative hearing.

The Union also notes that the County has attempted to portray Schroeder's finding as the decision of some outside body. In fact, it has standing only as a determination of what County management thinks may have happened. The County is responsible for investigating

allegations of abuse, and the fact that they engage another county's employe to do the work does not change the fact that this is their agent. For disciplinary purposes, this finding cannot be treated any differently than any other preliminary management judgment of guilt.

In summary, there is no proof to support the charge that Dallas Maass is guilty of misconduct, nor is there any reason to deny him reinstatement. The Examiner must enter findings and conclusions to that effect, and order that he be reinstated and made whole.

DISCUSSION

I. Burden of Proof

Section 111.07(3), WEPA, defines, inter alia, the standards for proof and the burden of proof in a complaint proceeding:

> (3) A full and complete record shall be kept of all proceedings had before the commission, and all testimony and proceedings shall be taken down by the reporter appointed by the commission. Any such proceedings shall be governed by the rules of evidence prevailing in courts of equity and the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence.

The case here is a challenge to a discharge during a contract hiatus, and the status quo ante established by the labor agreement is that discharge must be supported by just cause. As the Employer and the moving party in the decision to discharge Maass, the County bears the burden of proving just cause. There are two grounds cited for the discharge. The first is that the County believes Maass is guilty of sexually abusing JB. The second is that the County believes it was required to terminate his employment once Schroeder made a finding that the allegations were substantiated, pursuant to HSS 59 of the Administrative Code.

As to the first allegation, notwithstanding Sec. 111.07(3), the applicable standard of proof is clear and convincing evidence. As the burden on the County is to show that it met the standards established by the status quo, and as the status quo is just cause, the principles encompassed by a just cause standard must be applied to this case. A just cause standard is commonly understood to require different degrees of proof, depending upon the nature of the offense. The charge against Maass is one involving moral turpitude and criminal conduct, and if it were submitted to grievance arbitration, as would normally have been the case but for the contract hiatus, the term "just cause" would have been held to require this more stringent level

of evidence. 1/ Thus in order to show that it conformed to the status quo ante in deciding to discharge Maass, the County must support the charge of sexual abuse by clear and convincing evidence.

1/ See BORNSTEIN, ET AL., LABOR AND EMPLOYMENT ARBITRATION, (2D EDITION, MATTHEW BENDER), VOLUME 1 (RELEASE NO. 18, APRIL 1998), AT §506, FOOTNOTE 1:

"... it is almost certainly the "clear and convincing evidence" standard that will be applied (either expressly or by implication) by arbitrators in cases involving accusations of criminal conduct or moral turpitude..."

This same principle leads to the conclusion that the second ground for discharge need be supported only by a preponderance of the evidence. Having said that, the burden of proof is somewhat irrelevant to this aspect of the case. The County's essential argument is that, whether Maass is guilty or not, the mere fact that Schroeder substantiated the finding compelled his discharge under Department of Health and Family Services rules. This is either a correct reading of the rules, or an incorrect reading of the rules, and an argument about the standard of proof required to support either conclusion is an empty exercise.

II. Hearsay

Section 111.07(3) further provides that complaint proceedings ". . . shall be governed by the rules of evidence prevailing in courts of equity." The alleged victim, JB, did not appear at the hearing despite numerous opportunities for him to be present and his initial assurances that he would testify. As the alleged contacts with Maass were not witnessed by any other person, the only evidence going directly to the occurrence or non-occurrence of these contacts are Maass's denials and JB's prior statements to Nurse Ledvina, Manitowoc County Social Worker Linda Schroeder, Green Bay Police Sergeant Brodhagen, and his testimony at Maass's preliminary hearing. All of these are statements by a person absent from the hearing offered in evidence to prove the truth of the matter asserted. On their face, they are hearsay (Sec. 908.01(3), Stats.), and the Union urges that they not be considered. The County, for its part, asserts that JB's various statements fall under one or more of the exceptions to hearsay, as an excited utterance, former testimony of an unavailable witness, or under the residual exception for other statements having circumstantial guarantees of trustworthiness.

An excited utterance is "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." (Sec. 903.03(2)). The standards for an excited utterance in child sexual assault cases are much looser than in other cases, in particular the usual rule that the utterance must be made shortly

after the event. Even granting this looser standard, the passage of at least six weeks between the last possible date for a sexual contact with Maass and the making of the statement to Ledvina would seem to remove the statement from the definition of an excited utterance. Unless the rule is that the "stress of excitement" is a permanent condition for any minor relating a sexual assault, it is not possible to fit the statement to Ledvina into this exception.

The primary argument for the admission of the statements is that JB was unavailable. If so, his testimony at the preliminary hearing is "former testimony" and his unsworn statements fall under the residual exception to the hearsay rule:

> **908.045 Hearsay exceptions; declarant unavailable.**
>
> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) FORMER TESTIMONY. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered.
>
> . . .
>
> (6) OTHER EXCEPTIONS. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

The Union argues that JB was not unavailable. Since he could have testified through video-teleconference, there is little proof of a diligent effort by the County to secure his presence, and his failure to appear is self-imposed as a device to avoid cross-examination. Section 908.04 defines the circumstances in which a witness may be considered unavailable:

> **908.04 Hearsay exceptions; declarant unavailable; definition of unavailability.**
>
> (1) "Unavailability as a witness" includes situations in which the declarant:
>
> (a) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

> (b) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the judge to do so; or
>
> (c) Testifies to a lack of memory of the subject matter of the declarant's statement; or
>
> (d) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (e) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

JB's absence from the initial days of hearing was caused by his hospitalization, as reflected in a letter from his guardian ad litem:

> This letter is to inform you that JB will not be available for testimony in Brown County either in person or via teleconference. He is currently hospitalized in a local adolescent psychiatric treatment unit and it is unknown how soon he will stabilize.
>
> On Sunday, November 23, he did mention to his stepmother that he wanted to get to Wisconsin in order to testify, but was subsequently hospitalized. Based on his current status, its seems highly unlikely that he will be available anytime in the next 3-4 weeks.
>
> MK, JB's case worker in D----- County, is more familiar with the details of JB's status at this time. She will be out of her office this morning, but should be in this afternoon if you should like to contact her. . . .

This hospitalization was apparently occasioned by JB's taking an overdose of Tylenol. His testimony was deferred until later in the hearing process. However, in late January as the hearings were being concluded, a letter from JB's psychologist was submitted indicating that he would not be available:

> The following represents a brief note regarding JB's capacity to testify at the trial set for January 19, 1998. Although JB has expressed an interest in testifying and a genuine concern for bringing closure to this matter, I do not feel

> it would be in his best interests at this time. The issue and anticipation of testifying is quite anxiety-producing for JB and it's (sic) discussion has resulted in considerable regression.
>
> JB's recent adjustment has been marked by periods of improved achievement, relatedness and judgement. However, JB's adjustment has been interrupted by periods of disorganization, affective instability including self-injurious behavior, and running away. These episodes have been temporally coincident with the discussion and/or anticipation of his participation in the court proceedings.
>
> In light of the evocative nature of this situation, I think it would be wise to postpone JB's involvement until he is able to demonstrate increased affective management and more adaptive coping relative to this issue or simply utilize his past testimony.

I conclude that JB's absence from the hearing was based upon "then existing . . . mental illness or infirmity," and thus he may be considered an unavailable declarant under the statute. Compelling his testimony against the advice of his psychologist, even if practical, would not serve his interests nor, on balance, the interests of justice. To be sure, the inability to confront and challenge his lone accuser is prejudicial to Mr. Maass, and the Examiner is mindful of the basic unfairness of the situation. However a contrary ruling would effectively immunize many acts against the interests of mentally ill children who cannot testify, and would run counter to the policies enunciated by the Wisconsin courts in cases of this sort. STATE V. SORENSON, 143 WIS.2D 226, 421 N.W.2D 77 (1988).

Given that JB was unavailable as a witness, his testimony at the preliminary hearing is admissible under §908.045(1). JB testified under oath about the same charges that underlie this proceeding. Mr. Maass was represented by counsel, who had an opportunity for cross-examination. Granting that the strategy of defense counsel in cross examining an accuser at a preliminary hearing may be substantially different than the strategy followed in full-blown litigation of the merits, "the confrontation clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective to whatever extent the defense may wish." STATE V. LOMPREY, 173 WIS.2D 209; 496 N.W.2D 172 (CTAPP 1992).

As for JB's statements to Ledvina, Schroeder and Sgt. Brodhagen, these were not sworn and if they are to be considered it must be because they fall under the residual exception for hearsay which is "not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness." The factors to be considered in deciding whether a child's statements qualify under the residual exception were discussed by the Supreme Court in STATE V. SORENSON, SUPRA:

The WISCONSIN JUDICIAL COUNCIL COMMITTEE NOTE, 59 WIS.2D R301 (1974), specifically mentions hearsay in child sexual assault cases as an example of the potential use of the residual exception. We conclude there is a compelling need for admission of hearsay arising from young sexual assault victims' inability or refusal to verbally express themselves in court when the child and the perpetrator are sole witnesses to the crime. In the absence of a specific hearsay exception governing young children's statements in sexual assault cases, use of the residual exception is an appropriate method to admit these statements if they are otherwise proven sufficiently trustworthy.

To apply the residual exception requires establishment of "circumstantial guarantees of trustworthiness" comparable to those existing for enumerated exceptions. Sec. 908.045(6), Stats. The guarantees of trustworthiness which are found in the enumerated hearsay exceptions have been consolidated by WIGMORE in his treatise on evidence as resting upon one or more of the following underlying premises:

"a. Where the circumstances are such that sincere and accurate statement would naturally be uttered, and no plan of falsification be formed;

b. Where, even though a desire to falsify might present itself, other considerations such as the danger of easy detection or the fear of punishment would probably counteract its force;

c. Where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected." 5 J. WIGMORE, EVIDENCE, SEC. 1423 AT 254 (CHADBOURN REV. 1974).

In Wisconsin, comparable circumstances meeting these underlying requirements have been elaborated upon in several cases concerning sexual abuse of children. Most notably, STATE V. BERTRANG, 50 WIS.2D 702, 708, 184 N.W.2D 867, 870 (1971), discussed factors pertinent to establishing the type of guarantees contemplated by WIGMORE:

"Each case must be viewed on its particular facts and in exercising its discretion of whether to admit testimony about statements made by a [young child], the trial court should consider the age of the child, the nature of the assault, physical evidence of such assault, relationship of the child to the defendant, contemporaneity and spontaneity of the assertions in relation to the alleged assault, reliability of the assertions themselves, and the reliability of the testifying witness."

Subsequent to the adoption of the Wisconsin Rules of Evidence, this court has expansively applied the excited utterance exception, sec. 908.03(2), Stats, in child sexual assault cases. Though not made in immediate temporal relation to incidents which are the focal point of their statements, this court has held statements made by young children concerning sexual assault to be sufficiently contemporaneous and spontaneous to be admissible. See, e.g., STATE V. PADILLA, 110 WIS.2D 414, 420, 329 N.W.2D 263, 266 (CT. APP. 1982); STATE V. GILBERT, 109 WIS.2D 501, 515 N. 21, 326 N.W.2D 744, 751 N. 21 (1982). Use of the residual exception in child sexual assault cases is even less reliant upon immediacy of statements because other indicia of reliability support its trustworthiness. See JUDICIAL COUNCIL COMMITTEE NOTE, 59 WIS.2D 301 (1974). Following the principles set forth in BERTRANG and WIGMORE, we conclude that a court in making an assessment of the admissibility of a child's statements under the residual exception, should weigh the following factors, which need not be exclusive areas of inquiry:

First, the attributes of the child making the statement should be examined, including age, ability to communicate verbally, to comprehend the statements or questions of others, to know the difference between truth and falsehood, and any fear of punishment, retribution or other personal interest, such as close familial relationship with the defendant, expressed by the child which might affect the child's method of articulation or motivation to tell the truth.

Second, the court should examine the person to whom the statement was made, focusing on the person's relationship to the child, whether that relationship might have an impact upon the statement's trustworthiness, and any motivation of the recipient of the statement to fabricate or distort its contents.

Third, the court should review the circumstances under which the statement was made, including relation to the time of the alleged assault, the availability of a person in whom the child might confide, and other contextual factors which might enhance or detract from the statement's trustworthiness.

Fourth, the content of the statement itself should be examined, particularly noting any sign of deceit or falsity and whether the statement reveals a knowledge of matters not ordinarily attributable to a child of similar age.

Finally, other corroborating evidence, such as physical evidence of assault, statements made to others, and opportunity or motive of the defendant, should be examined for consistency with the assertions made in the statement.

> The weight accorded to each factor may vary given the circumstances unique to each case. It is intended, however, that no single factor be dispositive of a statement's trustworthiness. Instead, the court must evaluate the force and totality of all these factors to determine if the statement possesses the requisite "circumstantial guarantees of trustworthiness" required by sec. 908.045(6), Stats.

Taking these five factors in order, it appears that JB is of an age and mental capacity to know the difference between truth and falsehood, to understand the questions he is asked and to respond to those questions. He was 14 years old at the time and, notwithstanding his emotional immaturity and mental problems, his IQ is within the normal range. As to the second factor, the reliability of the persons to whom the statements were made, there is absolutely no basis for questioning the accuracy of their reports. They had no stake in distorting JB's comments and are all, to varying extents, professionally trained to accurately record information relayed to them.

Reviewing the third criterion, the circumstances under which the statements were made do not add to their credibility, in the sense that at least six weeks had gone by since the last likely date of any nighttime contact between JB and Maass before he confided in Ledvina. Ledvina is not particularly close to JB, and there is nothing in the record to indicate that JB did not have ample opportunity in the meantime to confide in another person.

Reviewing the statement itself, JB's assertions were accompanied by signs of an upset stomach, which expert testimony indicates is a physical symptom that might be experienced by a child reporting a sexual assault. There is no particular significance to JB's ability to describe the sexual contact he alleged, as he has previously been the victim of sexual abuse and would have knowledge of such matters whether or not the touching by Maass took place. The statements included details of other behavior beyond the late night touching of JB's penis which is not buttressed elsewhere in the record. According to Schroeder's report:

> JB also told us that Dallas would give him "grundies", where Dallas would pull his underwear way up from the back. Afterwards, Dallas would sometimes help him straighten his pants, then around other staff members would say "let me know if I make you feel uncomfortable. You don't want to be touched." JB stated that there was another time when Dallas straightened his pants because the pockets were out and the pants were twisted. JB said that Dallas touched his penis, but he thought it could have been accidental. JB stated that one day after one of the incidents, Dallas stated to him "them are nice boxers you got". JB spoke of another time when JB was taking a shower and Dallas came in and was

> asking if he had shampoo and soap; JB had them and showed him, but Dallas grabbed it. JB had to grab it back. JB stated he felt uncomfortable because he felt that Dallas was looking at his body in an inappropriate way and was taking the opportunity of JB being in the shower to do so.
>
> To protect himself, JB stated that he used to barricade his door to his room at shelter care so that Dallas could not get in the room. He also stated he used to sleep from 3:00 - 6:00 p.m. so he could stay awake when Dallas would come to work. He stated he used to run away from shelter care so he wouldn't have to sleep there. . . .

There is no evidence that any other staff member or resident ever witnessed Maass administer these "grundies," or ever heard him make the "you don't want to be touched" comment. Nor was there any testimony that JB was known to habitually sleep during the afternoon. The barricading of himself in his room was a well known behavior, but the record evidence is that JB did this because the other boys would beat him up. His running away from Shelter Care was a pre-existing behavior, not something new that came up in the aftermath of the alleged attacks. (Respondent's Exhibit 39). Thus these elements of JB's story do not jibe with the rest of the evidentiary record.

Finally, there is no physical evidence one way or the other that would tend to corroborate or disprove JB's assertion. Maass had access to him during evening hours, albeit at some risk of discovery. JB's statements to Ledvina, Schroeder and Brodhagen were generally consistent, although obviously they were sharply at odds with JM's testimony that JB recanted to her.

The issue is whether the hearsay statements of JB are admissible, not whether they are conclusive or even whether they hold up when compared with the remainder of the record. On balance, while it is a close call, I conclude that they are admissible under the SORENSON standards, and that their underlying hearsay nature goes to the weight that they may be accorded relative to the other record evidence.

III. The Merits of the Sexual Abuse Charge

The principle basis for Maass's discharge is the allegation that he sexually molested JB by entering his room during the night shift and touching his penis on at least three occasions. According to JB, these incidents were isolated from other events, in that there was no form of outside acknowledgment of this contact. There is nothing about the accusation of touching itself that is inherently probable or improbable. JB was in the facility at roughly the times he alleged that the touching took place, and Maass was working on those evening shifts. While

Maass contended that it would have been risky and difficult to go to a child's room without being detected by the other worker, the record strongly suggests that sleeping on duty is not unheard of, and even Maass agreed that it would be possible to enter a room if one were willing to risk it. Thus there is nothing to absolutely rule out or rule in JB's allegations, and the decision is at base a choice between JB's accusation and Maass's denial, a pure question of credibility.

The County's case depends in some part on asserting JB's credibility and in greater part on attacking the credibility of Maass and JM, the girl who claimed that JB admitted lying. The Union's case is a reverse image of the County's, focusing on JB's lack of credibility.

A. Maass's Credibility

With respect to Maass's credibility, the County argues that he has a strong incentive to lie, as his career is on the line. Certainly this is true, and motive to lie is a legitimate consideration in any credibility determination. It also bears remembering that a denial from an innocent man will read much the same as a denial from a guilty one. While the Examiner is bound to view the evidence with a mind to Maass's stake in the outcome, he is also obliged to remember that there is a presumption of innocence.

The County alleges that there is evidence of past misconduct towards other residents that is consistent with the charge that he is prone to violating the Shelter Care's rules prohibiting physical contact and the procedures for insuring privacy in the shower room during intake, and also to invading the personal privacy of residents. Six instances are cited:

> 1. An incident in 1991 or 1992, during the intake of SW, when Maass had the boy completely undress prior to taking a shower, rather than having him keep his underwear on until Maass had left the room;
>
> 2. An incident in 1992, when he rubbed resident NR's back in an overly familiar manner which concerned the boy and led to an investigation;
>
> 3. An incident with AS in 1993, when he told the boy during intake that he had to bend over and grab his ankles in the shower room. AS also claimed that Maass threatened to strip search him later in his stay, when he was found to have cigarettes in his room.
>
> 4. An incident in 1993 when Maass allowed other residents to spank a boy, AS, on his 16th birthday, then drew a smiley face on the boy's stomach with a magic marker and told him to "make it whistle."

5. An incident in 1993, in which Maass had a flirtatious exchange with a male resident. Maass commented on the boy's necklace and when the boy told him he was not "that way", Maass replied "I keep hoping" and then asked about the boy's sexual preference and performance.

6. An incident in October of 1994 when another staff member said she didn't understand why a particular boy was so popular with the girls, and Maass replied that he'd seen the child in the shower room and he was "hung like a horse."

Maass said he had no recollection whatsoever of the first incident, and the Examiner attaches no significance to that incident. The full extent of the alleged misconduct is having a child remove all of his clothes before the intake shower, rather than just stripping to his underwear and then having him go behind a privacy screen. The record shows that privacy screens are not always available in the boys shower room, and SW testified that there was no screen in the shower room at that time. There was also testimony to the effect that some boys strip down quickly. Whatever the case may be, it is not reasonable to expect Maass to be able to recall and explain a relatively innocuous incident that took place six or seven years before he was asked about it.

The incident involving Maass rubbing down NR's back was thoroughly investigated when it took place. NR told Bowman that Maass rubbed his back to calm him when he was upset, that he was not comfortable with it and told Maass to stop, and Maass did so. NR concluded the discussion by saying he had no problems with Maass and understood what he was trying to do. Bowman thereafter discussed the incident with Maass and was satisfied with his account of the situation. (Respondent's Exhibit 21).

Maass testified that he had no recollection of having AS bend over and grab his ankles during the intake procedure in 1993, or threatening to strip search him later in his stay, but says he would not have done those things. I do not find any reason for AS to have fabricated this claim, and I conclude that it did happen.

As for the claim that Maass allowed the other boys to spank AS for his 16th birthday, and then drew a smiley face on his stomach and told him to make it whistle, the child may have disliked this but it says nothing about whether Maass is a child molester. AS and Maass both testified that Maass drew the face on his stomach to cheer him up because he was depressed. This was all done in front of other residents and staff. It was well known at the time it took place, and Bowman looked into it at the same time she reviewed the allegations concerning NR.

The flirtatious exchange with a male resident is clearly inappropriate, and a matter of great concern. I do not believe Maass's testimony that he did not have a specific recollection of this incident, as it is not the type of thing someone could forget. However, this too was thoroughly investigated when it happened, and a meeting was held with Maass, a Union representative and representatives of the County Human Resources office. (Respondent's Exhibit 21). The record does not show the outcome of the County's investigation, nor does it reflect any disciplinary action flowing from this incident. The silence in the record about the County's conclusions at the time of the incident is very striking. It is inconceivable that, if the management of the Shelter Care and the Human Services Department actually concluded that one of their staff members was propositioning a resident, they would have done nothing about it.

Finally, with respect to Maass's comment that a child was "hung like a horse," obviously the observation is crude and inappropriate, but it does little to shed light on whether he is guilty of the charges leveled by JB. The comment was directed in private to another staff member, and was made in response to a comment by that staff member. Maass's additional statement that he knew this because he had seen the child in the shower room is ambiguous, in that staff members are supposed to see the children in their underwear during intake. Depending upon the style of underwear and the proportions of the child's sexual organ, the observation made by Maass does not show that he violated Shelter Care procedures.

The Examiner cannot agree with the County that Maass's conduct shows the type of utter disregard for appropriate behavior that would permit an inference that he has no boundaries when it comes to the children in his care. Of the six allegations, three have previously been investigated by the County itself and apparently disregarded. Of the remaining three, one is relatively innocuous and so stale that Maass cannot possibly defend himself against it. Another concerns a comment to a fellow staff member about a resident, but shows nothing about Maass's conduct towards residents. The remaining incident, in which he told AS to grab his ankles before showering, is a clear violation of rules concerning privacy during intake. However, this took place five years before the hearing in this matter and, while it is not so innocuous as the other shower room incident, Maass's inability to explain it is less damning than it might be, given the passage of time. While troubling, this incident does not suffice to show a pattern of conduct towards residents that would paint Maass as a predator. 2/

2/ Both parties submitted the results of polygraph examinations. This evidence was received pursuant to an agreement between the parties which was memorialized in an August 22, 1997 letter from the Examiner:

> ***2. The County and the Union have agreed that each will be permitted to present testimony and exhibits concerning polygraph evidence. The Examiner reserves the right to weigh the probative value of this expert opinion evidence, including the option of giving it no weight.***

In arriving at the decision herein, the Examiner has assigned no weight to the polygraph results. Putting aside general questions about the reliability of such tests, the reports in this case conflict as to the central issue of guilt or innocence, and the circumstances surrounding the administration of these tests by both polygraph examiners raise very substantial doubts in the Examiner's mind as to the validity of the results.

Maass has an obvious motive to lie, but that does not mean that he is lying. He was evasive on some points, and lied about at least one. The Examiner is mindful, however, of the fact that the County's investigation of his conduct stretched back over his entire career and he was called upon to answer for actions from years before these allegations were first made. Taken as a whole, Maass was not a completely persuasive witness, but he cannot be held to prove the negative in this case. He was not incredible, and his denials are entitled to weight in this proceeding.

B. JB's Credibility

Assessing JB's credibility is necessarily accomplished at a remove. He did not appear at the hearing, and his testimony consists of hearsay -- his unsworn statements to Ledvina, Schroeder, and Brodhagen, and his testimony at the preliminary hearing. JB was at the time of these statements a 14 year old boy of normal intelligence, but with severe emotional and mental problems. Cutting in favor of his credibility is the fact that he was initially reluctant to name Maass, citing his fondness for him as his favorite shelter care worker. He was also reasonably consistent in his description of the events, although as he described the sexual contacts themselves, there was not a great deal of detail which could vary from one telling to another.

As discussed in Section I, above, beyond the allegations of sexual contacts themselves, there are aspects of JB's statements that do not hold up well under scrutiny. He claimed that he barricaded his door to keep Maass out, but the barricading was something he did before the alleged sexual contacts, and was a protection against attacks by the other boys. Likewise he blamed his running away from Shelter Care on fear of Maass, but he had been in Shelter Care nine times and had run away five times, including four times before the probable dates of these alleged assaults. These elements of his statements are true, in that they occurred, but they are false in the sense that they did not occur for the reasons he claimed. It is also striking that the other claims he made to Schroeder and Brodhagen, about being given "grundies" with Maass then adjusting his pants and touching him as he did so, were apparently not witnessed by any other person even though they would have taken place in the common areas of the Shelter. Nor were the comments Maass supposedly made to other staff members about JB not liking to

be touched recalled by any other Shelter Care worker or administrator. Given the painstakingly thorough investigation the County undertook in preparing this case, if Maass did or said these things, one would normally expect that there would have been some evidence of it. The fact that there is none draws these allegations into question and casts doubt on the remainder of JB's statement.

Normally, where a child alleges a sexual assault, there is a great reluctance to believe that he or she would be capable of making up such a charge. In the case of JB, there is considerable reason to believe he might be capable of such a thing. He has previously been the victim of a sexual assault, and thus the concept would not be foreign to him. He has made allegations of sexual misconduct against both his father and mother, charges that were determined to have been unfounded. He has a history of making false charges against his care givers, including claims that staff at the Mental Health Center stole his jacket, that Shelter Care worker Dave Felzer injured him, and that Maass kicked him in the face. 3/ On this last occasion, which occurred two weeks before these charges were made, JB threatened to "have" Maass's job. 4/

3/ The County argues that this claim against Maass was made by another resident. In fact it appears that JB made the allegation, and that it was subsequently repeated by another resident. (Respondent's Exhibits 23 and 41).

4/ The County questioned Maass's log entry documenting this threat, suggesting that it was possible that it was generated after the fact. However, the log itself indicates that this was a contemporaneous entry. Specifically, the entry by another staff member immediately following Maass's is responsive to Maass's entry, demonstrating that the entry was actually made on April 16th. (Respondent's Exhibit 23).

The Union points to Maass's attendance at a custody review hearing involving JB on April 14th, during which he discouraged the court commissioner from sending JB back to Shelter Care after he had been placed in Secure Detention. Maass claims that JB was upset with him for this recommendation, and the Union speculates that this might be the reason for making a false charge against Maass. From the transcript of the session (Respondent's Exhibit 39) it does appear -- contrary to the County's argument in this case -- that JB wanted to return to the Shelter Care and that Maass did discourage the court from placing him there because of his inability to follow the rules and get along with the other children. 5/ Whether this would provide sufficient motive for inventing a story of sexual abuse is an open question, but it is clear that two days later JB falsely accused Maass of physically assaulting him and

vowed to have his job. For whatever reason, JB displayed a willingness to make a serious and false accusation against Maass, and connected the making of the false accusation with a desire to see Maass fired.

5/ The County makes much of JB's intermittent reluctance to return to Shelter Care, and of a log entry at his intake in early April, noting his statement that he did not feel safe at Shelter Care. The worker on duty put the notation "Why?" after this in the log. One likely explanation is that JB was frequently the object of physical assaults from other children, whom he was in the habit of provoking. David Felzer testified, for example, that on March 13, 1995, JB asked to be moved to Secure Detention because the other boys had threatened to kill him.

The fact that a person suffers from mental illness and emotional disturbance, even serious mental illness, does not render that person inherently incredible as a witness. A person such as JB, who shows suicidal, homicidal and perhaps psychotic behaviors, may be rendered somewhat less reliable a witness by his illness, but those conditions also increase his vulnerability to the type of exploitation alleged here, and he is entitled to be taken seriously when he reports abuse. Clearly everyone involved in this proceeding has taken his allegations seriously. However, sensitivity to an allegation is a different thing than accepting the allegation at face value. Here the accuser did not appear to testify in person, and has never been subject to more than pro forma cross-examination. He has a history of making false allegations, including false allegations of sexual misconduct and false allegations directed at Maass. He expressed an interest in having Maass fired shortly before he made these charges. Some elements of his statement to Schroeder and Brodhagen are inconsistent with other facts in the record, and some are not supported by evidence from other witnesses, even though one would expect them to have been witnessed by other residents and staff members. On balance, the hearsay allegations made by JB cannot be given a great deal of weight in this proceeding. Separate and apart from the alleged recantation to JM, there are simply too many problems with the witness's personal history, his history with Maass and the other elements of his story to conclude that his second-hand statements alone could support a finding of guilt under any standard that incorporates a presumption of innocence.

C. JM's Credibility

JM testified that JB told her that Maass was not guilty and that he had made the allegations to get even with Maass and/or the Shelter Care facility. Clearly if JM is credible, there is no case against Maass on the merits. The County points to what it believes are numerous defects in JM's story, and suggests that she was put up to her story by other Shelter Care workers who sought to protect Maass. They also note various log entries and the testimony of shelter care workers to the effect that JM commonly lies.

Reviewing the defects identified by the County, some may reflect an understandable confusion by an unsophisticated young lady trying to recall events eighteen months after the fact, and others do not suggest fabrication. In this latter category, JM claimed to have been on an outing to Bay Shore Park with Maass and JB once when JB became angry with Maass for refusing to toss him into the water. The County's review of the records indicates that JB and JM never went together on such an outing. Maass testified that he could not remember any such incident. If such a trip took place, it likely would have been in connection with the Seasons Program, and should have been noted in that Program's records and in the general log. There is no notation of it in the general log, and the Seasons Program records and outing book for Shelter Care were not available. Having said this, it is difficult in the extreme to understand what bearing this discrepancy has on the remainder of her testimony. This detail is included in her original affidavit from August of 1996. The affidavit also says of this incident: "JB was mad about that and pouted. Eventually, he got over it." If this detail is supposed to offer a motive for Josh's accusations, the notation that he got over being mad defeats that purpose. Given the extensive logging of activities and movements at the Shelter Care, it seems unlikely that any of the workers would suggest this story to JM, as it serves no apparent purpose and they would presumably know that a check of the logs would cast doubt on it. It seems likely that JM is wrong about this, but at the same time it does not seem likely that this is a deliberate lie, simply because it is not a useful lie.

Neither does the Examiner find the discrepancies about events in the Secure Detention themselves compelling evidence that JM is lying about the recantation. These statements were made 15 to 18 months after the fact, and having observed this witness at length on the stand, I am not surprised that there are variations at the margins of her story. She variously said that she walked away from JB, yelled at JB, and hit JB. She consistently said she had an argument with JB about his admission, and the variations in her recollections as to whether she pushed at him or not in the course of it are not terribly significant. She also claimed to have been locked down for her confrontation with JB. The record shows she was placed in lockdown the following day. However, it also bears noting that she initially said she was threatened with lockdown for being too loud in speaking with JB, and that the lockdown the next day was in fact for being too loud. The fact that she connected the two events is not remarkable.

JM also said that the male guard, John Mitchell, overheard her conversation with JB. Mitchell said he heard nothing along these lines, and it is clear that her testimony in this regard was an assumption, based upon Mitchell being in an office nearby. In her affidavit, first interview with the County's private investigators, and during her testimony at the hearing, she said that she did not discuss the matter with the guards. In her second interview with investigator Harold Rivkin and his associate, however, she indicated that she told Mitchell what JB had said:

. . .

> Peggy: One more thing if I could, did you tell them then? Did you talk to them and let them know what you guys had been arguing about?
>
> JM: Mitch?
>
> Peggy: Yes, did they ask you what you were arguing about?
>
> JM: Yes, but I told them what JB said and that was it, and then they didn't do nothing and I just told Sandy, because Sandy and Dallas worked together.
>
> Peggy: Were you mad that Mitch didn't do anything about it when you told him?
>
> JM: Yes, because he was a cop and he didn't say nothing. I don't think he said anything, but I don't know.

. . .

(Respondent's Exhibit 54, pps. 3-4)

Clearly this conflicts with all of the other accounts and with Mitchell's testimony. It is more than a passing discrepancy, as she is claiming to remember something that didn't happen. Likewise her claim to have witnessed JB's threat to Maass's job appears to have been a recollection of something that she could not have witnessed, since she was not in Shelter Care when this happened. This second point is, on its face, more troubling than the question of speaking with Mitchell, since it would have to be information that someone relayed to her. However, it is not quite as clear-cut as the County claims, since she said during the second interview with Rivkin that she had discussed possible reasons for JB's accusations with Maass:

> Peggy: Why do you think JB told you that he was making all this up? What was his motive, do you think??
>
> JM: I don't know, probably the same thing that Dallas said was in his record.
>
> Harold: What did Dallas tell you was in his record.
>
> JM: Dallas said that when he was at work, like when that time . . . they called him Spanky. Do you remember him? He had that (?) here and she got (?) by the cops, she had barely no clothes on, and he's the one that write that crap all over the bathroom, the boys bathroom, and the cops came in.

Peggy: I heard about it.

JM: When the cops came in to get him, because they had locked in that first room because he kept coming out, that first room of the boys and it's on I think the left hand side, they locked him in there and then they went and got him, they like hog tied him and JB came running out of the day room and was calling the cops pigs and Dallas put JB in his room. And then JB kept on yelling, "Oh, I'm gonna get you in trouble, you're gonna get fired, trust me," and etc.

Peggy: So you heard about that but you didn't see it, though, right?

JM: What?

Peggy: You heard about it from it being in the record, or did you see . . .

JM: No, I was there. (?) was chasing him. Miss Korth . . . I think . . . no, Miss Korth wasn't working. I can't remember. It was on a weekend.

. . .

(Respondent's Exhibit 54, pps. 3-4)

JM began by saying that she knew about this because Maass told her about it, and then changed it to being there personally. At the second day of hearing, she repeated that she was present, even when Maass's attorney asked her if she wasn't mistaken about it. This makes it clear that JM is capable of adopting those things she has merely been told about as her own memories. This does not speak well of her overall credibility, but it does not necessarily mark her as a conscious liar.

JM's confusing account of who she first told about this and when is, as the County asserts, consistent with untruth overall, but it is also consistent with someone who is confused about the sequence of events. I do not find the same sinister implications in this that the County does. This witness was clearly immature, hostile to the process of testifying and, as noted above, quite unsophisticated. Her recollection was not good, and rather than saying she did not remember, she gave answers that conflicted. In some measure, her immaturity works against the County's conspiracy theory of her testimony. It is difficult to believe that Korth, Dudley and Elliott would all enter into a dangerous cabal with someone like JM. It bears recalling that, at the time this affidavit was given, this was not primarily a labor-management dispute. It was a criminal prosecution, and if Mass's co-workers did elicit perjury from JM,

they were risking their liberty as well as their jobs. The record does not show that any of these people are more than co-workers, and it is not plausible that they would, in the name of solidarity, enter into a criminal conspiracy, whereby their futures would hinge on JM's discretion.

The one point JM was quite sure of was that JB admitted that he lied, and on this point she was consistent. Having observed her on the stand, I am convinced that she was telling what she believed to be the truth about JB's admission. Overall, she was not a terribly persuasive witness, and the various inconsistencies and conflicts in her account of the events beyond JB's statements detract from her credibility. Weighed against very strong evidence to the contrary, her testimony would not swing the balance. However, I do attach some weight to her testimony, and conclude that it is more likely than not that JB did recant his story while in Secure Detention on July 30, 1996.

D. Conclusion on the Merits

None of the witnesses is overwhelmingly credible. There are problems with each one of them. However, the question here is whether Maass sexually abused JB, and the issue is whether JB's allegations have sufficient credibility to effectively shift the burden to Maass and the Union to refute them. Given the weakness of JB as a witness, I conclude that his hearsay statements do not satisfy even a preponderance standard, much less rise to the level of clear and convincing evidence. Accordingly, I conclude that the allegations of sexual abuse are not proved, and thus do not constitute just cause for discharge.

IV. The Effect of a Substantiated Finding of Abuse

Manitowoc County social worker Linda Schroeder entered a substantiated finding of abuse against Maass when she made her report in June of 1995. The County asserts that it was, as of that date, legally unable to continue to employ Maass, and that it continues to be impossible to employ him, because to do so would place the County in violation of its license. The Union takes the position that Schroeder was simply an agent of the County, and that her investigation and findings are indistinguishable from those of any other employer investigation of misconduct charges, the results of which are often overturned in discharge arbitrations. The parties' arguments carry the process of substantiating an abuse allegation to polar extremes, and neither party's view is completely correct.

A. Deferral to the Department of Health and Family Services

Central to the County's position is the argument that the Examiner and the Commission do not have the authority to overrule the Department of Health and Family Services on issues

of abuse, and must instead defer to a fellow State agency. That argument is, however, misleading. The Department has not made any determination whatsoever as to Maass's guilt or innocence. Robert Wagner, Chief of the regulation and licensing unit for the Bureau of Regulation and Licensing, Division of Children and Family Services in the northeastern region, testified about the effect of a substantiated finding of abuse. While Wagner said that the Department would abide by a contrary determination of another administrative agency, taken as whole the essence of his testimony is that the "substantiated / not substantiated" decision is made at the local level, and that the Department's role is to determine the effect of the finding on the license of the employing entity if the employe remains employed:

> Q Assuming a DCS-64 came back with a substantiated child abuse disclosed as a yes, what would the department do as far as that licensed facility?
>
> A . . . If a licensee such as a shelter care had that information on an employee, they would need, according to the information there or in consultation with a licensing specialist, review that information and make a decision as to the appropriateness of that employee.
>
> Q And directing your attention to the minimum qualifications of a shelter care worker, being mature and having sound judgment, would someone with a substantiated child abuse meet those minimum requirements?
>
> A It wouldn't be in the best interests of kids to have an employee of substantiated finding of abuse of a child as an employee. [Transcript, pages 392-393]
>
> . . .
>
> Q What, if anything would be your role or as the licensing agency to take measures if a shelter care facility had an employee with a substantiated abuse in the record?
>
> A If a licensing specialist came through and looked at the personnel records, which we do of all employees, and noted a substantiated abuse, we would initially talk to the shelter care facility to see what they did and why that -- why that employee is still there. We would then, if they -- if the employee is continuing on and there is a substantiated finding, we most likely would start with this non-compliance statement and indicate that it's contrary to our rules. [Transcript, pages 394-395]
>
> . . .

Q Could you indicate what the department's role in the licensee's action is required in a situation of child abuse -- of child abuse on an employee?

A Well, this particular section was -- and the whole memo was sent out to licensees, and what it says, what the licensees are expected, and it talked about if they've been either the subject of a criminal record check or convicted of a crime related to kids or if that person found to have abused or neglected a child, that that person should not be employed or allowed on the licensee premises.

Q Is that the current regulatory position of your agency?

A That's correct. [Transcript, page 395]

. . .

Q Let me ask you this. What if subsequent to that report being prepared -- and keep in mind the woman did not review everything. She did not review all the records. But let's assume that subsequent to that, there was a full-blown hearing before an administrative agency of the State of Wisconsin where all the witnesses were heard under oath, not just hearsay but the witnesses were heard under oath and all the records were reviewed. Is it your testimony that the determination that might be made as a result of that hearing would carry no weight?

A What's the result of that hearing?

Q Well, let's assume the result of the hearing is a determination that, based on all of the evidence and consideration of the sworn testimony of all of the witnesses and review of all of the records, the charge was not substantiated.

A We would abide by the administrative hearing. [Transcript, pages 401 - 402]

. . .

Q Okay, do you know if your agency would be bound by the decision of a different administrative agency which deals with the rights of employees to file prohibited practices and finding was made that there was not just cause to terminate someone because the substantiated child abuse may have not been substantiated?

A You know, I don't know if we're bound by it. We would look at that. It's really going to come back to the employing agency, the licensee, with this information and they're going to have to make some decision regarding that

> employee and how that substantiated abuse relates to it. If the facts of the situation don't change the substantiated abuse from the county, we would -- we would continue to push on the fact that you have an employee with substantiated abuse. [Transcript, pages 402-403]
>
> . . .
>
> Q The bottom line is, if another agency, after a full hearing, considering all the testimony under oath and all the records, were to determine that the abuse was not substantiated, your agency would defer to that, would they not?
>
> A We are going to defer to the licensee. The licensee has to take whatever that information is and make a decision, and then we would be working with them to review it, yes.
>
> Q In any event you're not going to tell them to ignore the determination that this abuse was not substantiated.
>
> A We wouldn't tell them one way or the other. [Transcript, page 404]

Wagner's testimony that the Department would defer to the findings of another administrative agency cannot be understood to mean that the Department itself would alter the "substantiated / not substantiated" decision. Instead it must be read as going to the Department's view, during licensing review, of a change in the local agency's substantiation decision or to the local agency's citation of the findings to explain why the local agency was employing a person with a substantiated finding.

B. Modification of a Finding of Substantiation

The County views the substantiated finding as a sort of mark of Cain, unreviewable and indelible. Carried to its logical conclusion, the County's position is that, if the day after Schroeder issued her report substantiating the abuse, JB went to the police and told them that he fabricated the whole story, the substantiated finding would still stand. The County would have no obligation to return Maass to work, and no other Wisconsin agency could employ him in his chosen profession. As noted above, given Wagner's testimony, it does not appear that that bizarre result is required. Instead it appears there is an opportunity to revisit a substantiation at the local level, with the Department consulting on that decision:

> A . . . It's really going to come back to the employing agency, the licensee, with this information and they're going to have to make some decision regarding that employee and how that substantiated abuse relates to it. . . . [Testimony of Wagner, Transcript, page 403]
>
> . . .
>
> A We are going to defer to the licensee. The licensee has to take whatever that information is and make a decision, and then we would be working with them to review it, yes. [Wagner, page 404]

Thus the substantiation decision is not set in stone once it is issued. It can be amended by the local agency, and the Department will consult with them about the amendment, applying a deferential standard in its consultations.

C. The Effect of a Finding of Substantiation Prior to Modification

The Union compares Schroeder's report to any other investigation of misconduct, and asserts that it has no independent effect. This ignores the immediate impact of the finding on the facility's license. In a run of the mill misconduct case, the County may accept or ignore the recommendation of its chosen investigators. In the case of alleged child abuse by a County care provider, the County contracts with Manitowoc County for an investigation, and may not ignore a substantiation without putting its license at risk. Unlike the ordinary misconduct case, here the County must justify itself to an outside regulator, DHFS, whose rules would on their face prohibit the County from continuing the active employment of someone with a substantiated finding, absent a compelling explanation. It is possible at this point -- after seven days of hearing, thirty-two witnesses and one hundred and seventeen exhibits -- to conclude that Linda Schroeder's initial substantiation decision, while made in good faith, was erroneous. The County was not in that position when it made the initial decision to terminate Maass.

D. Conclusion on the Effect of a Finding of Substantiation

While the substantiation decision is not so immutable as the County contends, neither is it the formality that the Union asserts. The County has the authority to modify the finding, but it cannot do so without being able to justify the modification to the DHFS, and until the modification is made, Maass is not eligible to work at his former position without putting the Shelter Care out of compliance with its operating license. In order to harmonize the County's obligations under the labor agreement and MERA with its obligations under Section 48.981 and the Administrative Code, the appropriate course of action is to:

1. Amend the records to reflect that the charges of child abuse against Maass are not substantiated.

2. Inform the appropriate officials of the Department of Health and Family Services of the amendment of the records and provide them with a copy of this decision.

3. Reinstate Maass to his former position, treating the period between his discharge and the date of this Order as an unpaid leave of absence.

4. Remove all references to this discipline from Maass's personnel file.

Dated at Racine, Wisconsin, this 29th day of December, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/

Daniel Nielsen, Examiner

DN/mb
29094-A