STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MICHAEL W. HOPKINS, Complainant,

vs.

CITY OF KENOSHA (FIRE DEPARTMENT) and KENOSHA FIREFIGHTERS, LOCAL 414, IAFF, AFL-CIO, Respondents.

Case 187
No. 57812
MP-3538

Decision No. 29715-A

Appearances:

Mr. Michael W. Hopkins, 33326 118th Street, Twin Lakes, Wisconsin 53181, appearing on his own behalf.

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, by **Attorney Timothy E. Hawks**, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of Kenosha Fire Fighters, Local 414, IAFF, AFL-CIO.

Davis & Kuelthau, S.C., by **Attorney Roger E. Walsh**, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-6613, appearing on behalf of the City of Kenosha.

ORDER DENYING COMPLAINANT'S MOTION TO DISQUALIFY COUNSEL FOR THE RESPONDENT UNION

Daniel J. Nielsen, Examiner: On July 26, 1999, Michael W. Hopkins (hereinafter referred to as either Hopkins or the Complainant) filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission, alleging that the City of Kenosha (hereinafter referred to as the City) had violated the Municipal Employment Relations Act (MERA) by discriminating against him, and by violating the collective bargaining agreement. The complaint also alleged that Local 414, IAFF (hereinafter referred to as the Union) had

violated MERA by failing to represent Mr. Hopkins at a Police and Fire Commission hearing considering disciplinary charges against Mr. Hopkins. The Commission appointed Daniel Nielsen of its staff to act as Examiner and to make and issue appropriate Findings of Fact, Conclusions of Law and Orders. A hearing was scheduled in this matter for October 15, 1999.

On August 18, the law firm of Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, by Mr. Timothy Hawks, entered its appearance as counsel for the Respondent Union. On September 2, Mr. Hopkins filed a Motion with the Examiner, alleging that the Shneidman firm had a conflict of interests and requesting that the Shneidman firm not be allowed to appear as counsel for the Union. Mr. Hopkins asserted that the Shneidman firm had previously been engaged to represent him in a related matter and had interviewed him about the events material to this complaint, in anticipation of representing him at the Police and Fire Commission hearing. The October hearing was postponed to allow the resolution of the Motion. The City advised the Examiner that it would take no active part in the argument or resolution of the Complainant's Motion. The Union took the position that it would not secure other counsel, and the Shneidman firm took the position that there was no conflict of interests, and asked the Examiner to so rule. The Examiner sought a stipulation to the underlying facts through a series of letters to the parties, and invited submission of additional legal arguments and authorities by January 7, 2000.

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.

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 Order.

ORDER

The Complainant's Motion to Disqualify Counsel for the Respondent Union is denied.

Dated at Racine, Wisconsin, this 24th day of January, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/

Daniel Nielsen, Examiner

CITY OF KENOSHA (FIRE DEPARTMENT)

**MEMORANDUM ACCOMPANYING
ORDER DENYING COMPLAINANT'S MOTION TO
DISQUALIFY COUNSEL FOR THE RESPONDENT UNION**

BACKGROUND

The relevant facts are essentially undisputed. Reviewing the submissions of the parties, the Examiner prepared a "Summary of Undisputed Facts" which was transmitted to the parties for comment. Modifications were made on the basis of those comments, and based on the modified Summary, I find the following to be the relevant factual background:

1. Mr. Hopkins is employed as a firefighter by the City of Kenosha Fire Department and is a municipal employe.

2. Kenosha Firefighters, Local 414, IAFF, AFL-CIO is a labor organization and is the exclusive bargaining representative for the firefighters employed by the City of Kenosha Fire Department. Mr. Hopkins is a member of the bargaining unit represented by the Union.

3. The law firm of Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer (hereinafter referred to as the Shneidman Firm) represents IAFF Local 414. A member of the Shneidman Firm, Mr. John Kiel, is also a firefighter on the Kenosha Fire Department and is acquainted with Mr. Hopkins.

4. Members of the Shneidman Firm have represented Mr. Hopkins individually in two matters in the past. One was a probate matter. The parties concede that the probate matter has no bearing on this case. The second was a criminal investigation into a 1993 traffic accident. Mr. Hopkins was alleged to be the driver of a vehicle involved in the accident, an allegation that he denied.

5. In the course of the Kenosha Police Department's investigation into the traffic accident, during 1993, a police detective named Bob Queen spoke with Chip Keckler who is a dispatcher for the City-County Joint Services Board. Queen asked Mr. Keckler to elicit an admission from Mr. Hopkins that he was the driver of the automobile at the time of the accident. Detective Queen represented to Mr. Keckler that the police had sufficient evidence against Mr. Hopkins to charge him with being the driver. Mr. Keckler is not a member of the bargaining unit represented by Local 414.

6. Mr. Keckler spoke with Mr. Hopkins, and Mr. Hopkins denied being the driver. Mr. Keckler relayed this information to Detective Queen.

7. The accident investigation was ultimately resolved with the dismissal of felony criminal charges against Mr. Hopkins.

8. The Shneidman Firm closed its file in the criminal matter and terminated its representation of Mr. Hopkins in 1997.

9. On December 24, 1997, Mr. Hopkins is alleged to have telephoned Mr. Keckler's residence and to have had a conversation with Mr. Keckler's son, Kristopher Keckler. In the course of the conversation, Mr. Hopkins is alleged to have made "harassing, sarcastic and disparaging statements" about Mr. Keckler to his son. The call is alleged to have been connected to the 1993 traffic accident and Mr. Keckler's role in questioning Mr. Hopkins about whether he was the driver.

10. On January 7 and January 13, 1998, Mr. Hopkins met with Chief Thomas and denied making a call to Keckler's home. At the January 13th meeting, Mr. Hopkins was represented by Local 414 Vice-President Alan Horgen. Mr. Hopkins tape recorded these meetings. Chief Thomas, at the January 13th meeting, offered Mr. Hopkins the option of accepting a one-day suspension or a written reprimand with counseling.

11. On February 27, 1998, Chief Thomas wrote to Irene Kraemer, Chairman of the Board of Police and Fire Commissioners, alleging that he had independent confirmation of the December 24th telephone call. Chief Thomas asserted that Mr. Hopkins' conduct in making the telephone call and then denying having made the call violated Departmental rules governing "general conduct" of Fire Department personnel. He recommended that Mr. Hopkins be suspended without pay for ten work days.

12. On March 4, 1998, Mr. Hopkins submitted an appeal to Ms. Kraemer, with a copy to the Mayor:

> On January 13, 1998, Thomas is not being truthful as he has charged. On this date there wasn't a denial of any kind. Thomas at that time said "through further investigation I've concluded you haven't been honest in denying the phone call . . . Therefore here are the options I'm giving you . . . If no answer within 24 hours . . . recommended discipline to the . . . commission will be one day suspension." I'll be able to provide a truthful transcription to above.
>
> On January 8, 1998, Thomas violated Labor Contract: XII General Rules: However, before any action is taken relative to the above, both the complainant and the complained against and witnesses shall be interviewed together by . . . Also other individuals were questioned with contrary answers to Thomas's goal. Although I'm looking foreward (sic) to cross-examination.

On January 7, 1998, I have denied "personally making the call." Hindsight, I find it ironic that Thomas privately at that time spoke with Captain Bloxdorf expressing that "this has gotten out of hand and Keckler now is unable to accept drinking the water he has pissed in." The exact same I now find out he charges is harassing, sarcastic and disparaging. Also initially at that time, Thomas said there was a complaint filed against. When asked to see or hear what complaint is about, he refuses to produce. Upon his "demand an answer!", that's when he was told "me personally no" to his insistence of a "blank-check" admittance.

On December 24, 1997, I personally deny speaking with anyone of Keckler's family. Recently I've heard the alleged harassing, sarcastic and disparaging claimed charge. Through litigation I'm sure we'll conclude if there's merit opposing Rule XII: . . . observed by law abiding citizens.

There were three other claims investigated by Thomas's staff: Hopkins'

- Conduct at scene
- Patient care
- Patient confidentiality

By Thomas's own admittion (sic) "those claims were found unsubstantiated."

Please be aware that this all generates from Kip Keckler's stalking of my home, threaten phone call and DWI.

Respectfully,

/s/ Mike Hopkins

p.s. Is the commission willing to police - i.e. non-tax payments and illegal gambling. Rule XII General Rules: In matters of general conduct not within the scope of dept. rules, personnel shall be governed by the ordinary rules of good behavior observed by law abiding citizens.

13. A hearing on the recommended discipline was scheduled before the Police and Fire Commission for July 30, 1998.

14. Local 414 scheduled a meeting concerning the recommended discipline with Mr. Hopkins, two members of the Local's Executive Board, and the Union's attorney, Mr. Hawks. The purpose of the meeting was to determine what steps, if any, Local 414 would take to further represent Mr. Hopkins in his appeal. The meeting was held at the offices of the Shneidman Firm on March 13, 1998.

15. While waiting for the meeting to begin, Mr. Hopkins spoke with Attorney Charles Blumenfield, a partner of Mr. Hawks, and the two discussed the proposed discipline.

16. Mr. Hawks met with Mr. Hopkins, Union President Matthew Loewen and Union Vice-President Al Horgen. Mr. Hawks interviewed Mr. Hopkins about the alleged telephone call and his meetings with Chief Thomas. Mr. Hawks also interviewed Messrs. Horgen and Loewen about the Local's efforts on behalf of Mr. Hopkins. Mr. Hopkins advised Mr. Hawks that he had not personally placed the call to Mr. Keckler's residence, but that he wrote out a script to be read by a relative, and was present when the relative made the call and read the script to the person who answered Mr. Keckler's phone. Mr. Hawks reviewed the procedures for appealing the Chief's recommended discipline, and provided his assessment of the chances of prevailing before the Police and Fire Commission, the likely costs of the proceeding, and the probable outcome of the Police and Fire Commission's deliberations.

17. After hearing Mr. Hawks' assessment of the case, Mr. Loewen and Mr. Horgen both suggested to Mr. Hopkins that the Local Union be allowed to continue negotiations with Chief Thomas over a reduction in the penalty. Mr. Hopkins declined, insisting instead that the case be tried on the merits, as he had not actually made the call as claimed by the Chief and thus could not agree to something short of rescission of the discipline.

18. Mr. Hopkins also generally discussed the matter with Firefighter Kiel. Mr. Kiel was not a participant in the meetings between Mr. Hopkins, members of the Local 414 Executive Board and members of the Shneidman Firm. Instead, Mr. Hopkins' conversations with Mr. Kiel were conversations between co-workers. Mr. Kiel did not discuss the matter in detail with Mr. Hopkins.

19. The Executive Board of Local 414 met on March 20, 1998, and voted not to provide further assistance to Mr. Hopkins if he chose to pursue an appeal. The Local's position was spelled out in a memo sent to Mr. Hopkins by Mr. Horgen:

> The executive board met on March 20, 1998 and considered the following facts regarding the matter you have appealed to the Police and Fire Commission:
>
> 1. That you were aware of the context of the phone conversation made on 12/24/97 at approximately 12:20 P.M.
>
> 2. That although you didn't "personally" make the phone call, you were not totally forthcoming to the Fire Chief when questioned on Jan. 7, Jan. 13 and Feb. 27.

3. That the Fire Chief produced phone records on Feb. 27 showing a phone call was made from your residence to Kip Keckler's residence on 12/24/97 at 12:10 P.M.

4. That you withheld from the Union until Feb. 27 the fact that you were aware of the context of the phone conversation of 12/24/97.

5. That you were offered a one day suspension on Jan. 13 as discipline in this matter and refused to accept it.

6. That the Union's labor attorney predicts a 90% failure rate based on the merits of your case.

7. That the Union's labor attorney predicts a reduction in discipline to at most 8 days off, based on past precedent, if this case proceeds to a Police and Fire Commission hearing.

8. That you have, on two separate occasions (Feb. 27 and March 13) refused to allow the Union to approach the Fire Chief with intent of reducing discipline.

Based upon our attorney's belief that this case will lose on its merits, the Executive Board has unanimously decided to not offer the further services of the Union if you should choose to proceed to the Police and Fire Commission. The Executive Board is desirous of bringing this situation to a resolution through further negotiations with the Fire Chief if so authorized by you.

If you have any questions or concerns regarding this matter, feel free to contact either myself or Matt Loewen.

20. The Police and Fire Commission hearing proceeded on July 30, 1998. Local 414 did not provide legal representation for Mr. Hopkins at the hearing. The Commission allowed the imposition of discipline against Mr. Hopkins, but did not accept the recommendation of a ten-day unpaid suspension. Instead some other penalty was imposed.

21. The Police and Fire Commission's decision was not appealed to circuit court.

22. On July 26, 1999, Mr. Hopkins filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission, alleging that the City of Kenosha had violated the Municipal Employment Relations Act (MERA) by discriminating against him, and by violating the collective bargaining agreement. The complaint also alleged that Local 414 had violated MERA by failing to represent Mr. Hopkins at the Police and Fire Commission hearing.

23. On August 18, 1999, Mr. Hawks advised Mr. Hopkins that Local 414 had engaged the Shneidman Firm to represent it in defense of the prohibited practice charge brought by Mr. Hopkins. Mr. Hawks further advised Mr. Hopkins that the firm had reviewed its files concerning prior representation of Mr. Hopkins and had determined that there was no relationship between the prior matters and the complaint case, and that the Shneidman Firm had accepted the defense of Local 414 in the complaint case. Mr. Hawks invited Mr. Hopkins or his counsel to contact him if there was any objection to the Shneidman Firm's representation of Local 414. On that same date, Mr. Hawks sent a letter to the Examiner, entering the Shneidman Firm's Notice of Appearance.

24. On September 2, 1999, Mr. Hopkins submitted a Motion to the Examiner, alleging that the Shneidman Firm had a conflict of interests in representing Local 414, and requesting that the Examiner order the Shneidman Firm to withdraw as counsel for Local 414. Mr. Hopkins represented that, if the Shneidman Firm did not withdraw, he would file a complaint with the Board of Attorneys' Professional Responsibilities.

25. On November 22, 1999, Mr. Hawks submitted a Motion, denying that there was any material connection between this litigation and the Shneidman Firm's prior representation of Mr. Hopkins, and requesting that the Examiner issue a written determination as to whether the Shneidman Firm's representation of Local 414 would violate SCR 20:1.9.

JURISDICTION OF THE EXAMINER

Both Hopkins and the Union have requested a ruling on the Shneidman firm's alleged conflict of interests. On November 26, 1999, the Examiner advised the parties that he would receive submissions on the issues of "(1) what authority the Examiner has to address an alleged conflict of interests by counsel; and (2) assuming the Examiner has such authority, whether the Shneidman Firm has a conflict of interests in representing Local 414." The threshold question here is whether the Examiner has authority to rule on the conflict question. The Examiner concludes that he does have such authority, not as a matter of interpreting and enforcing the Supreme Court's Rules, but as a matter of insuring that the parties receive basic due process of law.

MERA expressly requires that the provisions of Section 111.70 are intended to provide, inter alia, "a fair . . . procedure" for the resolution of labor disputes:

> **(6) Declaration of policy.** The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest

> that municipal employes so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employes' own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter.

In administering a fair procedure for the resolution of prohibited practice claims, §ERC 20.17 of the Administrative Code provides that "It shall be the duty of the individual conducting the hearing to inquire fully into all matters in issue, to obtain a full and complete record upon which the duties of the commission . . . under subch. V, ch. 111, Stats., may be properly discharged." ERC 20.18 empowers the examiner to "regulate the . . . course of the hearing," "dispose of procedural requests or other similar matters," and to "take any other action necessary under the foregoing or authorized under these rules."

The fundamental obligation of the Examiner is to insure that parties appearing before the Commission receive due process of law. Due process requires that the parties to a dispute be afforded the opportunity for a "full, fair and public hearing" before any final decision is made. KROPIWKA V. DEPARTMENT OF LABOR, INDUSTRY AND HUMAN RELATIONS, 87 WIS.2D 709 (1979), 275 N.W.2D 881, CERTIORARI DENIED 100 SUPCT 105, 444 U.S. 852, 62 L.ED.2D 68. The cardinal test of the presence or absence of due process of law in administrative proceedings is the presence or absence of the rudiments of fair play long known to the law. STATE EX. REL. MADISON AIRPORT CO. V. WRABETZ, 231 WIS. 147 (1939), 285 N.W. 504; SEE ALSO BITUMINOUS CAS. CO. V. DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, 97 WIS.2D 730 (CTAPP 1980) 295 N.W.2D 183.

One of the "rudiments of fair play" in a legal proceeding is the right of a party to a hearing in which his or her substantial rights are unaffected by conflicts of interest or other professional misconduct by counsel. ENNIS V. ENNIS, 88 WIS.2D, 276 N.W.2D 341 (CTAPP 1979); CITY OF WHITEWATER V. BAKER, 99 WIS.2D 449, 299 N.W.2D 584 (CTAPP 1980). The courts in ENNIS and BAKER found that when such a conflict becomes apparent to a trial court, the court has an affirmative duty to intervene on its own motion. Likewise, in WERC proceedings, one circuit court found that examiners have the duty to intervene and ensure that conflict is abated. JEAN ELLIOT V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, CASE NO. 93-CV-1217 (BROWN CO. CIRCUIT COURT, 5/16/94). In another WERC proceeding, a reviewing court found it necessary to determine whether the Commission erred in allowing a violation of SCR 20:3.7 when counsel for one of the parties was allowed to testify. CHRISTIAN THOMSEN V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, CASE NO. 98-CV-1437 (DANE CO. CIRCUIT COURT, 5/20/99); DEC. NO. 28647-D. Thus, in some circumstances, the Commission is obliged to consider and regulate the role of counsel.

The allegation here is that the Union's law firm possesses confidential and privileged information about the case by virtue of its former representation of him in the traffic accident investigation and by virtue of having interviewed him about this case at a time when he was consulting with Attorney Hawks about representing him before the Police and Fire Commission. Allowing a law firm to switch sides and use confidential information to the detriment of a former client would pose a clear threat to the Complainant's opportunity for a fair hearing. Accordingly, the Examiner concludes that resolution of this Motion is a necessary predicate to conducting a hearing in which all parties are afforded due process of law.

THE MERITS OF THE ALLEGATIONS

As noted in Point No. 4 of the Summary, above, it is conceded that the Shneidman firm's representation of Mr. Hopkins in the probate matter has no bearing on this case. The two interactions that are alleged to give rise to the conflict here are the Shneidman firm's representation of Hopkins in the 1993 traffic accident investigation and the March, 1999 interview of Hopkins by Hawks. In analyzing the claim of conflict, the Examiner looks for guidance to the provisions of SCR 20:1.9. which regulates the conduct of attorneys in cases involving the interests of former clients. 1/ The rule provides:

> A lawyer who has formerly represented a client in a matter shall not:
>
> (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents in writing after consultation;
>
> (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Applying this rule to the facts of this case, I find that there is no violation of SCR 20:1.9 nor is there any impairment of the Complainant's due process rights in allowing the Shneidman firm to defend the Union against his claim that he was not fairly represented.

1/ In using SCR 20:1.9 as the template for this analysis, the Examiner does not suggest that the lack of strict, point by point adherence to the Code of Professional Responsibilities will always raise questions of due process in an administrative proceeding, nor does he purport to sit in the place of the Board of Attorneys' Professional Responsibility in this matter.

SCR 20:1.9 requires that the disputed representation involve "the same or a substantially related matter." The Shneidman firm's representation of Mr. Hopkins in the 1993 traffic accident investigation is not substantially related to the alleged telephone conversation between Mr. Keckler's son and Mr. Hopkins or his relative. The alleged motive for the conversation -- retaliation for Keckler's cooperation with Detective Queen -- was tangentially related to the accident investigation, but the facts surrounding the traffic accident are entirely separate and distinct from the facts surrounding the disciplinary matter. It is the fact of the telephone call and the Complainant's allegedly disingenuous response to the Chief's inquiries that triggered discipline, not his involvement in the traffic accident. The facts related to the traffic accident itself are irrelevant in this proceeding.

An even clearer conflict would exist if the Shneidman firm was engaged as counsel for Hopkins in the disciplinary proceeding and abandoned him in favor of the Union when he brought this action. However, the Shneidman firm was not engaged as counsel for Mr. Hopkins in the disciplinary matter, nor would Mr. Hopkins have reasonably understood that the firm was being engaged as his personal counsel. He sought representation through his Union, and the Union arranged for a meeting with Hopkins, Attorney Hawks and members of the Union's Executive Board. Attorney Hawks provided his assessment of the case to the officers of the Union, and the ultimate decision not to provide legal counsel for the Police and Fire Commission hearing was announced by the Union's Executive Board. A reasonable person in Mr. Hopkins's position would have understood that the Shneidman firm was engaged as counsel for Local 414 in the disciplinary matter. Thus, aside from the unrelated 1993 traffic accident investigation, there was no attorney-client relationship between Mr. Hopkins and the Shneidman firm, and the firm owed no duty of loyalty to Hopkins.

The final possible objection to the Shneidman firm's representation of the Union in defense of the duty of fair representation claims is that it has access to confidential or privileged information that would be used to Hopkins' disadvantage. Mr. Hopkins did convey information to Attorney Hawks in the March 13, 1999 interview. However the contents of that interview cannot be treated as privileged or confidential information which could not be disclosed to the Union for use in its defense in this complaint case. As noted, there was no attorney-client relationship between Mr. Hopkins and Attorney Hawks or his firm. The purpose of the interview was to brief and advise the officers of the Local, and there would be no expectation of confidentiality as to them. Moreover, it appears that members of the Union's Executive Board were present during the interview and the information disclosed in their presence cannot plausibly be termed a confidential communication between Mr. Hopkins and Attorney Hawks.

In conclusion, the Examiner finds that there is no substantial relationship between the Shneidman firm's representation of Mr. Hopkins in the traffic accident investigation and its representation of the Union in this case. Nor has there been any attorney-client relationship between Mr. Hopkins and the Shneidman firm in the disciplinary matter. The law firm was

engaged as counsel to the Union, and a reasonable person in Mr. Hopkins' position would have understood that. Finally, the information gathered in the March, 1999 interview was not privileged or confidential, either as a matter of law or as a matter of fact, as to the Union. For these reasons, the Examiner concludes that there is no violation of SCR 20:1.9 in the Shneidman firm's defense of Local 414 against Mr. Hopkins' charges, and that there is no impairment of Mr. Hopkins' right to due process of law. Accordingly his Motion to Disqualify Counsel is denied.

Dated at Racine, Wisconsin, this 24th day of January, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Examiner

DN/mb
29715-A.doc