STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JENNIFER A. PESHUT, Complainant,

vs.

UNIVERSITY OF WISCONSIN MILWAUKEE (UWM); NANCY L. ZIMPHER, CHANCELLOR; ERIKA SANDER, ACTING DIRECTOR OF HUMAN RESOURCES; SHANNON BRADBURY, LABOR RELATIONS MANAGER; WILLIAM R. RAYBURN, DEAN OF THE GRADUATE SCHOOL; MARJORIE BJORNSTAD, ASSISTANT DEAN OF THE GRADUATE SCHOOL; SUSAN BURGESS, DIRECTOR OF THE CENTER FOR WOMEN'S STUDIES, Respondents.

Case 465
No. 56793
PP(S)-295

Decision No. 29775-F

JENNIFER A. PESHUT, Complainant,

vs.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 24, WISCONSIN STATE EMPLOYEES UNION (WSEU); MARTIN BEIL, EXECUTIVE DIRECTOR, KARL HACKER, ASSISTANT DIRECTOR, JANA WEAVER, FIELD REPRESENTATIVE, Respondents.

Case 466
No. 56821
PP(S)-296

Decision No. 29776-F

Appearances:

Ms. Jennifer A. Peshut, P.O. Box 11116, Milwaukee, Wisconsin 53211, appearing on her own behalf.

Lawton & Cates, S.C., by **Attorney P. Scott Hassett,** Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of Union Respondents.

Attorney Mark J. Wild, Legal Counsel, Department of Employment Relations, 345 West Washington Avenue, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of UWM Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The procedural background to these cases has been set forth in a series of decisions, the most recent of which are DECS. NO. 29775-E and 29776-E (McLaughlin, 7/01). The Order from that decision stated:

> The motions filed by Complainant on May 2, 2001 are denied. The parties shall, as soon as feasible, state their positions on an appropriate schedule for the submission of closing arguments in the consolidated cases noted above.

By July 23, 2001, the parties had confirmed agreement on a briefing schedule. Complainant and Union Respondents exchanged initial briefs directly, and UWM Respondents submitted their initial brief for an exchange through the Examiner. I mailed the brief of UWM Respondents to Complainant and Union Respondents under a cover letter dated September 7, 2001. Complainant filed a Motion to Exclude Employer's Hearing Brief on September 11, 2001. Union and UWM Respondents filed a response to the Motion by September 13, 2001. I denied the Motion in a letter to the parties dated September 12, 2001. The parties filed reply briefs by October 3, 2001.

FINDINGS OF FACT

1. Jennifer A. Peshut, referred to as the Complainant, is an individual residing in care of P.O. Box 11116, Milwaukee, Wisconsin 53211. Complainant was employed as a Program Assistant 2 in the Center for Women's Studies (the Center) in the graduate school of the University of Wisconsin-Milwaukee, from February of 1990 until August of 1998.

2. The University of Wisconsin-Milwaukee (UWM), is a part of the University of Wisconsin System, governed by the Board of Regents of the University of Wisconsin System. UWM maintains offices at 2310 East Hartford Avenue, Milwaukee, Wisconsin, and a mailing address at P.O. Box 413, Milwaukee, Wisconsin 53201.

3. Throughout Complainant's tenure as a Program Assistant 2, Nancy L. Zimpher was the Chancellor of UWM. Erika Sander was acting Director of Human Resources for UWM. Shannon Bradbury was Labor Relations Manager for UWM. William R. Rayburn was Dean of the UWM Graduate School. Marjorie Bjornstad was Assistant Dean of the UWM Graduate School. Susan Burgess was the Center's Director from the Fall of 1996 through the balance of Complainant's tenure at the Center. UWM affiliated Respondents are collectively referred to as UWM Respondents.

4. American Federation of State, County, and Municipal Employees, Council 24, Wisconsin State Employees Union, AFL-CIO, is a labor organization maintaining offices at 8033 Excelsior Drive, Suite C, Madison, Wisconsin 53717, and is referred to below as WSEU. WSEU is part of an affiliation that stretches from local unions to national and international unions. AFSCME and the AFL-CIO are administrative structures with national and international ties. Council 24 charters local unions within the State of Wisconsin, and maintains roughly fifty-six such charters, including one for Local 82, which is the local encompassing the bargaining unit of which Complainant was an individual member while a Center employee. The Executive Director for WSEU during Complainant's tenure as a Program Assistant 2 was Martin Beil, Karl Hacker was its Assistant Director, and Jana Weaver was one of its Field Representatives. Weaver's duties include representing members of Local 82. WSEU affiliated Respondents are collectively referred to as Union Respondents.

5. WSEU and the State of Wisconsin are parties to a collective bargaining agreement in effect by its terms from October 11, 1997 through June 30, 1999. The agreement covers employees within Local 82, and includes the following provisions:

AGREEMENT

> This agreement, made and entered into . . . pursuant to the provisions of ss. 111.80-111.97, Wis. Stats., by and between the State of Wisconsin and its Agencies (hereinafter referred to as the Employer), represented by the Department of Employment Relations; and AFSCME, Council 24, Wisconsin State Employees Union, AFL-CIO, and its appropriate affiliated locals (hereinafter referred to as the Union), as the representative of employes employed by the State of Wisconsin . . .

ARTICLE III
Management Rights

3/1/1 It is understood and agreed by the parties that management possesses the sole right to operate its agencies so as to carry out the statutory mandate and goals assigned to the agencies and that all management rights repose in management, however, such rights must be exercised consistently with the other provisions of this Agreement. Management rights include:

. . .

D. To suspend, demote, discharge or take other appropriate disciplinary action against employes for just cause.

. . .

ARTICLE IV
Grievance Procedure

Section 1: Definition

4/1/1 A grievance is defined as, and limited to, a written complaint involving an alleged violation of a specific provision of this Agreement.

. . .

4/1/3 If an employe brings any grievance to the Employer's attention without first having notified the Union, the Employer representative to whom such grievance is brought shall immediately notify the designated Union representative and no further discussion shall be had on the matter until the appropriate Union representative has been given notice and an opportunity to be present.

. . .

4/1/5 The parties will make a good faith effort to handle filed grievances, discipline and investigations in a confidential manner. A breach of confidentiality will not affect the merits of the grievance, discipline or investigation.

Section 2: Grievance Steps

4/2/1 Pre-Filing Step: When an employe(s) and his/her representative become aware of circumstances that may result in the filing of a Step One grievance, it is the intent the parties that, prior to filing a grievance, the Union Representative will contact the immediate supervisor of the employe regarding the matter in a mutual attempt to resolve it. . . .

4/2/2 If the designated agency representative determines that a contact with the immediate supervisor has not been made, the agency representative will notify the Union and may hold the grievance in abeyance until such contact is made.

. . .

4/2/5 Step One: Within twenty-one (21) calendar days of receipt of the written grievance or within twenty-one (21) calendar days of the date of the supervisor contact provided for in 4/2/1, whichever is later, the designated agency representative will schedule a hearing and respond to the Step One grievance.

. . .

4/2/6 Step Two: If dissatisfied with the Employer's answer in Step One, to be considered further, the grievance must be appealed to the appointing authority or the designee . . . within fourteen (14) calendar days from receipt of the answer in Step One. Upon receipt of the grievance in Step Two, the department will provide copies of Step One and Step Two to the Division of Collective Bargaining of the Department of Employment Relations as soon as possible. Within twenty-one (21) calendar days of receipt of the written grievance, the designated agency representative(s) will schedule a hearing with the employe(s) and his/her representative(s) and a representative of Council 24 (as Council 24 may elect) and respond to the Step Two grievance, unless the time limits are mutually waived.

. . .

4/2/7 Step Three: Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party . . .

Time Limits

4/2/8 Grievances not appealed within the designated time limits in any step of the grievance procedure will be considered as having been adjudicated on the basis of the last preceding Employer answer. Grievances not answered by the Employer within the designated time limits in any step of the grievance procedure may be appealed to the next step within the designated time limits of the appropriate step of the procedure. . . .

. . .

Section 5: Exclusive Procedure

4/5/1 The grievance procedure set out above shall be exclusive and shall replace any other grievance procedure for adjustment of any disputes arising from the application and interpretation of this Agreement.

. . .

Section 9: Discipline

4/9/1 The parties recognize the authority of the Employer to suspend, demote, discharge or take other appropriate corrective disciplinary action against employes for just cause. An employee who alleges that such action was not based on just cause may appeal a demotion, suspension or discharge taken by the Employer beginning with the Second Step of the grievance procedure. . . Any letter issued by the department to an employe will not be considered a written reprimand unless a work rule violation is alleged or it is specifically identified as a letter of reprimand.

4/9/2 An employe shall be entitled to the presence of a designated grievance representative at an investigatory interview (including informal counseling) if he/she requests one and if the employe has reasonable grounds to believe or has been informed that the interview may be used to support disciplinary action against him/her.

4/9/3 Unless Union representation is present during informal counseling or performance evaluations, disciplinary action cannot be taken at such counseling or performance evaluation meetings. The occurrence of an informal counseling or performance evaluation meeting shall not be used as the basis for or as

evidence in any subsequent disciplinary action. Such a meeting can be used to establish that an employe had been made aware of the circumstances which resulted in the performance evaluation or informal counseling.

ARTICLE XI
Miscellaneous

. . .

Section 7: Work Rules

. . .

11/7/3 It is understood that records of work rule violations which did not involve criminal violations will be removed from the employe's personnel file(s) if there are no other violations within twelve (12) months after the violation.

. . .

Section 25. Committees

. . .

11/25/2 Other Committees: Where the Employer creates or has created other committee(s) that meet on a regular basis, with represented employes on it, and the subject of the committee(s) has a direct affect on WSBU employes, the members of such committee(s) shall be appointed and serve at the discretion of the Employer except that one (1) member from each affected bargaining unit shall be designated by the local union, and serve without loss of pay. Topics of discussion in these comniittee(s) shall not include topics mandated under the Master Agreement, Or Chapter 111.80, Wis. Stats., but may include identifying, analyzing and recommending changes or solutions to employe/Employer concerns about the work product or the affected work area

NEGOTIATING NOTE NO. 14
1997-1999 AGREEMENT
MEMO – PERFORMANCE EVALUATIONS

. . .

> To this end certain questions have been raised during the current round of negotiations regarding the content of written performance evaluations. Specifically, concerns have been raised regarding direct references to department work rule violations which are occasionally contained in employe's annual performance evaluations.
>
> Under cover of this memorandum, I am directing State Agencies to advise their supervisors to refrain from quoting specific work rules in written performance evaluations. Since performance evaluations are not discipline, but are part of an employe's permanent record, such evaluations could conceivably be misconstrued as disciplinary actions.
>
> Performance should be discussed directly in the annual evaluations. Examples of good or bad performance can be made, and references to specific deficiencies are acceptable.
>
> . . .

Negotiating Note No. 14 is a memo dated July 19, 1985, authored by then-incumbent Secretary of DER, Howard Fuller, and attached to the labor agreement. UWM is bound by the terms of this agreement concerning the Complainant's conditions of employment.

6. Complainant first worked for UWM as a limited term employee. She assumed a permanent position with UWM sometime in 1988 or 1989. When she became a permanent employee, she fell within a bargaining unit represented by WSEU. She became a member of WSEU early in her permanent employment, then ceased paying dues, then again became a dues paying member on February 6, 1998.

7. Burgess was the Center's third Director. She had served UWM as an Associate Professor in the Department of Political Science since 1994. At the time Burgess became the Center's Director, its staff included two full-time employees, Complainant and Kim Romenesko, as well as one part-time employee, typically a work-study student. Romenesko began her employment at the Center as an Associate Administrative Program Specialist, and ended her employment at the Center as a Senior Administrative Program Specialist. Romenesko and Complainant reported to the Director and two advisory committees. The Director functioned as their direct supervisor. Burgess served as Director on a roughly one-half time basis. The Center is part of the UWM Graduate School, and has an instructional mission carried out through the College of Letters and Science, and a research mission carried out through the graduate school. The Center also provides a resource area for students and others, as well as other outreach programs, including student advising.

8. The Director annually evaluates the Center's staff. UWM evaluation forms rate employee performance against performance standards on a scale of E, M or DN, where, roughly, "E" means "exceeds", "M" means "meets" and "DN" means "does not meet" the performance standard. Prior to Burgess' arrival as Director, Complainant had consistently received "E" ratings. In the Spring of 1996, then-incumbent Director, Merry Wiesner-Hanks, started a reclassification process for the Complainant's position. In April of 1997, Burgess authored a memo to Bjornstad supporting the reclassification process, and seeking information on how to move the process along. The process continued throughout 1997. During the process, Burgess concluded that a new position description should be prepared.

9. The Center's structure assures that Center staff must work with considerable independence and limited oversight. Relationships between Burgess and her staff showed strains from early in Burgess' tenure as Director. Romenesko thought work had built up prior to Burgess' appointment, and that the work required her hands-on attention, or at least a clear delegation of authority. Burgess also perceived the Center to suffer from a work back log, but differed with Romenesko's views on the cause of and cure for it. Complainant and Romenesko perceived Burgess to be neglecting her duties in the Center for other pursuits. Romenesko further perceived that Burgess neglected the Center throughout the Summer of 1997 to complete a book she was then working on. Burgess perceived Complainant to have difficulty completing work on time, accommodating herself to changes in work requirements, and maintaining functional work relationships within the Center. Burgess perceived that Romenesko and Complainant wished to work primarily with students and other clients on a one-to-one basis, while Burgess wanted to focus on more general issues impacting curriculum and funding. Tensions within the Center grew throughout the Fall to the point that at one staff meeting an exchange between Romenesko and Burgess became so emotionally charged that Burgess, Romenesko and Complainant agreed that they should seek outside assistance. Burgess sought and received funding from UWM to hire an outside consultant to help address issues within the Center including the working relationship between Burgess and Center staff. In a memo to Bjornstad dated November 25, 1997, Burgess, after consulting Romenesko and Complainant, described the relationships thus:

> Although all the employees in the Center are excellent workers, a conflictual and at times difficult group dynamic has emerged which is stressing each of the staff considerably. Some of this is due to long standing problems of group interaction in the Center inherited from the past and some of it is grounded in difficult patterns of group interaction amongst current Center personnel.

The memo added that Burgess sought to obtain funding for a consultant to "address these issues proactively, in order to prevent a more serious blow-up." Romenesko and Complainant agreed initially to participate with the consultant, believing they might play a role in the

selection of the consultant as well as the matters to be discussed. Neither Romenesko nor Complainant felt Burgess involved them in the selection of the consultant, June Kriviskey. Burgess felt Romenesko and Complainant were willing to agree a problem existed, but were less than forthcoming regarding how to solve it. Romenesko, Complainant and Burgess met with Kriviskey on January 7, 1998, and set up a meeting for February 13. Tension grew within the office, however. The meeting originally set for February was moved into late January. That meeting proved more confrontational than that of January 7, and relationships within the Center continued to deteriorate. Complainant brought some of the difficulties within the Center to the attention of Stan Yasaitis, the President of Local 82. Yasaitis voiced concern that the meetings with Kriviskey constituted a committee meeting for which Local 82 could assert a right of appearance. He voiced this concern at a labor management meeting on January 23. On January 23, Burgess perceived that Complainant walked away from her after Burgess had asked Complainant a question. Complainant took the position that Burgess was involved in a meeting she was not a part of, and that the question did not require an immediate response. Complainant's relationship with Burgess continued to deteriorate. On or about January 26, Burgess met individually with Complainant, then Romenesko. The meetings were so animated that Romenesko met with Complainant after work, and the two of them determined to take their concerns to Bjornstad, who met with them on January 28. Complainant and Romenesko sought to keep the substance of their conversation confidential, and Bjornstad honored the request. Complainant perceived that the January 26 meeting had disciplinary overtones, and began to actively discuss these concerns with Romenesko and WSEU affiliated personnel, including David Keach, a Steward for Local 82. Romenesko advised Complainant to seek assistance from the WSEU. Complainant asked Burgess, through a memo and an e-mail, to set up a meeting involving Keach concerning a potential grievance. The memo is dated January 31, and the e-mail is dated February 2. By February 3, Burgess had confirmed arrangements for the meeting. Complainant's request for this meeting was Burgess' first notice that Complainant actively sought assistance from WSEU.

10. Tensions continued to build within the Center. Romensko took leave in late January and early February of 1998. Shortly after returning from leave, Romenesko and Burgess discussed their relationship. Romenesko informed Burgess that Romenesko needed to leave the Center, and would actively seek other employment. Romenesko perceived that her relationship with Burgess improved after this meeting, and that Burgess became more confrontational with Complainant. Yasaitis contacted Brenda Jackson, then a UWM employee but not a Local 82 Steward, to determine whether Jackson would appear as a union representative at the February 13 meeting with Kriviskey. Jackson appeared at the meeting. Burgess objected to Jackson's presence, so informed Jackson, and asked Jackson to leave. Jackson did not leave, asserted a right to be at the meeting and referred Burgess to Bradbury if she had questions on Jackson's position. Jackson and Romenesko perceived Burgess to be angry about her presence at the meeting. At the end of the meeting, Kriviskey set March 6 as

the date for another meeting. Between the February 13 meeting and March 6, Burgess discussed with Bradbury and Bjornstad whether the consultant meetings were of a type that Local 82 could assert a right to appear at them. They concluded that the meeting was not of a type covered by the labor agreement and that Local 82 did not have a right to appear. Local 82 representatives also discussed the matter and reached the conclusion that they could assert a right to representation. Burgess and Complainant discussed the scheduled March 6 meeting on March 4. Burgess took the position the meetings were voluntary, and that no representation from Local 82 was necessary or desirable. Bjornstad rejected the position of Local 82 on the matter in e-mail correspondence with Yasaitis and Jackson on March 5. Complainant authored a memo to Burgess dated March 5, asserting that she was not interested in attending the March 6 meeting, and that since attendance was voluntary, she should suffer no adverse impact. Local 82 filed a grievance on March 6, claiming UWM violation of Section 11/25/2. Complainant left work early on March 6, stating in a memo to Burgess that she "was not feeling well." Neither Complainant nor any Local 82 representative attended the session with Kriviskey on March 6.

11. Romenesko found a position outside of the Center, leaving the Center in June of 1998. On or about June 16, Romenesko had an exit interview with Bjornstad concerning her reasons for leaving the Center. Bjornstad asked Romenesko about her time at the Center and her reasons for leaving. Romenesko replied that she felt fortunate to have worked there, but did not believe she could work with Burgess. Bjornstad replied that she thought the environment at the Center was improving. Romenesko responded that Burgess' aggression toward her had eased, but had increased toward Complainant. Romenesko stated the environment was so intolerable that it was making her ill. Bjornstad responded to the effect that it was unfortunate Complainant had gone to WSEU. Romenesko was not, at the time, a member of a bargaining unit. Bjornstad's statement reflected her disappointment that the effort to improve communications within the Center with Kriviskey's help had broken down. It did not reflect anti-union hostility toward WSEU or Complainant's recourse to WSEU.

12. UWM numbered the March 6 grievance as 286-98-021. Bjornstad responded to the grievance on April 1, denying the grievance because the "staff development initiative" did not constitute a "committee" under the labor agreement. Bradbury responded to the grievance on July 10, 1998. Bradbury asserted, among other points, that the meetings led by Kriviskey "were aimed at developing effective workplace communication and resolving work style conflicts in the office." She characterized the sessions as "team building", expected to last no more than a few sessions, and thus was more akin to a staff meeting than to a "committee" within the meaning of Section 11/25/2. The parties were unable to resolve the grievance prior to the arbitration step, and WSEU determined not to arbitrate it.

13. By early to mid-April of 1998, Burgess had implemented a written process by which Complainant was expected to log assigned duties and her response to them. Burgess viewed the documents as a structure by which Complainant could better organize and prioritize her work. Complainant viewed them as, among other things, demeaning. In early April, Burgess started the annual evaluation process. She started by showing Complainant a draft of performance standards, which were a revision of the performance standards by which Complainant's work performance had been evaluated in the prior year. Burgess sought to meet with Complainant to determine Complainant's view of the strengths and weaknesses in her work performance for the evaluation year. Complainant declined to actively participate in the discussion except to note that she would respond in writing to any concerns articulated by Burgess. The process culminated in Burgess' issuance of an evaluation document dated April 15. Burgess issued the evaluation in a form unlike Complainant's prior evaluations. The evaluation consists of a cover memo, a one page summary headed "Classified Employee Performance Evaluation", three pages of narrative supplementing the summary and one page listing of "Classified Employee Performance Standards Worksheet." The cover memo sought a response from Complainant by April 17. The evaluation's one page summary noted an "Overall Rating" of "DN", and stated the following "Goals for Next Review Period":

> Improve prompt compliance with specifications for assigned work; eliminate inappropriate office behavior and increase cooperative office behavior; improve supervision of student worker.

The three-page narrative stated, among other points, the following:

. . .

> With respect to clerical support I began by stating that I was very pleased that we were largely caught up in this area. At the beginning of the year, there had been considerable stress in the office due, in part, to backlogged work. . . .
>
> Jenny's work product is usually of good quality. Nevertheless, there is still considerable room for improvement in terms of producing assigned work in accordance with specifications more efficiently and accurately, as well as in the area of following instructions without deviation. Assigned tasks have sometimes been left incomplete or have been completed contrary to specifications.

. . .

> In addition, Jenny has sometimes left the workplace for the day without directly informing me. Although emergencies and illnesses certainly arise which make it necessary to leave, it is important to me to be aware of such vacancies so that, if possible, alternative office coverage can be arranged and service can continue uninterrupted. Consequently, to improve in this area, when Jenny needs to leave the office she should attempt to let me know directly, either by telling me in person at Women's Studies, or, by calling me at my office at home, and leaving a message if I am not there.
>
> . . .
>
> In terms of Jenny's administrative work pertaining to the curricular program, she seems to have done a good job this year learning the new computer system used to create the schedule of classes . . . she agreed that she is now comfortable with the new system.
>
> . . .
>
> Finally, in our April 13 meeting, I discussed with Jenny the importance of maintaining a friendly, uniformly welcoming, cooperative, productive environment in the office; I also emphasized the relationship between maintaining such an environment and our central goals, particularly serving students, staff and faculty . . . Jenny's inappropriate office behaviors (e.g., insubordination, non-cooperation, excessive negativity, beligerance) as outlined above, certainly impact the office environment . . .

The cited portions of the evaluation are from paragraphs 3, 4, 7, 8, and 11. The April 15 evaluation did not expressly cite any work rule. Complainant and Burgess met on April 15 to discuss the evaluation. The meeting became confrontational, and Complainant requested that she be given the opportunity to meet with Yasaitis. Burgess did not consider such a meeting necessary, but did arrange for a meeting between Complainant and Yasaitis, to be held on April 24. Complainant responded by memo that she could not comply with the April 17 deadline stated in the Burgess memo of April 15. On April 17, after some difficulty in discussing work assignments for the day, Burgess summoned Complainant into her office to discuss the office's working environment. Complainant responded that she would participate in the discussion only with union representation. Burgess responded that she did not intend to discuss disciplinary matters. Complainant continued her request to be represented, and the meeting ended with no substantive discussion. On April 17, Burgess forwarded a copy of the April 15 evaluation document to Bjornstad, noting that Complainant had not signed or returned the original. Complainant prepared a formal response to the evaluation document. The first

two pages of that response, dated April 23, consist of a memo to Bjornstad. Among other points, Complainant stated:

> Please take notice that the Burgess Document of 4/15/98 is misleading, groundless, and contains numerous false statements. I will not sign off on the Burgess document of 4/15/98. If you sign off on the Burgess document of 4/15/98 and place it in my Graduate School personnel file and send a copy to be placed in my personnel file in the Department of Human Resources you may be legally liable.

Complainant also identified and addressed the cited paragraphs from the evaluation thus:

> 3. As to paragraph 3, the statements do not have a reference to my knowledge.
> 4. As to paragraph 4, the statements are vague in contravention of DER regulations and UWM policy and procedures. In addition, the statements are misleading, groundless, and/or false.
> 7. As to paragraph 7, the statements refer to events that occurred outside of the review period of *March 1, 1997 through March 1, 1998*. Moreover, the statements are misleading, groundless, and/or false.
> 8. As to paragraph 8, I affirm that I said I am comfortable using the new computer system to generate the schedule of classes. As to other statements in this paragraph, they relate to the evaluations of another individual. Furthermore, all other statements in this paragraph are misleading, groundless, and/or false.
> 11. As to paragraph 11, the statements are misleading, groundless, and/or false.

In a memo dated April 27, Complainant stated:

> You introduced a new work method on April 13, 1998. It calls for recording minute details of all the tasks you assign me. Work assignments that I used to complete on my own, you have divided into separate tasks. In addition, you often change the goals of these tasks before they are finally completed. As a result of these changes, tasks require more time to complete.
>
> Therefore, I am asking for the following:
>
> 1. Prioritize these tasks according to the amount of time I estimate for completion.
> 2. Authorize overtime.

Complainant issued a copy of this memo to Yasaitis. In a memo to Burgess dated April 27, Yasaitis alleged a portion of Complainant's evaluation established a call-in procedure that constituted an unreasonable work rule in violation of the labor agreement. Yasaitis stated the memo was a "pre-filing contact under Article IV, Sec. 2, par. 1" of the labor agreement. In memos to Complainant dated April 28 and 29, Burgess noted the date and time for "a pre-disciplinary meeting" at which a Local 82 representative would be present. Complainant returned the April 15 evaluation to Burgess under a cover memo dated April 30, 1998, which states: "I am returning to you the purported performance evaluation you gave to me on April 15, 1998." Complainant responded to the notice of a predisciplinary meeting in a memo dated May 4. That memo challenged the sufficiency of the notice provided by Burgess' memos of April 28 and 29, which "failed to include the purpose of the meeting, namely the nature of the contemplated discipline and the specifics of the alleged violations." In a memo to Burgess dated May 4, Yasaitis made a pre-filing contact to challenge the following:

. . .

> The purported performance evaluation . . . includes reference to specific work rule violations as follows:
>
> -- "insubordination, non-cooperation, excessive negativity, beligerance" (sic)
> -- "left the workplace for the day without directly informing me"
> -- "difficulty maintaining respectful communication patterns that are appropriate for the office environment:
>
> . . .

On May 5, Burgess, Yasaitis, Complainant and Eleanor Miller, a member of one of the Center's advisory councils, attended the pre-disciplinary conference. Miller attended at Burgess' request. Burgess attempted to read a written statement summarizing her position. Yasaitis and Complainant asked questions and made statements during this attempt, and the meeting ultimately broke down. Yasaitis issued Burgess two memos dated May 5. One stated a pre-filing contact that alleged Burgess had violated the labor agreement and internal UWM supervisory procedures by failing to afford Complainant adequate notice and information of the substance of the May 5 meeting prior to the meeting. The second challenged Burgess' response to Yasaitis' original pre-filing contact concerning the establishment of a new call-in procedure through the evaluation process.

14. In a letter to Complainant dated May 6, 1998, Burgess issued the following reprimand:

Pursuant to the authority vested in me, you are hereby formally reprimanded. Some examples of the reasons for this action are as follows.

On January 22, 1998 I assigned you to stay at home on February 2 to complete a project which you had been working on for seven months. The next day, when asked how the project had progressed, you said, "It didn't". Instead of completing the project at home, as directed, you unilaterally decided to come into the office instead. The project was not completed.

On April 14, 1998 you refused work I assigned to you. At approximately 10:00 a.m. I asked you to check on the price of some office supplies. You said that you would not have time to do it that day, and said I should "unassign" some other tasks. I went over the list of tasks, ascertained that you should have ample time to place the requested phone calls, and prioritized the list for you. You made some further excuses why you couldn't make the phone calls, asserting that you might not be able to get through to everyone on the phone. I again requested that you make the calls as directed, and simply report your progress to me. You claimed in a note that I had changed the due date for some of the work, when . . . I had not done so. Your work for the day was not completed.

These acts are representative of a pattern of insubordination and negligence in violation of UWS Classified rules I.A. and I.G.

> I.A. Insubordination, including disobedience, or failure or refusal to carry out assignments or instructions.
>
> I.G. Negligence in performance of assigned duties.

You were made aware of these work rules in that you received a copy of them at the time you were hired.

You have also exhibited extreme negligence in the performance of your duties. You have repeatedly failed to complete assigned work in a timely manner, have failed to follow clear instructions, and, upon occasion, have unilaterally revised your own work tasks.

In the week of April 13 - 17 you failed to follow instructions no less than five times. On at least four occasions during that week I advised you that you had not followed the instructions. On April 28 there were no less than five additional instances of failure to complete assigned work, failure to adhere to

clear instructions, or of unilaterally revising work requests. These actions are representative of a pattern of negligent behavior in the performance of your job, in violation of Classified work rules, I.G.

I.G. Negligence in performance of assigned duties.

You have exhibited unacceptably rude behavior with me, your supervisor.

On January 23, 1998 you left the room abruptly and in mid-sentence, while I was talking to you. When I discussed this behavior with you on January 26 you raised your voice to me.

On April 21, during a conversation with me about the logistics of a printing project, you walked away from me in mid-conversation. When I followed you out into the hall to continue the conversation, you cut me off in mid-sentence, and said with your back to me, "I know, I know, transfer the printer".

These are examples of a pattern of rudeness and unacceptable conduct towards your supervisor, in violation of UWS Classified work rules, IV.J.

IV.J. Failure to exercise good judgment, or being discourteous, in dealing with fellow employes, students or the general public.

All these cited examples are merely indicative of an overall pattern of deliberately insubordinate, repeatedly negligent, and unacceptably rude conduct which undermines the operation of the Center. On April 13, without proper notice you failed to attend the annual Women's Studies Award Ceremony. Plans for the event had to be changed at the last minute due to your absence. Such behavior jeopardizes the Center's ability to meet goals and complete projects so that we may serve students, faculty and staff associated with the Center for Women's Studies.

Significant efforts have been attempted to try to improve the Center's work processes so that we may better serve students, faculty, and staff in a manner consistent with the goals of the program. Starting in January this year, an outside consultant conducted four sessions for program staff designed to improve office processes. Your cooperation in these efforts was minimal, and, despite my repeated efforts and your repeated assurances that you would respond in writing you have completely refused to make a commitment to improving the office environment.

> You are advised that UWM maintains an Employee Assistance Program for use by employees who my be experiencing personal problems which are affecting their work performance. . . .
>
> You are also advised that any further violation of the work rules will result in further disciplinary action, up to and including discharge. If you feel this action has been taken without just cause, you may exercise your appeal rights as set forth under Article IV of the 1997-99 WSEU Agreement.

The "project" referred to in the second paragraph of the reprimand was Complainant's preparation of a revised position description for the reclassification process noted in Finding of Fact 8. In a memo to Burgess dated May 8,Complainant requested that Burgess arrange a meeting between Complainant and Yasaitis "to discuss filing a grievance based on the letter of reprimand you issued to me on May 6, 1998." In a three-page letter to Bjornstad and Bradbury dated May 11, Complainant stated "an appeal pursuant to Article IV, Section 9, paragraph 1 of the Agreement between the State of Wisconsin and the Wisconsin State Employees Union." The letter detailed Complainant's position that the May 6 reprimand was invalid and needed to be remedied. Complainant also filed memos with Bjornstad and Burgess contending that Miller's attendance at the predisciplinary meeting "violated my right to confidentiality." In a memo to Burgess dated May 12, Complainant stated:

> On May 8, 1998 I made a written request to meet with my union representative. At 7:45 AM I put it in your mailbox in the Center for Women's Studies, Mitchell Hall 121. You have not made arrangements for me to meet with a union representative. More than 48 hours have passed since I made the request. You are violating my right to union representation.
>
> As you know, you approved time off for me from 5/18/98 through 6/5/98 (see memo dated 3/31/98). Please arrange for me to meet with my union representative, Stan Yasaitis, President of AFSCME Local 82 at once.

Burgess discussed the point with Complainant on May 12, noting to her that she had been out of town during at least part of the time for which Complainant sought her assistance to obtain a WSEU representative. Burgess noted in a memo to Complainant dated May 12, that she had made arrangements for the meeting for June 8. Complainant responded in a memo dated May 13, which states:

> You are obstructing my right to union representation. Yesterday, May 12, I put a memorandum in your Women's Studies office mailbox saying that you had not provided me with union representation as I requested in my May 8 memorandum to you. As you are aware, my May 8 request pertained to your disciplinary letter of reprimand to me dated May 6, 1998. I had placed it in your Women's Studies office mailbox Friday morning, May 8, 1998. You took no action on my request by the end of the workday, Monday, May 11, 1998, despite the fact that you were in your office.
>
> At approximately 1:50 P.M. yesterday you approached me at my desk with a memorandum that appeared to be my May 12 memorandum to you in which I told you that you had not acted on my May 8 request for union representation. You said "I want to talk to you about this."
>
> I replied that you must call a union steward for me before I would discuss the matter with you. You said you just wanted to "communicate with me." I again asked for a steward. You continued to move closer to me, saying, "the way to communicate is to be direct." Then you told me that in the future, when I wanted union representation, I must email or telephone you. You added that you had been out of town on Friday, May 8, 1998. You were threatening and harassing throughout this interaction.

In memos to Burgess dated May 13 and May 14, Yasaitis filed three pre-filing contacts regarding the letter of reprimand and regarding the events covered in Complainant's memos of May 8 and May 13. Yasaitis and Burgess discussed, via e-mail and inter-departmental mail, the timeliness of Burgess' response to Yasaitis' pre-filing contacts and Complainant's request to meet with him concerning a grievance. Yasaitis informed Burgess he was available to meet Complainant prior to June 8, and Burgess responded by arranging a meeting between Yasaitis and Complainant on May 15. Yasaitis and Burgess continued to correspond concerning the pre-filing contacts. Burgess waived the pre-filing step, taking the position that she was "too close to the situations." Yasaitis stated his disagreement with her position.

15. In a letter to Bradbury and Rayburn dated May 14, 1998, Complainant stated, among other points, that Burgess, "is obstructing my right to union representation and she is and has been retaliating against me for my union activity." The letter included a portrayal of events leading up to and from the April 15 evaluation. Bradbury and Rayburn returned the letter to Complainant, asserting the matters alleged should appropriately be referred to the contractual grievance procedure. Bradbury also returned Complainant's letter of May 11, under a cover letter dated May 14, which stated:

> I am returning the enclosed, as it is inappropriate as a challenge to a disciplinary action. Disciplinary actions may be challenged by the filing of a grievance, on an approved State of Wisconsin DER-25 form. The form must be co-signed by a WSEU grievance representative. A grievance in response to a written reprimand does not begin in the Labor Relations Office, but must begin at the step of the grievance procedure appropriate to the level of authority of the person signing the reprimand (4/9/1).
>
> I have enclosed a blank grievance form.

Complainant responded in writing to each of them, asserting that the labor agreement did not require the signature of a WSEU representative, that Burgess' actions "have put the institution of UWM at risk of legal liability" and that Rayburn's conduct turned away the opportunity to avoid that risk.

16. On May 20, 1998, Yasaitis filed four grievances on Complainant's behalf, challenging the conduct Yasaitis had highlighted in the pre-filing contacts noted above. On June 18, a grievance meeting took place on the grievances. Complainant, Complainant's attorney, Walter Kelly, Yasaitis and Berthena Joseph attended the meeting. Kelly is not affiliated with WSEU. Bjornstad was unaware Kelly was going to attend the meeting until his appearance at the meeting. Kelly filed a formal statement of Complainant's position regarding the meeting in a letter to Bjornstad dated June 24. On July 2, Bjornstad sought an extension of time to respond to the Step One meeting. On July 3, Complainant denied the request. Complainant filed the grievances at Step 2 with Bradbury. Bradbury received the grievances, dated July 15, on July 16. Prior to July 15, Complainant sought to have Bradbury issue a number to each grievance, based on UWM Respondents' system for tracking grievances, as noted above regarding the March 6 grievance. Bradbury declined, contending she could not number grievances she had yet to receive. Bradbury uses a database program to generate grievance numbers, and does not generate such numbers prior to physical receipt of a Step One grievance that has been answered by UWM. Complainant numbered the grievances I through IV. Grievance I consists of seven pages, and challenges whether the reprimand was for just cause. Grievance II consists of two pages, and challenges the notice for and substance of the pre-disciplinary meeting. Grievance III consists of three pages, and challenges the propriety of the April 15 evaluation. Grievance IV consists of a single page, asserts that the April 15 evaluation sought to establish a new call-in procedure, and challenges the propriety of the procedure as a work rule. Complainant filed with Bradbury and with the Administrator of the Department of Employment Relations, attachments to the grievances on July 20, noting, among other points, that Bjornstad had not responded at Step One. Complainant issued a memo to Bradbury dated July 27. The memo stated it was a pre-filing contact challenging Bradbury's

handling of the four grievances, and specifically challenging Bradbury's return to Complainant of copies of the grievances in an unsealed, inter-departmental mail envelope not including a designation denoting "confidential". Bradbury responded in a memo to Yasaitis dated July 31, in which she acknowledged "a regrettable oversight on my part, or that of someone in my Department", expressed regret for any inconvenience and stated her intent to seal and stamp such materials appropriately in the future. The response also asserted that "a properly filed Pre-filing Step contact under Article IV, Section 2, paragraph 1 . . . should come from the grievance representative rather than the employee." Complainant responded in a memo to Bradbury dated August 3, in which she challenged Bradbury's conduct and asserted she would "proceed to the next step of the grievance procedure" in the absence of a meaningful response. Yasaitis, in response to Bradbury's July 31 memo, took the position that the prefiling contact could come from an employee or their grievance representative. Bradbury ultimately changed her opinion regarding the need for a prefiling contact to come from a grievance representative other than the grieving employee. Bradbury set Step 2 grievance hearings for a series of matters, including Complainant's four grievances, for late July. Yasaitis requested and received a postponement to permit more preparation. Bradbury rescheduled the hearing for August 26. On August 11, Bjornstad issued her response to Complainant's four grievances. Sometime after this, Bradbury generated the eight-digit grievance numbers from her database to track the grievances numbered I through IV by Complainant. Complainant issued a written response Bjornstad's answer in a memo dated August 13. In a document dated August 14, Complainant filed a "Notice of Claim" with the Attorney General of the State of Wisconsin concerning the "libelous and defamatory" nature of the April 15 evaluation. Complainant filed a similar document, dated August 31, challenging the written reprimand. On August 20, Complainant issued a letter to Bradbury, seeking that Bradbury disqualify herself as a Step Two hearing officer due to "demonstrated bias" manifested by a pattern of negligent and willful conduct derogating Complainant's rights.

17. In an e-mail to Burgess issued on August 4, 1998, Gabrielle Verdier, then Chair of the Department of French, Italian, and Comparative Literature, stated that Complainant would be moving, via mandatory transfer, into a Program Assistant position in the department. Verdier noted that although her department hoped to start Complainant on August 10, and that she thought it important that staff give a full two weeks' notice, she hoped Complainant could start on August 17. She also noted it would be helpful if Complainant could spend an hour or two within the new position prior to her start date to orient herself to the office. Burgess responded, via e-mail, thus:

> Thanks for your note. I have not yet received any word, formal or informal, from Jenny about a transfer, and so we have had no discussion about notice. Two weeks is fine, once Jenny gives me word she intends to transfer. When she returns from lunch I will ask her about her intentions regarding the transfer and she can then submit a letter of resignation, with two weeks notice. It's ok with me if, sometime during that two weeks, you'd like to arrange for Jenny to spend a few hours with your current LTE, to facilitate a smooth transition. No problem; just let me know when.

After conferring with Complainant, Burgess sent Verdier the following e-mail:

> I have now spoken to Jenny, who says that her understanding is that she is not to submit a letter of resignation and that she was not to speak to me at all about this transfer until it was entirely complete. You can imagine my confusion about all of this, as your email was the first formal word I've heard about the transfer. I will call Linda Daley to make sure the appropriate processes are followed to facilitate Jenny's transfer in the most expeditious manner possible. I'm sure we can get this all cleared up in no time.

After further e-mail correspondence on August 5, the mechanics of the transfer were set in a fashion to keep the Center open after Complainant's transfer. In an August 6 e-mail to Bradbury, Yasaitis noted that Complainant had become a Local 82 Steward, and asked "(f)or now, please do not refer new cases to her" pending the completion of her training. In a memo to Burgess dated August 6, Complainant stated:

> This to notify you that as of August 6, 1998, I am a steward in Local 82 . . .
>
> You have retaliated against me because of my union activities in the past. You have violated my right to union representation, you have disciplined me because of my union activities, and attempted to restrain and abridge my rights as set forth in the *Agreement between the State of Wisconsin and AFSCME Council 24 Wisconsin State Employees Union*.
>
> Most recently, August 4, 1998, this retaliation has taken the form of your interference in the mandatory transfer process in violation of *Article VII* of the *Agreement*.
>
> This serves as notice that this retaliation is in violation of state and federal laws and regulations which can result in prosecution against you for unfair labor practices.

She issued a copy of this memo to Yasaitis, Bjornstad and Rayburn. In a letter to Zimpher dated August 17, Complainant summarized her reasons for the transfer and detailed her perception of a pattern of obstruction by UWM officials to the resolution of her grievances.

18. Bradbury hears Step Two grievances for UWM, and Weaver represents WSEU at Step 2 hearings. A Steward and a grievant may also appear at such hearings, and may actively participate. Weaver, whether or not she functions as the sole spokesperson, represents WSEU at all such hearings. Dates for Step Two hearings are set consensually by Weaver and Bradbury, who coordinate the calendars of other necessary participants. Step Two grievance hearings at UWM are typically scheduled to be heard on one day per month. Shortly before August 26, Kelly and Weaver discussed by phone whether the date permitted sufficient preparation time for Complainant and her attorney. Weaver informed Kelly that the WSEU, by policy, did not permit grievances under the WSEU labor agreement to be advocated by individuals not affiliated with WSEU. Kelly questioned the authority for this policy, and requested that the meeting be postponed. Weaver informed Kelly that the matter could be taken to her supervisors, Beil or Hacker. Weaver requested, and Bradbury agreed to postpone the Step 2 meeting dates. Complainant issued a letter to Beil, dated September 10 and to Hacker, dated September 11, in which she sought to have them direct Weaver "to allow Mr. Kelly to appear at the hearing as one of my representatives." She stated "this effort will be cooperative" and added the following to support the request:

> As you know, I have a right to any representative of my choosing. That right is guaranteed by the union contract 4/2/6 Step Two . . . the UWM Supervisor's Handbook and state law (111.81(17) Wis. Stats.). Of course the union contract also guarantees a representative of Council 24 to be present, and UWM recognizes both representatives.

Bradbury rescheduled the Step Two hearing for October 6, and so advised Complainant in an e-mail issued on September 22. Bradbury determined she would not function as the representative for UWM at the hearing, and formally confirmed this to Complainant in an e-mail issued September 24. Owen Bradley, a UW system labor relations specialist from Madison, was scheduled to conduct the Step Two hearing on Complainant's grievances. This is not common practice in processing UWM grievances. Weaver did not cancel the October 6 date, but informed Complainant by phone sometime on or about October 1 that WSEU would not waive its policy concerning her representation at the Step Two hearing. Complainant responded formally in a letter to Beil and Hacker dated October 1, which states:

. . .

> Ms. Weaver's telephone call to me was a continuation of coercion and intimidation against me by AFSCME Council 24, WSEU. Furthermore, your refusal to allow me to have the representative of my choice, namely my attorney, is a deliberate violation of state law [sections 111.83(1) and 111.84(2)(a) *Wisconsin Statutes*], and a violation of the *Agreement between the State of Wisconsin and the Wisconsin State Employees Union , Article IV*. Moreover, your coercion and intimidation against me regarding my choice of representative is the subject of a current unfair labor practices complaint against you and AFSCME Council 24, WSEU . . . Your continued coercion and intimidation, therefore, are deliberate and aggravated flouting of your responsibilities under law and contract.

In a letter to Zimpher dated October 2, Complainant stated:

. . .

> Under state law and the union contract I am allowed the representative of my choice. Therefore, I will only participate in the October 6, 1998 hearing if I am allowed the representative of my choice.

The WSEU policy challenged by Complainant has been consistently followed by WSEU, which does not permit non-WSEU affiliated attorneys to serve as advocates within the contractual grievance procedure, except in certain discharge cases or where the grievance affects a criminal charge. Complainant called in sick on October 6, and did not appear at the Step Two hearings set for that day. The Step Two hearings on Complainant's grievances have not been rescheduled.

19. Complainant filed a grievance on August 13, 1998, challenging Bradbury's "good faith" in handling her Step One grievances. In a memo to Sander dated September 17, Complainant alleged that Sander had violated her confidentiality while attempting to schedule a Step One meeting, and that Sander had violated the labor agreement by failing to timely answer the August 13 grievance. In an e-mail to Sander issued September 17, Complainant asserted, among other points, that it would be "improper" for Sander to act as a hearing officer in her grievance since Sander is a respondent in this unfair labor practice. Sander responded in a memo that asserted Complainant's September 17 memo constituted a waiver of the Step One meeting. Complainant disputed this in a memo dated September 18, and filed the grievance at Step Two on September 21. In a memo to Sander dated September 30, Complainant asserted Sander's processing of the grievance has "a chilling effect on the exercise of my rights" under the labor agreement, and constituted part of "a pattern and practice" of UWM administrators

to obstruct the fair and expeditious resolution of her grievances. This grievance was to be heard at the Step Two meeting described in Finding of Fact 18.

20. In a memo to Yasaitis and Weaver dated August 26, 1998, Bradbury stated:

> In recent months, Jennifer Peshut, a WSEU-represented employee has engaged in repeated attempts to misuse contractual procedures and bypass her union representation. As the chief officer of WSEU Local 82 and area field representative for WSEU Council 24, I want you both to be aware of the extent of her attempts to bypass the union and union procedures, and to assure you that I will not engage in inappropriate communication with any WSEU-represented employee, nor commit the Unfair Labor Practices demanded by Ms. Peshut. I am also concerned that as a new steward she may advise others to similarly bypass appropriate procedures, as she clearly does not understand the meaning of much contract language. The following are some examples of Ms. Peshut's attempts to bypass the union and engage impermissible ad hoc communications;
>
> . . .

The memo listed five examples including Complainant's May 11 appeal of the reprimand to Bjornstad and Bradbury; Complainant's May 14 appeal to Rayburn; Complainant's July 27 and August 7 pre-filing contacts to Bradbury; and the following:

> On July 9, 1998 Ms. Peshut contacted me directly by E-mail, demanding the "grievance numbers" for four grievances. At that time, no grievances had been filed by or about her, which I informed her by return E-mail. She then made the same demand a second time, asserting that she needed the number *in order to file* the grievances. As it is clearly inappropriate for the management's representative to correspond ad hoc and at length with a represented employee, I responded with an E-mail which was copied to both of you, in which Ms. Peshut was informed that the file numbers would be generated after she filed the grievances, but that I did not have any grievances from or about her in my possession. She responded with yet *another* message asserting that I *did* have her grievances in my possession, and that I was just refusing her demand. In truth, the first time grievances from or about Ms. Peshut were filed in my office was July 16. According to letters subsequently received from her, Ms. Peshut apparently still believes that I had her grievance file numbers in my possession on July 9, and that she needed them before she could file her grievances.

The memo concluded thus:

> Clearly Ms.Peshut fails to appreciate that it is *patently inappropriate* for management's representative to communicate, deal or bargain with her *individually*. Dealing individually with a represented employee without either the presence of a steward or the express permission of the union to conduct such direct communication could be construed as unilateral bargaining or a violation of the exclusive representation relationship of the WSEU. It would be as improper as an attorney communicating directly with another attorney's client yet she insists that my refusal to act inappropriately is negligent. According to recent letters received from her, she also believes that being told that a grievance form "…must be cosigned by a WSEU grievance representative" is false and misleading information, and that informing her that Pre-filing contacts must come from the union representative somehow "chills" her rights.
>
> Please explain to Ms. Peshut that the Labor Relations Manager is management's representative, and as such it would *clearly be improper* for me to deal with her individually outside of contractual procedures, despite her repeated demands that I do so. Please explain to her that the Manager's authority is to adjust grievances at the Second Step, but that I have no authority to "intervene" or "take corrective actions" on contractual matters outside of contractual procedures. Please explain to her that as the Labor Relations Manager, I am neither neutral nor impartial, but serve as the management *representative,* as you serve as the employees' and the union's *representatives*. And please explain to her that being told to use the grievance procedure is a protection, not a violation, of her rights.
>
> I hope that some of Ms. Peshut's misconceptions as to appropriate procedures in a union context can be made clear to her before she begins her stewardship duties in earnest. I will continue to keep you apprised if further demands for inappropriate communications are made.

Bradbury based her view that a grievance required the signature of a WSEU representative on Section 4/1/3 of the labor agreement. Yasaitis responded in a letter to Bradbury dated September 9, which states:

> I've heard it say that you can tell how close to home one's arrow has fallen by the pitch of the wail of the target.

I am writing to respond to your August 26, 1998 memo regarding actions of Jennifer Peshut. Let me start by stating that Jennifer Peshut has neither misused contractual procedures, nor bypassed union representation, nor attempted to "negotiate".

As to your examples:

1. It is not a violation to attempt to resolve a workplace issue within the workplace. The grievance procedure is another forum in a workplace with many levels of communication. Any worker has every right to expect response and resolution of a complaint -- whether it proceeds to a grievance is usually an indication that communication and response by management has FAILED. Since you complain about Peshut's non-grievance communications with UWM managers, I must ask that you provide any rules that prohibit an employee from internal communication.

2. Even you, Ms. Bradbury, can be communicated with in a non-grievance format. You may choose to respond (or not respond or act) and refer to the grievance procedure. Whether you like it or not, your response (whatever it might be) may be considered negligent. Surely, you've been called worst things.

3. You'll have to excuse Jennifer's insistence on grievance filing numbers. The WSEU steward training she received explicitly instructs new stewards to insist upon that information. I will be inquiring with WSEU representatives as to the impact of this long neglected aspect of your handling of grievances.

4. That you received a pre-filing contact from Jennifer Peshut on July 27 is noted.

5. Your complaint of an August 7, 1998 pre-filing contact from Jennifer Peshut is without merit, since you were notified of her appointment as a steward on August 6. Or are you denying receipt of the August 6 email from me? Those can be tracked, you know ….

The only truly valid part of your August 26 memo is found on page 3, where you carefully, in writing, declare your role as UWM's Labor Relations Manager. What's interesting about your definition of yourself as the "neither neutral nor impartial … management representative" however, is what you do NOT state. You state no commitment to resolutions of problems, you state no commitment to non-management employee rights, and no commitment to

> making UWM the best workplace it can be. You state no commitment to an employee's right to a fair, equitable, and timely response to concerns. You do not even state a commitment to uphold employee contractual rights with the managers you represent and advise. I have in the past, continue today, and will in the future document your efforts to divert and undermine employee rights.
>
> Another of your memo's intent is clear from what is not included in your list of complaints, that is, Jennifer's recent demand that you be recused from hearing her cases due to your personal prejudice against her.
>
> Your reference to referring issues to the grievance procedure as a protection of rights is insulting, given the fact that Unfair Labor Practice charges have had to be filed to convince you to implement grievance arbitration awards.
>
> As I stated in the August 6 email to you, managers should not be referred to Jennifer Peshut (and Cecilia Lewandowski, UCCE) for representation pending additional training in the form of accompanying stewards on a few cases to gather hands-on experience. Your memo of August 26 certainly is part of their training.

On October 28, Yasaitis filed a grievance that listed Complainant as his representative. Bradbury set the Step Two hearing for November 12. Weaver contacted Complainant prior to this hearing, and advised her that WSEU did not want her to represent Yasaitis at the hearing. Yasaitis summarized the events in a letter to Beil dated November 30, which states:

> I am writing to express concerns about Council 24's treatment of and attitude toward Local 82 steward Jennifer Peshut.
>
> Jennifer was the steward in a case I had at 2d step, that was heard Nov. 12. Field Representative Weaver contacted me prior to the hearing to say that she was directed to not allow the case to be heard if Jennifer were the steward involved. This was based on the fact that she has filed an Unfair Labor Practices charge on another matter. Weaver has also stated that Jennifer "can not" be a steward, having filed said ULP, based on Article X. Sec. 2 of the AFSCME International Constitution.

My concerns are as follows:
1. Local 82 would strenuously object to interference in the appointment of Local stewards. Its difficult enough to bring members to active involvement without a council veto over who may serve Local 82. The WSEU constitution itself forbids staff interference in Local activities.
2. Jennifer only filed an ULP charge because you and Assistant Director Hacker failed to respond to her request/appeal of the Council's decision to bar her attorney from a 2d step hearing. Since the violation was of state law, not the AFSCME constitution, the threat of not recognizing her as a steward based on Article X, Sec. 2 of the AFSCME International Constitution is improper. Further, since no charges have been filed, there is no basis upon which the WSEU can disbar Peshut.

Marty, we can face off with a series of charges and counter charges that will go all the way up to the International Judicial panel. I don't see the necessity of that. I am confident that Jennifer Peshut is in no way planning to undermine this union. If you had bothered to contact her about the appeal of the attorney's presence, you would have known that her sole intent was to add clout to her -- and the Union's -- case. By refusing to recognize her as a steward you seriously undermine this Local's ability to face management, you undermine the credibility of this Local's steward selection and appointment process, and you tread dangerously near to a failure to represent a member. We don't want, and we don't need to go there.

Jennifer's WERC case is nearing resolution or hearing. Regardless of the answer, Local 82 considers Jennifer Peshut a recognized steward in good standing. We will be treating her as such, and demand that Council 24 do the same. . .

WSEU does not play any role in the process by which local unions select or remove Stewards. WSEU has not taken any action to remove Complainant as a Steward, and Complainant remains a Steward for Local 82. WSEU affiliated representatives other than Complainant processed the Yasaitis' grievance. WSEU acted to keep Complainant from advocating that grievance because of her pending complaint against Weaver. The timeliness of employer responses to grievances has been a subject of ongoing concern between the WSEU and the State of Wisconsin for several years.

21. In a letter to Sander dated May 4, 1999, Complainant stated:

> Please take notice that pursuant to 11/7/3 and 11/14/3 of the *Agreement between the State of Wisconsin and AFSCME Council 24 Wisconsin State Employees Union,* the May 6, 1998 letter of discipline issued by Susan Burgess against Jennifer A. Peshut must be removed from all personnel files. This letter and all copies must be removed by Thursday, May 6, 1999.
>
> All personnel files includes but is not limited to the following: the official personnel file located in the department of Human Resources at UWM, any and all personnel files in the Labor Relations Office at UWM, any and all personnel files in the Graduate School at UWM, any and all personnel files in the Center for Women's Studies at UWM, any and all personnel files in the College of Letters and Science at UWM, and any and all personnel files in which the letter might be found.
>
> Please send the original letter and all copies to me at the address above. In addition, please confirm in writing that you have expunged all copies of the May 6, 1998 letter from any and all personnel files.

Bradbury issued a memo to Sander, with a copy to Complainant, Burgess, Bjornstad, Yasaitis, Kelly, Daley and representatives of DER, WSEU and the WERC, dated May 10, that stated:

> **RE: Removal of Letter of Reprimand**
>
> Pursuant to 1997-99 WSEU Agreement Section 11/7/3, please note that the following letter of reprimand has been removed from the official Personnel File of Jennifer Peshut;
>
> | **Date of Records Removed** | **Subject** | **Signed By** |
> |---|---|---|
> | May 6, 1998 | Reprimand | Susan Burgess |
>
> If you or any of the persons listed below have kept copies of the original letter of reprimand, please remove them, and return them to Jennifer Peshut, 730 E. Burleigh Street, Milwaukee, WI 53212. Please mark all copies **CONFIDENTIAL.**

Complainant responded in a letter to Bradbury dated May 13, which states:

I am writing to you as the representative of the appointing authority of the University of Wisconsin-Milwaukee. I received from you two documents. The first appears to be the May 6, 1998 letter of discipline written by Susan Burgess against me. Affixed to it is a small hand written note marked "ORIGINAL FROM P-FILE."

The second document is a copy of a May 10, 1999 memorandum from you to Erika Sander, Acting Director of Human Resources at the University of Wisconsin-Milwaukee (UWM). This peculiar and confusing memorandum fails to meet the requirement for expunging this record from university archives.

My May 4, 1999 letter to Erika Sander (copy enclosed) states that copies should be removed from UWM archives. -

> *"All personnel files includes but is not limited to the following: the official personnel file located -in the department of Human Resources at UWM, any and all personnel files in the Labor Relations Office at UWM, any and all personnel files in the Graduate School at UWM, any and all personnel files in the Center for Women's Studies at UWM, any and all personnel files in the College of Letters and Science at UWM, and any and all personnel files in which the letter might be found."*

First, your memorandum addresses individual staff at UWM. This does not ensure that the letter will be removed from units of the university such as those mentioned in my May 4, 1999 letter to Erika Sander.

In addition, the memorandum is confusing because you seem to be addressing individuals outside of the university over whom you have no authority. You include individuals who have a copy of the May 6, 1998 letter of discipline because it is an appendix to a complaint I filed against the University of Wisconsin-Milwaukee with the State of Wisconsin Employment Relations Commission. As I am sure you know it would be improper for them to remove that document from those files.

Furthermore, you tell Stan Yasaitis, the president of the local union, to remove it from his files. This is interference with union matters.

> Finally, although you are shown as copied on the May 6, 1998 letter of discipline, you have not returned your copy to me.
>
> Please return all copies of the May 6, 1998 letter of discipline held by the University of Wisconsin-Milwaukee to me at the address above. Please confirm in writing that you have expunged all copies of the May 6, 1998 letter from any and all personnel files.

Bradbury retained one copy of the reprimand in the open grievance file that challenged whether the discipline was for just cause.

22. WSEU is the exclusive collective bargaining representative under the labor agreement noted in Finding of Fact 5 above, and is a party to that agreement. Local 82, for the purposes of that agreement, is an affiliated local unit of WSEU, and is not a party to that agreement except as an affiliated local within WSEU. WSEU determines whether or not an individual grievance will be processed through arbitration under the labor agreement, and, if so, how WSEU will advocate that the contractual language should be interpreted. Affiliated local unions have input into this process, but the ultimate determination on how the contract is to be interpreted, from WSEU's perspective as a party to the agreement, is that of WSEU. WSEU does not permit affiliated locals to proceed to grievance arbitration without WSEU approval. The approval process is set forth in an "Appeal Procedure" maintained by WSEU, which states:

> Grievances which have been processed through the third step of the grievance procedure shall be dealt with by Council 24 in the following manner:
>
> 1 . Once an appeal has been filed on a third step grievance denial, the field representative having jurisdiction will then meet with the assistant director of Council 24 to review the case on its merits. After this review, the assistant director will issue a decision, in writing, either to support or not support the grievance to arbitration based on the merits of the case, previous precedent and the effect on the union and its membership. This written decision, including the reasons for denying support, will be sent to the grievant and steward. Explanation of appeal procedure will be included.
>
> 2. If the grievant has grounds to dispute the decision, he/she may, within thirty (30) calendar days of receiving the decision not to support the grievance to arbitration, appeal said decision to the executive director of Council 24.

3. The appeal MUST be in writing, VIA CERTIFIED LETTER, and state the specific reason(s) for the disagreement with the decision not to support and shall contain supportive documentation and other relevant evidence or information needed for the executive review.

4. The executive director will then meet with the assistant director and conduct an executive review of the disputed case. Upon completion of this review. the executive director will issue a written determination which will either uphold or reverse the decision not to support. This decision shall be final.

5. If the decision is not to support the grievance to arbitration, the grievance shall no longer be pursued.

6. In the matter of discharge cases which do not receive Council support to arbitration only, Council 24 will relinquish ownership of the grievance to the grievant under the following circumstances:

   A. The grievant must file a WRITTEN request, VIA CERTIFIED LETTER, for ownership of the grievance with the executive director of Council 24; and
   B. The grievant must sign a waiver of indemnity holding Council 24 harmless in any future proceedings on the matter.

7. The postmarked dates of both the decision not to support and the appeal from that decision shall determine the time limits for the appeal.

The reference to "third step" in the procedure reflects that the labor agreement in effect did not have arbitration as its third step.

23. WSEU is prepared to represent Complainant regarding the Step Two grievances noted at Finding of Fact 18, and UWM is prepared to answer those grievances if Complainant processes them under Article IV, including use of a WSEU-affiliated advocate. Complainant has not informed Union Respondents or UWM Respondents that she has altered the position stated in her October 2, 1998 letter to Zimpher. Complainant has not requested WSEU or UWM Respondents to proceed to Step Two on the grievances noted in Finding of Fact 18, since October 6, 1998.

24. No UWM Respondent bore anti-union hostility toward Complainant for her exercise of lawful, concerted activity.

CONCLUSIONS OF LAW

1. Complainant is an "Employee" within the meaning of Sec. 111.81(7), Stats.

2. UWM is an "Employer" within the meaning of Sec. 111.81(8), Stats.

3. WSEU is a "Labor Organization" within the meaning of Sec. 111.81(12), Stats.

4. Bjornstad's statement to Romenesko to the effect that it was regrettable that Complainant had brought her concerns with Burgess and the Kriviskey facilitation effort to the attention of WSEU representatives had a reasonable tendency to interfere with rights granted Complainant by Sec. 111.82, Stats., in violation of Sec. 111.84(1)(a), Stats.

5. No UWM Respondent committed any act that violated Sec. 111.84(1)(b), Stats.

6. No UWM Respondent bore any hostility to Complainant's exercise of rights granted Complainant by Sec. 111.82, Stats. Thus, no UWM Respondent violated Sec. 111.84(1)(c), Stats.

7. No Union Respondent committed any act that violated Sec. 111.84(2)(a), Stats.

8. No Union Respondent committed any act that violated Sec. 111.84(2)(b), Stats.

9. No UWM or Union Respondent violated the terms of the labor agreement noted in Finding of Fact 5 to deny Complainant's recourse to the grievance procedure. Thus, no UWM or Union Respondent committed any act that violated Sec. 111.84(1)(e), Stats., or Sec. 111.84(2)(d), Stats., to the extent the labor agreement is at issue in this litigation.

10. No UWM or Union Respondent acted toward Complainant in any capacity except as the agent of UWM or WSEU. Thus, no UWM or Union Respondent committed any act that violated Sec. 111.84(3), Stats.

ORDER

1. The complaints, as amended, underlying Case 465 and Case 466 are dismissed, except that portion of the complaint in Case 465 alleging UWM Respondent violation of Sec. 111.84(1)(a), Stats.

2. To remedy its violation of Sec. 111.84(1)(a), Stats., UWM, through its officers and agents, shall immediately:

a. Cease and desist from making statements to employees that derogate employee use of WSEU representatives, where the statement can reasonably be expected to interfere with employee access to such representatives.

Dated at Madison, Wisconsin, this 15th day of February, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

STATE OF WISCONSIN (DEPARTMENT OF EMPLOYMENT RELATIONS)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE PARTIES' POSITIONS, CASE 465

Complainant's Brief

Complainant contends this case poses issues in the following areas: interference in the internal affairs of unions; interference, including inappropriate discipline and litigation tactics, with the exercise of concerted activities; performance evaluations; and an employee's statutory and contractual right to representation. After a review of the facts, Complainant notes that the "complaint against the employer has three elements." The first is a pattern of adverse employment action by Burgess against Complainant. That action prompted Complainant to seek the protection of Union Respondents and the labor agreement. The second essential element to the complaint is a pattern of interference by Bradbury and other UWM administrators, in an effort to hinder Complainant's attempted recourse. The final element is that the employer's response reflects hostility to Complainant's concerted activities.

Complainant contends that proof of her claims demands that she establish the adverse employment actions "were motivated at least in part by hostility against . . . concerted activities," and, in the alternative, that "the adverse employment actions had a reasonable tendency to interfere with (Complainant's) rights to concerted activity, whether or not motivated by hostility." UWM Respondents' defense turns on whether the adverse employment actions "were in fact based solely on valid reasons." Federal law sets a more stringent standard of proof than Wisconsin law, but Complainant contends the evidence is sufficient to meet either.

A detailed review of the 1997-98 performance evaluation demonstrates it served as a pretext for reprisal. The evaluation differed from all predecessors, in form and in substance. Viewed on its purported merit, the document contains "criticisms Burgess knew to be false" and in any event failed to conform to State of Wisconsin or UWM requirements for evaluations. Since the evaluation was demonstrably flawed, it establishes "*prima facie* evidence that the employer used the 1997-98 annual performance review as a means of reprisal for her concerted activities." Under Sec. 903.01, Stats., this shifts the burden of persuasion to UWM Respondents to rebut the allegations.

UWM Respondents cannot do so. Burgess' testimony fails to establish a valid work-based reason for the precipitous change in her attitude to Complainant's work. That Burgess did not cease advocating for Complainant's reclassification until after Complainant "asked for union representation at the beginning of February 1998" underscores the weakness of her testimony. Beyond this, UWM Respondents have afforded no "plausible alternative explanations" for the adverse evaluation.

The reprimand of May 6, 1998 manifests the patently pretextual basis for Burgess' conduct. The reprimand "was fabricated out of whole cloth." There is no demonstrated basis for Burgess' accusations, the reprimand violates internal policies and alleges violation of work rules never provided to Complainant. A review of the evidence "supports the inference that Burgess, in consultation with Bradbury, knowingly manufactured a series of false accusations to suppress Ms. Peshut's concerted activities."

Burgess' conduct manifests proscribed hostility. Among other facts, her consultation with Bradbury on an evaluation document, her delay in responding to Complainant's requests for representation, her action to ban Jackson from the February 3, 1998 meeting, and her attempts to secure Complainant's resignation from UWM after a transfer establish the existence and the depth of the hostility. Similarly, Bjornstad was hostile to Complainant's exercise of concerted activities. Her comments to Romenesko in June of 1998, and her tardiness in responding to Complainant's grievances establish the hostility. Bradbury's hostility is manifested by, among other facts, her responses to Complainant's letters to various UWM administrators, her attempts to get Union Respondents to control Complainant, and her efforts to channel all of Complainant's concerns into the grievance procedure which Bradbury sought to delay indefinitely. Rayburn and Sander have shown similar "scorn for Ms. Peshut's exercise of her rights."

Complainant concludes that a long chain of events, starting with Burgess' evaluation, set in motion what became a pattern of discriminatory conduct by a series of administrators. Complainant's attempt to correct that evaluation prompted the concerted activity that became focused with Bradbury's attempts to channel the entire dispute into the grievance procedure. That procedure is manipulated by UWM Respondents to cause delays that wear down grievants. UWM Respondents' refusal to hear the grievances postponed from October of 1998 reflects this. Complainant has never conditioned rescheduling the matters on her choice of a non-Union Respondent advocate. Rather, she asserts "she has a right to have her grievances heard and answered **and** she has a right to present them through her representative of choice." The conduct of UWM Respondents in the litigation of the complaint underscores this consistent pattern of "intransigence." The patently frivolous claim for attorney fees and costs underscores this point. Because UWM Respondents have offered no credible defense to the complaint, the allegations of the complaint must be affirmed and remedied.

UWM Respondents' Brief

UWM Respondents claim that Complainant "did not produce one scintilla of evidence to support the allegations in her complaint against UWM." Rather, her claims rest only "upon the timing of her first contact with the union." That meeting occurred "on or about February 2, 1998" and Complainant seeks to establish that any action adverse to her after that date is tainted.

UWM is obligated by contract to channel disputes regarding the interpretation of the labor agreement to the contractual grievance procedure, for which Union Respondents are the exclusive representative. More specifically, UWM Respondents assert that Sections 4/1/1, 4/1/3, and 4/5/1 mandate the conduct Complainant seeks to make unlawful. Articles III and IV of the labor agreement authorize UWM to discipline employees for just cause. Complainant's letters complaining of discipline thus require a contractual response, if any. Beyond this, Complainant ignores that any "crackpot can make allegations, but an employer does not have to react to them" if they lack merit. UWM Respondents cannot be faulted for referring her correspondence to the grievance procedure. If Complainant believed another, non-contractual forum was preferable, it was her choice to make.

Even if UWM Respondents committed violations in processing Complainant's grievances, they were technical and produced no irreparable harm. That Burgess refused a pre-filing contact reflects no impropriety: she had no relevant collective bargaining training; Burgess understandably believed she was "too close to the matter" to view it objectively; Complainant's own conduct showed no hope for meaningful dialogue; and even if taken as a violation, the appropriate remedy is advancement of the grievance to the next step. In any event, "no reasonable person can find that UWM tried to obstruct Ms. Peshut's rights to union representation."

Bradbury had a "longstanding practice to ensure that grievances were signed by both the grievant and a union representative." This may not be required by Section 4/1/2, but is understandable under Section 4/1/3. The requirement of a signature by a union representative "actually helped to ensure union involvement." Nor can Complainant's allegations regarding the timeliness of UWM responses be credited: "nothing in the contract . . . time-bars a grievance answer." Beyond this, the allegation presumes Complainant wants the grievances heard, and her own conduct belies that. That the Union has determined the approach Complainant advocates is an unproductive way to address disputes further undermines the Complainant's assertion. UWM Respondents conclude that "the totality of the evidence reveals that UWM took extraordinary efforts to try to set up meetings for Ms. Peshut to meet with her union representative. The evidence demonstrates Complainant's allegation that Bradbury improperly failed to assign grievance numbers to her grievances is without significance.

Nor will the record support an assertion that UWM Respondents' failure to hear the Step 2 grievances has any statutory significance. The delay is attributable solely to Complainant's refusal to proceed unless her attorney could represent her. The Commission, in UW HOSPITAL AND CLINICS BOARD, DEC. NO. 29784-D (WERC, 11/00), established that "the parties to the Agreement own the grievance proceeding . . . including arbitration." Unlike the contract at issue in that case, the 1997-99 agreement does not contain language that would permit an individual employee the independent right to process a grievance. Thus, her continued intransigence alone can bar the processing of her grievances.

A review of the evidence establishes that Complainant often requested union representation when she had no right to it and that UWM Respondents consistently provided her such representation when she had a right to it. In fact, Complainant's flawed view of the law "was a large factor in making her relationship with Dr. Burgess so difficult." Complainant used the request for representation as a sword to assert control over Burgess, not as a shield to protect herself. A review of the evaluation process underscores that Complainant selectively requested representation, and that she received it even when she had no clear right to it. Such a review also establishes that the evaluation can not be in policy, and was not in fact, disciplinary in nature. That the evaluation rating dropped regarding the supervisor's opinion of Complainant's work is without statutory significance, for it reflects no more than Burgess' honest opinion. Work rule citations did not occur until the issuance of the written reprimand.

Detailed review of the record will not support the claim UWM Respondents denied representation when Complainant was entitled to it. Jackson did attend a meeting with Kriviskey, only to prompt a grievance that the meeting "constituted a committee under the Agreement." That grievance has no merit, and was withdrawn.

The written reprimand falls short of establishing proscribed hostility. Complainant's concerted activity was not curtailed, and Complainant became a steward. The evidence affords reason to believe that Complainant sought representation to generate a claim that the discipline she saw coming was anti-union retaliation. That the written reprimand was removed from her file shows the weakness, if not mootness, of her claim.

The reclassification once supported by Burgess affords no support for the inference that UWM Respondents bear hostility for her exercise of concerted activity. The reclassification was not, under governing administrative rules, a promotion, as Complainant contends. Even if taken as a promotion, the lack of progress in its implementation is attributable to Complainant's conduct alone. Viewing the evidence as a whole, UWM Respondents conclude that "this claim should be dismissed."

Complainant's Reply Brief

Complainant contends initially that UWM Respondents fail to recognize that the Commission is bound by the Wisconsin rules of evidence, and complicates this neglect by abusing applicable law. They presume "facts not in evidence" and create "a new cause of action" thus committing a new unfair labor practice. More specifically, Complainant alleges "no agent of the employer ever said they would not hear" the pending grievances unless Complainant agreed to be represented by Union Respondents. In effect, UWM Respondents offer Complainant an ultimatum that she present grievances through representatives of the employer's choosing, or waive the right to process them. This ultimatum misstates the ministerial duty imposed by Sec. 111.83(1), Stats. It also wrongly coerces employee choice of WSEU representatives, interferes with Complainant's individual right to engage in concerted activity, and is internally inconsistent with UWM Respondents' asserted defenses. Although a new unfair labor practice, and a matter not directly applicable to Union Respondents, this matter should be decided in this forum.

UWM Respondents mischaracterize the duties imposed on them through the labor agreement, which does not impose on it a duty to ensure that employee grievances are asserted through the contractual grievance procedure. A review of the evidence establishes that UWM Respondents acted consistently to frustrate Complainant's use of that procedure, in violation of the contract, statute and Article I, Section 4 of the Wisconsin Constitution.

UWM Respondents attribute "allegations to Ms. Peshut that she never made" then add "a legal argument that does not apply." More specifically, Complainant denies she has asserted a WEINGARTEN-type claim. A detailed examination of the assertions of UWM Respondents establishes that they, however misplaced, are unproven diversions from the issues posed by the complaint, which center on hostility toward the exercise of protected rights. From their characterization of Complainant's requests for representation through their characterization of the reclassification process, UWM Respondents consistently manipulate evidence and argument to obscure their improper motivation.

An examination of UWM Respondents' defense establishes it is more akin to "a criminal defense" than to "an unfair labor practice claim." The "minor technicalities" highlighted by UWM Respondents' arguments are, in fact, "their way of setting up bureaucratic impediments to thwart Ms. Peshut's efforts." A review of the evidence establishes that UWM Respondents acted consistently to dictate Complainant's choice of representative and to frustrate her attempts to utilize the grievance procedure to obtain redress from Burgess' inappropriate conduct toward Complainant.

Complainant contends that UWM Respondents attempt to use a wrongfully admitted document as its statement of facts for this proceeding underscores a consistent pattern of conduct by which they seek to obscure the fundamental issues posed by the complaint. Similarly, the invective resorted to by UWM Respondents underscores the lack of merit to its case. That pattern of conduct mirrors the institutional pattern of conduct inflicted on Complainant as an individual employee. An impartial review of the evidence confirms Complainant's contentions.

UWM Respondents' Reply Brief

UWM Respondents characterize Complainant's assertion that Burgess was seeking to promote her as "nothing more than a delusion of grandeur." Repeated assertions made by Complainant establish that she has an "erroneous and unrealistic belief that whenever she requests union representation, she a right to that representation." Her repeated requests reflect a "calculated method of trying to intimidate" Burgess from "issuing work instructions." Complainant also mischaracterizes Bjornstad's comments concerning union representation. Bjornstad never intimated that the trouble in Women's Studies was caused by Complainant's request for union representation.

The evidence establishes that Complainant's work "performance did change dramatically." Burgess' evaluation accurately reports that. The poor evaluation was thus rooted in fact. Since a poor evaluation is not a disciplinary document it does not give rise to any right to representation, and thus there can be "no nexus between the bad performance evaluation" and Complainant's "union activities." Complainant's allegations concerning the evaluation manifest no serious challenge to its substance, but do manifest Complainant's "unfounded . . . paranoia over these events." A review of the evidence will afford no greater support for Complainant's concerns with Burgess' work orders to her or Burgess' response to her incessant requests for union representation. Complainant similarly mistakes Jackson's appearance at the consultant meetings as union advocacy. Jackson appeared as a representative of Complainant's interests at a meeting for which Complainant had no right to be represented.

A review of the record fails to support Complainant's assertions of anti-union hostility. Burgess never sought Complainant's resignation from UWM, and in fact granted her time to try out a new job. Complainant's allegations of proscribed hostility from Bjornstad or Bradbury are similarly misplaced. Bjornstad's desire to keep Jackson or other union representatives from attending the consultant meetings reflects no more than "a dispute over the meaning of a contractual provision." Bradbury played no effective role in the evaluation that is at the core of Complainant's allegations. Complainant's attempts to pull UWM administration into her complaint represents little more than her desire to circumvent the grievance procedure. UWM administration cannot be faulted for acting to keep contractual disputes within the contractual dispute resolution process.

Nor can UWM Respondents be faulted for not rescheduling a grievance hearing that Complainant missed. If the meeting is to be rescheduled, it must be on the request of the person who missed the meeting. Her insistence on presenting her grievance only through a representative who is not a representative of either party to the agreement is the sole reason the meeting has not been rescheduled. Her claim to the contrary is "frivolous." Nor will any material on exhibits submitted post-hearing support the complaint.

UWM Respondents conclude that Complainant's case fails to manifest "any sense of reality." It follows, according to UWM Respondents, that "all of Ms. Peshut's claims against UWM" should "be dismissed with prejudice, and that the examiner rule that her claims are frivolous."

THE PARTIES' POSITIONS, CASE 466

Complainant's Brief

Complainant contends that this matter questions whether Union Respondents are prohibited from interfering with Complainant's right to present "her grievance through her chosen representative;" whether "the right to present a grievance entail(s) a reciprocal right to represent another employee;" and whether Union Respondents are prohibited from coercing employees in the exercise of protected rights through such conduct such as pleading requests for attorney fees and costs. After a brief review of the evidence, Complainant notes that the matter "presents little factual controversy" and that interpretation of Sec. 111.83(1), Stats., is central to its resolution.

The Commission's decision in DEC. NO. 29784-D provides the starting point for review of this matter. The case is not dispositive because the labor agreement in dispute in that case retains the language of Sec. 111.83(1), Stats., while the labor agreement in dispute here does not. DEC. NO. 29784-D draws from MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 11280-B (WERC, 12/72), which can be read to root the rights of Sec. 111.83(1), Stats., in an employee's statutory right to decline to participate in collective bargaining. Although that case, under law, lacks precedential force, it supports Complainant. Because UWM employees have a contractual and a statutory grievance procedure, the cited cases must permit such employees to choose between them. Thus, Complainant, by presenting a grievance through a representative of her own choosing, chose to assert a statutory grievance. This reflects concerted activity, and Union Respondents' interference with it stands as unlawful interference.

The distinction between contractual and statutory grievances represents, however, bad law. The labor agreement does not preclude its use for "raising non-Contractual issues

through the Contractual grievance procedure." Nor does Ch. 111, Stats., raise any such distinction. Thus, recent Commission case law is "an innovation" flowing from "a misapplication" of DEC. NO. 11280-B. That case, however, did not concern an employee's challenge to a specific working condition. Rather, it posed issues regarding an individual employee's effort to subvert the collective bargaining process itself, and issues concerning "minority or individual bargaining."

The presentation of an individual grievance is not, however, collective bargaining and does not pose issues regarding a majority representative's status as a bargaining agent. This is evident on the face of the statute, through contemporary legal commentary and relevant case law.

Nor is it practical to distinguish between statutory and contractual grievances. Complainant's grievances cite contract, statute and administrative rules. There is no evident reason to demand that a grievant sort out such claims, particularly when the same officials hear them, without regard to their source. Permitting Complainant to process her grievance is not disruptive, since Union Respondents can monitor the grievance process by statute. That Union Respondents have taken a contrary position in prior cases underscores the weakness of their position.

Union Respondents' claim to "own" grievances suffers from "two fatal flaws." First, a grievance is not property, and thus cannot be owned. Second, even if a grievance could be considered property, a union is not an entity that could own it. Analysis of property law supports Complainant's first alleged flaw, and the statute posed here supports the second. Complainant has an individual right under, among other provisions, Sec. 111.83(1), Stats. to assert her own grievances, and no individual employee or collective group of employees can act to subvert that right under any theory of "ownership."

The language of Sec. 111.83(1), Stats., is "plain and clear" and thus permits no interpretation. Thus, Commission case law limiting that individual right cannot stand. Cases such as DEC. NO. 11280-B may stand for the proposition that an individual employee or group of employees cannot seek to bargain through the grievance procedure, but this cannot support the assertion that a union "owns" a grievance. Prior Commission cases cite no law to justify this conclusion. Assuming it flows from federal law, will not assist the Commission, for Wisconsin statutes differ from the federal law. Unlike federal law, Wisconsin law prohibits "union control of individual employee grievances." Federal labor law does not apply to public entities in Wisconsin, and thus preemption plays no role here.

Whether viewed on its face, or in light of its legislative history, or early Commission case law, the SELRA "guarantees individual employees the right to present grievances through

representatives of their own choosing." This is ultimately traceable to the creation of Sec. 111.05(1), Stats. The right created at Sec. 111.83(1), Stats., presumes the existence of a labor agreement and establishes a check "to prevent the tyranny of the majority from closing off the grievance procedure to dissident employees." Fundamental precepts of statutory interpretation confirm this. Beyond this, the statutory reference to the presence of the majority representative presumes that the representative has an interest in ensuring adherence "with an existing collective bargaining agreement." In sum, the Commission's attempt to create a dual grievance theory lacks any statutory basis.

An extensive review of Commission and Examiner decisions that equate federal with Wisconsin law concerning the right of an individual to process a grievance establishes that Wisconsin law is distinguishable, and affirms the individual right Complainant asserts. This does not require a finding that Union Respondents failed to fairly represent Complainant. It demands no more than the application of Sec. 111.83(1), Stats., as it was intended.

Unlike the federal law, Wisconsin law "was meant to encourage rival union activity." Legislative history shows this. Changes in Wisconsin law over time demonstrate that Wisconsin has, by statute, sought to "avoid minority and jurisdictional strikes by ensuring that employers had to answer minority employe's grievances." To ignore that law constitutes legislating law, rather than administering it.

Union Respondents' removal of Complainant from the advocacy of the grievance of a fellow employee is "a reciprocal right to the grievant's right to representation of his choice." Thus, their removal of Complainant from the Yasaitis grievance constitutes an unfair labor practice. A review of the pleading and litigation conduct of Union Respondents also establishes that they committed an unfair labor practice by seeking costs and fees against her.

A review of governing law establishes that the "dual grievance doctrine" created by recent Commission case law is unsupportable as a legal matter, without regard to whatever "predictability" it may afford. The plain meaning of the statute affords a more practical and workable result. Individual employees must be afforded the right to assert legitimate grievances concerning conditions of their employment, as Sec. 111.83(1), Stats., demands.

Union Respondents' Brief

Union Respondents note that Complainant advances three claims against them. The first questions whether Union Respondents violated SELRA by refusing to proceed "with a Step Two grievance when Peshut attempted to have her personal attorney as her representative." The second questions whether Union Respondents violated SELRA when Complainant was substituted "as a steward on a Step Two grievance." The third questions

whether Union Respondents violated SELRA "when a grievance hearing set for October 6, 1998, was cancelled."

Existing law grants a union "wide discretion in determining whether to advance a grievance through the grievance procedure up to and including arbitration, because it is the Union, not the employee, who owns the grievance." Complainant confuses the statutory right to present a grievance with contractually enforceable rights. Commission case law fully addresses "the relationship between a contractual grievance procedure and the statutory language found in Sec. 111.83(1), Stats." If Complainant chose to advance a statutory grievance, the "meet and confer" right of Sec. 111.83(1), Stats., "would presumably include an attorney or anyone else she may have chosen." This falls short of giving her "independent access and control of the contractual procedure." Since the labor agreement does not afford her the right to process a contractual grievance through a representative of her own choosing, her complaint must fail.

This result is supported by sound policy. More specifically, "there must be consistency in interpretation of the contract, and this consistency must be monitored from the top down." Council 24 is the apex of Union Respondents' internal structure and is the certified bargaining representative. If their interpretation of the labor agreement does not prevail, consistency in the application of agreement provisions will prove impossible. Complainant's grievances remain pending, and can proceed whenever she elects "to forgo outside representation."

The facts concerning Complainant's substitution as a steward are undisputed. She was removed from a Step Two grievance hearing involving another employee because she would have had to work with a representative she was suing. Union Respondents' decision that this was not in "the grievant's best interests at that time" is "a reasonable decision." Complainant was not removed from the Steward's list, and the grievance proceeded. Commission case law does not grant Complainant the standing to challenge WSEU's decision, and even if it did, "the Union acted reasonably and within its discretion in conforming to duties of fair representation."

Complainant's claims that the postponing of the October 6, 1998 hearing is improper should be considered moot. Complainant called in sick on the day of the hearing, and was therefore unavailable. Viewing the record as a whole, Union Respondents conclude "that complainant's claims" should "be dismissed."

Complainant's Reply Brief

Union Respondents misunderstand Complainant's concern with the postponement of the October 6, 1998 grievance hearing. Complainant does not claim that Union Respondents

"caused the employer, UWM, not to hear her grievances." Rather, the claim is that UWM Respondents have the sole "responsibility to hear and answer grievances." Union Respondents address an additional claim never made by Complainant. She does not assert that Union Respondents refused to proceed with the grievance, "because she did not rely on them to present it."

Sec. 111.84(2)(b), Stats., "makes it an unfair labor practice for Council 24 to do what would be an unfair labor practice if undertaken by the employer." Since UWM Respondents lack the authority to "fire Ms. Peshut as (Yasaitis') representative in favor of another representative" Union Respondents also lack it. Beyond this, Union Respondents misrepresent Complainant's testimony, and assert a bogus argument regarding standing. Complainant did not bring her complaint as a Steward, but as "an employee representing a fellow employee in presenting his grievance." Weaver may serve at the pleasure of WSEU, but the same cannot be said for Complainant. Thus, only the grievant would have the authority to fire Complainant as his representative. In any event, the authority cited by Union Respondents will not support their argument on standing.

While the testimony of Union Respondents offers their personal policy views on grievance processing, contract and law govern the complaint. Neither supports Union Respondents, for neither gives them "ownership" of the grievance. Rather, Complainant has individual rights interfered with by Union Respondents, who thus must be found to have committed unfair labor practices.

Union Respondents' Reply Brief

Union Respondents "dispute complainant's interpretation of the law." Her brief "repeatedly cites archaic, irrelevant or overturned law, or asks the examiner to overturn legal precedents of the Commission and the Courts."

More specifically, Union Respondents challenge Complainant's reading of DEC. NO. 29784-D and DEC. NO. 11280-B. Complainant unpersuasively attempts to assert that DEC. NO. 29784-D "lacks legal authority" and thus apparently is "asking that it be overturned." The two decisions make "the distinction between a statutory and contractual grievance" and basic principles "concerning Union control and ownership of the grievances." DEC. NO. 29784-D does not pose the contractual language at issue here, but affords no support for an assertion that the non-contractual grievance policy of UWM and the contractual grievance procedure are two choices freely available to represented employees. Complainant's attachment of the UWM policy to the post-hearing brief is inappropriate and should be stricken from the record. In any event, the non-contractual policy is irrelevant to issues posed here.

Contrary to Complainant's brief, Section 4/1/1 of the labor agreement specifically limits a contractual grievance to contractual issues. Beyond this, Commission case law distinguishes between contractual and non-contractual grievances, and this distinction cannot be written off as an "innovation" resulting from "misapplication" of the law. The labor agreement is itself enacted by the Legislature as law following the successful culmination of collective bargaining. At Sec. 111.93(3), Stats., the labor agreement supercedes much if not all of the other sources of authority cited by Complainant. No more persuasive is Complainant's attempt to distinguish grievance processing from the collective bargaining process. That this is necessary to her attempt to "justify outside representation and/or control of the process by individual employees or their representatives" does not make the attempt persuasive. A review of the commentary cited by Complainant does not point to the conclusion she reaches. Beyond this, reference works in employment law, federal precedent, Sec. 111.81(1), Stats., and an Attorney General's opinion reinforce the conclusion that grievance processing is inextricably linked to the collective bargaining process.

Nor does the distinction between statutory and contractual grievances pose practical difficulties solved by Complainant's reading of the law. The problem "solved" by Complainant's view is actually her own assertion that "a typical grievance is a web of tangled claims involving, potentially, multiple jurisdictions and violations of the contract, statutes, the Administrative Code and other possible claims." In fact, "such chaos is only evident in the grievances presented" by Complainant, and the record "contains no evidence of the muddled bedevilment of which she speculates." Ultimately, her argument does little more than commend the need for a trained steward or field representative to separate the contractual from the non-contractual so that the former can be funneled to the grievance procedure. Complainant's assertion that WSEU has advocated for an employee's free choice of representatives simply mischaracterizes the cited cases. Complainant "seeks to create confusion where none exists."

Complainant confuses "property rights with contractual rights." Union Respondents claim no more than the authority of controlling the dispute resolution procedure created by the labor agreement it is a party to. Union Respondents have not interfered with Complainant's statutory rights to "the common grievance procedure." Rather, Complainant overstates what the statute entitles her to. Statutory and contractual rights are distinguishable, and Complainant seeks to assert statutory rights in a contractual forum.

Wisconsin law is distinguishable from federal law, but the differences pointed to by Complainant "are irrelevant for purposes of this case." Like federal law, Wisconsin law distinguishes between statutory and contractual grievance rights. Complainant seeks "the reversal of that body of law" and the creation of "a common grievance procedure open to all employees for all claims with any representative of their choosing." Complainant's citation of

legislative history does not support this result, and her citation of UNIVERSITY OF WISCONSIN-MILWAUKEE, DEC. NO. 8383 (WERC, 2/68) is inapplicable, "since this precedes" the MBSD decision "and its progeny." Nor does the presence requirement of Sec. 111.83(1), Stats., support Complainant's arguments. The purpose of the presence of the majority representative "is to insure that any resolution of the grievance is consistent with the contract, as is clearly set forth in Sec. 111.83(1)."

Complainant's analysis of Commission precedent that draws on federal and Commission case law fails to establish that the precedent creates "much mischief." Rather, it confirms that "both Wisconsin statutes and general principles of labor law recognize the grievance procedure as a basi(c) component of collective bargaining." Nor can her analysis of legislative history overcome the persuasive force of that precedent.

Complainant's removal as advocate for another employee's grievance cannot be faulted under existing law. The decision was justifiable. Nor does Union Respondents' conduct in litigating this case afford evidence of an unfair labor practice. The request for costs and fees did not discourage Complainant, reflects that Commission rulings are subject to change, and is "boilerplate" that potentially can protect a client's interests in the event the law changes.

DISCUSSION

Background and Applicable Legal Standards, Case 465

The complaint, as amended, alleges violations of Secs. 111.84(1)(a), (b), (c), (e), and (3), Stats. Sec. 111.84(1)(a), Stats., makes it an unfair labor practice for the State to "interfere with, restrain or coerce state employees in the exercise of their rights guaranteed in s. 111.82." Sec. 111.82, Stats., guarantees State employees the right to engage in certain "lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The Wisconsin Supreme Court has observed that:

> It is helpful to compare the wording of MERA and SELRA, whereupon we find that the rights guaranteed to employees under these acts are identical . . . It would be illogical to apply a different test to MERA than SELRA merely because a different group of protected persons are involved (municipal employees versus state employees). STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 122 WIS.2D 132, 143 (1985).

This observation has been reflected in the test applied by Commission examiners to determine an independent violation of Sec. 111.84(1)(a), Stats., for the test parallels that used to determine an independent violation of Sec. 111.70(3)(a)1, Stats. The test requires that Complainant demonstrate that UWM Respondents' conduct was "likely to interfere with, restrain or coerce" Complainant or other employees in the exercise of rights protected by Sec. 111.84(2), Stats. See STATE OF WISCONSIN, DEPARTMENT OF ADMINISTRATION, DEC. NO. 15945-A (MICHELSTETTER, 7/79), AFF'D BY OPERATION OF LAW, DEC. NO. 15945-B (WERC, 8/79); STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DEC. NO. 17218-A (PIERONI, 3/81), AFF'D BY OPERATION OF LAW, DEC. NO. 17218-B (WERC, 4/81); STATE OF WISCONSIN, DEC. NO. 19630-A (MCLAUGHLIN, 1/84), AFF'D BY OPERATION OF LAW, DEC. NO. 19630-B (WERC, 2/84); STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES (DHSS), DIVISION OF CORRECTIONS (DOC), DODGE CORRECTIONAL INSTITUTION (DCI), DEC. NO. 25605-A (ENGMANN, 5/89), AFF'D BY OPERATION OF LAW, DEC. NO. 25605-B (WERC, 6/89). This is an objective test that does not require proof that UWM Respondents intended to interfere with the exercise of protected rights. See THE STATE OF WISCONSIN, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, DEC. NO. 11979-B (WERC, 11/75).

Sec. 111.84(1)(b), Stats., makes it an unfair labor practice for UWM Respondents to "dominate or interfere with the . . . administration of any labor or employee organization." To establish a violation of this section, Complainant must demonstrate that UWM Respondents' conduct "threatened the independence of the Union as an entity devoted to the employees' interests as opposed to the Employer's interest." See STATE OF WISCONSIN, DEC. NO. 25393 (WERC, 4/88) AT 17.

Sec. 111.84(1)(c), Stats., makes it an unfair labor practice for the State to "encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment." To establish a violation of this section, Complainant must establish (1) that she was engaged in activity protected by Sec. 111.82, Stats.; (2) that UWM Respondents were aware of the activity; (3) that UWM Respondents were hostile to Complainant's exercise of protected activity, and (4) that UWM Respondents acted toward her, based at least in part, on that hostility. See 122 WIS.2D AT 140.

Sec. 111.84(1)(e), Stats., makes it an unfair labor practice for an employer:

> To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting employes, including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

Application of this subsection turns on the labor agreement negotiated by the State and WSEU, and thus underlies Case 465 and Case 466. Inextricably intertwined with the allegation is Complainant's view of Sec. 111.83(1), Stats., since Complainant reads that section to provide her with rights regarding the contractual grievance procedure. The allegation thus underlies Case 465 and Case 466 and is addressed separately.

Sec. 111.84(3), Stats., makes it an unfair labor practice "for any person to do or cause to be done on behalf of or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by subs. (1) and (2)."

The alleged violations of Sec. 111.84(1), Stats., focus on UWM as an employer, and on the conduct of the individually named respondents as the employer's agents. The alleged violation of Sec. 111.84(3), Stats., focuses on the individually named respondents in their capacity as "any person" as opposed to an employer agent. Proof of a violation of Sec. 111.84(3), Stats., demands proof of a violation of Sec. 111.84(1), Stats. Thus, the alleged violations of Sec. 111.84(1), Stats., will be addressed first.

The Alleged Violation of Sec. 111.84(1)(c), Stats.

Subsection (a) and (c) turn on the existence of lawful, concerted activity protected by Sec. 111.84(2), Stats. The alleged violation of Subsection (c) is the cornerstone of Complainant's arguments regarding these subsections, and thus will be addressed first. The evidence establishes the existence of the first two elements set forth above. Complainant notified Burgess of her desire for the assistance of WSEU in a memo dated January 31, 1998, and in e-mails issued on February 2. The correspondence that built on those initial contacts is open and continuous throughout 1998. The correspondence involved each of the named UWM Respondents. Beyond this, Complainant filed a series of grievances, processed to Step Two of the grievance procedure. Ignoring the issue of access to a union representative, grievance filing and processing manifest lawful, concerted activity, as the Commission noted in VILLAGE OF WEST MILWAUKEE ET. AL, DEC. NO. 9845-B (WERC, 10/71) AT 21:

> When a grievance procedure is established by contract, the right to process grievances without coercion or interference along the way from an employer is a fundamental right included within the employees' right to representation.

Thus, it is evident Complainant engaged in concerted activity and UWM Respondents were aware of it.

The issue thus turns on proof of statutorily proscribed hostility by UWM Respondents toward this exercise of concerted activity. The evidence manifests unmistakable and shared hostility between Complainant and Burgess. The evidence also manifests hostility between Complainant and other UWM Respondents. The evidence fails, however, to manifest that this hostility is that type of hostility regulated by Sec. 111.84(1)(c), Stats., or that it is linked to Complainant's exercise of concerted activity.

As preface to examination of this conclusion, it should be noted that Complainant's arguments concerning the interpretation of law and contract play no significant role in application of this subsection. Those assertions bear on the remaining allegations. They are not, however, helpful or necessary in the application of this subsection, which focuses on the good faith of UWM Respondents' response to Complainant's assertion of concerted activity. As Complainant persuasively contends, the absence of rationale for UWM Respondents' conduct regarding the evaluation process and the grievance procedure can form the basis for an inference of bad faith. Here, however, such inferences are unnecessary. The assertion of pretext for UWM Respondents' explains nothing concerning the long history of hostility. The cause and the course of that hostility are apparent, and bear no relationship to the type of conduct proscribed by Sec. 111.84(1)(c), Stats.

The themes for the conflict Complainant attempts to characterize as retaliatory are evident well before January of 1998, and well before any exercise of concerted activity on her part. Those themes turn on personal and professional issues surrounding the control of the Center. Romenesko's testimony vividly highlights tension within the Center preceding Burgess' arrival as Director. Complainant's and Burgess' views underscore that testimony, differing only on where responsibility for the tension should be placed. What were hairline cracks in the Fall of 1996, became unmistakable rifts by the Fall of 1997 and fissures by the following Winter and Spring. Those issues are manifested in the stormy staff meetings that prompted Kriviskey's hire. No recourse to anti-union hostility is appropriate to this milieu, as Complainant's testimony concerning the tension at staff meetings demonstrates:

> And I was at the meetings, but I was disinvolved. It wasn't about my tasks, they were always about Ms. Romenesko's tasks and duties. (Tr. at 729)

As Romenesko's testimony establishes, the focus changed from her to Complainant. That focus had, however, nothing to do with the assertion of concerted activity. Rather, it turned on issues of control and working relationships within the Center. Those issues had a policy element and a personal element, but no element involving UWM Respondents' desire to encourage or to discourage "membership in any labor organization." The personal and policy-based conflict manifested in this time period devolved into the ongoing conflict culminating in this litigation. This conflict underlies the April 15 evaluation, and the events that follow it.

This course of events does not, however, manifest conduct regulated by Sec. 111.84(1)(c), Stats. Complainant's assertion of pretext provides no assistance in explaining that course of events. Significantly, Complainant's assertion of pretext provides no insight into what UWM Respondents hoped to gain by the complained of conduct. There is no evidence indicating UWM hoped to push Complainant or any other employee toward or away from WSEU or Local 82. No evidence indicates UWM Respondents had any reason to favor either or neither entity. Bradbury's letter of August 26 vented considerable frustration with Complainant's conduct, and is directed to WSEU and Local 82 representatives. Inferring she was hostile, within the meaning of Sec. 111.84(1)(c), Stats., to Complainant's behavior fails to explain why Bradbury took no action on that frustration beyond openly publishing it. No such inference is necessary if, as the evidence establishes, she stated her good-faith frustration with a course of conduct she found inappropriate. UWM Respondents did not follow up on the letter because the letter fully stated her purpose. That purpose was not to push Complainant toward or away from WSEU or Local 82. Rather, it was to push events into what at least Bradbury perceived as an appropriate dispute resolution process. The accuracy of those views is less important to the application of this section than is the good or bad faith with which she espoused them. The evidence affords no basis to doubt her good faith.

A similar tension underlies each of Complainant's attempts to color UWM Respondents' conduct with anti-union hostility. Complainant disputes the timeliness of Burgess' response to her requests for representation, as reflected in her memo of May 13. The memo highlights the depth of their interpersonal conflict, but is less than convincing as evidence of anti-union hostility. The memo ignores that Complainant made a written request for representation placed in Burgess' mailbox. The evidence indicates Burgess was not at the Center to receive it, yet Complainant took issue with Burgess' failure to respond within forty-eight hours, without regard to when Burgess received the request. Burgess did arrange a meeting with Yasaitis, then moved it forward after Complainant objected and Yasaitis stated he would be available for an earlier meeting. That these arrangements did not satisfy Complainant is evident. However, the fact remains that Burgess twice arranged a meeting with Yasaitis and Complainant. How this squares with the allegation of anti-union animus is less than evident. There is no apparent gain to Burgess in any of this.

Burgess' responses to other requests by Complainant make the inference of anti-union hostility untenable. Burgess disagreed with Complainant's request for representation on April 15, and said so. However, in response to Complainant's persistent requests, Burgess contacted Yasaitis. Her openness in expressing disagreement with the request, then arranging for representation make it difficult to conclude she was seeking to interfere in Complainant's relationship with her representative, or to punish her for it. Complainant's January 31 request to see Keach concerning "the filing of a possible grievance" was addressed not later than February 3. Consistent in the pattern of delay Complainant points to is her own dissatisfaction with any response. Absent, however, is convincing evidence of anti-union animus. Burgess took the requests seriously, and attempted to comply in good faith.

The inference of pretext adds nothing to understanding Complainant's conflict with Burgess. As noted above, the themes for that conflict predate any arguable claim to the assertion of concerted activity. Kriviskey's appointment as facilitator foreshadowed the conflicts played out through the processing of the grievances. Romenesko, Complainant and Burgess commonly perceived a problem within the Center, having both personal and policy dimensions. Romenesko and Complainant initially agreed with the appointment of an outsider, but that appointment came to pull the pre-existing differences with it. Burgess was willing to consider Romenesko's and Complainant's choice for a facilitator, but not to permit them any authority approaching a vote in it. Ultimately, the process reflected the internal struggle for direction of the Center. Kriviskey came to be seen by Center employees' as another of Burgess' attempts to exert control over them and to reconcile them to changes within the Center. This dispute grew in intensity with time. Burgess was unwilling to cede meaningful control over the Center, and the employees remained unconvinced of the quality of her leadership.

This process reached a watershed in the April 15 evaluation. By this time, Complainant had become convinced the struggle within the Center was for nothing less than her personal and professional survival as an employee. She responded in kind, enlisting the support of Local 82. This does not, however, transform a personal and professional conflict into a conflict regulated by Sec. 111.84(1)(c), Stats. The most intense areas of dispute manifest personal and professional conflict. The January 23 incident generated considerable ill-will, and is rooted on what Burgess perceived as a personal and professional snub. By January 26 that perceived snub was generating considerable friction that later surfaced in the evaluation and the written reprimand.

The April 15 evaluation brought the simmering conflict to a boil. Complainant took the evaluation as a personal attack. The "DN" rating contrasts starkly to Complainant's prior ratings. Elements of the evaluation resemble less a narrow description and evaluation of workplace behavior than a personality critique. The May 5 predisciplinary memorandum and the May 6 reprimand accentuate this theme by including broad character assessments within

documents that address office behavior. It is, for example, less than apparent what role is served within a reprimand by a recommendation for an "Employee Assistance Program for use by employees who may be experiencing personal problems which are affecting their work performance." Complainant's April 23 response to the evaluation cements an all or nothing conflict into place. The response rejects the entire evaluation document, including those portions of it lauding Complainant's work.

Coupling existing conflict with union representation does not necessarily color that conflict with anti-union hostility. On this record, none is apparent. Complainant's assertion that Burgess actively sought her resignation to further such hostility has no evidentiary support. The correspondence concerning Complainant's transfer undercuts this assertion. More illuminating, however, is the correspondence concerning Complainant's designation as Steward. Yasaitis advised Bradbury of the designation on August 6, and asked Bradbury to refrain from assigning cases to her, pending further training. Complainant's August 6 letter to Burgess manifests no such restraint. That letter, copied to Burgess' supervisors, notifies Burgess of the designation in its first paragraph, then castigates Burgess for contractual and statutory violations in the remaining three. The alleged violations affect only Complainant. This reflects that the designation was, to Complainant, an additional arrow in her quiver of responses to her individual and personal conflict with Burgess. In a similar fashion, Complainant's becoming a dues paying member corresponds to the growing intensity of her struggle with Burgess. This reflects the palpable pain growing from the struggle. It fails, however, to demonstrate any anti-union component. That Complainanat would enlist the support of WSEU is understandable. This fails, however, to establish anti-union hostility on the part of any of UWM Respondents.

With the exception of Bjornstad, there is no evidence of anti-union hostility warranting extended discussion. The exception turns on Bjornstad's exit interview with Romenesko. During that interview Romenesko understood Bjornstad to articulate a position that it was regrettable that Complainant involved Local 82 representatives in the Kriviskey facilitation effort. It is impossible to reconstruct that conversation with precision. The Findings of Fact, however, take Romenesko's perception as accurate. This reflects Romenesko's credibility as a witness, and is buttressed by the fact that Bjornstad could not recall the conversation in sufficient detail to specifically deny it, beyond noting it did not sound like something she would say.

This statement is discussed in greater detail below, but fails to establish anti-union hostility on Bjornstad's part. It, as the evidence noted above, reflects the tension within the Center. Bjornstad knew little of the conflict beyond its existence. On its face, and in the context of the discussion with Romenesko, the comment reflects Bjornstad's disappointment that the facilitation effort could not diffuse the conflict, and her disappointment that Local 82

took a position adverse to Kriviskey's control over the effort. Her means of stating the disappointment has statutory dimensions, as noted below. It does not, however, establish anti-union animus.

More specifically, the evidence fails to demonstrate any basis for the asserted bad faith on Kriviskey's part. Assuming the statement has the meaning asserted by Complainant, it was not pretextual. Rather, it reflects open hostility for WSEU or Local 82. There is, however, no evidentiary basis to demonstrate a purpose or goal for such hostility on Bjornstad's part. The evidence is silent on a reason for Bjornstad to favor or disfavor either WSEU or Local 82. More significantly, there is evidence establishing good faith on Bjornstad's part. Romenesko and Complainant treated her as a confidant in January of 1998. Bjornstad acted in the same capacity in June of 1998. She was unwilling to testify concerning the substance of the exit interview prior to Romenesko's testimony, because she saw that as a confidential matter involving Romenesko. Her testimony on the point is, in any event, credible. Bjornstad testified consistently that she had limited recall of the conversation. When asked initially about a comment detrimental to Complainant's involvement of Local 82, Bjornstad testified that it did not sound like something she would say. When informed of Romenesko's view, she declined the simple expedient of denying it. Rather, she willingly assumed the accuracy of Romenesko's views, and stated openly why she would make such a statement. This is difficult to reconcile with the assertion of open, anti-union hostility. It is a simple matter to deny, particularly if one is unconcerned with the truth. Bjornstad's openness on the point manifests a good faith disagreement, not the bad faith regulated by Sec. 111.84(1)(c), Stats.

Evidence concerning anti-union hostility of the remaining UWM Respondents does not warrant extended discussion. That Rayburn returned Complainant's complaint or that Sander took the position that Complainant manifested hostility toward UWM Respondents establishes no more than disagreement. There is no evidence such disagreement manifests anything other than the individual UWM Respondent's good faith opinion of Complainant's positions.

The timeliness of grievance responses by various UWM Respondents does not establish persuasive evidence of anti-union hostility. The evidence establishes the timeliness of responses is a long-standing, unit-wide problem, not an issue unique to Complainant. In any event, Section 4/2/8 of the labor agreement addresses the matter by permitting the processing of unanswered issues further up the processing chain. Complainant's unwillingness to move the grievances forward underscores the depth of her belief regarding her interpretation of the SELRA, but cannot be held against UWM Respondents.

The Alleged Violation of Sec. 111.84(1)(b), Stats.

The evidence affords no persuasive support for this allegation. The legal standard demands proof of employer conduct undercutting a labor organization's independence as a representative of employees. Bradbury's August 26 letter advocated a position adverse to Local 82. However, UWM Respondents took no significant action to further it. Yasaitis' September 9 reply demonstrates that the parties state their differences plainly. This falls short of conduct constituting a level of interference falling within the scope of this subsection. Nor does other evidence undercut this conclusion. After an exchange of correspondence, Bradbury dropped her position that grievances demand the signature of a WSEU representative. This is but one of several positions taken by Bradbury that she modified in response to Local 82 concerns. This flexibility contrasts to that of those she responded to, and is irreconcilable to the position that UWM Respondents sought to dominate Local 82 or WSEU.

That WSEU does not join Complainant in arguing for a violation of this subsection must also be noted. Complainant has differences with WSEU, and uses this subsection as a vehicle to express her dissatisfaction. This affords no basis to conclude WSEU or Local 82 perceived action seeking to undercut the union as the representative of UWM employees.

The Alleged Violation of Sec. 111.84(1)(a), Stats.

An independent violation of this subsection is established under an objective standard that functions without regard to respondents' intent. Bjornstad's statement to Romenesko focused less on the disagreement between Local 82 and UWM than on Local 82 as Complainant's representative. Although stated within a confidential interview, Bjornstad was aware that Romenesko and Complainant shared concerns regarding Burgess' conduct. Her statement denigrating the involvement of Local 82 could reasonably be perceived to discourage or to interfere with the relationship between Complainant and WSEU as her representative. Whatever is said of the conflict between Burgess and Complainant, it can not be presumed that WSEU had no constructive role to play in diffusing the conflict, without regard to whether the facilitation meetings constitute a meeting within the meaning of Section 11/25/2. Thus, the statement constitutes a violation of Sec. 111.84(1)(a), Stats.

The Order states a cease and desist order regarding this statement. The Order functions as a statement of the violation involved. No further remedy, in my view, is appropriate. The statement was made in a confidential interview, and there is no evidence Bjornstad or any other UWM Respondent made any attempt to convey the statement to any employee beyond Romenesko. There is no evidence any employee other than Romenesko and Complainant were aware of it. The statement reflects no more than a poor choice of words regarding a good faith disagreement on a contractual issue. Care in the choice of words is, however, a significant point in the exercise of supervisory authority.

The statement related to events within the Center involving participants who are no longer at the Center. There is no persuasive evidence to establish any chill of the rights of unit employees in what was otherwise an intensely personal conflict. There is, then, no basis for the posting of a notice.

The Alleged Violation of Sec. 111.84(3), Stats.

The only proven violation of Sec. 111.84(1), Stats., involves subsection (a). Thus, the only potential dispute regarding this section regards the exit interview between Bjornstad and Romenesko. There is no evidence Bjornstad acted in any capacity other than as an agent of UWM, and no one else was involved with the interview. Bjornstad's acts were those of UWM, and thus this section has no bearing on those acts. Thus, there is no proven violation of Sec. 111.84(3), Stats. The Order recognizes this by not naming any individual.

Background and Applicable Legal Standards, Case 466

The complaint, as amended, alleges violations of Secs. 111.84(2)(a), (b), (d) and (3), Stats. Sec. 111.84(2)(a), Stats., is similarly worded to Sec. 111.84(1)(a), Stats., but is more broadly addressed to an "employee's legal rights including those guaranteed under s. 111.82." The section parallels that governing municipal employees and stated at Sec. 111.70(3)(b), Stats. The Commission has applied a standard like that governing State and Municipal employers, see STATE OF WISCONSIN ET AL., DEC. NOS. 29448-C & 29495-C (WERC, 8/00), and has not treated the broad reference to "legal rights" to draw its authority beyond the employment relationship and the rights granted under Subchapters I, IV or V of Chapter 111. See RACINE POLICEMEN'S PROFESSIONAL AND BENEVOLENT CORPORATION, DEC. NO. 12637, (FLEISCHLI, 4/74), AFF'D BY OPERATION OF LAW, DEC. NO. 12637-A (WERC, 5/74), and cited with approval in MONONA GROVE SCHOOL DISTRICT ET AL., DEC. NO. 20700-G (WERC, 10/86).

Sec. 111.84(2)(b), Stats., shares the broader focus of Sec. 111.84(2)(a), Stats., regarding an "employee's legal rights including those guaranteed under s. 111.82." Viewed on this record, the subsection bans conduct by Union Respondents to "coerce, intimidate or induce any officer or agent" of UWM to "interfere" with Complainant's legal rights by taking action that "would constitute an unfair labor practice if undertaken by the officer or agent on the officer's or agent's own initiative."

Sec. 111.84(2)(d), Stats., tracks Sec. 111.84(1)(e), Stats. As noted above, Complainant's allegation under this subsection is inextricably intertwined with her view of Sec. 111.83(1), Stats. As noted above, the line of argument underlies Case 465 and Case 466 and is addressed separately.

Sec. 111.84(3), Stats., applies to Union Respondents in the same fashion as to UWM Respondents.

The Alleged Violation of Sec. 111.84(2)(a), Stats.

Complainant's allegations of a violation of this subsection focus on her dispute with Union Respondents regarding the appropriate interpretation of the labor agreement and Sec. 111.81(3), Stats. Complainant also, however, challenges other acts of coercion by Union Respondents. More specifically, Complainant challenges her removal as Yasaitis' chosen Steward, and Union Respondents' request for attorney fees and costs.

Complainant's removal as Yasaitis' Steward poses no significant issue outside of Complainant's reading of the labor agreement and Sec. 111.81(3), Stats. If she has the individual rights she asserts under those provisions, then her removal as a Steward violated them. That assertion is addressed below. If, however, this is an internal union matter, Complainant's allegation has no persuasive force. It is undisputed that Weaver serves as the WSEU representative at Step Two, and that there is extensive interplay possible in the advocacy at Step Two between a Steward, a grievant and the WSEU Field Representative. That WSEU would question Complainant's ability to effectively work with a representative she was suing cannot be dismissed as unreasonable. Complainant acknowledged the fundamental reasonableness of this conclusion in her September 17 e-mail to Sander. Whether Sander is expected to function as an impartial hearing officer is debatable. Assuming she is, Complainant correctly questioned whether Sander's status as a respondent should disqualify her from assuming hearing officer status. Similar considerations govern the WSEU decision to remove her as Steward for the Yasaitis grievance. Whether or not this is the best decision possible in the circumstances cannot obscure that it represents a reasonable position. There is no evidence WSEU took any action adverse to Complainant's status as Steward other than this.

Complainant's challenge of Union Respondents' request for attorney fees and costs does not establish interference. The claim is asserted in an answer. Complainant's challenge is internally inconsistent with other arguments. In her argument challenging Union Respondents' view of contract and law, Complainant cites authority for the proposition that the Commission is not bound by its prior cases (post-hearing brief at 6, footnote 4). Complainant uses the authority to contend that the Commission should depart from its decisions in DEC. NO. 11280-B and DEC. NO. 29784-D. Presumably, Complainant does not make this argument in bad faith. Against this background, it is difficult to understand her contention that WISCONSIN STATE EMPLOYEES UNION, AFSCME, COUNCIL 24, AFL-CIO, DEC. NO. 29177-C (WERC, 5/99) is sufficiently well established that Union Respondents' claim for fees and costs should be considered an act of interference. DEC. NO. 29177-C clarified STATE OF WISCONSIN, DEC. NO. 29093-B (WERC, 11/98), in which the Commission (AT 3) noted that its "view as to the award of attorney's fees

and costs has evolved over the years." Without belaboring that history, it is evident the Commission's position on the issue has varied over time. Even if the law was clear over a long period of time, it is not clear how her position on this point is reconcilable to her position on the Commission's case law interpreting an individual employee's access to a contractual grievance procedure. The Commission granted Complainant's request to submit written argument in the case producing DEC. NO. 29784-D, because it determined Case 465 and Case 466 "could be affected by the outcome of this case" (AT 2). Against this background, Complainant's argument in this case regarding the force DEC. NO. 29784-D is irreconcilable to her argument regarding Union Respondents' position toward DEC. NO. 29177-C.

Beyond this, the rule of DEC. NO. 29177-C is less than the clear bar to an award of fees and costs that Complainant asserts. Technically, a respondent can become a complainant by asserting a counter claim, thus turning a complainant into a respondent and a respondent into a complainant. Union Respondents did not file a counter claim. However, this cannot obscure that Complainant's argument against them turns less on the solidity of Commission case law than on Union Respondents' decision not to file a counter claim. This decision is not evidence of bad faith, nor can it be taken as unreasonable. The assertion that Union Respondents' claim for fees and costs constitutes interference as a matter of law is untenable.

Nor will recourse to the processing of the litigation assist the persuasive force of this claim. For example, Complainant argued that Union Respondents should not be considered a party to litigation questioning the interpretation of a labor agreement negotiated by WSEU. This argument was addressed on its merit. It illustrates, however, the thicket that is posed if the behavior of litigating parties is taken as evidence on the merits of the litigation. This may be appropriate regarding egregious conduct. Union Respondents' conduct in pleading and in arguing their case can not, however, be characterized as egregious.

Union Respondents' policy against permitting non-WSEU affiliated advocates in the grievance procedure cannot be characterized as unreasonable. WSEU sees the policy as essential to the maintenance of consistency across its state-wide jurisdiction. Whether this policy best serves its membership does not rise to the level of conduct regulated as an independent violation of this subsection. As a policy issue, it is best left to the political relationship between WSEU, its affiliates and their membership. As a legal matter, the interference asserted by Complainant questions less whether the policy constitutes an independent act of interference under this subsection than whether the interference is derivative of Union Respondents' inappropriate reading of the contract and Sec. 111.83(1), Stats.

The Alleged Violation of Sec. 111.84(2)(b), Stats.

This subsection focuses on Union Respondents' coercion of employer representatives to take action on the Union Respondents' behalf. No such conduct has been proven regarding Complainant's removal as Steward in the Yasaitis grievance or any other transaction questioned by this litigation. Union Respondents acted consistently toward Complainant based on its own internal policies. Complainant's disagreement with those policies falls short of establishing coercion within the meaning of this section.

That UWM Respondents could not remove Complainant as Steward has no bearing on whether Union Respondents may do so. If it did, Yasaitis' August 6 and September 9 requests of Bradbury to hold cases back from Complainant as Steward would be evidence of coercion. Complainant acknowledges that Union Respondents are not responsible for the "freezing" of the grievances at Step Two. The issue on the processing of those grievances turns on the interpretation of the labor agreement and Sec. 111.83(1), Stats. There is, in sum, no proven violation of Sec. 111.84(2)(b), Stats.

The Alleged Violation of Sec. 111.84(3), Stats.

Because there is no proven violation of Sec. 111.84(2), Stats., there can be no violation of Sec. 111.84(3), Stats., in Case 466.

The Alleged Violations Of Contract And Law Common To Case 465 And 466

As noted above, these allegations draw on Sec. 111.84(1)(e), Stats., and Sec. 111.84(2)(d), Stats. If proven, the allegations would establish derivative violations of Sec. 111.84(1)(a), Stats., and Sec. 111.84(2)(a), Stats. Sec. 111.83(1), Stats. states:

> Except as provided in sub. (5), a representative chosen for the purposes of collective bargaining by a majority of the employees voting in a collective bargaining unit shall be the exclusive representative of all of the employees in such unit for the purposes of collective bargaining. Any individual employee, or any minority group of employees in any collective bargaining unit, may present grievances to the employer in person, or through representatives of their own choosing, and the employer shall confer with said employee or group of employees in relation thereto if the majority representative has been afforded the opportunity to be present at the conference. Any adjustment resulting from such a conference may not be inconsistent with the conditions of employment established by the majority representative and the employer.

Complainant contends that reading Article IV in light of Sec. 111.83(1), Stats., demands the conclusion that she has a statutory right to process her five grievances to UWM, under Article IV, through a representative of her own choosing. UWM Respondents' refusal to process those grievances beyond Step Two thus constitutes an unfair labor practice, as does Union Respondents' insistence that a WSEU representative process the grievances under Article IV.

Complainant's written argument is well-crafted, but overstates the range of discretion available to an examiner regarding the interpretation of Sec. 111.83(1), Stats. The Commission's decision in DEC. NO. 29784-D is more than a starting point, as asserted by Complainant. Rather, it addresses Complainant's argument.

As acknowledged by each party, the labor agreement at issue here does not permit an individual employee the latitude to process a grievance presented by the labor agreement addressed by the Commission in DEC. NO. 29784-D. This focuses the analysis on whether Sec. 111.83(1), Stats., grants an individual employee, by statute, the contractual right the parties removed in the labor agreement at issue here.

As noted above, the Commission's decision does not permit this conclusion. In DEC. NO. 29784-D, the Commission stated (at 20):

> . . . (T)he statutory opportunity for individual employees to meet directly with their employer is separate and distinct from any such contractually bargained opportunity. The statutory opportunity to meet directly with the employer cannot be limited by a collective bargaining agreement. However, a union and employer have no obligation to bargain a contract which will give individual employees the right to independently process contractual grievances. The employee's statutory opportunity to meet with the employer is separate and distinct from the question of whether the employee has a contractual opportunity to meet with an employer over contractual grievances.

This language also appears in STATE OF WISCONSIN, ET AL., DEC. NO. 28938-C (WERC, 5/99) at 17. The language flows from DEC. NO. 11280-B, and from decisions issued under Sec. 111.70(4)(d)1, Stats., such as COLUMBIA COUNTY, DEC. NO. 22683-B (WERC, 1/87).

These decisions include language that is broader than necessary to state the Commission's holding. As noted below, Complainant lodges a number of persuasive arguments challenging the breadth of some of that language. The holdings of those cases, however, establish that Article IV and Sec. 111.83(1), Stats., constitute venues through which employee grievances may be presented. Sec. 111.83(1), Stats., creates a statutory forum that can not be waived by contract, and imposes a "meet and confer" obligation between UWM and

"(a)ny individual employee, or any minority group of employees." It neither creates substantive rights nor a means to enforce them. This provides the opportunity to address grievances, and a defense against an individual bargaining complaint from the majority representative. Article IV creates a procedure for airing grievances, and a forum to enforce the substantive rights created by the labor agreement. The parties to the agreement set and limit the procedural and the substantive rights set by contract. As established by the Commission, the two venues are distinguishable procedures, referred to by the Commission as "opportunities to meet."

Complainant attempts to insert substantive contractual rights into the procedural right granted by Sec. 111.83(1), Stats. I do not read the law or Commission cases to permit this, or to address what substantive issues are addressed in either forum. It is irrelevant to the cited cases whether "contractual," "statutory" or hybrid issues are posed in either forum or both. The distinction between the venues is that the statutory forum imposes only a meet and confer obligation. Only the contractual forum states enforceable substantive rights. Under this view, there is no conflict between DEC. NO. 8383 and DEC. NO. 29784-D. The conflict asserted by Complainant only arises through her attempt to insert contractually bargained substantive rights into the meet and confer forum created in Sec. 111.83(1), Stats.

Against this background, Complainant can request of UWM the opportunity to meet with her representative to discuss the circumstances prompting any or all of the five grievances. Complainant need not restrict her presentation to "contractual" or to "statutory" grievances. UWM Respondents are obligated to meet and consider the points raised. No adjustment can be made that conflicts with the labor agreement. Nothing stated in Sec. 111.83(1), Stats., requires UWM Respondents to take a position beyond the good faith consideration of points raised in good faith. A response, akin to that stated by Bradbury, Rayburn and others, that binding resolution of the point must be left to the grievance procedure falls within the meet and confer obligation. Under the cases cited above, Complainant cannot demand that UWM Respondents respond as set forth in the labor agreement nor enforce any substantive contractual right. A Sec. 111.83(1), Stats., conference would not be a Step Two meeting, for a Step Two meeting is established by contract. Good faith unwillingness by UWM Respondents to adjust her grievance, does not, under the statutory forum, demand recourse to Step Three, since Step Three is a contractual creation. A good faith meeting on the points raised fully addresses the requirements of Sec. 111.83(1), Stats., provided WSEU is afforded the opportunity to be present and no adjustment is reached that is inconsistent with the labor agreement.

In the alternative, Complainant can process the grievance to Step Two or beyond, provided she meets contractual requirements. This is, however, a matter of contract, and brings with it the limitation that Complainant must proceed with a WSEU representative.

Complainant's attempt to hybridize the two venues is not permitted by statute or by Commission case law. On the facts posed in this case, I do not view either UWM or Union Respondents to have an affirmative obligation to further process the grievance in either the statutory or the contractual forum, absent action from Complainant. Sec. 111.83(1), Stats., gives Complainant a right to invoke the procedure by stating an individual employee "may" present grievances that the employer "shall" confer on. The employer's obligation to confer is contingent on an employee request. I do not view Complainant to have requested such a conference. Without belaboring the extensive correspondence, Complainant's October 2 letter to Zimpher refers to participation in the October 6 meeting. Complainant thus made her request contingent on the meeting complying with Step Two requirements. This, however, slurs the relationship between the contractual and statutory venues. UWM and Union Respondents could each reasonably conclude that Complainant was demanding to enforce contractual rights through a non-contractual forum. This is not, standing alone, improper. However, Complainant's demand seeks to compel the parties to the labor agreement to violate the agreed upon procedures for enforcing those rights. The refusal to convert a meet and confer opportunity into a meeting complying with Article IV did no more than protect the contractual process.

The Order stated above dismisses the complaints except for the violation of Sec. 111.84(1)(a), Stats., noted above. The Order does not address what will happen to the five grievances, because that issue turns on a decision Complainant has yet to make. Complainant must choose if she intends to process her grievances, and, if so, where to process them. She may select either or both venues, but must process her concerns under their separate requirements. If she elects the statutory, then she has a wide range of choice in selecting an advocate, but can demand no more of UWM than the opportunity to meet and confer. If she elects the contractual, then she must proceed as the contract requires. There is no allegation that the WSEU policy to require the use of WSEU advocates violates the duty of fair representation. It is apparent that the bargaining parties treat the requirement as an understood function of the grievance procedure. Thus, Complainant's election of the contractual forum limits her choice of advocates. Complainant's unwillingness to conform her conduct to the requirements of the forum she chooses can not be held against UWM or Union Respondents.

It is impossible to meet each argument posed by the parties to this litigation, but it is appropriate to tie this conclusion more closely to the parties' arguments. Complainant argues that the Commission has created a distinction between "statutory" and "contractual" grievances. The Commission's case law distinguishes between procedures, not the underlying rights asserted through those procedures. Complainant is correct that either venue can involve allegations that stray beyond the narrow confines of the labor agreement. Whether such allegations can be enforced through arbitration as a matter of contract turns on the language of

the labor agreement. This contract would bring Section 4/1/1, among others, to bear on this point. Similarly, whether an adjustment can be reached in the Sec. 111.83(1), Stats., forum turns on whether an adjustment can be reached and whether it is reconcilable to the labor agreement. Commission case law does not address the substance of claims made in either venue. Rather, it states the existence and bounds of the two venues.

Complainant's attempt to incorporate substantive contractual rights into a meet and confer statutory obligation under Sec. 111.81(3), Stats., turns on her distinction between grievance processing and minority bargaining. The argument is well stated, but seeks a result neither necessary under Commission case law nor permitted under SELRA. Sec. 111.81(1), Stats., defines "Collective bargaining" as the:

. . .

> performance of the mutual obligation of the state as an employer, by its officers and agents, and the representatives of its employees, to meet and confer at reasonable times, in good faith, with respect to the subjects of bargaining provided in s. 111.91 (1) with the intention of reaching an agreement, or to resolve questions arising under such an agreement.

. . .

Thus, the duty to bargain includes the processing of contractual disputes, and can not be distinguished from it as Complainant asserts. This is also a fundamental tenet of Commission case law. In SCHOOL BOARD, SCHOOL DISTRICT NO. 6, CITY OF GREENFIELD, DEC. NO. 14026-B (WERC, 11/77), the Commission found the duty to process grievances, at least to the point of arbitration, to be a fundamental feature of the duty to bargain. Their conclusion brings grievance processing, not including the duty to arbitrate, into the "status quo" an employer must maintain during bargaining after the expiration of a labor contract, but prior to agreement on a successor. That general consideration is not posed on these facts, but highlights that grievance processing can not be meaningfully distinguished from collective bargaining.

Complainant persuasively undercuts the assertion that a union can be said to "own" a grievance. There is no need to bring property law concepts into employment law. This fails to establish that Complainant has a contractual right to a representative of her choosing. WSEU and the State are parties to the labor agreement, which links "Union" and "representative" in Article IV. It is unnecessary to define "ownership" of a grievance to conclude the WSEU, as the "union" that is a party to the labor agreement, can claim contractual authority to determine the "Union representative" or "representative" at each

grievance step. A labor agreement may cede such authority to individual employees or non-party affiliated advocates. This is a function of contract language, not property concepts. Here, there is no persuasive evidence that Complainant can claim such rights under the language of Article IV. Outside of a duty of fair representation claim, Complainant's disagreement with WSEU is political, not a legal matter enforced through the unfair labor practice process.

Complainant persuasively attacks the assertion flowing from DEC. NO. 11280-B (AT 2), that: "The Complainant, by not utilizing the Union to process her grievance, in fact, exercised her right not to engage in concerted activity and the right not to be represented by the Union." This statement carries forward through DEC. NO. 29784-D, and underlies Complainant's contention that Commission case law creates a "dual grievance" doctrine unsupported by law. The statement, in my view, is dictum, unnecessary to the application of Sec. 111.83(1), Stats. There is no reason to doubt that employee use of Sec. 111.83(1), Stats., can itself constitute lawful, concerted activity within the meaning of Sec. 111.84(2), Stats., see STATE OF WISCONSIN ET AL., DEC. NO. 15699-A (MCCRARY, 5/80), AFF'D DEC. NO. 15699-B (WERC, 11/81). This has no direct bearing on the Commission's case law establishing the limits of Sec. 111.83(1), Stats. As Complainant's experience at UWM indicates, a unit member need not be a member of the union. Nor is union membership a prerequisite for the exercise of lawful, concerted activity. None of this alters the Commission's conclusion that the meet and confer forum established by Sec. 111.83(1), Stats., does not create or enforce substantive contractual rights.

Language from DEC. NO. 22683-B, can be read to indicate the statutory forum serves not as a meet and confer obligation, but as a defense to a refusal to bargain complaint. In that decision, the Commission stated (AT 10):

> (Sec. 111.70(4)(d)1, Stats.) does not impose an affirmative obligation that the Employer meet and confer with employes and their representatives about grievances; rather it is intended 'to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the . . . duty to bargain only with the exclusive bargaining representative." (citing DEC. NO. 14026-B)

DEC. NO 22683-B addressed an employer discussion with an individual employee, without any union representative, at Step 3 of the contractual procedure set by the labor agreement in that case. That decision focused on a resolution that resulted from a meeting for which the union was not notified. This sets the context against which the quoted reference denying "an affirmative obligation that the Employer meet and confer" must be read. As Complainant underscores, the plain language of Sec. 111.70(4)(d)1 and Sec. 111.83(1), Stats., imposes a

duty by stating that "the employer shall confer." The holding of DEC. NO. 22683-B does not contradict this, even if the quoted language is read to imply it. DEC. NO. 22683-B addressed a common contractual and statutory duty for the employer "to afford the Union the opportunity to be present at the Step 3 meeting. (AT 13)" The quoted language highlights that the employer in that case was under no affirmative obligation to meet with the individual employee until the union had been afforded the opportunity to be present. This can not obscure that the statutory language does impose a meet and confer duty, provided certain requirements are met. The MERA and SELRA provisions create a forum for employees to air grievances, as well as a defense for the employer who confers with them, provided the requirements of the statutory provisions are met.

The alleged violation of Secs. 111.84(1)(e) and (2)(d), Stats., arguably puts the contractual merit of the conduct questioned by Complainant's grievances at issue. I do not read the parties' arguments to seek such determinations. In any event, I consider this beyond the appropriate scope of this litigation, see STATE OF WISCONSIN, DEC. NO. 25281-C (WERC, 8/91). The pleadings question whether the venues available for these issues were tainted by unfair labor practices. The evidence affords no persuasive basis to conclude the grieved conduct cannot be addressed within standard dispute resolution procedures. It is, in my view, inappropriate to comment on the interpretation of the labor agreement beyond that necessary to establish that the forum is not tainted by unfair labor practices.

This conclusion underscores that I do not find merit to any of Complainant's assertions of bad faith by UWM and Union Respondents. This includes litigation conduct. If litigation conduct is considered part of this proceeding, Complainant's is the least likely to withstand scrutiny. Complainant, for example, advocates rigorous application of the rules of evidence. I disagree with her view of the law, but do not believe it is posed by the facts of this litigation. However, assuming the rules of evidence strictly apply does little to commend Complainant's conduct over that she complains of. For example, Complainant attached to one of her post-hearing briefs a written grievance policy not offered as evidence, asserting the document is "for informational purposes only" not "evidence." I know of no rule of evidence that would permit this. The document plays no role as information or evidence in this proceeding, but exemplifies the recurring difficulty of distinguishing the causal relationship between Complainant's behavior and that she complains of. Further consideration of the litigation conduct of the parties to these complaints is not called for by the pleadings and will, in any event, not advance Complainant's cause.

Nothing stated above should be read to comment on the merit of Complainant's grievances. If she advances those claims, their merit must be addressed in other venues.

Dated at Madison, Wisconsin, this 15th day of February, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

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