STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARY PICHELMANN, Complainant,

vs.

UNIVERSITY OF WISCONSIN – MILWAUKEE; NANCY L. ZIMPHLER; SHANNON BRADBURY and MARY KAY MADSEN

and

COUNCIL 24, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; WISCONSIN STATE EMPLOYEES UNION; MARTIN BEIL and JANA WEAVER, Respondents.

Case 515
No. 59877
PP(S)–319

Decision No. 30124-C

Appearances:

Mr. Geoffrey R. Skoll, P.O. Box 11116, Milwaukee, WI 53211, appearing on behalf of the Complainant, Jennifer Peshut.

Lawton & Cates, S.C., by **Attorney P. Scott Hassett**, 214 West Mifflin Street, P.O. Box 2965, Madison, WI 53703-2594, appearing on behalf of the Respondent WSEU.

Mr. David Vergeront, Legal Counsel, Department of Employment Relations, P.O. Box 7855, Madison, WI 53707-7855, appearing on behalf of the Respondent, University of Wisconsin-Milwaukee.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

Daniel Nielsen, Examiner: The above-named Complainant having filed with the Commission a complaint, alleging that the above-named Respondents have violated the provisions of Ch. 111, Wis. Stats., by interfering with her right to be represented by a person of her choice

in a meeting with management, by delaying a Step 2 hearing on a grievance filed by the Complainant, by refusing to hear her grievance at Step 2 and by coercing and intimidating her in the presentation of her grievance; and the Commission having appointed Daniel Nielsen, an Examiner on its staff to conduct a hearing and to make Findings of Fact and Conclusions of Law, and to issue appropriate Orders; and a hearing having been on held on the complaint on May 22, 2001, at the State Office Building in Milwaukee, at which time all parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute; and the parties having submitted post-hearing briefs and responsive briefs, the last of which was received by the Examiner on August 17, 2001; and the Examiner being fully advised in the premises, now makes and issues the following Findings of Fact, Conclusions of Law and Order.

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

FINDINGS OF FACT

1. The Complainant, Mary A. Pichelmann, is a State employee, working for the University of Wisconsin – Milwaukee as a Program Assistant.

2. The Respondent University of Wisconsin-Milwaukee ("UWM") is a campus of the University of Wisconsin system offering undergraduate and graduate education to citizens in Milwaukee, Wisconsin. Nancy L. Zimpher is the Chancellor of UWM. Shannon Bradbury is the Labor Relations Coordinator for UWM. Mary Kay Madsen is the Chair of UWM's Department of Health Sciences. UWM's business address is 2310 East Hartford Avenue, Milwaukee, Wisconsin.

3. The Respondent American Federation of State, County and Municipal Employees, Council 24, Wisconsin State Employees Union ("WSEU") is the exclusive bargaining representative for, among others, UWM employees in the classification of Program Assistant. Martin Beil is the Executive Director of the WSEU and Jana Weaver is the WSEU Field Representative assigned to administer the collective bargaining agreement on behalf of WSEU members at UWM. WSEU's business address is 8033 Excelsior Drive, Suite C, Madison, Wisconsin.

4. The State of Wisconsin and WSEU are parties to a collective bargaining agreement covering State employees in six bargaining units, one of which is described as the Administrative Support bargaining unit. The Program Assistant title is included in the Administrative Support bargaining unit.

5. The collective bargaining agreement between the parties includes a Grievance Procedure, which is set forth in Article IV:

GRIEVANCE PROCEDURE

SECTION 1: Definition

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

4/1/2 Only one (1) subject matter shall be covered in any one (1) grievance. A grievance shall contain a clear and concise statement of the grievance by indicating the issue involved, the relief sought, the date the incident or violation took place, and the specific section or sections of the Agreement involved. The grievance shall be presented to the designated supervisor involved in quadruplicate (on mutually agreed upon forms furnished by the Employer to the Union and any prospective grievant) and signed and dated by the employe(s) and/or Union representative.

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.

4/1/4 All grievances must be presented promptly and no later than thirty (30) calendar days from the date the grievant first became aware of, or should have become aware of with the exercise of reasonable diligence, the cause of such grievance.

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.

4/1/6 (AS) Representatives of the Union and Management shall be treated as equals and in a courteous and professional manner.

4/2/1 Pre-Filing: When an employe(s) and his/her representative become aware of circumstances chat may result in the filing of a Step One grievance, it is the intent of the parties that, prior to filing a grievance, the Union

representative will contact the immediate supervisor of the employe to identify and discuss the matter in a mutual attempt to resolve it. The parties are encouraged to make this contact by telephone. The State's DAIN line facilities will be used whenever possible.

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.

4/2/3 The Employer representative at any step of the grievance procedure is the person responsible for that step of the procedure. However, the Employer may find it necessary to have an additional Employer representative present. The Union shall also be allowed to have one additional representative present in non-pay status. Only one (1) person from each side shall be designated as the spokesperson. By mutual agreement, additional Employer and/or Union observers may be present.

4/2/4 All original grievances must be filed in writing at Step One or Two, as appropriate, promptly and not later than thirty (30) calendar days from the date the grievant first became aware of, or should have become aware of, with the exercise of reasonable diligence, the cause of such grievance.

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. By mutual agreement of the parties, the parties are encouraged to hold grievance hearings by telephone or video conferencing. The State's DAIN line facilities will be used whenever possible.

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 (i.e., Division Administrator, Bureau Director, or personnel office) 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 Bureau 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. The Employer and the Union agree to hear Step Two grievances on a regular schedule, where possible, at the work site or mutually agreed upon

locations. By mutual agreement of the parties, the parties are encouraged to hold grievance bearings by telephone or video conferencing. The State's DAIN line facilities will be used whenever possible.

4/2/7 Step Three: Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party within thirty (30) calendar days from the date of the agency's answer in Step Two, or from the date on which the agency's answer was due, whichever is earlier, except grievances involving discharge, which must be appealed within fifteen (15) calendar days from the agency's answer in Step Two, or from the date on which the agency's answer was due, whichever is earlier, or the grievance will be considered ineligible for appeal to arbitration. If an unresolved grievance is not appealed to arbitration, it shall be considered terminated on the basis of the Second Step answers without prejudice or precedent in the resolution of future grievances. The issue as stated in the Second Step shall constitute the sole and entire subject matter to be heard by the arbitrator, unless the parties agree to modify the scope of the hearing.

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. The parties may, however, mutually agree in writing to extend the time limits in any step of the grievance procedure.

4/2/9 If the Employer representative with whom a grievance appeal must be filed is located in a city other than that in which the grievance was processed in the preceding step, the mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period. Likewise, when an Employer answer must be forwarded to a city other than that in which the Employer representative works, the mailing of the answer shall constitute a timely response if it is postmarked within the answer period. The Employer will make a good faith effort to insure confidentiality.

4/2/10 Arbitration hearing date(s) for discharge cases will be selected within one (1) year from the date of appeal to arbitration, unless the parties mutually agree otherwise in writing.

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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 6: Number of Representatives and Jurisdictions

4/6/1 (BC, SPS, T, LE) Council 24 shall designate a total of up to 750 grievance representatives who are members of the bargaining units for the bargaining units.

4/6/2 (AS) Council 24 shall designate a total of up to 500 grievance representatives who are members of the bargaining unit for the bargaining unit.

4/6/2A(P55) Council 24 shall designate a total of up to 115 grievance representatives who are members of the bargaining unit for the bargaining unit.

4/6/3 The Union shall designate the jurisdictional area for each grievance representative and his/her alternate. Each jurisdictional area shall have a similar number of employes and shall be limited to a reasonable area to minimize the loss of work time and travel giving consideration for the geographic area, employing unit, work unit, shift schedule and the right and responsibility of the WSEU to represent the employe of the bargaining unit. Jurisdictional areas shall include other employing units and/or departments where the number of employes in such units or departments are too minimal to warrant designation of a grievance representative.

4/6/4 (BC, T, P55, LE) Each local Union or each chapter of a statewide local Union (for PSS and Department of Transportation SPS only) may appoint one chief steward whom the designated grievance representative of the local or chapter may consult with by telephone pursuant to the provisions of Article II, Section 9 (Telephone Use) in the event the grievance representative needs advice in interpreting the Agreement or in handling a grievance.

4/6/4A(AS) Each local Union may appoint chief stewards, and shall furnish to the Employer, in writing, the name of the Chief Steward for each respective jurisdictional area. The grievance representative of the local may consult with his/her appropriate jurisdictional area Chief Steward by telephone pursuant to the provisions of Article II, Section 9 (Telephone Use) in the event the grievance representative needs advice in interpreting the Agreement or in handling a grievance.

4/6/5 In those instances where there is not a designated grievance representative from an employe's bargaining unit available in the same building, a designated grievance representative from another WSEU represented bargaining unit or local Union within the same building shall be allowed, pursuant to Paragraph 4/8/1, to cross bargaining unit or local Union lines so as to provide grievance representation. Such substitute grievance representative shall obtain approval from his/her supervisor prior to providing such substitute representation.

4/6/6 (BC, SPS, T, P55, LE) The Union shall furnish to the Employer in writing the names of the grievance representatives, and their respective jurisdictional areas within thirty (30) calendar days after the effective date of this Agreement. Any changes thereto shall be forwarded to the Employer by the Union as soon as the changes are made.

4/6/7 (AS) The Union shall furnish to the Employer in writing the names of the grievance representatives, and their respective jurisdictional areas as soon as they are designated and determined but not later than 180 calendar days after the effective date of this Agreement. Any changes thereto shall be forwarded to the Employer by the Union as soon as the changes are made.

4/6/8 The Employer will supply the local Union with a list of supervisors to contact on grievance matters.

SECTION 7: Union Grievances

4/7/1 Union officers and stewards who are members of the bargaining unit shall have the right to file a grievance when any provision of this Agreement has been violated or when the Employer interpretation of the terms and provisions of this Agreement leads to a controversy with the Union over application of the terms or provisions of this Agreement.

SECTION 8: Processing Grievances

4/8/1 The grievant, including a Union official in a Union grievance, will be permitted a reasonable amount of time without loss of pay to process a grievance through Step Three (including consultation with designated representatives prior to filing a grievance) during his/her regularly scheduled hours of employment. The employe's supervisor will arrange a meeting to take place as soon as possible for the employe with his/her Union representative through the Union representative's supervisor.

4/8/2 Designated grievance representatives will also be permitted a reasonable amount of time without loss of pay to investigate and process grievances through Step Three (including consultations) in their jurisdictional areas during their regularly scheduled hours of employment. Only one designated grievance representative will be permitted to process any one grievance without loss of pay as above. Further, in a group grievance, only one grievant, appearing without loss of pay, shall be the spokesperson for the group. (Group grievances are defined as, and limited to, those grievances which cover more than one employe, and which involve like circumstances and facts for the grievants involved.) Group grievances must be so designated at the first step of the grievance procedure and set forth a list of all employes covered by the grievance.

4/8/3 The grievance meeting as provided in the Pre-Filing Step and Steps One and Two above shall be held during the grievant's regularly scheduled hours of employment unless mutually agreed otherwise. The Employer shall designate the time and location for pre-filing, first and second step grievance hearings. The grievant's attendance at said hearings, including reasonable travel time to and from the hearing, shall be in pay status.

4/8/4 The designated grievance representative shall be in pay status for said hearing and for reasonable travel time to and from said hearing, provided that the hearing occurs during his/her regularly scheduled hours of work. If the grievant and/or the designated representative has a personally assigned vehicle, he/she may use that vehicle, without charge, to attend such grievance meetings, except that in the State Patrol, a designated grievance representative may only use his/her vehicle to attend a grievance hearing if the hearing occurs during his/her regularly scheduled hours of work. If there is a state fleet vehicle available, at the sole discretion of the Employer, the designated grievance representative may use the vehicle, without charge, to attend such grievance meetings. However, the decision of the Employer is not subject to the grievance procedure.

4/8/4 (BC, AS, SPS, T, LE) The Pre-Filing Step and Step One of the grievance procedure will be held on the grievant's and the grievant's representative's work time if the work time is on the same or overlapping shift. It is understood that the grievance time limits may have to be extended to accommodate this provision and that work schedules need not be changed.

4/8/5 The Employer is not responsible for any compensation of employes for time spent processing grievances outside their regularly scheduled hours of employment. The Employer is not responsible for any travel or subsistence expenses incurred by grievants or Union representatives in the processing of grievances.

4/8/6 (BC, AS) The Employer and the Union may mutually agree to the need for an interpreter in discipline hearings and the Pre-Filing Step and Steps One and Two of the grievance procedure. The interpreter shall be used to assist persons who are hearing impaired or who do not speak English to understand the proceedings. The person selected as the interpreter will be mutually agreed to, and the Union and the Employer shall share the costs equally.

4/8/7 The Employer will send one (1) copy of the answered grievance at Step One to the District Council 24 area representative.

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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 employe 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. A grievance in response to a written reprimand shall begin at the step of the grievance procedure that is appropriate to the level of authority of the person signing the written reprimand, unless the parties mutually agree to waive to the next step. 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 evaluation, 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 performance evaluation or informal counseling.

4/9/4 If any discipline is taken against an employe, both the employe and local Union president, or his/her designee, will receive copies of this disciplinary action. If the supervisor and the employe meet to explain or discuss the

discipline, a Union representative shall be present, if requested. When an employe has been formally notified of an investigation, and the Employer concludes no discipline will be taken at the present time, the employe shall be so advised.

4/9/5 No suspensions without pay shall be effective for more than thirty (30) days.

4/9/6 Where the Employer provides written notice to an employe of a pre-disciplinary meeting, and the employe is represented by a WSEU statewide local union, the Employer will provide a copy of such notice to the local union. Current practices between other WSEU local unions and the Employer will continue.

. . .

6. The collective bargaining agreement also contains Negotiating Note No. 14, specifying that performance evaluations are not disciplinary, and do not constitute notice of discipline, and directing State managers to refrain from listing specific work rule violations in performance evaluations:

NEGOTIATING NOTE NO. 14
1999-2001 AGREEMENT
MEMO - PERFORMANCE EVALUATIONS

DATE: July 19, 1985

TO: Agency Personnel Managers

FROM: Howard Fuller, Secretary
Department of Employment Relations

SUBJECT: Performance Evaluations

The performance evaluation process for employes is a necessary and important component of all well-managed organizations. The State is no exception. I believe strongly in the process and intend to see it develop in the coming years.

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 employes' 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.
>
> In closing, I would like to restate that my concerns lie with specific work rule references being included in the annual evaluations and the need to keep such references out of them. Even if the performance represents a work rule violation, only the description of the unacceptable performance should be included in the evaluation. I would appreciate your cooperation in insuring that this directive is implemented.

7. Ms. Pichelmann was promoted from Program Assistant I to Program Assistant III in 2000, resulting in a pay increase of approximately $2 per hour. Her promotional position was as a 50% FTE in the Department of Health Sciences, School of Allied Health Professions, working under the general supervision of Department Chair Mary K. Madsen. The promotion rendered her a probationary employee. State statutes require that probationary employees be evaluated during their probationary period. Professor Madsen performed the evaluations on Pichelmann.

8. While in the Department of Health Sciences, Ms. Pichelmann filed two grievances against Professor Madsen, one alleging a violation of First Amendment rights in ordering her to remove a Gloria Steinem quote from her computer's e-mail signature, and another challenging the designation of a fellow PA III as her supervisor. She also filed a lawsuit in federal court over the First Amendment issue, naming Professor Madsen and Dean Randall Lambrecht as Defendants.

9. On November 22, 2000, Professor Madsen conducted the initial probationary evaluation on Ms. Pichelmann. Ms. Pichelmann was rated as having performed poorly throughout the evaluation period.

10. On December 20, 2000, Professor Madsen asked Ms. Pichelmann to meet with her. Pichelmann asked the reason for the meeting, and Madsen told her it would be a performance evaluation. Pichelmann told Madsen that she wanted a Union representative present, and Madsen told her she was not entitled to representation in an evaluation meeting. Pichelmann persisted, and Madsen told her that she would be removed from the premises if she declined to meet without representation. Pichelmann called Jennifer Peshut, the WSEU

steward, and Peshut advised her to proceed with the meeting. Madsen reviewed her performance with her, and advised her that she had not passed the probationary period, and would be returned to her former position of PA I in the Graduate School. Madsen told her that she should go home, and report to the Graduate School on January 2nd to begin her new job. Madsen also told her that she would remain in pay status through the Allied Health School while waiting to start the new job. Following the meeting, Madsen had a letter prepared and mailed to Pichelmann, confirming that she had failed the probation, and summarizing the arrangements for her return to a PA I position:

> December 20, 2000
>
> . . .
>
> Dear Ms. Pichelmann:
>
> This letter is to inform you that you have failed to pass your promotional probation with the School of Allied Health Professions effective December 20, 2000. The reasons for this action are as follows:
>
> Failure to communicate regularly with the Chair as indicated in the position description and discussed in the initial probationary evaluation; failure to follow appropriate procedures related to open meeting requirements, failure to perform standard functions of the job such as ordering of supplies, completing work as designated.
>
> Because you are being released from promotional probation from within the same agency, you will be restored to your former position (or a similar position) and former rate of pay, according to ER-MRS 14.03 (1) *Wis. Adm. Code*. There is no appeal from this decision. You are to report to Doug Harder, Director of the McNair Program, Mitchell 243 on January 2, 2001 to resume the duties of your previous position. The School of Allied Health will continue your salary at your current rate of pay through January 1, 2001.
>
> Sincerely,
>
> /s/ Mary K. Madsen
> Mary K. Madsen
> Chair, Department of Health Sciences
>
> /s/ Randall S, Lambrecht
> Randall S, Lambrecht
> Dean

cc: Business Office
Local Union
Department of Human Resources
The Graduate School

This letter was sent to an incorrect street address, and was not received by Ms. Pichelmann until December 28th.

11. On the afternoon of December 20th, Ms. Peshut sent an e-mail to Professor Madsen, notifying her of the pre-filing of a grievance "pursuant to 4/2/1 of the Agreement between the State of Wisconsin and AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO, and Affiliated Local 82" over the denial of representation during the meeting. The e-mail stated that Madsen was in violation of section 4/9/3 of the contract, and asserted that the denial of representation and the termination of Ms. Pichelmann's Program Assistant III job were unjustified, and in retaliation for her Federal lawsuit. Madsen replied by e-mail to Pichelmann the following day, advising her that evaluations were not grievable issues. Peshut responded on Pichelmann's behalf, disputing Madsen's interpretation of the contract, and demanding a response to the pre-filing by the end of the business day on December 22nd.

12. On December 21st, Marjorie Bjornstad sent Ms. Pichelmann an e-mail, advising her that she should report on January 3rd, rather than January 2nd, because her supervisor in the Graduate School would not return to campus until the 3rd. The e-mail reiterated that the Graduate School would pick up her salary effective January 2nd. Although Madsen had told her she would remain in pay status, Pichelmann did not trust her assurances, and an e-mail was sent to Ericka Sander, the Acting Director of Human Resources on the 22nd, questioning whether she would be paid between December 21st and January 1st:

> As you can see, Ms. Bjornstad has ordered me NOT to report to work until January 3, 2000 [sic]. Does this mean that I am out of pay status from December 21, 2000 through January 1, 2001?
>
> Please advise at your earliest convenience.

Ms. Sander did not reply to the e-mail until December 26th, at which time she wrote back, assuring Pichelmann that she was in pay status:

> Mary . . . you have received in writing a letter indicating that you failed permissive (promotion) probation in Allied Health Professions. That letter also indicated that you would remain in pay status until your position in the Graduate School commences, on 2 January 2001. I trust this clarifies any concerns you had with remaining in pay status. All of this comports with DER and contractual expectations with respect to failing probationary periods.

> Please let us know if you have any further questions.

Pichelmann replied the next day:

> To date, I am not in receipt of the letter you refer to in your e—mail correspondence of 12/26/00 below.
>
> As you know, I was dismissed from my PA-3 position in the Department of Health Sciences, School of Allied Health without notice and without just cause 12/20/00.
>
> Where and when was the letter sent?
>
> Please advise at your earliest convenience.

Sander responded later that day, telling Pichelmann that a letter had been sent to her home address on December 20th, and speculating that it may have been delayed in the Christmas mails:

> The letter was sent to you on 20 December 2000 to what appears to be your home address. You should have received it or shortly will (I suspect the Holiday mail situation may have slowed down delivery). If you do not receive it by Friday, pls let us know. We can provide another copy (in person or via FAX).

Also on December 27th, a letter was sent to Ms. Pichelmann by the Dean of the Graduate School describing the terms of her return to PA 1 status:

> . . .
>
> With this letter, I extend to you an offer of mandatory restoration to the State Classified Service as a Program Assistant I in the Department of Graduate Academic Programs & Student Services in the Graduate School at the University of Wisconsin—Milwaukee, effective December 31, 2000.
>
> Your supervisor, Douglas Harder, will provide you with information regarding your duties and responsibilities, evaluate your performance, and be available to discuss employment problems with you.
>
> The salary for your new position is $10.782 per hour, paid bi-weekly every other Thursday. You will not be placed on probation.
>
> Your position is represented by the Wisconsin State Employees Union and is included in the Administrative Support bargaining unit.

> Current balances of sick leave, vacation and holiday hours accrued through previous service will be transferred to your position, and you may use these hours with the approval of your supervisor.
>
> To accept this offer, please sign the enclosed copy of this letter. Please return in the enclosed addressed envelope within five days of receipt. We cannot put you on the payroll until we receive this information with your signature affixed.
>
> On behalf of the Chancellor and the faculty and staff of UWM, I want to wish you success in your new position. I hope that your appointment will prove rewarding to you and beneficial to the students and others served by the University.
>
> Should you have any questions regarding your new position or the contents of this letter, please do not hesitate to contact your supervisor or Personnel Representative, Marjorie Bjornstad, at 229-5547.
>
> . . .

Ms. Pichelmann remained in pay status between December 20th and January 3rd.

13. On January 18, 2001, Ms. Pichelmann and her steward, Jennifer Peshut, filed a Step 1 grievance asserting that (a) Pichelmann had been suspended without just cause between December 20th and December 30th; (b) Professor Madsen had refused the Complainant representation during the December 20th meeting leading to the discipline; (c) Madsen threatened to have the Complainant forcibly removed if she did not attend the December meeting without representation; (d) the University failed to allow a pre-disciplinary meeting prior to the December 20th meeting; (e) the University failed to properly notify the Union of the discipline by instead sending a notice claiming it was a release from promotional probation; (f) Madsen ordered the Complainant to sign a time card for the period of the suspension which was later altered to conceal the suspension; (g) Madsen withheld training opportunities from the Complainant, contributing to her negative evaluation; (h) Madsen made false, misleading and groundless claims in the December 20th evaluation; and (i) that all of these actions were taken in retaliation against the Complainant for her filing of a federal suit against Madsen and Dean Randall Lambrecht over their effort to interfere with her constitutional right to free speech.

14. On February 2, 2001, Assistant Dean Elizabeth Bolt denied the grievance at Step 1. Bolt ruled that Madsen was entitled to make the determination as to whether Ms. Pichelmann was adequately performing her job during the probationary period. Bolt further found that there was no evidence of discipline, in that no discipline appeared in Pichelmann's personnel file, there was no statement or implication that discipline was being taken, and there was no loss of income to Pichelmann. Instead, Bolt determined that the directive to stay home from December 20th until January 3rd was due to a judgment that it was unproductive for her to

report to a job she had been released from, and that the Graduate School was not yet ready to have her start work. Given the lack of discipline, Bolt determined that there was no right to representation.

15. On February 16th, Ms. Pichelmann and Peshut submitted the grievance at Step 2 of the grievance procedure, asserting that Bolt had not answered the grievance, and reiterating the substantive complaints made at Step 1.

16. As Coordinator of Labor Relations, Shannon Bradbury is responsible for scheduling and hearing Step 2 grievances on behalf of the University. She does so in conjunction with Union Field Representative Jana Weaver, and the timing of the hearing is generally dictated by Weaver's schedule. Weaver is responsible for representing State employees in 14 locals across 4 counties in southeastern Wisconsin. Bradbury does not take action to schedule a Step 2 hearing until Weaver contacts her to arrange for a meeting. Step 2 hearings at UWM are not usually conducted within the 21 days contemplated by the collective bargaining agreement, because of the time demands created by Weaver's workload.

17. On Sunday, March 11, 2001, Ms. Peshut sent an e-mail to Shannon Bradbury, noting that Step 2 grievance hearings are to be held within 21 days of filing at Step 2, and that more than 21 days had passed since the filing of Ms. Pichelmann's grievance. Peshut stated that neither she nor Pichelmann had waived the time limit and that "[if] you do not schedule a grievance hearing immediately, I must conclude that you intend to violate both the contract and state law and I will proceed accordingly." Bradbury replied the following day, stating that the Step 2 hearings were scheduled to accommodate the WSEU Field Representative, and suggesting that Pichelmann contact Jana Weaver. Peshut wrote back, telling Bradbury that, as the University's designated representative, she was responsible for scheduling the Step 2 grievances in a timely manner, and warning that if the hearing was not scheduled by the end of the day, she would assume that Bradbury was refusing to schedule it and acting in violation of the contract and state law. Bradbury forwarded the correspondence to Weaver. On March 21st, Bradbury wrote back to Peshut and advised her that Step 2 hearings had been scheduled for April 5th, and that Pichelmann's grievance would be heard on that day.

19. On Saturday, March 31st, Ms. Pichelmann sent an e-mail to Ms. Bradbury, with copies to Ms. Peshut and to the UWM News, the student newspaper, demanding that the grievance hearing be open to the public. Bradbury replied on Monday, April 2, that grievance hearings were not open meetings, and the two exchanged e-mails on the subject, with Bradbury declining to notice the hearing as an open meeting, and Pichelmann expressing her view that the law required that the meeting be open to the public:

> PLEASE TAKE NOTICE, I request that my Step 2 Grievance Hearing scheduled for Thursday, April 5, 2001 in Engelmann Hall Room 122 at 11:00 a.m. be open to the public and that you notice it as such.

Thank you in advance for your prompt attention to my request.

. . .

Date: Mon, 2 Apr 2001 11:47:04 -0500 (CDT)

. . .

Ms. Pichelmann:

Grievance hearings are intended to be confidential, and are not open to the public. If you wish to have parties other than yourself, your steward and the WSEU Field Representative present at the hearing, you must first have the approval of the WSEU Field Representative, Ms. Jana Weaver.

. . .

Shannon E. Bradbury

Date: Mon, 2 Apr 2001 11:47:04 -0500 (CDT)

. . .

Dear Ms. Bradbury:

You do not have the authority to close the meeting. All meetings including grievance hearings are presumed to be open to the public unless they fall under an exception of the Wisconsin Open Meetings Law.

"The purpose of the exception [to the open meetings requirement of the law] is to protect a particular employe who is being considered or discussed and not to protect the public agency involved.." 80 OAG 176, 178 (1992) In the same opinion the Attorney General goes on to say ". . that the person has the right to demand that the evidentiary hearing or meeting be held in open session." Id. 179, 180.

Neither does Ms. Jana Weaver have the authority to close the meeting. Under both the contract and state law, Ms. Weaver's right is only to be present.

I and my representative intend to appear for the grievance hearing at the time and place you have scheduled and I expect it to be an open meeting. If you fail to abide by the laws of the State of Wisconsin you are presumptively refusing to hear my grievance.

Sincerely,

Mary Pichelmann

Dear Ms. Pichelmann:

The Open Meetings law is inapplicable. A grievance hearing does not constitute a "meeting" for the purposes of the Open Meetings law, because the attendees at the hearing do not constitute a "Governmental body" under § 19.82(1) Wis. Stats.

Grievance hearings are confidential and are not open to the public. Should you fail to attend, the hearing can be conducted in your absence.

Shannon E. Bradbury
Labor Relations Coordinator, UWM
(414) 229-6480

Date: Tue, 3 Apr 2001 13:14:50 -0500 (CDT)

. . .

Subject: Re: Notice of Grievance Hearing

Dear Ms. Bradbury,

The University of Wisconsin-Milwaukee is a governmental body, and the grievance hearings conducted by you or any other agent of the University are subject to the Wisconsin Opening Meetings Law.

Any meetings that are closed must be under an exemption of the Open Meetings Law and with proper notice. That you have improperly closed grievance hearings without notice in the past, merely establishes that you have a long history of flouting the law.

If you do not hold an open grievance hearing for me, your action will constitute refusal to hear my grievance.

Sincerely,

Mary Pichelmann

Neither Ms. Bradbury nor anyone in her office noticed the meeting as an open meeting. Notwithstanding this, on April 3rd, either Peshut or Pichelmann had the Office of University Relations add Ms. Pichelmann's grievance hearing to the Open Meeting Report for the week of April 2-6. Neither of the other two grievance hearings scheduled for the morning of April 5th was listed on the Report.

19. On March 31st, a few minutes after Ms. Pichelmann sent her open meeting request to Ms. Bradbury, Ms. Peshut sent an e-mail to representatives of the Progressive Student Network and the Student Association, asking them to show solidarity between students and workers by attending Pichelmann's grievance hearing.

20. On April 5th, Jana Weaver and Shannon Bradbury met for Step 2 grievance hearings. Ms. Pichelmann's was set as the third and last hearing, at 11:00 a.m. At about 10:45 a.m., Ms. Pichelmann, Ms. Peshut, and three students who responded to Peshut's e-mail appeal for support gathered in the hallway outside the hearing room. A photographer from the student newspaper was also present. Peshut, and two of the students held up mask placards supplied by Pichelmann, displaying the face of Gloria Steinem, and had their pictures taken. The placards were a reference to a Steinem quote "The truth will set you free, but first it will piss you off" which Pichelmann had earlier been ordered to remove from her e-mail signature.

21. Shortly before 11:00 a.m., Jana Weaver approached Ms. Peshut and Ms. Pichelmann and asked if they would meet her prior to the hearing, so that she could familiarize herself with the grievance. She had not, to that point, received any information on the case. Peshut told her that it was not necessary for them to meet before the hearing, and that the two of them were ready to proceed with the hearing. She also handed Weaver a copy of the Open Meetings Report and told her that the meeting would be open to the public. Weaver replied that it would not be open to the public. She told the two that they appeared to be done, and went into the hearing room to gather her materials. Peshut, Pichelmann and the students also entered the hearing room. Weaver again asked if they would meet with her, and Peshut said "no." Weaver advised them to go back to work, since there would be no hearing.

22. Jana Weaver left the hearing room and went to Ms. Bradbury's office. She informed Bradbury that Ms. Peshut and Ms. Pichelmann were refusing to meet with her on the grievance, and that there were members of the public in the hearing room. She told Bradbury that she would not proceed with the grievance hearing under those circumstances, and asked Bradbury to accompany her back to the hearing room. Bradbury and Weaver returned to the hearing room, and stood near the doorway. Peshut and Bradbury discussed the open meetings issue, with Bradbury reiterating her position that grievance hearings were not open meetings. Peshut showed her that hearing was listed on the Open Meetings Report, and Bradbury stated that it must have been listed by mistake. Weaver again asked if they would meet with her, and they said told her they would not. She then advised them that there would be no hearing, gathered her materials and left. Bradbury also left, returning to her office.

23. Ms. Peshut and Ms. Pichelmann followed Ms. Bradbury to her office and asked her to proceed with the hearing. Bradbury declined, but did offer to reschedule the hearing.

24. On April 18, 2001, the instant complaint of unfair labor practices was filed, alleging that UWM had violated Sec. 111.84 by refusing Ms. Pichelmann's request for representation in the December 20th evaluation meeting, by engaging in a practice of delaying Step 2 grievance hearings, and by refusing to hear Pichelmann's Step 2 grievance. The complaint also asserted that WSEU had violated Sec. 111.83 by interfering with Ms. Pichelmann's right to present grievances through a representative of her own choosing, and Sec. 111.84 by coercing and intimidating Ms. Pichelmann in her effort to present her Step 2 grievance.

25. The meeting on December 20, 2000, between Professor Madsen and Ms. Pichelmann was for the purpose of conducting a performance evaluation related to Pichelmann's probationary period as a Program Assistant III. Ms. Pichelmann was advised of this purpose in advance of the meeting. By contract, performance evaluations are not disciplinary in nature. No investigation of Ms. Pichelmann's conduct was announced, contemplated or conducted during this meeting. No discipline was imposed on Ms. Pichelmann in the course of the meeting or afterward. Ms. Pichelmann did not have a reasonable expectation that the December 20th meeting was investigatory in nature, nor that it could result in discipline.

26. The requirement of a hearing within 21 days of filing a Step 2 grievance is established by the collective bargaining agreement between the State of Wisconsin and the WSEU. The procedural provisions of the contract may be waived by mutual consent of the contracting parties. Delays in conducting Step 2 grievance hearings at UWM result from the workload and schedule of the Union's Field Representative. Hearings are conducted as soon as possible, within the confines of the Field Representative's work schedule. WSEU and the State have mutually agreed to this scheduling practice. The scheduling of these hearings beyond 21 days after filing does not have a reasonable tendency to interfere with employee rights to engage in concerted activity.

27. The grievance procedure in the collective bargaining agreement requires that a representative of Council 24 be involved in the Step 2 hearing, if Council 24 so elects. Jana Weaver is the designated representative of Council 24 for Step 2 grievances at UWM. The Step 2 hearing on Ms. Pichelmann's grievance did not proceed on April 5, 2001 because Weaver refused to have the hearing go forward without first having an opportunity to meet with Peshut and Pichelmann and familiarize herself with the grievance, and also refused to participate in the hearing if it was held as an open meeting. Bradbury did not have the option, under the collective bargaining agreement, of proceeding with a Step 2 hearing without Weaver, unless Weaver consented. Weaver did not consent. Bradbury's refusal to proceed with the hearing in the absence of Weaver did not have a reasonable tendency to interfere with employee's exercise of protected rights.

28. As the designated representative of Council 24, Weaver has the right to condition her participation in a Step 2 hearing on the cooperation of the employee and the local steward in preparing her for the hearing. Weaver's refusal to proceed with the Step 2 hearing on Pichelmann's grievance unless the Grievant and steward met with her before the hearing did not have a reasonable tendency to interfere with the exercise of employee rights to engage in protected activity, nor did it coerce or restrain Pichelmann in the exercise of those rights.

29. The grievance filed by Ms. Pichelmann was, both on its face and in its manner of processing, a contract grievance brought through the WSEU and pursuant to the contractual grievance procedure. Neither Ms. Pichelmann nor Ms. Peshut at any time represented the grievance to be a grievance brought by a minority of employees, nor a grievance brought on behalf of an individual outside of the contractual grievance machinery. The processing of this grievance was governed by the terms of the collective bargaining agreement.

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

CONCLUSIONS OF LAW

1. The Complainant, Mary A. Pichelmann, is an "employee" within the meaning of Sec. 111.81(7), SELRA and is a party in interest within the meaning of Sec. 111.07(2), Stats., and ERC 22.02(1), Wis. Administrative Code, for the purpose of filing the instant complaint of unfair labor practices.

2. The Respondents University of Wisconsin-Milwaukee, Nancy L. Zimphler, Shannon Bradbury and Mary Kay Madsen are agents of the State of Wisconsin, the "employer" within the meaning of Sec. 111.81(8), SELRA.

3. The Respondents Martin Beil and Jana Weaver are agents of the Respondent Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, which is a "labor organization" within the meaning of Sec. 111.81(12), SELRA.

4. By the acts described in the above and foregoing Findings of Fact, the Respondent Employer did not interfere with the Complainant's right to be represented by a representative of her own choosing in the exercise of right guaranteed by Sec. 111.83, and did not commit any unfair practice within the meaning of Sec. 111.84(1), SELRA.

5. By the acts described in the above and foregoing Findings of Fact, the Respondent Labor Organization did not interfere with the Complainant's right to be represented by a representative of her own choosing in the exercise of right guaranteed by Sec. 111.83, and did not commit any unfair practice within the meaning of Sec. 111.84(2), SELRA.

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

ORDER

That the instant complaint be, and the same hereby is, dismissed in its entirety.

Dated at Racine, Wisconsin, this 19th day of October, 2001

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Examiner

DEPARTMENT OF EMPLOYMENT RELATIONS (UW-MILWAUKEE)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

BACKGROUND

The factual background of the complaint is set forth in the Findings of Fact, but is briefly restated here. The complaint arises from a meeting held in December of 2000 and the subsequent processing of a grievance over the events at that meeting. The Complainant was promoted from a half-time Program Assistant I to a half-time Program Assistant III at UWM in 2000. While she was on probation in the promotional position, she filed several grievances against her Department Chair, Professor Mary Kay Madsen. She also filed a federal lawsuit against Madsen and the Dean of the School, alleging that they interfered with her First Amendment rights.

Probationary employees are subject to evaluation to determine whether they are satisfying the demands of the promotional position. If they fail probation, they are returned to their former positions and rates of pay. The Complainant's first evaluation was conducted in late November of 2000, after she had filed her grievances and lawsuit. It was not a positive evaluation. Thereafter Madsen's attitude towards her was distant and cool. On December 20th, Madsen asked to meet with her. She asked why, and Madsen said she wanted to conduct a performance evaluation. The Complainant requested Union representation and Madsen refused. When she persisted, Madsen threatened to have her removed from the premises. She called her steward, Jennifer Peshut, who advised her to proceed with the meeting. In the course of the meeting, Madsen reviewed her performance, advised her that it was not acceptable, and told her she would be returned to her former PA I position in the Graduate School after the first of the year. Madsen told her she should go home, and that she would remain in pay status until her new job started. The Complainant left, and returned to work at the Graduate School on January 3rd. She was paid for the time between the performance evaluation and the start of work in the Graduate School, although on returning to the PA I position, she did lose $2 per hour in wages.

A grievance was initiated on the Complainant's behalf. Peshut, as the WSEU steward, processed the grievance through pre-filing and Step 1, but it was not resolved, and a Step 2 grievance was filed on February 16, 2001. The contract between the State and WSEU requires that hearings on Step 2 grievance be conducted with the employer representative, the employee, the employee's representative, and a representative of Council 24, if the Union so elects, within 21 days of the Step 2 filing: "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 2 grievance, unless the time limits are mutually waived."

Shannon Bradbury, the University's Labor Relations Coordinator, is the employer representative at Step 2. She does not schedule Step 2 hearings until she is contacted by the WSEU Field Representative, Jana Weaver. Weaver is responsible for 14 locals of WSEU, and owing to this workload, she does not schedule Step 2 hearings at UWM on a regular basis as she does at other, larger volume locals in her jurisdiction. As a result of the demands on her time, Weaver is routinely unable to schedule Step 2 hearings at UWM within 21 days of filing, and Bradbury and she have engaged in a regular practice of scheduling the hearings when Weaver's schedule permits, irrespective of the 21-day limit.

On Saturday, March 11th, Peshut sent an e-mail to Bradbury demanding a hearing on Ms. Pichelmann's grievance. Bradbury wrote back on Monday, advising her to contact Weaver. Peshut responded that it was Bradbury's job to schedule and conduct hearings, not Weaver's, and that if a hearing was not scheduled by the end of the day, she would conclude that Bradbury was refusing to hear the grievance at Step 2. Bradbury forwarded the e-mails to Weaver, and the two of them arranged to conduct Step 2 hearings on three grievances, including Pichelmann's, on April 5th. Peshut and Pichelmann were advised of the schedule by e-mail on March 21st.

On March 31st, Pichelmann sent Bradbury an e-mail, seeking to have her grievance hearing held as an open meeting. Bradbury advised her that grievance hearings were not subject to the open meetings law, and are intended to be confidential. Pichelmann wrote back, disagreeing, and the two exchanged e-mails on the topic for several days. Meanwhile, Peshut contacted several student activists and asked them to attend the hearing in a show of solidarity between students and workers. The student newspaper was also contacted. Either Peshut, Pichelmann or someone acting on their behalf contacted the Office of University Relations and arranged to have the hearing be added to the list of open meetings for the week. 1/

1/ Neither Pichelmann nor Peshut testified to this. This is an inference drawn from Bradbury's unrefuted testimony that she understood that one of the two had had this done, and from the fact that the listing reflected Pichelmann and Peshut's desires for the meeting, and was contrary to the opinion of Bradbury and Weaver.

The Step 2 hearing was held on April 5th. Bradbury and Weaver heard two other grievances first, and were finished by 10:45 or so. Bradbury went back to her office and Weaver waited in the hearing room. At about that same time, Pichelmann, Peshut, and three students gathered in the hallway a little way from the hearing room. They conducted a short demonstration, holding up placards and having their pictures taken by a photographer from the school newspaper. Weaver emerged from the hearing room and approached Peshut and Pichelmann, asking whether they were prepared to meet with her on the grievance. Peshut responded that they did not need to meet with her prior to the hearing, and that they were ready to present the grievance. Weaver persisted, and was again told that no meeting was needed before the hearing. Peshut also advised her that the hearing would be an open meeting. Weaver told them there would be no hearing under those circumstances.

Weaver went to Bradbury's office and the two of them returned to the hearing room. Peshut told Bradbury that the hearing would be an open meeting and displayed a copy of the Open Meetings Report. Bradbury responded that the report was mistaken. Weaver again asked if Pichelmann was refusing to meet with her, and then advised Peshut and Pichelmann that the hearing was off. She left the premises and Bradbury returned to her office. Pichelmann and Peshut went to Bradbury's office, seeking to have her conduct the hearing in Weaver's absence. Bradbury refused.

ARGUMENTS OF THE PARTIES

Initial Brief

The Complainant

The Complainant asserts that UWM committed unfair labor practices by (1) denying her request for representation in the December 20th meeting with Madsen; (2) delaying the Step 2 hearing; (3) refusing to conduct the Step 2 hearing; and (4) engaging in persistent pattern of delaying Step 2 hearings. The Complainant further asserts that WSEU interfered with her right to engage in concerted activity by causing UWM to cancel the Step 2 hearing.

The meeting with Madsen did not take place in a vacuum, and viewed in context it is clear that the Complainant had a reasonable expectation that it could result in discipline. While Madsen claimed it was a performance evaluation, the Complainant had filed several actions against her, including a federal suit, and their relations had been chilly at best. The meeting was not pre-scheduled, and the Complainant was justifiably concerned about its actual purpose. This concern was heightened when Madsen threatened to call security and have her removed if she refused to meet without Union representation. The test for Weingarten rights is whether the employee's belief was reasonable at the time, and under the circumstances of December 20th, the Complainant was amply justified in her belief that the meeting was more than a run of the mill performance evaluation. Indeed, given that she was ordered to go home and not remain on the job, it is clear that discipline was the intended result of the meeting. Given this, Madsen violated her right to have a representative present, and thereby violated SELRA.

The Complainant followed the accepted avenues for challenging the disciplinary suspension imposed by Madsen and filed a grievance. UWM, however, failed to abide by its duty to promptly hear the grievance. The contract requires a grievance hearing within 21 days of filing at Step 2. The University admits that it did not meet this timeline, and has not met this timeline in processing grievances for many years. The University further concedes that it has never obtained written waivers of the time requirements. This persistent flouting of a clear contract provision demonstrates a deliberate attempt to frustrate the filing of grievances by employees, a protected right under the statutes. The pattern of resistance also reasonably draws into question the University intent to ever grant a fair hearing on a grievance.

Even more egregious than the regular refusal to grant prompt grievance hearings is the University's flat refusal in this case to conduct any hearing at Step 2. The Complainant exercised her right to request a public hearing, as she is plainly entitled to do under Wisconsin's Open Meetings law. Bradbury resisted this request, and threatened to hold the hearing without her if need be. On the day set for the hearing, Bradbury refused to proceed, notwithstanding the fact that the Complainant and her Steward, Ms. Peshut were ready and willing to go forward. Contrary to the pleadings of the Respondents, the Complainant never conditioned her participation in the hearing on the meeting being open to public. Weaver and Bradbury objected to the public being present, but they never asked anyone to leave, nor did Bradbury make any attempt to convene the hearing. It was Bradbury and Weaver who walked out and refused to proceed.

In addition to the statutory violations by UWM, WSEU has committed unfair labor practices by interfering with, and restraining the Complainant in her exercise of her rights. Weaver harassed the Complainant and Peshut, insisting that they meet separately with her before the hearing and declaring the hearings at an end when they refused. The contract gives WSEU the right to have a representative present at the Step 2 hearing "as Council 24 may elect." The right to elect to participate assumes the right to elect not to participate. Weaver was not required to be present if she did not like the arrangements for the hearing. She went beyond her rights, however, by engaging in conduct that discouraged Bradbury from conducting the required Step 2 hearing. Pichelmann had the right to engage in concerted activity, and to present her grievance through a representative of her own choosing. By influencing Bradbury to cancel the hearing, Weaver interfered with this protected right, and thus committed an unfair labor practice.

The Examiner must reject WSEU's claim that it somehow owned this grievance or was in sole control of the grievance procedure. This ignores the clear provisions of Sec. 111.83, allowing individuals to proceed with grievances through representatives of their own choosing, so long as a representative of the majority union is allowed to be present, and any adjustment is consistent with the negotiated conditions of employment. It also defies common sense, in that the grievance procedure is an opportunity for employees to air their complaints to the employer. WSEU is not in a position to adjust the grievances, and cannot refuse to proceed, since it had no authority to resolve the grievance. It is a party that is entitled to participate, but it may not interfere in the employee's right to be heard.

The Examiner must further dismiss the WSEU's argument that Weaver was justified in stopping the hearing because the Complainant and Ms. Peshut failed to cooperate with her. The Union has no right to order the employees to do anything, and it may not cut off their access to the grievance procedure because it does not like the manner in which the Grievant elects to proceed with the grievance.

Reply Briefs

The University

The University denies that it committed any unfair labor practices and urges that the complaint be dismissed in its entirety. At the outset, the University asks that any credibility questions be resolved against the Complainant as she demonstrably lied on the stand at the hearing. She claimed that she had been disciplined when she was returned to her former position, and in connection with this claim, said she had not been told that she would remain in pay status and would be returned to her former position. When challenged, she admitted that Madsen told her all of this during the meeting, but said she did not believe her and was waiting for written confirmation. Faced with e-mails proving that the information had been provided in written form, she said she was waiting for a formal letter. In fact, she lied until she was caught, and her testimony is not worthy of credit on any contested point.

The testimony of Jennifer Peshut should likewise be discounted. Over the University's objections, Peshut was not sequestered at hearing, due to the Examiner's erroneous conclusion that she was entitled to remain as a technical advisor to the Complainant's counsel. The statutes require a showing that the presence of an advisor is essential to the presentation of the case, and no such showing was made. Her rebuttal testimony should, therefore, be excluded from the record. The University also notes that the Complainant's brief is filled with inaccurate and unproved assertions of fact, designed to improperly influence the Examiner, as well legal citations that have no bearing on this case. The Complainant's testimony and legal argument completely lack credibility.

Turning to the merits, the University denies that the Complainant was entitled to representation in the meeting with Madsen. Weingarten rights only attach where an employee requests representation during an investigatory interview and the request is based on a reasonable belief that discipline may be the result of the interview. The meeting with Madsen was a performance evaluation. The contract is clear that performance evaluations are not discipline. The State takes this position. The Union concurs. There is no plausible argument to be made that discipline was a possibility during this meeting. No discipline was threatened. None occurred. She was restored to her former title after failing to pass probation in a promotional position. Thus, this portion of the complaint must be dismissed.

The Complainant's theory that the accepted practice of not scheduling Step 2 hearings until the WSEU's representative is available somehow violates the statute is utterly without basis. Ms. Weaver on behalf of the Union and Ms. Bradbury on behalf of the State have agreed to this manner of scheduling, and it is reasonable on its face, given the demands on Ms. Weaver's time, and the need for her presence at the Step 2 hearings. This practice is not directed at the Complainant or related to any concerted activity on her part. It is a bow to practicality. Moreover, the grievance procedure, which establishes these timelines, speaks in terms of the "parties" scheduling hearings and extending timelines, and this plainly refers to the Union and the

Employer, who are the parties to the contract. They are the parties who own the grievance procedure, and their mutual agreement to hear Step 2 grievances at a mutually agreed time cannot violate the contract or the law.

The Complainant's claim that she was unlawfully denied a Step 2 hearing is simply false. Granted the meeting did not take place, but that was the result of her actions. She insisted that the hearing be held as a public meeting and it was erroneously noticed as such. However, this was over the objections of the parties to the contract. Both Bradbury and Weaver told her that grievance hearings are not open meetings, and are not subject to the open meetings law. The insistence on an open hearing, against the wishes of the parties to the contract, led to the adjournment of the hearing. It has not been denied – it can be rescheduled at any time if the Complainant requests that it be rescheduled. What cannot happen is that the Complainant and Ms. Peshut cannot be permitted to attempt to dictate the manner and form of the Step 2 hearings, and override the wishes of the parties to the contract.

The Union

The Union takes the position that the Field Representative is in charge of grievance hearings at Step 2, and that Jana Weaver acted in an appropriate and lawful manner in the Step 2 hearing on April 5th. The Union owns the grievance, because it is the Union that is the party to the contract under which the grievance arises, and it is the Union that is legally responsible for grievance processing. Step 2 of the grievance procedure is a critical juncture in grievance processing, as it is the last step at which a grievance may be amended and is the step at which the Field Representative evaluates the grievances, so as to advise the Executive Director on whether the matter should be pursued to arbitration. Judgments on these matters cannot simply be delegated to stewards, whose training and experience varies widely across the many local unions in WSEU. Given these sound reasons for not allowing a Step 2 hearing to be held without a Field Representative present, and given the many demands on the time of Field Representatives, the agreement between the State and the Union as to scheduling Step 2 hearings when the Field Representative is available, rather than slavishly adhering to the timelines in the contract, is reasonable and in the best interests of the employees.

The Complainant makes reference to her right to be represented by an individual of her own choosing in grievance processing. Such a right is set forth in Sec. 111.83 of SELRA, but it has nothing to do with contractual grievance processing. The case law is clear that Sec. 111.83 permits every employee to meet and confer with the employer, outside of the negotiated grievance procedure and without control of the majority representative, so long as the majority representative is allowed to be present, and any adjustment made is consistent with the contract. The Union cannot interfere with or restrict that right. It is likewise clear that this statutory grievance presentation is not related to grievance processing under the collective bargaining agreement. The latter is a negotiated procedure between the employer and the majority representative and as such it can regulate who controls the grievance. Here the Union controls the grievance, and has the right to insist that its Field Representative control the presentation at Step 2.

Weaver, as the Field Representative, had the right and the obligation to make sure that she understood the grievance and its implications before proceeding with the hearing. She also had the right and the obligation to protect the integrity of the grievance procedure by refusing to turn it into a media circus. She was perfectly entitled to insist on meeting with the Complainant and Peshut before the hearing, and in having the hearing closed. Their refusal to cooperate in Weaver's effort to competently prepare the grievance and process it in an orderly fashion amply justified her refusal to proceed with the hearing.

The Complainant's Reply Brief

The Complainant notes a fundamental flaw in the University's argument that the Complainant's Weingarten rights were not triggered by the December 20th meeting. Certainly, there is ample evidence in the context of the meeting to trigger reasonable concerns by the Complainant over the meeting's true purpose. More significantly, Wisconsin law uses an in-part test for determining whether the burden of persuasion is met in cases alleging retaliation. This is a lower standard than the federal law under which Weingarten was formulated, and Complainant's concerns easily meet this lower standard.

The Union and the State both argue that the long-standing practice of not scheduling Step 2 hearings within 21 days is somehow excused because they have agreed to it. This is merely a joint confession to a continuing unfair labor practice. The contract allows extensions if the time limits are "mutually waived." There can be no mutual waiver if the Grievant has not agreed. It is the Grievant who has the absolute right to be present and participate. Council 24 only has the right to "elect" to be present, just as it has the right under the statute to an "opportunity to be present" when an employee presents a grievance. Moreover, the contract requires that waivers of time limits be in writing and Bradbury conceded that there were no written waivers when Step 2 time limits were extended.

The contract and SELRA are both silent as to the requirements of the Open Meeting Law and the Examiner has no jurisdiction to determine whether Complainant was correct in believing that she had the right to insist on a public hearing. However, the Commission and its Examiners are competent to determine whether an individual grievant, processing a grievance, is engaged in collective bargaining. That is the only exception to the Open Meetings law that is arguably applicable in this case. Plainly, the answer must be "no." If a grievant is engaged in collective bargaining, he or she must therefore be engaged in individual bargaining, and the Employer hearing the grievance must be bargaining with someone other than the majority representative. That would be contrary to the established requirement that the employer negotiate only with the majority representative. Arbitration may be a form of collective bargaining, but grievance processing is distinct from arbitration.

The Examiner must dismiss the Union's claim to own the grievance. Section 111.83 makes it clear that individual employees have the right to present their own grievances. While the

Union tries to distinguish this statutory right from the contractual grievance procedure, this arguments runs afoul of Sec. 111.83's provision requiring that the majority representative be given the opportunity to be present in statutory grievance meetings. There would be no reason for such a provision if the grievance procedure under the statute was not contractual in nature. Even if one assumed, for the sake of argument, that the contractual grievance procedure did not apply, the Civil Service procedure would stand in its place. Bradbury is responsible for hearings under that procedure as well, and the interference of the University and the Union in the non-contractual procedure is every bit as much an unfair labor practice as would be interference with the contractual procedure.

The Complainant asserts that the University overlooks the undisputed fact that it was Bradbury who refused to proceed with the grievance hearing. The Complainant never said she would not proceed in a closed session – no one ever asked her if she would. Indeed, no one made any effort to remove the public from the hearing room. The suggestion that Bradbury's refusal was justified by Weaver's departure has no support in the contract. The contract merely allows Council 24 to participate if it "elects" to do so. Weaver elected not to participate, and that does not relieve the Employer of its obligation to proceed.

DISCUSSION

The complaint raises distinct issues. First is the issue of whether the Complainant was denied her right to representation in a meeting Professor Madsen in December of 2000. Second is the issue of whether the University, with the collusion of the Union, has interfered with employee rights, or coerced employees in the exercise of those rights, by delaying Step 2 grievance hearings over a period of years. Third, the Complainant asserts that the University interfered with her rights by refusing to conduct a Step 2 grievance hearing on April 5th. Finally, the Complainant claims that the Union coerced and intimidated her in the exercise of her right to a Step 2 hearing, and her right to be represented by a representative of her choice at the Step 2 hearing.

Weingarten

An employee has the right to request the presence of a representative during an investigatory interview where the employee reasonably believes that the interview or meeting will result in discipline. This right, generally referred to as Weingarten rights after the NLRB case first announcing the principle, is recognized as applicable to State employees. STATE OF WISCONSIN, DEC. NO. 26739-B (WERC, 11/20/91). The Complainant asserts that the meeting with Madsen on December 20, 2000, was an occasion for the exercise of Weingarten rights. The record does not support this contention. The invocation of Weingarten rights depends upon the belief of the employee, and it may be that the Complainant genuinely believed that the meeting with Madsen would result in discipline. However, the subjective belief is not enough. The belief must be objectively reasonable, and there was no basis for believing that the meeting with Madsen

was an investigatory meeting that might yield discipline. It was announced as a performance evaluation, and the Complainant knew that Madsen was her evaluator, and that she was subject to such evaluations as a probationary employee. She knew that performance evaluations are not disciplinary, and the contract clearly states this in both its text and in its negotiating notes. The purpose of this meeting was not investigatory, and the Complainant has identified no incident or event that she might have believed was being investigated. The meeting as it proceeded was not investigatory – Madsen reviewed her performance and identified what she believed were deficiencies.

Certainly, the Complainant had ample reason to think that Madsen did not like her 2/ and to believe that the outcome of this evaluation would not be favorable. This does not change the fact that meeting was announced and conducted as a performance evaluation, not an investigatory interview, that by contract it could not be disciplinary meeting, and that it did not result in discipline. 3/ On this record, there were no grounds for invoking Weingarten rights, and I, therefore, conclude that the University did not commit an unfair labor practice be refusing to allow Peshut to sit in on the performance evaluation.

2/ In connection with this, the Complainant argues that, given the grievances and the lawsuit filed against Madsen, she was entitled to believe that retaliation might, at least in part, be the basis for a poor evaluation, and that this should lower the threshold for exercising the Weingarten rights. This confuses the standard for determining whether an action was motivated by union animus in a discrimination case with the reasonableness of her belief that a specific result – discipline – might be realized in a meeting. The two are completely unrelated.

3/ The merits of the grievance are not before me. However, to the extent that the Weingarten argument is made in part based on the claim that discipline was imposed, in the form of a paid suspension, I would observe that this is an assertion and nothing else. There is no evidence of a suspension being noted in her personnel file, no notice of discipline was issued, the term suspension was never used by anyone other than the Complainant and Peshut, and the University offered a reasonable explanation for having the Grievant off duty in pay status between the evaluation and her return to the Graduate School.

The Delay in Scheduling Step 2 Hearings

It is undisputed on the record that Step 2 hearings at the University are almost never held within 21 days of the Step 2 filing, despite the contractual requirement to do so. The Complainant argues that this is evidence of a long-standing effort to interfere with the exercise of the protected right to file and process grievances, and in fact does discourage employees from filing grievances. For their parts, the State and the Union agree that the failure to hold hearings with 21 days is the result of the need for the Field Representative to be present for these hearings, and the practical impossibility of scheduling the hearing within 21 days, given her work schedule. They also agree that the 21-day limit has been waived by mutual agreement in each case.

Section 4/2/6 of the contract governs the conduct of Step 2 grievance hearings. It reads in pertinent part:

> 4/2/6 Step Two: . . . 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. . . .

The Complainant asserts that Council 24 cannot waive the time limits without the agreement of the employee, and also that waivers must be in writing, per Section 4/2/8: "The parties may, however, mutually agree in writing to extend the time limits in any step of the grievance procedure."

The contract is between Council 24 and the State, not between each individual employee and the State. The term "parties" as used therein refers to the State and the Union, not to the State and each employee. This reading is consistent with duty of the State to bargain the contract with the majority representative, and it is also consistent with what both the State and the Union agree is the meaning of the contract. Both agree that the waiver mentioned in Section 4/2/6 can be accomplished verbally and by custom, and does not require the written confirmation provided for in Section 4/2/8. There must be powerful evidence to the contrary before a contract can be given a meaning other than that which the parties attribute to it: "Where the parties to a contract agree on the meaning of an ambiguous provision, and their agreement on that meaning is not a subterfuge to hide an arbitrary, capricious, discriminatory or bad faith course of action, their understanding must be given controlling weight in interpreting the contract. This is a fundamental precept of contract law in the field of labor relations." UW HOSPITALS AND CLINICS, DEC. NO. 28072-A (NIELSEN, 3/29/95).

The State and the Union agree that they have mutually and routinely waived the time limits in Section 4/2/6, and that the contract language does not give the Grievant the right to veto such extensions. This reading of the contract language is reasonable, and is not a fraud of some sort designed to defeat the Complainant's theory in this case. It is a practice driven by necessity and carried out over a period of years. The Complainant may disagree with the practice, and an argument can be made that it does have the effect of interfering with employee rights to process grievances, in the sense that it delays the Step 2 hearings and may frustrate some employees. However, the purpose of the delay is to allow the Field Representative to be present, and to bring to bear expert analysis of the grievance and a skilled presentation at Step 2. This serves the interests both of the individual grievant and the bargaining unit as a whole. In short, the tradeoff between speed and efficacy at Step 2 is a reasonable choice by the parties, and the record does not support the assertion that the delay in Step 2 hearings in an act of interference by the University.

The Refusal to Proceed on April 5

Bradbury and Weaver scheduled the Step 2 hearing for April 5th, but did not proceed with it. Weaver refused to proceed if the Complainant and Peshut would not meet with her before the hearing to discuss the grievance, and they repeatedly refused to do so. She also objected to their efforts to hold the hearing as a public meeting. Bradbury agreed that the hearing was not an open meeting, and declined to proceed without Weaver. Inasmuch as Bradbury's refusal to proceed with the Step 2 hearing was based on Weaver's refusal to participate, the initial question is whether Weaver had the right to insist that the hearing not go forward.

The Complainant asserts that she had the right to proceed with the hearing, whether or not Weaver participated. Subject to the Union's duty of fair representation 4/, the operation of the negotiated grievance procedure is governed by the contract itself, not by the wishes of individual employees, and the best evidence of what the contract means is the express agreement of the parties who negotiated it. As with the argument over the time limits, the actual parties to the contract – the State and WSEU – disagree with the Complainant's reading of the Article 4 and instead interpret the Grievance Procedure as giving the Council 24 Field Representative, rather than the employee or her local representative, control of the grievance at the Step 2 hearing.

4/ "The duty is satisfied so long as a labor organization represents its members' interests without hostility or discrimination, exercises its discretion with good faith and honesty, and acts without arbitrariness in its decision making. Thus the legal formulation for a breach of the duty of fair representation is whether the Union's actions are arbitrary, discriminatory or taken in bad faith." BLACKHAWK TECHNICAL COLLEGE, DEC. NOS. 28488-B AND 28449-B (NIELSEN, 7/24/97), CITING VACA V. SIPES, 386 U.S. 171 (1967); MAHNKE V. WERC, 66 WIS.2D 524 (1975); GRAY V. MARINETTE COUNTY, 200 WIS.2D 426 (CT. APP. 1996); MILWAUKEE COUNTY, DEC. NO. 28754-B (MCGILLIGAN, 1/97)

The Complainant offers no reason for Weaver to have held any hostility towards her. The two had never met prior to April 5th. Further, Weaver's reasons for not going forward were, on their face reasonable. Peshut's explanation that she and the Complainant merely refused to meet with Weaver before the hearing, but said they would meet with her during the hearing, is rank nonsense. The statement is literally true, but in every sense disingenuous. The offer to meet with Weaver during the hearing is meaningless. It constitutes an offer to allow Weaver to sit and watch Peshut present the grievance. By virtue of her status under the contract, Weaver is entitled to know the background and basis for the grievance, and the theory of the case before the hearing is held, and contrary to the Complainant's assertions, her refusal to allow the hearing to go forward without being briefed is not harassment or intimidation. It is prudent contract administration and quality control, both of which are reasons underlying the Field Representative's prominent role at Step 2.

Weaver's reluctance to proceed with an open hearing is also reasonable. Contrary to the claim that the employee alone has an interest in whether a grievance hearing is open or closed, the Union has an important interest in conducting hearings in which frank exchanges can be had,

employee privacy can be protected, and in which grandstanding and posturing are kept to a minimum. While it appears that 67 OAG 276 (1978), directly holding that a body meeting for the purpose of a grievance hearing is engaged in collective bargaining, and is not therefore a "governmental body" within the meaning of the Open Meetings law, provides strong support for Weaver's position that grievance hearings are not open meetings, it is not necessary that the Examiner determine whether Weaver was legally correct in refusing to meet in an open meeting. The Open Meetings law does not come into play, because no meeting was held. The sole question is whether Weaver was acting in an arbitrary, bad faith or discriminatory way in refusing to proceed in an open meeting, and I find that she was not. As for the Complainant's claim that neither she nor Peshut said they would not proceed if the hearing was closed to the public, this too falls in the category of literally true, but completely disingenuous. The Complainant had repeatedly stated that she was demanding an open meeting. She and Peshut arranged for members of the public and the press to be in attendance. Peshut showed the Open Meetings Report to Weaver and to Bradbury and announced that the meeting must be held in open session. The fact that neither Weaver nor Bradbury followed up by saying "Will you meet us in a closed meeting?" has no significance whatsoever. If the Complainant, having in every possible way indicated that she would not proceed in a closed meeting, wanted to change her mind, it was incumbent on her to say that clearly. Having failed to do so, she cannot blame Weaver and Bradbury for refusing to offer a closed meeting.

Under the negotiated grievance procedure, Council 24 owns the grievance at Step 2, subject only to the duty of fair representation. This includes the right insist on the presence of a Field Representative at the Step 2 hearing, and the right to insist that the Step 2 hearing not proceed without a Field Representative present. Thus, contrary to the Complainant's theory, Bradbury's refusal to proceed without Weaver was neither a violation of the contract, nor of SELRA. Weaver's refusal to proceed was not a violation of the contract, as it was based on her right to protect the integrity of the grievance procedure at that Step, and was provoked by the Complainant and Peshut.

Section 111.83

The remaining question is whether Weaver's refusal to allow the Step 2 hearing to proceed interfered with the Complainant's rights under Sec. 111.83(1), which reads in part:

> . . . 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 relations 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.

The Complainant asserts that Bradbury had a duty to meet on her grievance under this statutory provision, and that she had the right to have Peshut, rather than Weaver, represent her at Step 2. By interfering with this right, the Complainant argues that Weaver committed an unfair labor practice. This argument confuses the right to a Step 2 hearing under the collective bargaining agreement with the right to meet and confer guaranteed by Sec. 111.83. Certainly, the Complainant has the statutory right to meet and confer with the employer as an individual employee and to have Ms. Peshut or any other representative of her choosing present for such a meeting. Just as surely, Council 24 has no right to interfere with her attempt to have such a meeting, subject only to its right to be present and to insure that any settlement flowing from such a meeting is consistent with the terms and conditions of employment set forth in the collective bargaining agreement and other negotiated terms between it and the State. Had Weaver attempted to terminate or interfere with such a conference, she would be guilty of interfering with the Complainant's protected rights, and had Bradbury acquiesced, she too would have committed a violation of SELRA. That said, the April 5th hearing had nothing to do with a grievance meeting under Sec. 111.83.

A grievance hearing under Sec. 111.83 is completely distinct from the negotiated grievance procedure. STATE OF WISCONSIN (PRELLER), DEC. NO. 29938-C (WERC, 5/98). The distinction between the two is absolutely necessary, since the negotiated grievance procedure may contain limits on the rights of employees to control the presentation of their grievances, while the statutory grievance procedure may not be limited by agreement between the Union and the Employer. Indeed, the entire point of Sec. 111.83 is to give employees access to the employer without having to go through the majority representative. The grievance in this case was plainly not brought under Sec. 111.83. The grievance was filed on the Complainant's behalf by a WSEU steward, and was brought, according to the pre-filing, "pursuant to 4/2/1 of the Agreement Between the State of Wisconsin and AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO, and Affiliated Local 82." It was processed under the terms of the collective bargaining agreement, and the Step 2 hearing at issue in this case is a creature of the collective bargaining agreement. Having proceeded under the collective bargaining agreement, the Complainant cannot instantly transform a contractual Step 2 grievance hearing into a meet and confer session under Sec. 111.83 simply because she does not like the restrictions placed on her by the contract.

Dated at Racine, Wisconsin, this 19th day of October, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/

Daniel Nielsen, Examiner

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