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-D

Appearances:

Mr. Geoffrey R. Skoll, P.O. Box 11116, Milwaukee, Wisconsin 53211, appearing on behalf of Mary Pichelmann.

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 Council 24, American Federation of State, County and Municipal Employees, AFL-CIO; Wisconsin State Employees Union; Martin Beil and Jana Weaver.

Attorney David J. Vergeront, Chief Legal Counsel, Department of Employment Relations, 345 West Washington Avenue, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of University of Wisconsin–Milwaukee; Nancy L. Zimphler; Shannon Bradbury and Mary Kay Madsen.

ORDER AFFIRMING AND MODIFYING EXAMINER'S FINDINGS OF FACT, AFFIRMING EXAMINER'S CONCLUSIONS OF LAW AND AFFIRMING AND MODIFYING EXAMINER'S ORDER DISMISSING COMPLAINT

On October 19, 2001, Examiner Daniel Nielsen issued Findings of Fact, Conclusions of Law and Order Dismissing Complaint with Accompanying Memorandum in the above matter wherein he concluded that neither Respondents University of Wisconsin-Milwaukee and its agents nor Respondents Council 24, AFSCME and its agents had committed unfair labor practices within the meaning of the State Employment Labor Relations Act.

Complainant timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.84(4), Stats. The parties thereafter filed written argument in support of and in opposition to the petition -- the last of which was received on December 26, 2001.

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.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. Examiner's Findings of Fact 1-24 are affirmed.

B. Examiner's Finding of Fact 25 is affirmed as modified to read:

> 25. The meeting on December 20, 2000, between Professor Madsen and Ms. Pichelman 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. Ms. Pichelmann did not have a reasonable expectation that the December 20th meeting was investigatory in nature.

C. Examiner's Findings of Fact 26-29 are affirmed.

D. Examiner's Conclusions of Law are affirmed.

E. Examiner's Order is affirmed as modified to deny Respondent University's request for attorneys fees and costs.

Given under our hands and seal at the City of Madison, Wisconsin, this 3rd day of January, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/
Steven R. Sorenson, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

MEMORANDUM ACCOMPANYING ORDER AFFIRMING AND MODIFYING EXAMINER'S FINDINGS OF FACT, AFFIRMING EXAMINER'S CONCLUSIONS OF LAW AND AFFIRMING AND MODIFYING EXAMINER'S ORDER DISMISSING COMPLAINT

PLEADINGS AND CASE HISTORY

The initial complaint filed April 18, 2001 by Complainant Pichelmann (herein Pichelmann) asserts that Respondents University of Wisconsin-Milwaukee and its agents (herein the University) violated Secs. 111.84(1)(a) and (e), Stats., by refusing to: (1) allow Pichelmann to have representation at a meeting with her supervisor and (2) hear Pichelmann's Step 2 grievance. The initial complaint further alleges that the University violated Secs. 111.84(1)(a), (c), and (e), by delaying the processing of Complainant Pichelmann's Step 2 grievance.

The initial complaint further contends that Respondents Council 24, AFSCME and its agents (herein Council 24) violated Secs. 111.84(2)(a) and (b) and 111.84(3) by interfering with Pichelmann's attempt to present her Step 2 grievance to the University.

On May 7, 2001, given a substantial overlap in facts and issues between the Pichelmann complaint (Case 515) and a complaint filed by Peshut (Case 516), the Commission issued an Order Consolidating Complaints For Hearing.

On May 7, 2001, Council 24 filed a motion to dismiss both Cases 515 and 516 with the Examiner and the University joined the motion as to Case 516 and asked that the hearing be delayed pending the disposition of the motions.

By letter dated May 10, 2001, Examiner Nielsen advised the parties that he was denying the motion to dismiss the Pichelmann complaint, was granting a motion to dismiss the Peshut complaint and was denying the University request that the Pichelmann complaint hearing be delayed pending completion of any Commission review proceedings in Case 516.

Council 24 and the University subsequently filed answers to the complaint denying the alleged unfair labor practices.

On May 16, 2001, Pichelmann filed a motion to amend the complaint by adding allegations that: (1) University legal counsel Vergeront violated Secs. 111.84(1)(a) and 111.84(3), Stats., by requesting costs and attorneys fees in the answer filed by the University; and (2) Council 24 committed an additional unfair labor practice within the meaning of Sec. 111.84(2)(a), Stats., as to the Step 2 grievance.

By letter dated May 16, 2001, Examiner Nielsen advised the parties that he was denying the motion to amend the complaint as to allegation (1) above. He stated:

> The relief requested is a standard request, and is routinely sought by Respondents in complaint cases. It is either justified under the facts of the case or it is not. There is nothing about this legal boilerplate that should reasonably tend to interfere with the exercise of rights.

During the May 22, 2001 hearing, the Examiner granted the motion to amend as to allegation (2) above.

Pichelmann filed a petition for review with the Commission as to the Examiner's denial of her motion to amend. On July 23, 2001, the Commission dismissed the petition (DEC. NO. 30124-B) but advised Pichelmann that she could raise this issue again once the Examiner issued a final order as to her entire complaint.

On July 17, 2001 the Commission reversed the Examiner's dismissal of the Peshut complaint and remanded the matter to the Examiner for hearing.

The briefing schedule in the Pichelmann complaint was completed August 17, 2001.

On August 26, 2001, Pichelmann asked Examiner Nielsen to confirm that the Pichelmann and Peshut complaints remained consolidated.

By letter dated August 28, 2001, the Examiner responded as follows:

> I have received Mr. Skoll's E-Mail of August 27th asking that I confirm that the Peshut and Pichelmann cases are still consolidated. I cannot give the requested confirmation, at least as to hearing and argument. The matters cannot be considered consolidated for hearing and argument, since the practical effect of my earlier dismissal of Ms. Peshut's complaint was that the Pichelmann case was heard and argued separately. Mr. Skoll has stated his position that the record of Pichelmann is not sufficient for the disposition of the Peshut case, and certainly the amendment to Peshut cannot be resolved on the basis of the Pichelmann record.

> It might make some sense to consolidate the matters for decision, given the substantial overlap in the facts and issues raised by the two cases. This would have the advantage of allowing the Commission to consider the entire matter at one time, should the parties, or any of them, take issue with my ultimate decision and seek review before the Commission and/or the courts. The disadvantage is that the Examiner's decision on the Pichelmann case would have to wait for the hearing and argument of the Peshut case to be completed.

Pichelmann then advised the Examiner as follows:

> In view of your communication today saying the Pichelmann and Peshut cases are no longer consolidated for hearing, I ask for clarification. Will the record in the Pichelmann case (Case 515 No. 59877 PP(S)-319) be used in the Peshut case (Case 516 No. 59886 PP(S)-320)? If not, we will have to call the same witnesses, elicit the same testimony, and produce the same exhibits as have already been produced.

Pichelmann then asked that the Pichelmann and Peshut complaints be consolidated for purposes of decision. By letter dated September 6, 2001, the Examiner responded in pertinent part as follows:

> I have received a copy of Mr. Skoll's Motion to the Commission, asking that it consolidate these matters for decision. As a technical matter, this request is pending before me, not the Commission. Having said that, after hearing from all parties on the question of consolidation for decision, I have decided not to consolidate the cases. The original consolidation was for purpose of hearing and argument. The question of separate decisions was left open. The cases were, as a practical matter, severed when I dismissed Ms. Peshut's complaints. Hearing and argument on Ms. Pichelmann's complaint has been completed, while a hearing on Ms. Peshut's case is not set for another six weeks or so. The substantial delay in an answer to Ms. Pichelmann's case weighs heavily against any consolidation at this point, while there is no good reason to attempt to reconsolidate the matters, other than a purely speculative possibility of an appeal. Should it develop that one or more parties wish to appeal both cases, the Commission can decide whether it wishes to consolidate the matters for purposes of the appeals.

The Examiner issued his decision on the Pichelmann complaint October 19, 2001 and on the Peshut complaint on April 16, 2002.

THE EXAMINER'S DECISION

Alleged Illegal Denial of Representation

As to Pichelmann's contention that the University illegally denied her representation during a December 20, 2000 meeting with her supervisor, the Examiner made the following legal analysis:

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.

Alleged Illegal Delay in Scheduling Step 2 Hearings

As to Pichelmann's claim that the University committed unfair labor practices by failing to conduct Step 2 hearings within 21 days, the Examiner made the following legal analysis:

> 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.

Alleged Illegal Refusal to Proceed with the Step 2 Hearing

As to Pichelmann's allegation that both the University and Council 24 illegally refused to proceed with the Step 2 grievance hearing, the Examiner made the following legal analysis:

> 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.
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> 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.

POSITION OF THE PARTIES ON REVIEW

Pichelmann asks that the Commission reverse the Examiner as to each complaint allegation dismissed in the October 2001 decision as well as the complaint allegation dismissed by the Examiner in May 2001. Pichelmann further alleges that the Examiner's dismissal of the Peshut complaint and the resulting severance of that complaint proceeding prejudiced her ability to present evidence in support of her complaint.

The University and Council 24 ask that the Examiner be affirmed in all respects.

DISCUSSION

We affirm the Examiner in all respects.

We begin with Pichelmann's overriding contention that the Examiner's dismissal of much of the complaint was based on the erroneous conclusion that a contractual grievance procedure is distinct from the statutory right of an employee to present grievances under Sec. 111.83(1), Stats., and that Pichelmann was not exercising Sec. 111.83(1), Stats., rights as to her grievance.

When rejecting Pichelmann's claim that her Sec. 111.83(1), Stats., rights had been violated, the Examiner correctly relied on existing Commission precedent which in UNIVERSITY OF WISCONSIN HOSPITAL AND CLINICS BOARD, DEC. NO. 29784-D (WERC, 11/00) was summarized as follows:

Section 111.83(1), Stats., provides in pertinent part:

> Any individual employe, or any minority group of employes in a 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 employe or group of employes 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.

This same statutory language is found at Sec. 111.70(4)(d)1, Stats., in the Municipal Employment Relations Act (MERA). While the Commission has not extensively discussed Sec. 111.83(1), Stats., in prior cases, we have a long standing interpretation of Sec. 111.70(4)(d)1, Stats. Given the parallel statutory language and the common policies behind both SELRA and MERA, we find the interpretation of Sec. 111.70(4)(d)1, to be instructive and applicable to the interpretation which should be given Sec. 111.83(1), Stats. STATE V. WERC, 122 WIS. 2D 132 (1985).

In MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 11280-B (WERC, 12/72), we stated the following as to the relationship between a contractual grievance procedure and the above quoted statutory language:

> Said statutory provision merely requires the Municipal Employer to confer with an individual employe or minority group of employes on grievances presented to the municipal

> employer. The provision implements Section 111.70(2) granting a "right" to employes to refrain from engaging in concerted activity for the purpose of collective bargaining. The right to present grievances and the duty of the employer to confer on those grievances, as required in the above quoted provision, does not grant the grievant involved the grievance procedure negotiated in the collective bargaining agreement between the Union and the Municipal Employer.
>
> As evidenced by the above-quoted portion of MILWAUKEE, the **statutory opportunity** for individual employes 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 employes the right to independently process contractual grievances. The employe's statutory opportunity to meet with the employer is separate and distinct from the question of whether the employe has a contractual opportunity to meet with an employer over contractual grievances. (emphasis added)

While Pichelmann does not find this precedent persuasive, it continues to be our view that our existing precedent correctly concludes that there is a distinction between the rights, if any, of an employee under a contractual grievance procedure and the State employee's statutorily guaranteed right to present a grievance to the employer under Sec. 111.83(1), Stats. Thus, we affirm the Examiner's reliance on existing precedent and turn to the question of whether the Examiner correctly concluded that Pichelmann was proceeding under the contractual procedure in the case at hand.

When concluding that Pichelmann was proceeding under the contractual grievance procedure, the Examiner relied on the facts that the grievance was filed by a Council 24 steward, referenced a specific provision of the Council 24 contract, and was processed under the terms of the Council 24 contract -- including the Step 2 hearing at issue in this proceeding. We find the Examiner's reliance on these facts to be persuasive and thus affirm his determination that Pichelmann was proceeding under the contractual grievance procedure.

Pichelmann argues that she should be able to use the contractual procedure to exercise her statutory Sec. 111.83, Stats., rights, and should be able to jump instantaneously from the exercise of contractual rights to the exercise of statutory rights at her discretion. We disagree.

Section 111.83, Stats., does not specify any particular procedure for the exercise of the right therein created. As a general matter, we think the statute contemplates no more than: (1) the employee advises the employer that she wishes to meet pursuant to the statute; (2) the union is advised of the request; and (3) a meeting occurs at a time satisfactory to the employee, the employer and the union (if it indicates it wishes to be present). Here, Pichelmann never gave the employer notice that she wished to meet pursuant to Sec. 111.83, Stats. and the evidence points to the fact that she was at all times pursuing contractual rights using a contractual process. 1/ Further, while an employee and employer could agree to use a contractually established process for the purpose of a Sec. 111.83, Stats. meeting, there is no evidence in our record that such an agreement existed here. Lastly, there certainly is no evidence of any agreement that would allow Pichelmann to shift back and forth between the exercise of contractual and statutory rights in the middle of the contractual process and we reject Pichelmann's contention that she could unilaterally (with or without notice) make that choice.

1/ Pichelmann argues that if she had made a request for a statutory meeting, it would have been rejected by the University and thus she used the contractual process. Pichelmann did not testify that she was attempting to exercise her Sec. 111.83, Stats., rights when she filed a grievance and did not testify that she only used the contractual process because she believed the University would have rejected any other method. Thus, we reject this argument as having no factual support in the record.

Within the foregoing general legal framework, we now turn to a consideration of the specific complaint allegations that Pichelmann argues the Examiner incorrectly dismissed.

Alleged Illegal Denial of Representation

All parties agree that the Commission generally has adopted the reasoning of the United States Supreme Court in NLRB v. WEINGARTEN, 420 U.S. 251 (1975) when determining the extent of the Sec. 111.82, Stats. rights of an employee to have union representation during meetings with the employer. SEE STATE OF WISCONSIN, DEC. NO. 15716-C (WERC, 10/79); STATE OF WISCONSIN, DEC. NO. 26739-C (WERC, 3/92).

The Examiner concluded that Pichelmann did not have a right to union representation during the meeting with Madsen because she could not have reasonably concluded that it was an investigatory meeting that could ultimately produce discipline. In reaching his conclusion, the Examiner recited the facts that Pichelmann was told by Madsen that the meeting was a performance evaluation, that Pichelmann knew Madsen was her evaluator and was obligated to conduct performance evaluations of Pichelmann, that the meeting was in fact a performance

evaluation, that Pichelmann did not identify any incident or event which she thought might be the subject of an investigatory meeting, that by contract, performance evaluations are not disciplinary in nature, and that the meeting did not result in discipline. 2/

2/ At the conclusion of the meeting, Madsen advised Pichlemann that she had not passed her probationary period. To the extent such an action is based on deficiencies in performance and has negative consequences for the employee, it could be viewed as discipline. However, in the circumstances present here, the question of whether discipline was imposed during the meeting is irrelevant for WEINGARTEN purposes. Where, as here, the employer uses a meeting to advise the employee of action that the employer has already decided to take, the right to representation is not present because the meeting is not investigatory in nature. SEE WAUKESHA COUNTY, DEC. NO. 14662-B (WERC, 3/78); CITY OF MILWAUKEE, DEC. NO. 14899-B (WERC, 8/80). Therefore, we have modified Examiner Finding of Fact 25 as to the question of whether discipline was or was not imposed.

Pichelmann takes issue with the Examiner and argues that the combination of the unannounced nature of the meeting and Madsen's threat "to call security on me" after the request for union representation was made gave her a reasonable basis for concluding that the meeting was investigatory in nature. In the context of all of the other circumstances recited by the Examiner, the unannounced nature of the meeting and the threat to call security fall far short of providing a persuasive basis for an employee to reasonably conclude the meeting was investigatory. Thus, we affirm the Examiner's conclusion that there was no right to representation during the meeting with Madsen and thus also affirm his conclusion that the denial of the request for representation did not violate Sec. 111.84(1)(a), Stats.

Alleged Illegal Delay in Scheduling Step Two Hearings

When rejecting Pichelmann's claim that the delay in the conduct of the Step 2 hearing violated the contract and interfered with her Sec. 111.84(1)(a), Stats., rights, the Examiner concluded: that because the contract which includes the 21 day deadline is between the State and Council 24, the interpretation given the contract by these two parties should generally be given controlling weight; that the University and Council 24 had the contractual right to waive the 21 day time limit for conducting Step 2 hearings without Pichelmann's agreement; that both the University and Council 24 could and had historically agreed that such waivers could be accomplished verbally and by practice; that such waivers served legitimate purposes; and that such a waiver occurred here.

Pichelmann attacks the Examiner's reasoning by asserting that: (1) there is no evidence of an oral or written waiver here; (2) the contract unambiguously requires that waiver be written; (3) the parties to any waiver are Pichelmann and the University and thus Council 24 has no authority to waive the time limit; (4) any long standing practice by the University and Council 24 of failing to comply with the 21 day time limit only establishes the long standing nature of the violation of the contract and Sec. 111.84(1)(a), Stats.; and (5) delay discourages employees from filing grievances and thus interferes with employee rights under Sec. 111.84(2), Stats.

We affirm the Examiner's dismissal of this allegation.

Pichelmann is correct that there is no evidence of an explicit waiver of the 21 day time limit as to her contractual Step Two grievance and that the contract unambiguously states that a waiver must be written. However, as the Examiner correctly found, the University and Council 24 have a long standing practice of accommodating the scheduling of Step Two hearings to the schedule of the Council 24 representative. It is maxim of contract interpretation that an agreement can be amended by a long standing mutually accepted practice. Elkouri and Elkouri, How Arbitration Works, 5th Edition, pp. 652-653 (1997). We conclude that the scheduling practice of these parties had the effect of amending the contract to be consistent therewith. Pichelmann would attack this conclusion by arguing that she is a necessary party to any contractual amendment. We disagree. The contract is between the State/University and Council 24. They and they alone have the right to amend the agreement to which they are parties.

Remaining is the contention that such an amendment interferes with Pichelmann's rights because it produces delay which in turn discourages the filing of grievances and thereby interferes with her rights under Sec. 111.84(2), Stats. First, we concur with the Examiner's view that the scheduling practice generally serves the interests of employees by allowing the skills of the Council 24 Field Representative to be utilized during the Step Two hearing. However, even if this was not so, it must be remembered that the grievance in question was contractual -- not statutory -- and that employees have no statutory right to use a contractual grievance procedure. The extent of any such right is totally dependent on the result of bargaining between the employer and collective bargaining representative. Here, the employer and the collective bargaining representative have agreed through a mutually accepted practice that delay in Step Two hearings is acceptable. Thus, even if it were the case that delay in Step Two hearings may discourage employees from filing grievances (despite the benefits that result from the delay), such discouragement would not interfere with a statutory right. Thus, we reject Pichelmann's contention to the contrary.

Alleged Illegal Refusal to Proceed with the Step Two Hearing

The Examiner concluded that Council 24 representative Weaver refused to proceed with the Step Two hearing because Pichelmann refused to meet with Weaver before the hearing began and because Pichelmann wanted the hearing to be public. He determined that Weaver's conduct under those circumstances did not violate the collective bargaining agreement or breach Council 24's duty of fair representation toward Pichelmann. He further determined that given the legitimate basis for Weaver's refusal to proceed, the University's refusal to proceed without Weaver also did not violate Pichelmann's rights under the State Employment Labor Relations Act.

The Examiner also rejected Pichelmann's contention that she was entitled to proceed on April 5, 2002 through a representative of her own choosing. He reasoned that because Pichelmann was pursuing a contractual grievance, Council 24 "owned" the grievance and controlled who the union representative would be.

Pichelmann attacks the Examiner's determinations based on her view that she, not Council 24, had control of the Step Two hearing because she was processing a Sec. 111.83, Stats., grievance. We have previously discussed and rejected that view herein. We do so again and thus affirm the Examiner.

Alleged Interference Caused by Respondent University's Answer

As noted earlier herein, it its Answer, Respondent University, through Attorney David Vergeront, asked for attorneys fees and costs. Pichelmann then moved to amend her complaint to name Vergeront as a Respondent who had violated Secs. 111.84(1)(a) and 111.84(3), Stats., by making that request.

The Examiner denied the motion to amend because he viewed the request as "legal boilerplate" that did not reasonably tend to interfere with Pichelmann's rights.

Pichelmann asserts that the threat of seeking costs and attorneys fees in response to an individual employee's filing of a complaint presumptively interferes with employee rights under Sec. 111.82, Stats.

We concur with Pichelmann's view that the filing of an unfair labor practice complaint is the exercise of a right protected by Sec. 111.84(1)(a), Stats. However, we do not concur with her view that the content of the pleadings filed in response to her complaint had a reasonable tendency to interfere with that right.

Pichelmann asserts that the request is a threat because the Examiner did not have authority under Commission precedent to award costs and attorneys fees to Respondent. However, from our perspective, it is this linkage to the Examiner's authority that removes the request from having a reasonable tendency to interfere with Pichelmann's rights. A reasonable person would know that a neutral third party determines whether the request made in an answer should be granted and that the request will only be granted if the law so allows. Therefore, we conclude that the request could not interfere with the right to file a complaint. Therefore, the Examiner properly denied Pichelmann's motion to amend her complaint to allege otherwise. However, the Examiner should have but did not dispose of Respondent's request for costs and fees in his decision. We do so by denying same because, as Pichelmann points out, we do not have the authority to grant such fees and costs to a Respondent. STATE OF WISCONSIN, DEC. NO. 29177-C (WERC, 5/99).

Alleged Procedural Error Regarding Consolidation

As recited earlier herein, Pichelmann's complaint was originally consolidated for hearing with a complaint filed by Jennifer A. Peshut because of substantially identical facts and legal issues.

On May 7, 2001, the Examiner issued a Notice setting hearing for May 2, 2001.

Prior to hearing, the Examiner granted a motion to dismiss the Peshut complaint in its entirety and denied the previously discussed motion by Pichelmann to add Attorney Vergeront as a Respondent. Peshut and Pichelmann both filed petitions for review with the Commission. Respondent University asked the Examiner to hold hearing on the Pichelmann complaint in abeyance pending disposition of the Peshut's appeal. The Examiner advised the parties that:

> Given the very substantial overlap in the allegations between the two complaints, the disposition of the Peshut complaint will not bear on the scope of the evidence presented in the course of the hearing.

On May 22, 2001, the Examiner conducted hearing on the Pichelmann complaint.

On July 19, 2001, the Commission issued a decision in the Peshut complaint reversing the Examiner's dismissal thereof.

On July 23, 2001, the Commission issued a decision dismissing Pichelmann's petition for review.

On August 17, 2001, briefing in the Pichelmann complaint was completed.

On August 26, 2001, Pichelmann asked Examiner Nielsen to confirm that the Pichelmann and Peshut complaints remained consolidated.

By letter dated August 28, 2001, the Examiner responded as follows:

> I have received Mr. Skoll's E-Mail of August 27th asking that I confirm that the Peshut and Pichelmann cases are still consolidated. I cannot give the requested confirmation, at least as to hearing and argument. The matters cannot be considered consolidated for hearing and argument, since the practical effect of my earlier dismissal of Ms. Peshut's complaint was that the Pichelmann case was heard and argued separately. Mr. Skoll has stated his position that the record of Pichelmann is not sufficient for the disposition of the Peshut case, and certainly the amendment to Peshut cannot be resolved on the basis of the Pichelmann record.
>
> It might make some sense to consolidate the matters for decision, given the substantial overlap in the facts and issues raised by the two cases. This would have the advantage of allowing the Commission to consider the entire matter at one time, should the parties, or any of them, take issue with my ultimate decision and seek review before the Commission and/or the courts. The disadvantage is that the Examiner's decision on the Pichelmann case would have to wait for the hearing and argument of the Peshut case to be completed.

Pichelmann then advised the Examiner as follows:

> In view of your communication today saying the Pichelmann and Peshut cases are no longer consolidated for hearing, I ask for clarificiation. Will the record in the Pichelmann case (Case 515 No. 59877 PP(S)-319) be used in the Peshut case (Case 516 No. 59886 PP(S)-320)? If not, we will have to call the same witnesses, elicit the same testimony, and produce the same exhibits as have already been produced.

Pichelmann then asked that the Pichelmann and Peshut complaints be consolidated for purposes of decision. By letter dated Septmeber 6, 2001, the Examiner responded in pertinent part as follows:

> I have received a copy of Mr. Skoll's Motion to the Commission, asking that it consolidate these matters for decision. As a technical matter, this request is pending before me, not the Commission. Having said that, after hearing from all parties on the question of consolidation for decision, I have decided not to consolidate the cases. The original consolidation was for purpose of hearing and argument. The question of separate decisions was left open. The cases were, as a practical matter, severed when I dismissed Ms. Peshut's complaints. Hearing and argument on Ms. Pichelmann's complaint has been completed, while a hearing on Ms. Peshut's case is not set for another six weeks or so. The substantial delay in an answer to Ms. Pichelmann's case weighs heavily against any consolidation at this point, while there is no good reason to attempt to reconsolidate the matters, other than a purely speculative possibility of an appeal. Should it develop that one or more parties wish to appeal both cases, the Commission can decide whether it wishes to consolidate the matters for purposes of the appeals.

The Examiner issued his decision on the Pichelmann complaint on October 19, 2001 and on the Peshut complaint on April 16, 2002.

On review, Pichelmann argues that the Examiner erred by failing to consolidate the complaints for hearing and decision. She asserts that the Examiner's failures deprived her of the right to use evidence in the Peshut record in support of her allegations.

As reflected by the above-recited chronology of procedural events relevant to this issue, the Peshut complaint was returned to the Examiner for hearing after hearing in Pichelmann had been completed and before the briefing of Pichelmann had been completed. After briefing in Pichelmann was complete, Pichelmann raised the question of consolidation. The Examiner advised Pichelmann that as a practical matter, the cases had been severed for the purposes of hearing and argument by virtue of his dismissal of the Pehsut complaint. Upon receiving this information from the Examiner, Pichelmann did not ask that the Pichelmann record be reopened to include the record subsequently made in Peshut. Instead, Pichelmann asked the Examiner whether the Pichelmann record would be part of the record in the Peshut complaint. This request was subsequently granted by the Examiner.

Pichelmann then asked that the Pichelmann and Peshut matters be consolidated for decision. By letter dated September 6, 2001, the Examiner denied the request because of the delay that would be produced in the rendering of a decision in Pichelmann. Thus, it was apparent that the Examiner would be proceeding to decide the Pichelmann matter based on the existing record. Pichelmann did not thereafter ask that decision in her complaint be held in abeyance so that her record could include that to be made in the Peshut matter.

Given all of the foregoing, because Pichelmann never asked that the Peshut record be part of her record, we conclude that the Examiner could not have erred by proceeding as he did. Simply put, the Examiner never denied a request to that effect and had no reasonable basis for knowing that Pichelmann even wanted the Peshut record to be part of hers.

Thus, we reject this Pichelmann contention.

Dated at Madison, Wisconsin, this 3rd day of January, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/
Steven R. Sorenson, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

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