STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES #40, AFSCME, AFL-CIO,** Complainant,

vs.

**LOIS SCHEPP, CATHERINE SCHMIT, AND THE COUNTY OF COLUMBIA,** Respondents.

Case 208
No. 59234
MP-3683

# Decision No. 30197-A

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Appearances:

**Mr. David White,** Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of Wisconsin Council of County and Municipal Employees #40, AFSCME, AFL-CIO.

Murphy & Desmond, S.C., by **Attorney Daniel G. Jardine**, 2 East Mifflin Street, Suite 800, P.O. Box 2038, Madison, Wisconsin 53701-2038, appearing on behalf of Lois Schepp, Catherine Schmit, and the County of Columbia.

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 2, 2000, Wisconsin Council of County and Municipal Employees #40, AFSCME, AFL-CIO (the Union) filed a complaint of prohibited practice alleging that Lois Schepp, Catherine Schmit, and the County of Columbia had violated Secs. 111.70(3)(a) 1, 3, 5 and (c), Stats., by conduct leading to the termination of the employment of Erica Raddatz. The complained of conduct also prompted the filing of a series of grievances. In a letter filed with the Commission on October 2, 2000, the Union noted that one of those grievances had been filed with the Commission, but had not been processed to hearing because Columbia County had not agreed to arbitrate it. That grievance, filed with the Commission on May 3,

2000, alleged harassment, but did not allege that Columbia County had taken any disciplinary action against Raddatz. In its October 2 letter, the Union stated that Raddatz "was discharged by the County," and that the Union would prefer to have the Commission retain the filing fee for the May 3 grievance, but process the file as a grievance challenging the discharge. Columbia County agreed, and hearing was set on the arbitration file for November 21, 2000.

In a letter filed with the Commission on October 23, 2000, Daniel Jardine stated his appearance as counsel for Columbia County, and, among other points, sought clarification on "which grievance(s) is/are the subject of the November 21 arbitration?" In a letter to the parties dated October 31, 2000, I suggested a conference call to address the points raised by the October 23 letter. During the course of that conference call a number of issues were discussed, including the possibility of consolidating the Union's complaint with the arbitration. Ultimately, the arbitration hearing set for November 21 was cancelled, and the parties discussed a number of dates for rescheduling the hearing, including January 4, 2001. In a letter dated November 20, 2000, Columbia County confirmed its availability for "an arbitration hearing on January 4, 2001."

In a letter to the parties dated November 29, 2000, I stated:

> I write to clarify the status of the above-noted matters. I am available for hearing on January 4, 2001. The issue thus becomes what is to be heard, and how. I checked the arbitration file captioned above, and found that Mr. White filed a letter clarifying that the arbitration file covers the discharge. He filed that letter with the Commission on October 2, before Mr. Jardine's involvement. I enclose a copy of that letter for Mr. Jardine. If I read that letter and Mr. Jardine's letter of November 20 correctly, then if I set hearing for January 4, I do so as an arbitrator to hear a grievance challenging the contractual validity of the Grievant's discharge.
>
> There has been considerable discussion concerning the possibility of "consolidating" the two matters captioned above for hearing. I will state here what I believe this requires. First, I believe the two of you need to stipulate that such a consolidated hearing would be appropriate, since it links a contractual forum to a legal forum. If you so stipulate, and the Commission agrees that I should be assigned as Examiner as well as Arbitrator, then the matter would have to proceed procedurally as a complaint. This means that the County would file an answer, I would formally notice the hearing as a contested case, and hear the matter as an Examiner. The hearing would be transcribed.

> As I understand it, I would be required to issue two decisions based on this record. One would be an arbitration award stating my view on the contractual propriety of the discharge. The other would be a formal decision including findings of fact, conclusions of law and order addressing the allegations of the complaint, other than any allegation of a violation of Sec. 111.70(3)(a)5, Stats. The arbitration award could be appealed, if at all, by separate enforcement actions before the Commission or a Court. The complaint decision could be appealed, if at all, by right to the Commission under the terms of Chapters 111 and 227, Stats. The arbitration award would command whatever deference it is entitled to under law. My decision as Examiner would command, as I understand Commission case law, no deference. "Consolidating" the matters works a waiver of any right either of you may have to present evidence or argument on the contractual merit of the discharge grievance under Secs. 111.70(3)(a)5, or (b)4, Stats. The contractual merit of the discharge could conceivably impact your arguments or evidence on other sections of Sec. 111.70(3), Stats., but would not be put directly before the Commission under Sec. 111.70(3)(a)5, or (b)4, Stats.
>
> If the two of you agree that the matter stated above is accurately set forth and you wish to "consolidate" the two cases for hearing purposes, please advise me as soon as possible. Hearing on the complaint requires notice of not less than ten days. More practically speaking, the Commission must secure a court reporter for hearing on the complaint, and more notice is always better than less on that point.

I received no response to this letter, and in a letter to the parties dated December 28, 2000, confirmed that hearing would proceed on January 4, 2001, regarding the arbitration file only. The Union requested and received a postponement of the January 4, 2001 hearing date. Hearing was conducted in Portage, Wisconsin on January 30, 2001. Respondents filed their answer to the complaint on February 16, 2001. The hearing continued on May 21, May 22 and July 10, 2001.

On May 21, 2001, the Union and Respondents executed a stipulation concerning the consolidation of the grievances and the complaint captioned above. That stipulation, taken into evidence as Joint Exhibit 5, states:

> 1. The parties, Columbia County, Erica Raddatz, and the Wisconsin Council 40, AFSCME, agree that all of Ms. Raddatz's grievances against Columbia County, and the Union's prohibited practices complaint against Columbia County, can be consolidated and are to be consolidated before Arbitrator Richard McLaughlin, in one proceeding.

> 2. Specifically, the grievances include all three grievances filed by Ms. Raddatz on April 17, 2000 (relating to alleged wrongful discharge, denial of job opening in Treasurer's office, and denial of use of sick leave donation), and case number 212 (no. 59234; MP-3683) filed with the State of Wisconsin's Wisconsin Employment Relations Commission.
>
> 3. For mutual consideration, the parties agree that neither of them will contend that the aforementioned matters should be conducted separately, and none of the parties will object to Arbitrator Richard McLaughlin deciding the merits of the grievances and the complaint in one proceeding.

In a letter to the parties dated July 12, 2001, I stated:

> . . . As I stated at the close of the hearing, I will forward Joint Exhibit 5 to the Commission for the appointment of an Examiner.
>
> Assuming I am appointed Examiner I will issue separate decisions for the complaint and the arbitration files. I will address the statutory allegations as noted in my letter of November 29, 2000. . .

In a letter to the parties dated August 15, 2001, Peter G. Davis, the General Counsel for the Commission, stated:

> . . .
>
> I write to suggest that you agree that the entire dispute (including the violation of contract portion already heard by Mr. McLaughlin in his capacity as grievance arbitrator) be decided by Mr. McLaughlin in his role as Examiner.
>
> If you agreed to proceed in this fashion, the record created before Arbitrator McLaughlin would become part of the record before him as Examiner and he would issue a single decision in his capacity as Examiner resolving all issues. I should emphasize that Mr. McLaughlin did not ask me to write this letter and is fully prepared to issue two separate decisions – one as arbitrator and one as Examiner. However, it is my view that proceeding in two separate forums creates needless complexity and expense for you and for the Wisconsin Employment Relations Commission.

The Commission, on August 15, 2001, appointed me Examiner. In a letter filed with the Commission on August 23, 2001, Respondents agreed to proceed as outlined in the August 15 letter.

In a letter filed with the Commission on August 27, 2001, Respondents stated that the parties had agreed to alter the briefing schedule set at the close of the July 10, 2001 hearing. The revised briefing schedule set a deadline of August 27, 2001. Respondents filed a copy of their brief on August 30, 2001, with a cover letter dated August 28, 2001. The cover letter notes that Respondents mailed a copy of the brief to the Union. Respondents filed the original of their brief on September 4, 2001.

In a fax filed with the Commission on September 6, 2001, Respondents noted that "it has been more than one week since the thrice-extended deadline for submitting briefs in this matter" and that "no brief has been submitted by Ms. Raddatz or the Union." Respondents took the position that an untimely filing by the Union "will be prejudicial" and requested that the record not include any brief filed by the Union. In the alternative, Respondents requested "the opportunity to submit a reply brief to what will now essentially be 'response brief' from" the Union. In a letter to the Union dated September 11, 2001, I stated:

> I have received no brief from you, nor any response to Mr. Jardine's letter of September 6, 2001. Beyond this, I have no formal statement from you in response to Mr. Davis' letter of August 15, 2001.
>
> At a minimum, it is important that I get your formal position on whether I should issue one decision as an Examiner (Davis letter of August 15, 2001) or two decisions (Tr. at 826). Beyond this, if you believe I should receive a brief from you, you should address the concerns raised by Mr. Jardine.
>
> If I do not hear from you by September 21, 2001, I will close the record in the two matters noted above. My letter of November 29, 2000, states my continuing belief that I cannot compel a consolidation of the complaint and arbitration. Thus, if I hear nothing from you, I will issue two decisions, based on the record and argument submitted prior to September 21.

On September 18, 2001, the Union filed its brief, noting in a cover letter that it had been mailed on August 27, 2001, under the briefing schedule set at the close of the July 10, 2001 hearing. In a letter to the parties dated September 20, 2001, I stated:

> I received Mr. White's brief on September 18, 2001. I write to determine whether Mr. Jardine objects to my consideration of the brief. Beyond this, I write to determine if Mr. White agrees that I should issue one decision (see Davis lettter of August 15, 2001, and my letter of September 11, 2001) . . .

Respondents filed a response on October 2, 2001. Among other points raised in that letter, Respondents noted skepticism regarding the purported mailing date of the brief, since it failed to reach Respondents or the Arbitrator. Respondents added "it is (un)necessary for the County respondents to force a further delay of this matter by filing a reply brief." Respondents also argued that the Union's brief raised an issue regarding the clothing worn by a County witness, and Respondents enclosed a copy of a portion of the videotape taken of that testimony.

The Union filed a response on October 5, 2001. Among the points raised in that letter, the Union noted that it mailed two copies of its brief in a single mailing to the Arbitrator as agreed upon at hearing. The Union added that it believed the "record was closed upon receipt of the briefs of the parties", and objected to the receipt of the videotape. The Union concluded the letter thus: "The Union hereby moves that the videotape of the hearing be excluded from the record in this case."

In a letter to the parties dated October 9, 2001, I stated:

> . . .
>
> The Union has not stipulated to the issuance of a single decision. Thus, as I have indicated before, I will prepare two decisions.
>
> I view closing of the record as the most significant point before me. I will retain the tape submitted by Mr. Jardine. At a minimum its retention will serve as an offer of proof in the complaint case. If I use the tape as evidence in either case, I will explain how and why. For now, I write to confirm that my receipt of the tape and your argument on it mark the close of the record.
>
> If I have misstated the Union's position on the issuance of a single decision, Mr. White should so advise me in writing.

In a letter dated October 9, 2001, and filed with the Commission on October 11, 2001, Respondents stated:

> . . . Assuming that WERC is interested in getting at the truth, the County believes that you and WERC should be allowed to view the indisputable evidence on the video tape.
>
> On one final matter, I note that the Union has still not responded to your inquiry about whether you can issue one decision (see your letter of 09/20/01). As a simple courtesy, I would ask Mr. White to at least let you know, one way or the other, whether or not the Union agrees that you can issue one decision rather than two.

I received no response to my letter dated October 9, 2001.

## FINDINGS OF FACT

1. Wisconsin Council of County and Municipal Employees #40, AFSCME, AFL-CIO, referred to below as the Union, is a labor organization, which maintains its offices at 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903. Local 2698-B is a Union affiliate, and serves as the exclusive collective bargaining representative for certain employees of Columbia County. Carole Lyons is the President of Local 2698-B.

2. Columbia County, referred to below as the County, is a municipal employer, which maintains its offices at 400 DeWitt Street, Portage, Wisconsin 53901. The County employs Lois Schepp as its Comptroller. The County employs Catherine Schmit as the Accounting Supervisor in the Comptroller's office. The County employs Cindy Devine as the Office Manager of the Accounting Department. The County Sheriff is Steven Rowe, and the County Treasurer is Deborah Raimer.

3. The County employed Erica Raddatz as an Accounting Assistant in the Accounting Department from May 4, 1998 until April 13, 2000. Schmit served as Raddatz's immediate supervisor. Schepp is Schmit's immediate supervisor. While a County employee, Raddatz was an individual member of the bargaining unit represented by the Union.

4. The Union and the County have been parties to a series of collective bargaining agreements, including one in effect by its terms from January 1, 2000 through December 31, 2001. The agreement contains the following provisions:

**ARTICLE 5 – GRIEVANCE AND ARBITRATION PROCEDURE**

. . .

**ARTICLE 7 – SENIORITY RIGHTS**

. . .

> 7.6 Selection of applicants to fill job vacancies or new positions shall be determined by the employee's skill, ability as reflected in his/her personnel file, and seniority. Where all factors are comparatively equal, the employee with the greatest seniority shall be entitled to preference. The Employer retains the right to establish necessary qualifications for all positions.

. . .

**ARTICLE 15 – MANAGEMENT RIGHTS**

15.1 The County possesses the sole right to operate county government and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:

. . .

D) To suspend, demote, discharge, and take other disciplinary action against employees for cause, and subject to the procedure of Article 5 of this contract . . .

. . .

**SIDE LETTER AGREEMENT**

Re: Sick Leave Donation

Donation of Sick Leave: In the event extraordinary circumstances arise under which an employee has depleted all of his/her sick leave (including catastrophic account) and is still unable to return to work, individual employees may voluntarily donate a portion of their accrued sick leave, in increments of one (1) day, not to exceed five (5) days per donator, to the employee. It is understood that the donation will be on a day-for-day basis, without regard to any difference in the hourly rate of pay between the donor and the receiver.

5. The County maintains a Personnel Policies and Procedures Manual, which is referred to below as the Manual. Section 7.18 of the Manual is entitled "Misconduct-Unacceptable Performance." Subsections (a), (b), (c) and (d) of Section 7.18 enumerate State law and County rules of conduct that can prompt discipline by the County, and state other more general considerations concerning conduct in which the County has a disciplinary interest. Subsection 7.19(a) of the Manual is entitled "Disciplinary Procedures", and contains the following provisions:

(1) The following disciplinary procedures shall be employed in disciplinary matters of County employees, unless these procedures are superseded by more specific procedures contained in a current employment or collective bargaining contract, whenever rules and policies of the County are broken or an employee performs unsatisfactorily. In each instance, the disciplinary action taken is to be fair, just and in proportion to the seriousness of the violation.

(2) Whenever an employee violates any of the rules and regulations outlined in this Personnel Manual, the County may begin progressive disciplinary action in any of the steps listed below, depending on the seriousness of the offense committed and provided that immediate discharge is not warranted by the seriousness of the violation. . . .

Subsection 7.19(b) of the Manual is entitled "Classification of Misconduct," and states:

(1) **Minor Offenses.** Violations or conduct which are unacceptable if repeated, but for which the employee will not be discharged for the first offense.

(2) **Serious Offenses.** Willful or deliberate violations or conduct of such a nature that the first offense may indicate that continued employment of the employee may not be in keeping with the best interest of the County.

Subsection 7.19(c) of the Manual is entitled "Disciplinary Considerations," and states the following:

(1) Prior to taking disciplinary action, the Personnel Director, the employee's supervisor or other authority reviewing the violation should give full consideration to the following guidelines:

a. Do the reviewing officials know all the facts accurately?
b. Is the rule that has been violated reasonable?
c. Did the employee know the rule or should he/she reasonably have known it?
d. Has the rule been strictly enforced in the past? If not, what recent notice to employees warned of enforcement on violations of certain rules?
e. In this instance, is the rule being applied reasonable?
f. Is this employee personally guilty of the violation or is he/she guilty by association with another?
g. Can the employee's guilt be proved by direct, objective evidence, or is the evidence circumstantial or hearsay?

h. Does the employee have a reasonable excuse for the infraction of this rule or not following a direction of his/her supervisor(s)?
i. What is the employee's record of past violations, warnings, disciplinary action, etc.?
j. What is his/her length of service?
k. Is the employee receiving the same treatment others received for the same offense?
l. Does the discipline fit the offense?

Section 7.19(d) governs "Progressive Disciplinary Procedures," and specifies a four step system consisting of oral warning, written warning, suspension and dismissal for those matters in which "immediate discharge is not warranted by the seriousness of the violation." Section 7.19(e) governs "Serious Violations" and states:

> The County is not required to go through all the steps (Steps One - Three above) involved in this disciplinary procedure. Discipline may begin at any step in the procedure depending on the seriousness of the offense committed. Any discipline should be commensurate with the offense committed. In addition, the County may repeat any of the first three steps of this procedure when it feels it is necessary, so long as the discipline is commensurate with the offense committed.

Section 7.19(g) of the Manual notes that the "requirements of the Wisconsin Statutes or any collective bargaining contract shall supersede the provisions of this Section when in conflict." Individual departments in the County may maintain written policies to supplement the Manual. The Accounting Department maintains, among its polices, the following:

M. Dress Code

> The Accounting Department is a professional office within the Columbia County government. Accordingly, all employees will dress in appropriate office work attire. Jeans, "after-hour wear", and overly casual clothes are not acceptable. Adequate grooming is also expected.

6. In July of 1998, Schmit gave Raddatz a written performance evaluation, consisting of a completed evaluation form and Schmidt's supplementary comments. The evaluation noted Raddatz had successfully completed the three-month evaluation process. The form specifies eleven separate areas for evaluation, and specifies that each area is to be evaluated on the following scale: Outstanding; Exceeds Job Requirements; Meets Job Requirements; Below Job Requirements; and Poor Job Performance. Schmit checked the "Exceeds Job Requirements" entry for each of the performance areas. In November of 1998,

Schmit completed the same form for Raddatz's six-month evaluation. Schmit checked the "Meets Job Requirements" for each of the performance areas. With this evaluation, Raddatz passed her probation period. On June 22, 1999, Schmit met with Raddatz for Raddatz's annual evaluation. Schmit gave Raddatz the evaluation form, on which she had checked the "Exceeds Job Requirements" entry for three of the performance areas, and the "Meets Job Requirements" for eight of the performance areas. Sometime prior to this evaluation, Schmit became concerned with the time Raddatz spent on breaks, her compliance with the departmental dress code and with the number of personal phone calls made to and from Raddatz's phone. Schmit attached the following written supplement to the June 22 evaluation form:

**Good Work Qualities:**

1. Erica is willing to take on any assigned tasks. She consistently completes all tasks as per expectations and meets all deadlines.
2. Demonstrates a positive attitude, initiative, and timeliness on new project assignments.
3. Maintains positive professional relationships with co-workers and demonstrates the ability to communicate effectively with staff of various county departments.
4. Asks questions when necessary.
5. All work and work area are neat, clean, and organized.

**Goals for Future:**

1. Continue positive support to Highway Dept., assist new staff when possible.
2. Monitor assigned grants on a monthly basis, reconciling to ledger.
3. Assist Supervisor with account reconciliations.
4. Reconcile payroll taxes and fringe benefits on a quarterly basis.
5. Per conversations with supervisor June 10 and 11, practice punctuality when returning from breaks and lunch.
6. Log all deadlines on calendar to ensure they are met.
7. Always follow office dress code and conduct yourself in a professional manner that is a positive reflection of the Accounting Department.
8. Continue to expand knowledge of overall county system.
9. Continue to pursue continuing to achieve advance degree.

The reference "June 10 and June 11" is to an incident in which Schmit went from the accounting office to the break room on the floor below to get Raddatz to return to work. Schmit went to the break room because she believed Raddatz had been absent from work for one-half hour. Raddatz was taking her break with Jessica Koss, the Executive Secretary to the County Corporation Counsel, and Linda Kay Samsel, who works for the County in the Child Support Department. Other employees from Child Support were also at the break room. Schmit approached Raddatz, and made a statement in effect questioning whether Raddatz intended to return to work anytime soon. Raddatz and Samsel did not believe Raddatz had taken too long at break, and perceived Schmit's inquiry to be sarcastic, designed to embarrass Raddatz in front of her co-workers. Schmit believed she had informally counseled Raddatz on several prior occasions to be more careful regarding time spent on breaks, and should not have been required to speak at all. Raddatz believes the reference to the office dress code in the June 22 evaluation referred, at least in part, to an incident in which David McClean, then County Corporation Counsel, advised Schmit and Schepp that Raddatz was wearing a skirt that was too short. Schmit and Schepp discussed the matter with Raddatz, who was disappointed neither attempted to defend her with McClean, and believed Schmit and Schepp treated her as an embarrassment to the department. Raddatz did not believe her skirt was shorter than those worn by other departmental employees.

7. Schmit did not believe Raddatz was appropriately responding to Schmit's attempts to alter her conduct regarding break time usage and compliance with the dress code. From June of 1999 through February of 2000, Schmit observed and documented what she felt was a continuing series of violations by Raddatz of the departmental dress code and of the contractual break period. On June 28, 1999, Schmit instructed Devine to observe and to document Raddatz's breaks and her clothing. Schmit also documented her own observations, including five file entries for late June and July of 1999 concerning what Schmit viewed as inappropriate attire and three violations of break time usage. Schmit's file includes an entry summarizing a meeting on July 8, 1999 at which Schmit met with Raddatz to address the violations noted in Schmit's file. The summary states that at the close of this meeting Schmit advised Raddatz "that any future violations of either the break or dress code policies will be addressed with formal written disciplinary action." Raddatz acknowledges that she met with Schmit at some time to address her compliance with the dress code, but denies that Schmit warned her that future violations would result in discipline.

8. Tension between Raddatz and Schmit heightened during and after the July 8, 1999, meeting. Schmit continued to maintain a file on Raddatz's compliance with the dress code and break schedule. The file contains ten entries between Ocbober 4, 1999 and Februrary 4, 2000. The entries concern a number of items of clothing, but each contains a reference to either a flannel or denim shirt. On February 18, 2000, Schmit observed Raddatz and Koss visiting during work hours in the morning, and then observed Raddatz return late from lunch. Schmit's file summarizes the events of that afternoon thus:

> Was late arriving back from lunch. On passing thru her office after lunch, found her visiting with Jessica again. Asked Jessica to go home to her office as Erica had a lot of work to get done. (*Left office area Jessica was still there*.)
>
> **1:45 P.M.** Erica approached me in a hostile manner, and in a raised voice stated that she did not appreciate how I treated her. I asked that she be specific. She shouted that she did not appreciate my sending Jessica from her office. She should be free to visit as she pleases, just as I do. That she is not afraid to file a grievance or harassment suit. I stated that this did not surprise me. She stated that my work performance was not a good example to her that I do not meet the standards to which she is held. I responded that my performance is an issue for **my** supervisor to address, not her. At this time she stomped out of the office and slammed the door. Staff from the front accounting office heard the shouting and slamming of the door and were concerned enough to come back to the office to verify that everything was O.K.
>
> . . .
>
> **3:00 P.M.** After waiting for her to complete personal phone call (*I love you . . .)* suggested to Erica that she go home for the day as she has since been unproductive and spent subsequent time on personal phone calls. Erica refused the opportunity to leave as she did not want to use her sick leave or vacation time. I told her to consider it paid leave as she was obviously having trouble being productive in her present state of mind. She again declined. I stated that if she stayed she was expected to be productive. She then shouted in a (raised) voice that "she was working and just leave her alone!" I walked out of her office with no response.

Raddatz believes she was doing homework during her break period, since she had stopped leaving the office to take breaks due to the ongoing difficulties between her and Schmit. Raddatz believes Schmit never attempted to determine if she was on break, and chose to address her sarcastically, by asking whether she needed more work to do. On February 18, 2000, Raddatz had lunch with Koss, who learned during lunch that another courthouse employee had just been killed in a car accident. Koss and Raddatz were discussing the death at lunch, and after lunch when Schmit approached Koss at Raddatz's desk to send Koss "home" to work. Raddatz acknowledges she went to Schmit's office to discuss the matter. Raddatz denies approaching Schmit in an angry or hostile fashion, and believes she did no more than try to make Schmit understand that Koss was upset over a friend's death. Raddatz believes she tried to highlight to Schmit that supervisors including Schmit were discussing the death in the office and that Raddatz was continually being singled out by Schmit for spurious reasons. Raddatz denies slamming the door, and asserts she left the office to speak with Lyons about

her difficulties with Schmit. Raddatz testified that she received a call from her mother after she returned to the office, and made no personal calls. She denies raising her voice to Schmit.

9. On a form dated February 21, 2000, Raddatz filed a grievance. The form is captioned as No. 00-AC-002, and contains an entry for "Date of the alleged infraction", which Raddatz completed thus: "June '99 – February '00." The form includes an entry for the "(Circumstances of Facts)", which Raddatz completed thus:

> Harassment, Treated unprofessionally. Embarrassment in front of co-workers (child support/Corp. Counsel). Unfair treatment (Being singled out, i.e. dress code, breaks, conversations with employees outside of acctg. dept. vs. within acctg. dept.). Set bad example ("Do as I say, not as I do"), moodiness & uncertainty of workplace atmosphere from day to day minute to minute.

The form includes an entry for "(The Request for Settlement or corrective action desired):", which Raddatz completed thus:

> I would like to be treated like an employee at Columbia County and not like a child. If this problem can't be solved with current supervisor, due to conflicting attitudes, I would appreciate the opportunity to be placed elsewhere within the accounting department.

In a memo to Raddatz dated February 25, 2000, McLean stated the following:

> I wish to acknowledge receipt of your grievance, dated February 21, 2000. The Courthouse Contract defines a grievance as a "dispute concerning the interpretation or application of this contract." Your "grievance," while setting forth a number of issues, fails to describe how the conduct you complained of arises from the "interpretation or application" of the contract. Consequently, the "grievance" fails to state a claim upon which relief can be granted. For this reason alone, I return your grievance to you. The County will take no further action on this grievance at this time.
>
> Please contact me if you have any questions.

On March 1, 2000, Schepp called a meeting with Schmit and Raddatz to discuss the circumstances that prompted Grievance No. 00-AC-002.

10. Raddatz agreed to attend the meeting, and each participant entered the meeting hoping to "clear the air." Schepp hoped to resolve the ill-will prompting the grievance and to keep the matter from within the accounting and personnel departments. She perceived that

tension between Schmit and Raddatz was affecting the entire office. Among other points, Schepp wanted Raddatz to stop being angry about past events; to stop discussing, outside of the department, events that occurred within the accounting department; and to comply with County policies. Raddatz hoped to resolve the ill-will. She described why she filed the grievance, including her conclusion that she had been singled out for policy violations even though she did not behave or dress differently than other departmental employees. She stated that she resented being treated like a child. She asked for greater detail on what to wear to comply with the dress code. Schepp and Schmit responded to the effect that if she was in doubt on an item of clothing, she should simply not wear it, or that if she was in doubt as to whether Schepp or Schmit would wear an item of clothing, she should simply not wear it. Schepp noted she wished Raddatz would have come to her before filing the grievance. Schepp underscored to Raddatz that Schmit was responsible for ensuring Raddatz's compliance with County policies, and that Schmit's prior warnings and counseling had been warranted. Raddatz became convinced that Schmit and Schepp held her accountable for all the problems and that they felt she could not control her behavior or emotions. Raddatz eventually left the meeting, crying, because she could not endure what she perceived as a personal attack on her. When, or slightly before she left, Raddatz made a statement to the effect that she wanted to have Lyons present at the meeting or that she wondered if she needed Lyons. Raddatz did not hear their response as she left Schepp's office. She walked to her desk, and Schepp and Schmit followed. At Raddatz's desk, Schepp and Schmit attempted to further discuss the issues raised in the meeting. Raddatz again asked for Lyons. Schepp or Schmit continued to emphasize that the three of them had issues that needed to be resolved. Schmit's notes of the meeting detail the close of their meeting thus:

> Lois ultimately told her that if we could not work out the situation with her so that she would be happy, that maybe she needed to look for a new position elsewhere. Erica stated that she already has. Lois again tried to convince Erica to let go of all the old anger from moths ago and move forward for her own personal well-being. Lois outlined all the ways the accounting office have been supportive to her since she was employed (*through illnesses and personal problems, continuing ed., new office furniture*). Lois suggested that perhaps the Employee Assistance program may be helpful. Erica did not respond. Lois asked if we should do a referral for her. Erica just shrugged this off. Lois asked if resolution had been achieved and whether Erica could give up her anger and move forward. Erica gave a non-committal shrug. The meeting ended.

Raddatz, in tears, contacted Lyons. Raddatz informed Lyons that she had been involved in a meeting involving discipline and that she had been denied the opportunity to have Lyons present. Lyons contacted McLean and David White. They went to the accounting office. McClean spoke with Schepp and Schmit while White and Lyons spoke with Raddatz. McClean informed Raddatz that she could take the balance of the day off with pay. Raddatz did so. Schmit's notes of the meeting note Raddatz's departure from the worksite thus:

> (McLean) suggested that we allow Erica to go home for the rest of the day with pay. I told him that I had already given her permission to do so. He stated that he would also tell her this, which he did and exited the office. In the mean time, Erica's union rep entered the office an shut the door to Erica's office. Erica subsequently left without speaking to anyone or opening her office door. No one is aware of exactly what time Erica exited the workplace. She left her work undone.

11. Sometime in early March of 2000, Raddatz prepared a spreadsheet for Rowe concerning funds available under a program by which the Sheriff's Department was to be made an independent departmental computer network. The program spanned at least two fiscal years and involved the expenditure of from one to one and one-half million dollars. The accounting department would periodically prepare spreadsheets for Rowe that detailed the expenditures made and the funds available for the program. Schepp maintains the ledger that tracked the actual expenditures of the program. The spreadsheets were to be reconciled to the ledger. The March, 2000 spreadsheet prepared by Raddatz showed a negative balance of $15,480.41. Rowe tracked the program closely, and believed he had a positive balance. He was upset to learn of the negative balance, and brought the matter to Schepp's, Schmit's and Raddatz's attention. Raddatz maintains that Schmit and Schepp were aware of the negative balance prior to the time Raddatz gave the spreadsheet to Rowe. The spreadsheet Raddatz prepared was not reconciled to the ledger. Schmit and Schepp maintain that Raddatz violated policy by giving the spreadsheet to Rowe prior to bringing it to the attention of managerial staff in the accounting department.

12. Sometime on or about March 10, 2000, Schmit issued a "verbal counseling verification" to Raddatz. The warning was one of four separately headed sections of a one-page form document entitled "Progressive Discipline Notification System For Employees." The four sections are entitled: "verbal counseling verificaiton"; "written warning notification"; "second written warning or work suspension"; and "employee termination notification." Schmit filled in the "summary" section of the verbal counseling verification section thus:

> According to the Accounting Office Policies and Procedures Manual: "if an employee believes he/she may miss a deadline, the supervisor must be notified immediately."

Attached to the verbal warning, were attached two memos from Schmit to Raddatz. One memo, dated March 6, 2000, states:

> This is to confirm our conversation of this morning and to reiterate Accounting Department policy regarding job responsibilities and deadlines. You stated that you had given Mark Zimmerman Register of Deeds A/P to reconcile and were reconciling A/R yourself, but that neither account was "coming out". During fiscal year 1999 it was your responsibility to reconcile these accounts on a monthly basis. Your deadline for having these and all balance sheet accounts reconciled and ready to close was 3/l/00. Office policy dictates that in the event that your work is incomplete or a deadline cannot be met, your supervisor is to be notified immediately. I have never been notified that you had not reconciled these accounts monthly as required. Neither had I been notified that you would be unable to meet your year-end close reconciliation deadline. In addition, neither your supervisor nor the Department Director were notified of your efforts to reassign your job tasks to a co-worker.

The second memo, dated March 9, 2000, states:

> The schedule of outstanding Register of Deeds receivables that you prepared and presented to me yesterday was in error. I have prepared a corrected analysis. Please revise the attached schedule and forward it to me by noon today. I will then review it before forwarding it to the Comptroller.

Schmit continued to document what she perceived as continuing violations by Raddatz of the departmental dress code. Her file includes four such entries between March 1 and March 13, 2000.

13. On the morning of March 16, 2000, Raddatz approached Schmit, and gave her a physician's statement to excuse Raddatz from work for a two week period. Schmit's notes detail what happened after this point thus:

> At 8:45 A.M. she approached my desk and laid a copy of a Dr.'s excuse on my desk and said, "This is a copy of my Dr.'s excuse, I am waiting for personnel to complete my paperwork." She then went to her office. I asked, "What is this for?" She stated, "Stress." I responded, "Then we should all get one." I reviewed the document and made note that it excused her from work for two weeks and was dated 3-15-00. I went to Erica's office where she was writing on notepaper, and told her she could leave the office and wait in personnel for her paperwork. She said no, that she would wait here. I stated that as long as she was on leave, she did not need to be in the office and could wait in personnel for any paperwork. She said, "I will go over there when I am ready. Leave me alone! You can just stand there and stare at me as long as you want!" I gave her several moments to leave, and then said again, " I am asking you to

> leave the office and wait in personnel for your paperwork." She then snatched up her notes, grabbed her purse out of the drawer, gave me a dirty look and said "gladly" directly into my face. She then retrieved her coat and exited the accounting office through the front entrance in a hostile manner.

Raddatz does not dispute the essential accuracy of Schmit's description of the events of March 16. On March 17, 2000, Raddatz returned to the accounting department to remove certain items from her desk. Schmit approached her. Schmit asserts she asked whether Raddatz had a key to the office, and when Raddatz responded in the affirmative, then asked that Raddatz return the key. Schmit asserts Raddatz refused, and made a statement to the effect that she was not quitting. Raddatz denies that Schmit asked her for the key, and asserts she responded that she was not quitting in response to Schmit's questioning whether she was coming back. Raddatz acknowledges she left the accounting office without returning the key.

14. Raddatz took a medical leave of absence from the County from March 16, 2000 until April 13, 2000. As of March 16, she had a slight balance of sick leave available to her, but not enough to cover the entire period of the absence. Sometime on or about March 20, 2000, Schmit completed the "written warning notification" of the "Progressive Discipline Notification System For Employees" form noted in Finding of Fact 12. Schmit completed the "summary" portion of that section of the form thus:

> 1. Speaking to Supervsior in a raised voice; disrespectful manner. 2. Abuse of County property. 3. Failure to obey directives of immediate supervisor. 4. Failure to return County property at the direct request of immediate supervisor.

On or about March 21, 2000, Raddatz filed a worker's compensation claim with the state of Wisconsin, stating the "type of injury or illness" thus: "Migraines, Nosebleeds, High Blood Pressure, Loss of Appetite, Stress, Anxiety, fatigue, hemroids, Digestive Problems, Diaherrea, Depression, Sleep Problems, Mental Anguish." Between March 21 and March 27, 2000, Raddatz signed a job posting for the position of Accounting Assistant in the Department of the County Treasurer. In a letter dated April 3, 2000, Raimer advised Raddatz that "I cannot offer you this position."

15. On April 13, 2000, Raddatz returned to work at the accounting department. Schmit asked that she report to the conference room to go over some matters to get her ready for work. Raddatz returned to her office, then approached Schmit before either had seated themselves in the conference room. Raddatz displayed a tape recorder to Schmidt, then asked whether she should have a Union representative present or use the tape recorder. Schmit replied to the effect that Raddatz could do whichever she chose. Raddatz summoned Lyons. When Lyons arrived, the meeting started. The meeting covered a number of points. Among them, Schmit asked whether Raddatz had a physician's release to work statement. Raddatz

responded in the affirmative, and offered the release. Schmit asked that Raddatz return the office key. Lyons, Raddatz and Schmit discussed that point. Schmit presented the March 20 written warning notification to Raddatz. This was also subject to some discussion. Schmit also presented Raddatz with two memos. The first, dated March 15, 2000, states:

> The following tasks for which you had responsibility and turned over to other office staff to complete for you, are being returned to you and are to be completed according to the time line as indicated:
>
> | | | | |
> |---|---|---|---|
> | 1. | Register of Deeds - Accounts Receivable | : | monthly |
> | 2. | Register of Deeds - Accounts Payable | : | monthly |
> | 3. | Health Insurance Payable | : | monthly |
> | 4. | Life Insurance Payable | : | monthly |
>
> In addition, be aware that it is still your responsibility to reconcile all Payroll Deductions Payable accounts.
>
> Any questions or concerns regarding problems you have while doing any project should be referred directly to me. Should it be necessary I can defer to other office staff at my discretion.
>
> Any discrepancies found in your daily work that may involve communication with other department staff, is also to be brought to my attention first. There may have been prior communications or insight on may part that may reconcile the matter without disturbing others unnecessarily.

The second, dated March 30, 2000, states:

> As always, you are to be at your workstation and prepared to work at 8:00 A.M. and shall remain at work until 4:30 P.M. It is your responsibility to open the office blinds in the morning before you start work, and close the blinds in the evening after you finish work.
>
> In addition, your breaks shall be from 10:00 – 10:15 A.M. and 2:45 – 3:00 P.M. Your lunch break will begin at Noon and end at 1:00 P.M. If you do not leave on time for your break, you will still be expected to return on time. There will be no exceptions unless there is prior approval from your supervisor. All personal business, visiting, phone calls, etc. are to be conducted at this time. Any family or friends that may find it necessary to contact you on a daily basis, should be notified that this is the time you are available for non-emergent communication.

These memos were discussed in some detail. Raddatz questioned why she had been denied the opportunity to participate in some computer training that had occurred during her leave, and why she was going to be required to work in the conference room on April 13. Lyons and Schmit discussed each point, and Schmit advised Raddatz the employee who had filled in for her needed to use the computer terminal in Raddatz's office to complete some work. At some point in the discussion, Raddatz made a statement to the effect that she simply could not work with Schmit. After the meeting ended, at roughly 8:45 a.m., Raddatz worked in the conference room. At roughly 10:00 a.m., Raddatz left the conference room to take a break. When she returned, Schmit advised her that she had to notify Schmit of her departure from the office and when she expected to return. Schmit and Raddatz differ on the degree of hostility with which they discussed this point and the points addressed in the earlier meeting. Schmit believes Raddatz received a series of personal calls between 10:07 and 12:05 a.m. Her records indicate one came at 10:07 a.m, and another at 12:05 a.m.

16. Schmit reported her difficulties with Raddatz to Schepp during the morning of April 13, 2000. Schepp discussed the matter with the County Board's Finance Committee and the County's Corporation Counsel, Joseph Ruf. Sometime around 3:30 to 4:00 p.m., Ruf, Schmit and Schepp summoned Raddatz to a meeting. Raddatz summoned Lyons, and the meeting began on her arrival. Ruf informed Raddatz that the County was terminating her employment, and gave Raddatz a letter of termination that reads thus:

> Please be advised that your employment with Columbia County, Wisconsin, is hereby terminated, effective immediately, pursuant to Article 15 (Management Rights) of the Collective Bargaining Agreement between AFSCME Local 2698-B and Columbia County, Wisconsin, and Sections 7.18 and 7.19 of the Columbia County Personnel Policies and Procedures Manual. The decision to terminate your employment was made after consultation with the Columbia County Corporation Counsel and Columbia County Board Chair.
>
> The specific grounds for the termination of your employment include, but are not necessarily limited to, gross insubordination, misconduct and unsatisfactory performance, as evidenced by:
>
> 1. Abusive behavior and language toward department supervisors.
> 2. Inappropriate and unprofessional conduct such as violently slamming office doors and angrily throwing objects in the office.
> 3. Disrupting and interfering with normal department operations and preventing other department employees from completing their work.
> 4. Failure to complete assigned tasks within specified deadlines, failure to perform tasks within departmental performance standards and transferring assigned tasks to other employees rather than completing work as assigned.

5. Refusal to comply with departmental rules regarding punctuality, appropriate professional attire, limiting personal telephone calls and not conducting personal business during normal office hours.
6. Refusal to comply with specific direction of department supervisors to return county property, specifically, office key.
7. Refusal to comply with work assignments issued by department supervisors and instead arguing with department supervisor, demanding right to audio tape record all conversations with department and repeatedly threatening to bring legal action against department supervisors if department supervisors did not comply with your demands regarding work rules and assignments.

Pursuant to Section 7.25 of the Personnel Policies and Procedures Manual, you are directed to immediately return all county property in your possession including keys, and parking sticker(s).

17. The Union filed three grievances, dated April 17, 2000, on Raddatz's behalf. Grievance No. 00-AC-003 was filed on the blank form noted in Finding of Fact 9. It states the "Circumstances of Facts" thus: "Grievant was denied the opportunity to use sick leave donation." Grievance No. 00-AC-004 was filed on the same type of form and states the "Circumstances of Facts" thus:

> Grievant denied opportunity for opening in treasurer's office. Posting dated March 21, 2000, position advertised Daily Register 4/5/2000.

Grievance No. 00-AC-005 was filed on the same type of form and states the "Circumstances of Facts" thus:

> Grievant was discharged from her position as accounting assistant. The discharge lacks just cause.

These are the three grievances referred to in the parties May 21, 2001 stipulation, which is set forth above and received into evidence as Joint Exhibit 5.

18. The submission and processing of Grievance No. 00-AC-002 is lawful, concerted activity. The meeting of March 1, 2000, to address the concerns prompting Grievance No. 00-AC-002 was not called for disciplinary purposes, but deteriorated into an extended discussion of personnel matters in which the County had, and could reasonably be expected to assert, a disciplinary interest. On March 1, 2000, Raddatz, by leaving Schepp's office, and by either requesting Lyons or by questioning whether she needed Lyons, attempted to withdraw herself from a meeting that could reasonably be expected to have disciplinary

significance. Schepp's and Schmit's continuation of the meeting at Raddatz's desk has a reasonable tendency to chill the exercise of lawful, concerted activity. Neither Schepp, Schmit, nor any other County supervisory employee acted toward Raddatz motivated even in part by hostility against Raddatz's exercise of lawful, concerted activity.

## CONCLUSIONS OF LAW

1. The Union is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

2. The County is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

3. Raddatz, while employed as an Accounting Assistant by the County, was a "Municipal employee" within the meaning of Sec. 111.70(1)(i), Stats.

4. By continuing the March 1, 2000 meeting to Raddatz's desk, after Raddatz had requested Lyons' presence and had left Schepp's office, Schepp and Schmit committed acts having a reasonable tendency to interfere with Raddatz's exercise of rights guaranteed at Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

5. No County employee acted toward Raddatz motivated even in part by hostility toward Raddatz's exercise of rights guaranteed at Sec. 111.70(2), Stats., or in any way that violates Sec. 111.70(3)(a)3, Stats.

6. Neither Schepp, Schmit, nor any other person committed any act toward Raddatz that violates Sec. 111.70(3)(c), Stats.

## ORDER

1. Those portions of the complaint alleging that Respondents violated Secs. 111.70(3)(a)3 or (c), Stats., are dismissed.

2. To remedy its violation of Sec. 111.70(3)(a)1, Stats., the County shall immediately:

a. Cease and desist from:

(1). Conducting or continuing a meeting that can reasonably be expected to lead to the discipline of an individual employee who has declined to participate in the meeting without the presence of a Union representative.

b. Take the following affirmative action that the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:

(1). Notify members of the bargaining unit represented by the Union by posting and disseminating the attached "APPENDIX A" in the manner in which notices to bargaining unit employees are typically made. Where the County posts a copy of "APPENDIX A", it shall take reasonable steps to assure that the notice remains posted and unobstructed for a period of thirty days.

(2). Notify the Wisconsin Employment Relations Commission within twenty days of the date of this Order as to what steps the City has taken to comply with this Order.

Dated at Madison, Wisconsin this 15th day of November, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

**APPENDIX "A"**

NOTICE TO EMPLOYEES REPRESENTED BY COLUMBIA COUNTY
COURTHOUSE EMPLOYEES, LOCAL 2698-B, WCCME, AFSCME, AFL-CIO

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employees that:

> COLUMBIA COUNTY WILL NOT violate Section 111.70(3)(a)1 of the Municipal Employment Relations Act through a supervisor or supervisors conducting or continuing a meeting that can reasonably be expected to lead to the discipline of an individual employee who has declined to participate in the meeting without the presence of a Union representative.

Dated this _____ day of _____, 2001.

COLUMBIA COUNTY

By _____

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL.

**COLUMBIA COUNTY**

## MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

## BACKGROUND

The tortuous procedural background to this proceeding is set forth at length above. As noted in the letter of November 29, 2000, the complaint allegations to be addressed here turn on Secs. 111.70(3)(a)1, 3 and (c), Stats. The allegations regarding the interpretation of the agreement turn on Sec. 111.70(3)(a)5, Stats., but those allegations must be addressed in a companion grievance arbitration.

Drawing the line between the two forums is somewhat troublesome. The Findings of Fact highlight, without resolving, certain factual disputes underlying the grievances. Arguably, the grievances should be resolved prior to the disposition of the complaint. The adverse employment actions following the March 1, 2000 meeting could, for example, be resolved to establish an increased or decreased probability of hostility proscribed by Sec. 111.70(3)(a)3, Stats. I am convinced, however, that this does not clarify the underlying disputes and risks undercutting the contractual forum. The statutory and contractual dimensions of the two proceedings are distinguishable. As is discussed below, credibility determinations arguably central to the grievances are not significant here. More significantly, although Raddatz's personal circumstances are the pivot point of statutory issues, the rights involved are more institutional in nature, turning on any individual municipal employee's right to mutual aid and protection. In contrast, Raddatz's personal circumstances are the pivot point of the grievance arbitration process.

## THE PARTIES' POSITIONS

### The Union's Brief

After an extensive view of the evidence and an analysis of the application of the evidence to the grievances, the Union argues that Respondents violated Secs. 111.70(3)(a)1 and 3, Stats. Proving the latter allegation demands evidence meeting four elements of proof, well established in Commission case law. More specifically, the Union notes that Raddatz's filing of a grievance is concerted activity of which the County was well aware.

A long pattern of Respondent conduct establishes the anti-union hostility that is the third element of proof. Schmitt and Schepp interrogated Raddatz concerning the grievance on March 1, then acted to wall Raddatz off from her Union representative. After this, Respondents started to impose formal discipline on Raddatz, even though the asserted

violations predated the filing of the grievance. Beyond this, Respondents consistently acted to thwart "every right which Ms. Raddatz sought to exercise under the labor agreement", including her attempt to post for another position and to take advantage of sick leave donation. Ultimately, Respondents discharged Raddatz, thus effectively terminating her assertion of protected rights.

Unlike Sec. 111.70(3)(a)3, Stats., Sec. 111.70(3)(a)1, Stats., does not require proof "that the employer acted out of hostility to the union." Rather, the Union must "merely show that the employer's action would have a reasonable tendency to inhibit or limit employees in the exercise of their protected rights." The evidence leaves "little doubt that a reasonable person would view the Employer's actions as retribution against the grievant for having attempted to exercise her rights." To permit such action would allow Respondents to create an environment in which any employee knew that any "challenge to management authority in the Accounting Department will be dealt with harshly."

The Union seeks that the Commission determine that Respondents violated MERA, and order the County to reinstate Raddatz to her former postion; offer her the Accounting Assistant position in the Treasurer's office; make Raddatz whole, without any mitigation, for "all losses suffered as a result" of Respondents' conduct; and cease and desist from violating the statutory rights of its employees.

**The Respondents' Brief**

The complaint "is downright frivolous", as is the grievance on donated sick leave and the posting grievance. The discharge grievance is the sole point raised by the Union that has even arguable merit. After an extensive review of the evidence and its application to the non-discharge grievances, Respondents contend that the complaint "simply recites the three grievances". The only possible exception turns on the allegations concerning the March 1, 2000 meeting.

Since the evidence demonstrates that the complaint was being drafted in March, the posting dispute and sick leave donation dispute have no bearing on an analysis of the alleged intimidation attributed to the March 1 meeting. More significantly, the evidence fails to establish even a hint of wrongful coercion. Respondents set the March 1 meeting to try to clear the air regarding the events that prompted the February 25 grievance. When Raddatz requested Union representation, Schmit and Schepp agreed. That they hoped to address personal rather than disciplinary issues falls short of wrongful interrogation or intimidation. There is, in sum, "no credible evidence that the County attempted to prevent Ms. Raddatz from exercising her Union rights, or in any way tried to deprive her of Union representation during the March 1, 2000 meeting, event though it was not disciplinary in nature".

The absence of evidence of wrongful intent or action demands that the complaint be dismissed. Of concern to resolution of the complaint, however, is the "shotgun" approach of the Union's allegations. Respondents caution that the Union's "strategy to toss a number of claims into the mix in hopes of subconsciously convincing the eventual arbitrator that a finding of a violation by the County on 'just this one claim' will be an 'easy compromise' to this matter.

Respondents conclude that the only appropriate result of the complaint is that it "should be dismissed summarily."

## DISCUSSION

### The Alleged Violation of Sec. 111.70(3)(a)3, Stats.

This allegation is central to the Union's statutory attempt to restore Raddatz's employment. Sec. 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to "encourage or discourage a membership in any labor organization by discrimination in regard to . . . tenure or other terms or conditions of employment." To prove a violation of this section the Association must, by a clear and satisfactory preponderance of the evidence (see Sec. 111.07(3), Stats., made applicable by Sec. 111.70(4)(a), Stats.), establish that: (1) Raddatz was engaged in activity protected by Sec. 111.70(2), Stats.; (2) Schmit or Schepp was aware of this activity; (3) Schmit or Schepp was hostile to the activity; and (4) Schmit or Schepp acted, at least in part, based upon hostility to Raddatz's exercise of protected activity. MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 WIS.2D 540 (1967), which is discussed at length in EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985).

The existence of activity protected by Sec. 111.70(2), Stats., is crucial to the first two elements, and to the operation of Sec. 111.70(3)(a)1, Stats., which is discussed below. For purposes of addressing the alleged violation of Sec. 111.70(3)(a)3, Stats., the existence of the first two elements can be taken as a given. This focuses the allegation on whether Schmit or Schepp acted, at least in part, to Raddatz's exercise of protected activity.

There is no persuasive evidence of statutory hostility on Schepp's or Schmit's part toward Raddatz. The inclusion of "statutory" is significant here. Arguably, long-simmering hostility is the cornerstone of the relationship between Raddatz and Schmit. Hostility in the statutory sense, however, does not involve the characterization of an inter-personal relationship. Rather, it involves an aggressive response by an employer to encourage or discourage membership in a labor organization. However the termination grievance is resolved, there is no persuasive evidence of statutory hostility on Schepp's or Schmit's part. The ultimate resolution of the factual issues posed in the Findings of Fact cannot obscure the existence or the source of the deterioration in the working relationship between Raddatz and her supervisors. That

deterioration can not be meaningfully traced to Raddatz's attempts to use Lyons as a representative or to Raddatz's assertion of a grievance. Rather, it must be traced to Schmit's and Schepp's personal and performance-based concerns with Raddatz's behavior.

The contractual validity of those concerns is posed by the termination grievance. The concerns are, however, precisely those set out in the termination letter of April 13, 2000. Whatever is said of Schepp's or Schmit's conduct toward Raddatz, it was not a pretext masking their aggressive intent to discourage Raddatz from active Union participation. Throughout the deterioration in Schmit's and Raddatz's relationship, Schmit and Schepp acted solely on their perception of Raddatz's work-based misconduct. Thus, the evidence does not establish a violation of Sec. 111.70(3)(a)3, Stats.

**The Alleged Violation of Sec. 111.70(3)(a)1, Stats.**

Sec. 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer to "interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed" by Sec. 111.70(2), Stats. Those rights are "to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

An independent violation of Sec. 111.70(3)(a)1, Stats., requires that the Union meet, by a clear and satisfactory preponderance of the evidence the following standard:

> Violations of Sec.111.70(3)(a)1, Stats. occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. . . . If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere. . . . CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. 25849-B (WERC, 5/91) AT 11-12.

The CEDAR GROVE standard distinguishes those cases in which employer intent is not relevant from those in which it is. Independent violations of Sec. 111.70(3)(a)1, Stats., look beyond evidence of employer intent due to the significance of the public policy declared in Sec. 111.70(6), Stats., and implemented through Secs. 111.70(2) and (3), Stats. The chilling of the exercise of rights protected by Sec. 111.70(2), Stats., thus can assume a significance independent of an employer's desire to interfere in the exercise of those rights.

Threshold to the application of this standard is employee exercise of activity protected by Sec. 111.70.(2), Stats. Raddatz filed Grievance No. 00-AC-002 concerning her deteriorating relationship with Schmit, and met with Schmit and Schepp, on March 1, 2000, to air out the concerns that prompted the grievance.

The grievance filing and subsequent meeting constitute lawful, concerted activity protected by Sec. 111.70(2), Stats. In VILLAGE OF WEST MILWAUKEE ET. AL, DEC. NO. 9845-B (WERC, 10/71) AT 21, the Commission stated:

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

In MONONA GROVE SCHOOL DISTRICT ET. AL, DEC. NO. 20700-G (WERC, 10/86) AT 24, the Commission stated a more restrictive view, positing the "filing and processing of a grievance" as presumptively concerted activity. The presumption could be rebutted if the grievance did not advance "colorable claims" or if "a strong showing" was made "to the effect that the grievance is wholly unlawful in manner of presentation or purpose."

In the unique context of this complaint, the March 1 meeting, considered against the background of the filing of Grievance No. 00-AC-002, establishes the exercise of concerted activity. Whatever doubt may surround the merit of Grievance No. 00-AC-002, or its status after McClean's February 25 letter, cannot obscure Raddatz's attempt to use the Union for her protection during the March 1, 2000, meeting.

At a minimum, the grievance set the background to the March 1 meeting. Schepp called the meeting to air out the long-simmering tension between Schmit and Raddatz. Raddatz agreed to the meeting. As envisioned by all, the meeting was to clear the air of a conflict vexing to each participant. As such, the meeting had no bearing on Raddatz's or the Union's assertion of protected activity. However, as the meeting progressed, it grew increasingly contentious, eventually prompting Raddatz to leave, after having either requested Lyons' presence, or questioned the need for it.

This request and its aftermath pose issues of protected activity. Commission case law establishes that that an employe may refuse to participate in an investigative interview without Union representation where the employe reasonably believes that the interview may lead to discipline, see CITY OF MILWAUKEE, DEC. NOS. 14873-B, 14875-B AND 14899-B (WERC, 8/80), which incorporates NLRB V. WEINGARTEN, INC., 88 LRRM 2689 (1975).

It is not necessary to address witness credibility to establish that Raddatz could reasonably perceive that the March 1 meeting had disciplinary implications. It is undisputed that Raddatz left Schepp's office after either specifically or effectively requesting Lyons, and that Schepp and Schmit followed Raddatz to Raddatz's office to continue the meeting. Nor is it disputed that Raddatz offered no meaningful participation in that portion of the meeting conducted at her desk. The closure Schmit and Schepp insisted on had disciplinary overtones. Schmit's notes of the meeting reflect that, prior to Raddatz's departure from the Schepp's office, Schepp had indicated

to Raddatz "(n)o reprimands or direction (Raddatz) had received from (Schmit) had been unwarranted." This is reasonably perceived as a statement of compliance with the early steps of progressive discipline. Schmit's notes also establish that, after following Raddatz to her desk, Schepp stated "maybe (Raddatz) needed to look for a new position elsewhere." This statement is strikingly similar to the remedial request stated in Grievance No. 00-AC-002. The crucial difference is that Schepp has the disciplinary authority to deliver on it. Her statement thus is reasonably perceived as a statement of the likelihood of further action under progressive discipline. Schmit's notes underscore her own concern with the disciplinary significance of Raddatz's conduct. On a meeting that was called for non-disciplinary purposes, her notes close on a disciplinary note:

> Erica subsequently left without speaking to anyone or opening her office door. No one is aware of exactly what time Erica exited the workplace. She left her work undone.

Schmit's and Schepp's testimony establish that McClean excused Raddatz from the work site. By glossing over the fact that Raddatz was excused to leave, the closing reference underscores the depth of her feeling that Raddatz's conduct had disciplinary significance.

In sum, the filing of Grievance No. 00-AC-002 presumptively establishes the exercise of activity protected by Sec. 111.70(2), Stats., and sets the background to the meeting of March 1, 2000. As originally envisioned, that meeting posed no statutory issue. Nor does the contentiousness of the meeting pose, standing alone, a statutory issue. However, when Raddatz left the meeting, she could reasonably perceive that discipline was either imminent or envisioned by Schepp and Schmit. Her request for Lyons thus acquired statutory significance. It is not necessary to look beyond Schmit's or Schepp's testimony and related notes to establish that disciplinary overtones predominated in that part of the meeting that occurred after Raddatz left Schepp's office.

The disciplinary significance of Raddatz's work performance is ultimately a matter to be decided through the termination grievance. Here, however, the issues are whether Raddatz's filing of the February 21 grievance and her request for Lyons' presence on March 1 constitutes concerted activity and, if so, whether Schepp's and Schmit's conduct had a reasonable tendency to interfere with it.

Schmit's and Schepp's insistence on continuing the meeting at Raddatz's desk, then making statements reasonably perceived to have disciplinary significance had a reasonable tendency to interfere with Raddatz's protected right to grieve discipline or to enlist the presence of a Union representative in a meeting having disciplinary significance. However well intentioned the March 1, 2000 meeting may have been when it started, it reached a point beyond

which any reasonable claim could be made that the air was being cleared. Schepp and Schmit questioned the viability of Raddatz's continued employment after Raddatz had literally made a plea for help, and without regard to the existence of the labor agreement or County policies governing discipline. Whether Raddatz could or should have been disciplined for performance preceding this meeting cannot obscure that the meeting assumed extra-contractual significance. An employee could reasonably perceive the meeting put the viability of the contract's or the Union's protection into question. The meeting thus did have a reasonable tendency to interfere with employee exercise of rights protected under Sec. 111.70(2), Stats.

This conclusion is institutional in nature. The individual and contractual significance of Raddatz's work performance must be left to the grievance procedure. The Order entered above is institutional in nature, addressing the rights of unit employees to reflect the collective nature of the rights involved. The Order does not address concerted activity other than that noted above. The Union has asserted that a series of coercive events followed the March 1, 2000 meeting, including the events subject to the three grievances that must be addressed in arbitration. There is, however, no persuasive evidence that those events can be reasonably perceived as anything other than performance based controversies rooted in the conflict between Raddatz's and County supervisors' views of Raddatz's performance as an employee. That the controversies followed the March 1, 2000 meeting is without statutory significance, since they track work performance-based concerns rather than Raddatz's exercise of protected activity.

Before closing, it is necessary to touch upon other points posed by the parties' arguments. McClean's letter of February 25, 2000, does not undercut the conclusions reached above. By its terms, the letter fails to make Grievance No. 00-AC-002 a "non-grievance." The letter asserts no more than that the "County will take no further action on this grievance at this time." This is something less than a statement of closure. More significantly, the issue is not whether Raddatz has a right to process a meritorious grievance, or whether the grievance was pending during the March 1 confrontation. Rather, the concerted activity involves events surrounding her use of the grievance procedure. This poses a broader point than the status of Grievance No. 00-AC-002 in late February of 2000. That Raddatz may not have artfully drafted the form cannot obscure that the concerns she pointed to were the concerns that prompted the March 1, 2000 meeting. As noted above, that meeting strayed beyond an inter-personal dispute into matters of disciplinary significance, and did so after Raddatz effectively requested a Union representative. Even though the grievance, standing alone, probably meets the "colorable claim" standard set in MONONA GROVE, this is not the source of its significance. Its role in prompting the March 1 meeting is not in dispute, and that meeting is the focal point of the concerted activity. McClean's letter has no affect on Raddatz's right to Union representation at a meeting of disciplinary significance.

Nor is the precision of Raddatz's request for Lyons a determinative point. It is impossible to recreate her exact words. Under any view of the testimony of the three participants, it is apparent Raddatz sought to remove herself from a meeting she perceived as a

personal assault. That the meeting continued and that it included statements questioning the viability of Raddatz's employment are traceable to Schepp and Schmidt.

The parties' dispute concerning the admissibility or the weight of the videotape has no bearing on statutory issues. This reflects the conclusion that the course of conduct following March 1 poses only contractual issues and the conclusion that the statutory violation posed by the March 1 meeting does not turn on witness credibility. Thus, the determination of that dispute turns on the resolution of the three grievances to be decided in arbitration.

**The Alleged Violation of Sec. 111.70(3)(c), Stats.**

This section makes it a prohibited practice "for any person to do or cause to be done on behalf of or in the interest of municipal employers . . . any act prohibited by par. (a) . . ." The only possible area of argument in light of the conclusions reached above concerns the operation of Sec. 111.70(3)(a)1, Stats. It is not apparent how the Union sees this provision to apply here. To the extent the alleged violation underscores the Union's naming of Schmit and Schepp as individual respondents, it is without merit. Schmit and Schepp acted as County employes, and thus have no individual responsibility under the operation of this section.

Dated at Madison, Wisconsin this 15th day of November, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

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