STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BARBARA FINKELSON, Complainant,

vs.

CLARK COUNTY, Respondent.

Case 117
No. 61001
MP-3805

Decision No. 30361-A

Appearances:

Mr. Brian G. Formella, Anderson, O'Brien, Bertz, Skrenes & Golla, Attorneys at Law, 1257 Main Street, P.O. Box 228, Stevens Point, Wisconsin 54481-0228, appearing on behalf of Barbara Finkelson.

Ms. Victoria L. Seltun, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Clark County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On March 15, 2002, Barbara Finkelson filed a complaint of prohibited practice alleging that Clark County had violated Sec. 111.70(3), Stats., by terminating her employment for asserting rights protected by Sec. 111.70(2), Stats. After the failure of informal attempts to resolve the matter, the Commission, on May 31, 2002, appointed Richard B. McLaughlin, a member of its staff, to act as Examiner. Hearing on the matter was set for July 24, 2002, and on June 10, 2002, rescheduled to August 19, 2002. On July 18, 2002, the August 19, 2002, hearing was postponed. On August 19, 2002, hearing was scheduled for November 6, 2002. On August 28, 2002, Clark County filed its answer to the complaint. On November 1, 2002, hearing was rescheduled to November 21, 2002. The November 21, 2002 hearing date was postponed, and on December 9, 2002, rescheduled for January 15, 2003. Hearing was held on

January 15, 2003 in Neillsville, Wisconsin. At the start of the hearing, I requested that Complainant further specify the allegations, and the Complainant responded by requesting to amend the complaint to allege County violation of Secs. 111.70(3)(a)1 and 3, Stats. The County did not object and I confirmed the amendment of the complaint on the record.

During the course of the hearing and a conference call to schedule further hearing, I voiced concern to the parties that the Union representing the bargaining unit including the position occupied by Barbara Finkelson might be a necessary party to the litigation. I summarized my concern and conclusion on the point in a letter to the parties dated January 21, 2003, which states:

> As I have noted during the hearing and our conference call on January 17, 2003, I have concerns regarding whether the Union should be afforded formal notice of the complaint . . . My concerns stem from the language of Sec. 111.07(2)(a), Stats., which is applicable to this proceeding under Sec. 111.70(4)(a), Stats. Sec. 111.07(2)(a) Stats., provides:
>
> . . .
>
> > The Commission may bring in additional parties by service of a copy of the complaint.
>
> My concerns relate to the . . . quoted sentence, since I agree with you that the Union's arguable interest in the matter does not demand that it be made a party. The Union's President's testimony establishes that the Union is aware of the complaint. Thus, my concerns are whether I should give the Union formal notice of the complaint to complete the procedural record.
>
> As I left you at the close of the conference call, I stated that I intended to send the Union a letter advising them of the proceeding, advising them that further hearing is being set and that if they did not choose to reply, the hearing process would continue. I did not intend to serve a complaint with the letter to make the Union a party. Rather, I sought only to give them the formal opportunity to respond.
>
> After the conference call, prior to mailing the letter, I researched the point. I did not find authority that was on point. I did, however, find a case that was instructive, and that changed my mind regarding the letter to the Union. The case is CITY OF WAUWATOSA, DECS. NO. 19310-C, 19311-C, 19312-C (WERC, 4/84). In that case, the Commission reviewed an Examiner's decision, DEC. NO. 19310-B, 19311-B, 19312-B (Crowley, 11/82), that concerned three

> firefighters discharged during a probationary period. The Union was not a party to that proceeding, which included alleged violations of Secs 111.70(3)(a)3 and 5, Stats., and Sec. 111.70(3)(b)4, Stats. The matter was appealed through the judicial system, producing an unpublished Court of Appeals decision, (District I, No. 85-2201, 7/86). The Supreme Court denied a petition to review the matter on November 4, 1986.
>
> None of the decision makers specifically addressed the union's non-participation in the litigation. However, the litigation concerned the interpretation of a labor agreement negotiated by a fire-fighters' union, and addresses an allegation that it breached the agreement. Interestingly, its local president testified during the litigation. The Commission specifically addressed evidence of bargaining history. If the absence of the union in that proceeding did not rise to the level of a Commission or judicial concern, then I am convinced there is no basis for me to send the letter I had originally intended to send.
>
> I write this letter in some detail so that the concerns I raised off-the-record can be brought onto the record. Feel free to comment if you wish. If not, this letter will serve to memorialize the point.

Neither party responded to this letter. Hearing was scheduled for January 28, 2003, but the court reporter did not receive the hearing notice until after the date set for hearing, and attempts to secure a substitute proved unsuccessful. Attempts to informally resolve the matter on that date proved unsuccessful and a final day of hearing was set for February 12, 2003. Hearing was conducted on February 12, 2003, in Neillsville, Wisconsin. Jennifer T. Mitchell filed a transcript of both days of hearing with the Commission on March 10, 2003. The parties filed briefs and reply briefs by April 18, 2003.

FINDINGS OF FACT

1. Barbara Finkelson (Complainant), is an individual who resides at N14252 County Road O, Withee, Wisconsin 54498.

2. Clark County (the County), is a municipal employer which maintains its principal offices at 517 Court Street, Neillsville, Wisconsin 54456. The County's executive authority resides in its elected Board of Supervisors. Ralph Landini is the Chairman of the County Board of Supervisors. Charles Rueth is its Vice Chairman. Barbara Petkovsek is the County's Director of its Department of Administration. Petkovsek reports to Landini, and the directors of the County's departments report to Petkovsek. Colleen Johnson is the Director of the County Child Support Agency.

3. Clark County Courthouse Employees, Local 546-B, AFSCME, AFL-CIO (the Union) is the exclusive collective bargaining representative of a bargaining unit of roughly ninety County employees employed at the Courthouse, including those in the Child Support Agency classified as Child Support Specialist I and II as well as the Program Assistant II/Receptionist. The Union and the County are parties to a collective bargaining agreement, in effect by its terms for 2001, 2002 and 2003, which contains, among its provisions, the following:

ARTICLE IV - SENIORITY

. . .

> 4.3 All new employees shall serve a probationary period of twelve (12) months or 2080 hours for part-time employees, during which time they may be discharged by the county without recourse to this Agreement or the grievance procedure. . . .

The County ratified the 2001-03 agreement in February of 2001. The agreement included a three percent increase, effective January 1, 2001, for all wage rates, and provided a wage reopener for 2002 and 2003. The wage schedule for the 2001 contract year consists of three steps: "Start"; "6 Months"; and "18 Months." For the position of Child Support Specialist II, the wage schedule reads thus:

	Start	6 Months	18 Months
Child Support Specialist II	13.07	13.92	14.79

4. The wage reopener reflected the pending status of a classification and compensation study. Carlson Detmann Associates, LLC (Carlson) performed the study under a cooperative agreement entered into between the Union and the County late in 2000. Broadly speaking, the agreement sought that Carlson define an objective method to determine relative pay levels within the bargaining unit represented by the Union. The study sought to combine positions that were highly similar in duties, responsibilities and skill levels into a single classification, and then to establish pay grades for the classifications. The study sought to establish equity within the positions represented by the Union based on internal worth, and did not address the relationship of County pay grades with non-County positions. The Union and the County agreed to the study, in significant part, to address on a systematic level what had in prior rounds of bargaining been addressed on an ad-hoc basis in response to continuing reclassification requests. Carlson used a job analysis procedure based on written questionnaires and interviews. The process included ongoing dialogue with the County and the Union, as well as the publication of preliminary conclusions that Carlson made subject to an appeal procedure invoked by employees who did not believe the preliminary conclusions

accurately reflected the demands of their position. The end point of the process was to be Carlson's recommendation of a salary schedule. The Union and the County directed Carlson to structure its salary recommendations to as large a degree as possible on the existing salary progression, and to make recommendations that did not cut any existing employee's wage rate. The conclusions of the study were not binding, but subject to collective bargaining.

5. The County hired Complainant on January 17, 2001, as a Child Support Specialist II. Complainant submitted a resume, a job application and submitted to a testing and interview process. Johnson hired Complainant, without oversight by other County personnel or Board members. As part of the orientation process, the County provided Complainant with a copy of a document entitled "Clark County Personnel Policies January 1, 2001" which includes, among its provisions, the following:

> **3.10 PROBATION**
>
> All newly appointed employees shall serve a probationary period of one (1) year during which they may be discharged without recourse. The department head, with prior approval of the Personnel Committee, may extend the probationary period for up to an additional six months for any employee. Such extensions must be based upon substantial and documented reasons. (See Section 3.11 - Performance Evaluations) . . .
>
> **3.11 PERFORMANCE EVALUATIONS**
>
> Employees shall be retained based upon the adequacy of their performance. Each employee's job performance shall be evaluated by their department head/supervisor periodically but on no less than an annual basis . . .

The County trained Complainant by having her observe another Child Support Specialist II, Gail Jasmer, as she performed her work. This took roughly three weeks, when Complainant began to process files under the supervision of Jasmer or another Child Support Specialist II, Lori Schultz. This process continued for roughly eight weeks, when Complainant began to process files on her own. Each Child Support Specialist II maintains a caseload averaging roughly three hundred files. Throughout Complainant's probationary period, Johnson would periodically ask Complainant how her learning process was going.

6. By the end of January, 2001, Carlson had completed the questionnaire portion of its study. By early March of 2001, Carlson had completed draft findings and recommendations for what it described to the County and the Union as "an internally equitable pay structure reflecting the appropriately measured relative worth of each classification." At some point after this, Carlson prepared classification specifications to distinguish pay grades

and to slot positions into classifications within those pay grades. In an appeal form dated May 11, 2001, all the employees then classified as Child Support Specialist II, including Complainant, filed an appeal asserting that Carlson had incorrectly graded the position because "key areas were missing and/or insufficiently described." Johnson reviewed the documentation, and formally stated that the representations made by the employees were factually accurate. Although not required to state a position, Johnson added a memo to the appeal form stating, "I fully expected to see this position in the top grade range." In a memo to the employees dated September 5, 2001, Carlson stated its conclusion that the position should be upgraded to pay grade 13. Carlson published its final report on September 5, 2001. The Study recommended the creation of pay grades from Grade 5 to Grade 14, with Grade 14 being the highest ranked and Grade 5 the lowest. The study recommended the following for Pay Grade 13:

	Start	6 Months	18 Months
Pay Grade 13	14.33	14.96	15.58

7. After the publication of the Carlson study, the Union and the County bargained its impact on the creation of a wage schedule. On December 4, 2001, they reached tentative agreement on a wage schedule to cover 2002 and 2003. The Union set December 10, 2001 as the date to ratify the tentative agreement, and the County Board set December 20, 2001 as the ratification date. Prior to its ratification vote, the Union distributed a summary of the tentative agreement to its members under a cover letter dated December 4, 2001. This document is referred to below as the Ratification Document. The cover letter states:

Dear Local 546B Union Member:

Attached you will find the following:

1st Sheet: A listing of all Local 546B union positions at the 18 month level of the 2001 contract, then 3% on the 18 month rate for 2002 and another 3% on the 18 month rate for 2003.

2nd Group of Sheets: The County's proposal to our union. Please refer to the color coded key on the top of the sheet. They have listed our current title & wage and proposed title & wage for 2002 and 2003.

Some positions get the full amount in January 2002 and 2003 while others have step increases. For example: with the County's proposal the deputy

positions get step increases in January and July 2002 and again in January and July 2003.

Please be sure to review the **overall** percentage increases for 2002 and 2003.

Review this materials (sic) before the union meeting on **MONDAY, DECEMBER 10**, 5:15 P.M. If you have any questions, write them down and bring them to the union meeting. At this meeting we will discuss the County's proposal and vote on their proposal as well as election of officers. **Please attend this meeting.**

If we accept the County's proposal, there will be no re-classes until after 2003 and they will follow the Carlson Study.

For the position of Child Support Specialist II, the "1st Sheet" reads thus:

JOB TITLE	18 MONTHS 2001	18 MONTHS 2002	18 MONTHS 2003
	Current Rate	3%	3%
Child Support Spec II	14.79	15.24	15.7

The "2nd Group of Sheets" begins with a document headed "Clark County Costout of Courthouse Reclassification." This document is a three-page spreadsheet, containing data for the individual employees in the bargaining unit represented by the Union. At the head of the first of these three pages is a box headed "ASSUMPTIONS" that states:

1 All employees work 40 hours/week 2,080 hours per year.
2 For 2002 initial schedule placement, all employees are placed on the lowest step that provides an increase.
3 Employees who would normally move a step but whose schedule placement provides more than a 3% increase remain at the same step all year.
4 Employees whose current wage rates are more than what would be provided by placement on the schedule receive 20 (cents) on Jan. 1 of each year.

5 The 2001 wage rates do not include the 75 (cents)/hour adjustment for abnormal work schedules. For 2002, forestry workers shall receive a wage differential of 95 (cents)/hour and for 2003, $1.00/hour.

The three-page spreadsheet consists of three sections. The content of the first section, for the position title of "Child Support Spec II" reads thus:

2001			
Employee	Wage	Annual Wage	Prop Grd Pts
Averill, J	14.79	30,763	13
Jasmer, G	14.79	30,763	13
Finkelson, B	14.79	30,763	13
Schultz, L	14.79	30,763	13

The second section reads thus:

Proposed 2002 (see attached schedule)							
Employee	1/1 Step	1/1/02 Wage	$ Incr.	% Incr.	7/1 Step	7/1/02 Wage	Annual Wage
Averill, J	3	15.23	0.44	2.97%			31,678
Jasmer, G	3	15.23	0.44	2.97%			31,678
Finkelson, B	3	15.23	0.44	2.97%			31,678
Schultz, L	3	15.23	0.44	2.97%			31,678

The third section reads thus:

Proposed 2003							
Schedule Increase =							**3.00%**
Employee	1/1 Step	1/1/02 Wage	$ Incr.	% Incr.	7/1 Step	7/1/02 Wage	Annual Wage
Averill, J	3	15.69	0.46	3.02%			32,635
Jasmer, G	3	15.69	0.46	3.02%			32,635
Finkelson, B	3	15.69	0.46	3.02%			32,635
Schultz, L	3	15.69	0.46	3.02%			32,635

The final page of the Ratification Document consists of two tables. One table is headed "Proposed 2002 Pay Structure" and the other is headed "Proposed 2003 Pay Structure". Each states hourly rates for Pay Grades 5 through 14, at each of three steps: "Start", "6 mos.", and "18 mos.". The 2002 table states the following for Pay Grade 13:

Start	6 mos.	18 Mos.
14.01	14.62	15.23

The 2003 table states the following for Pay Grade 13:

Start	6 mos.	18 mos.
14.43	15.06	15.69

The Union met on December 10. Local officials and the Union's business representative addressed questions, and discussed the assumptions of the Ratification Document, including that it assumed each employee was placed at the 18 Month Step, even if they had not actually reached the step. The Union officials noted during the meeting that for employees who had yet to actually reach the 18 Month Step, the Ratification Document would not state their actual wage rate. Not all unit employees were full-time or had actually reached the 18 Month step. Complainant was not a member of the Union and did not attend the meeting. Schultz is a Union member and attended the meeting. Schultz, and a majority of the voters at the December 10, 2001, meeting voted to ratify the tentative agreement. The County Board met on December 20, 2001 and, through Resolution #54-12-01, voted to ratify the tentative agreement. The resolution included the spreadsheet summarized above.

8. The assumptions of the Ratification Document sought to provide a basis of comparison between the 2001 salary schedule and the schedules that would supplant it for 2002 and 2003. Employee changes in positions, as well as employee movement through the steps of the 2001 wage schedule made up to date costing difficult, and the assumption that all employees were full-time and placed on the highest salary step sought to make schedule to schedule comparisons easier. After the ratification, the County had to make the wage schedule placements to generate each employee's wage rate. The Assumptions state the rules that governed placement on the 2002 schedule. The costing assumption that each employee was full-time and placed at the 18 month step played no role in actual placement on the 2002 wage schedule. Thus, those employees who could not be placed on the highest salary step would receive a lower rate than shown on the Ratification Document. Schultz, for example, would have received an 18 Month Step increase on January 31, 2002 had the 2001 wage schedule remained in effect. She and Johnson had completed the paperwork to secure the step by early January of 2002, prior to the creation of a spreadsheet showing the actual wage rate for each employee. When the County generated the spreadsheet showing individual employee's wages, Petkovsek knew it might cause concern among affected employees. She distributed the

spreadsheet and informed Department Heads, including Johnson, that she would make herself available to answer questions.

9. Schultz entered Johnson's office on or about Friday, January 11, 2002, after Johnson received the spreadsheet with individual wage rates. Johnson informed her of the existence of the spreadsheet, which is referred to below as the Spreadsheet, and of her willingness to answer questions about it. Schultz was visibly upset, and left Johnson's office with a copy of the Spreadsheet. Schultz left the office and discussed the Spreadsheet with Complainant. Johnson went to Petkovsek's office, and asked Petkovsek to explain the differences between the Ratification Document and the Spreadsheet.

10. The Spreadsheet is structured the same as the Ratification Document. The Spreadsheet's first section for the position title of "Child Support Spec II" reads thus:

2001			
Employee	Wage	Annual Wage	Prop Grd Pts
Averill, J	14.79	30,763	13
Jasmer, G	14.79	30,763	13
Finkelson, B	13.92	28,954	13
Schultz, L	13.92	28,954	13
Otto, S	13.07	27,186	13

The Spreadsheet's second section reads thus:

Proposed 2002 (see attached schedule)							
Employee	1/1 Step	1/1/02 Wage	$ Incr.	% Incr.	7/1 Step	7/1/02 Wage	Annual Wage
Averill, J	3	15.23	0.44	2.97%			31,678
Jasmer, G	3	15.23	0.44	2.97%			31,678
Finkelson, B	1	14.01	0.09	0.65%	2	14.62	29,775
Schultz, L	1	14.01	0.09	0.65%	2	14.62	29,775
Otto, S	1	14.01	0.09	7.19%			29,141

The Spreadsheet's third section reads thus:

Proposed 2003 Schedule Increase =							**3.00%**
Employee	1/1 Step	1/1/02 Wage	$ Incr.	% Incr.	7/1 Step	7/1/02 Wage	Annual Wage
Averill, J	3	15.69	0.46	3.02%			32,635
Jasmer, G	3	15.69	0.46	3.02%			32,635
Finkelson, B	2	15.06	1.05	7.49%			31,325
Schultz, L	2	15.06	1.05	7.49%			31,325
Otto, S	2	15.06	1.05	7.49%			31,325

The final page of the Spreadsheet consists of two tables. One table is headed "Proposed 2002 Pay Structure" and the other is headed "Proposed 2003 Pay Structure". Each states hourly rates for Pay Grades 5 through 14, at each of three steps: "Start", "6 mos.", and "18 mos.". The 2002 table states the following for Pay Grade 13:

Start	6 mos.	18 Mos.
14.01	14.62	15.23

The 2003 table states the following for Pay Grade 13:

Start	6 mos.	18 mos.
14.43	15.06	15.69

Differences in the wage rates between the Ratification Document and the Spreadsheet can be observed in other classifications, such as Program Assistant II/Receptionist and Bus Drivers.

11. Schultz and Complainant discussed the differences in the wage rate entries between it and the Spreadsheet, including employees in the Child Support Agency, as well as other departments, including the Bus Drivers. Johnson brought Petkovsek to the Child Support Agency to discuss the differences between the documents. Schultz, Complainant, Petkovsek and Johnson met at roughly 1:00 p.m. on the afternoon of January 11, 2002. Petkovsek attempted to explain the assumptions underlying the differences between the documents, and attempted to answer questions put forward by Schultz and Complainant. Complainant and Schultz were convinced that the differences were mistakes at best and possibly misrepresentations of fact. Complainant forcefully argued her position, contending that something had to be done to correct the mistake, since the ratification vote turned on votes from employees who either misunderstood or were misled about what was being voted on. She informed Petkovsek that the County should be held to a higher standard as a public entity, and that the County's failure to rectify the mistake was wrong. Petkovsek did not acknowledge

that mistakes had been made and did not offer to take any corrective action. She believed that Schultz and Complainant misunderstood the costing documents and that the problem was to address their misunderstanding. Complainant and Schultz interpreted the Spreadsheet to treat Schultz as if she was a new hire, and to wipe out her experience. After leaving the meeting, Schultz and Complainant spoke. Schultz stated she would call the Union's Business Representative sometime during the weekend to discuss the matter.

12. Prior to the start of the workday on the following Monday, Schultz informed Complainant that the Union's Business Representative was unwilling to take any corrective action regarding the differences between the Ratification Document and the Spreadsheet. Later that morning, Johnson informed Schultz that the Union's President, Jim Smagacz and its Vice President, George Arndt, would meet with Schultz concerning her concerns. Schultz or Johnson invited Complainant to the meeting, but Complainant could only attend part of it. Petkovsek, Johnson, Smagacz, Arndt, Schultz, Complainant, Jasmer, and the Program Assistant II/Receptionist, Lonnie Klump, attended at least part of the meeting. Schultz asserted that the ratification vote was based on factual misrepresentations and should have been postponed. She understood the Union's position to be that there may have been misunderstandings, but that the Union considered the ratification vote valid. Smagacz attempted to explain that the discrepancies pointed out by Schultz and Complainant reflected that the Ratification Document, for costing purposes, gave employees credit for a step some of them would not earn until after initial placement on the revised wage schedule. He understood that the differences between the Ratification Document and the Spreadsheet could be perceived as inaccuracies, but he took the position that the voting members had been fully informed of the assumptions underlying the Ratification Document and voted knowing what they were voting on. He perceived Complainant to become increasingly more upset the more he attempted to explain the source of the inaccuracies she and Schultz complained of. He also perceived that there was no explanation he could offer her that either would find satisfactory. He informed Schultz that she had the right to file a grievance, and she left the meeting considering whether she and other employees should band together and file a group grievance. Schultz, Jasmer and Complainant actively discussed this possibility at sometime following the close of this meeting. After the meeting with the Union officials and the subsequent meeting with Schultz and Jasmer, Complainant concluded that the Union would not assist them, and that the Union had attempted to place responsibility on Schultz for grieving the matter in a fashion that would suspend the County's implementation of the revised wage schedule. Complainant advised Schultz that if the decision were Complainant's to make, she would pursue the matter, since something wrong had happened.

13. On the evening of Monday, January 14, 2002, Complainant called Rueth, whom she had known for some time. Complainant explained that the Ratification Document could not be reconciled to the spreadsheet she understood to reflect the actual wage schedule. She asserted that implementing the new wage schedule rested on a joint Union/County impropriety.

Rueth found a copy of a spreadsheet, and compared certain figures on it to those recited by Complainant from the two documents in her possession. They could not reconcile the total cost figures from the documents. Rueth indicated that he would look into the matter, and did discuss the differences with Petkovsek, who discussed with him the impact of employee movement through the salary schedule on the costing spreadsheets. Rueth took no further action on the matter.

14. During the morning of Wednesday, January 16, 2002, Complainant met Jill Opelt, a County employee from another department, who asked if rumors that the revised wage schedule had problems were true. After some discussion of the point, each returned to their department. Opelt later phoned Complainant to see if Complainant could supply her with a copy of the Spreadsheet. Complainant, Jasmer and Schultz supplied the copy for Opelt during their morning break. Opelt brought two other employees from the County Community Services Department, including the wife of the Union President. The employees discussed the differences between the Ratification Document and the Spreadsheet for roughly fifteen minutes. Complainant understood one of the Community Services employees to take the position that nothing improper had occurred and the matter should be dropped. Complainant responded that the differences reflected something fundamentally wrong in the documents. Schultz left the meeting when she became convinced the discussion served no purpose. Jasmer concluded that the Community Services employees had no interest in pursuing the matter.

15. At roughly fifteen minutes before the close of the workday on January 16, 2002. Johnson entered Complainant's office, closed the door, and handed her a letter, which states:

> Effective immediately your employment with Clark County is terminated; the county will however be meeting with the union to determine if an extension on your probationary period may be warranted.
>
> You will be notified if you are to return to work on an extended probationary period.

Petkovsek contacted Smagacz to determine if the Union would agree to an extension of Complainant's probation period. The collective bargaining agreement is silent on the point, but the Union has agreed to extend a probationary period in at least one prior termination. Smagacz informed Petkovsek that he could not make the decision on his own, but would call a meeting of the Union's Executive Board. He contacted the Union's Business Representative and called a meeting of the Executive Board on January 17. The Board voted not to agree to extend the probationary period. Smagacz informed Petkovsek of the vote in a memo dated January 17, 2002. Johnson confirmed this in writing in a letter to Complainant dated January 17, 2002.

16. Johnson made the termination decision after being summoned to a meeting with Petkovsek, Landini and another County Board member on January 16, 2002. The Board members and Petkovsek voiced concern regarding Complainant's conduct during one of the meetings concerning the differences between the Ratification Document and the Spreadsheet. They voiced to Johnson their concern that Complainant's conduct had been unduly aggressive, showing a lack of respect and a poor attitude toward County employment. They voiced the opinion that Complainant could pose long-term problems if retained as a County employee. Johnson understood their concern to reflect that she had to deal with Complainant's attitude problem, but the ultimate decision was hers to make. Johnson did not have, at the time of this meeting, reason to terminate Complainant based on her work performance. She never formally evaluated Complainant's work performance, and afforded Complainant no warning of the termination.

17. Johnson had concerns with Complainant's work performance during the probationary period. She was concerned that Complainant was unduly aggressive in her conduct toward other workers and training instructors. She was also concerned that Complainant was insufficiently attentive to the opinions of others in her handling of cases, and unreceptive to direction regarding office management and decorum. She did not, however, have any concerns that Complainant could not respond to instruction as of the time of Complainant's termination. After the termination, Johnson split Complainant's pending caseload in half, assigning one-half to Schultz and one-half to Jasmer. Schultz found no problems with Complainant's processing of the files. Jasmer, however, alerted Johnson to what she perceived as problems. Johnson, after reviewing the files, concluded that Complainant had, on several occasions, undertaken actions not authorized by a pending Court Order. Complainant also corresponded with a minor child concerning a parent's support efforts, in a fashion Johnson took to be fundamentally improper. Johnson concluded that had she more closely focused on Complainant's work performance she would have terminated Complainant for performance-based reasons during the probationary period. Petkovsek did not consult non-supervisory employees concerning Complainant's attitude toward work, toward management, or toward other County employees. Johnson made no such inquiry, except in her periodic discussions with Complainant and Jasmer concerning Complainant's progress during the probation period.

18. Complainant's good-faith expression of concern with the differences between the Ratification Document and the Spreadsheet during and around the meetings noted in Findings of Fact 11 and 12 is lawful, concerted activity. The differences between the Ratification Document and the Spreadsheet concerned employees in the Child Support Agency and other employees. No County employee and no member of the County Board was hostile, even in part, to the Complainant's exercise of lawful, concerted activity. Petkosek, while County Clerk, took Schultz as an employee from the Social Services Department as part of the settlement of a grievance filed to contest Schultz's termination. Complainant's termination on

January 16, 2002, was not motivated, even in part, by hostility toward her exercise of lawful, concerted activity. The circumstances surrounding Complainant's termination have a reasonable tendency to interfere with the exercise of lawful, concerted activity. Jasmer and Schultz were surprised by the termination, and Schultz considered its ramifications while determining whether or not to grieve the differences between the Ratification Document and the Spreadsheet.

CONCLUSIONS OF LAW

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

2. Complainant, while employed by the County, is a "Municipal employee" within the meaning of Sec. 111.70(1)(i), Stats.

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

4. County employees could reasonably perceive Complainant's termination on January 16, 2002, as retaliation for her lawful, concerted activity of expressing good faith concerns regarding differences between the Ratification Document and the Spreadsheet. This has a reasonable tendency to interfere in employee exercise of rights set forth in Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

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

ORDER

A. Those portions of the amended complaint alleging County violation of Sec. 111.70(3)(a)3, Stats., are dismissed.

B. Clark County, its officers and agents shall immediately take the following affirmative action that the Examiner finds are reasonably necessary to effectuate the purposes of the Municipal Employment Relations Act:

1. On Complainant's request, expunge from Complainant's personnel file(s) any reference to her termination on January 16, 2002, which characterizes the termination as involuntary or County-initiated, and amend the personnel file(s) to reflect her resignation from the position of Child Support Specialist II.

2. Take the action necessary to assure that inquiries from prospective employers of Complainant receive a response consistent with County personnel records as amended consistent with Paragraph B, 1.

3. Make Complainant whole by paying her an amount equal to reasonable attorney fees and costs she incurred to initiate the complaint and to process it through the completion of evidentiary hearing on February 12, 2003, plus interest at the rate established by Sec. 814.04(4), Stats.

4. Notify Courthouse employees represented for the purposes of collective bargaining by the Union by posting in conspicuous places on its premises where these employees work, copies of the Notice attached to this Order as Appendix A. The Notice shall be signed by an official of the County and shall remain posted for 30 days. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

5. Notify the Wisconsin Employment Relations Commission in writing within 20 days of the date of this Order as to what steps have been taken to comply with it.

Dated at Madison, Wisconsin this 20th day of May, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYEES

As ordered by the Wisconsin Employment Relations Commission and in order to effectuate the purposes of the Municipal Employment Relations Act, Clark County notifies our employees that:

1. As requested by Barbara Finkelson, we will expunge from her personnel file(s) any reference to a County-initiated termination on January 16, 2002, will amend her personnel file(s) to reflect her resignation from County employment, and will respond to inquiries from prospective employers consistent with those changes.

2. We will make Barbara Finkelson whole for the termination action to the full extent ordered by the Wisconsin Employment Relations Commission.

Dated this _____day of _____, 2003

On Behalf Of Clark County:

_____
Name

_____
Title

CLARK COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE PARTIES' POSITIONS

The Complainant's Brief

The Complainant contends that an evaluation of the record demonstrates that "the facts are simple and straightforward." There is "no serious expression by the County that Ms. Finkelson and Ms. Schultz were not engaging in concerted activity" when they voiced their concern "over the salary schedule disparities." Since Complainant was a municipal employee at the time, this conduct falls within the rights stated at Sec. 111.70(2), Stats. That Finkelson was not a union member at the time has no bearing on this.

That Complainant was fired for engaging in concerted activities violates Sec. 111.70(3)(a)1, Stats. An examination of the evidence establishes that it "is a transparent ruse for Clark County to suggest that it was (Complainant's) workplace attitude that caused her firing." More specifically, Complainant argues that a series of facts warrant the inference that the County acted to retaliate for Complainant's assertion of protected rights: County board members, not Complainant's supervisor, triggered the termination; the County never documented any work deficiencies on Complainant's part; the County gave no reasons for the termination; Complainant never engaged in "unruly" behavior in questioning the salary schedules; the County never sought the opinion of other employees concerning Complainant's "attitude" problem; and the timing of the termination decision. That Complainant was a probationary employee at the time of the termination decision has no bearing on the appropriate analysis of her statutory rights.

To remedy the County's violation, "the hearing examiner should order back wages, front wages, and reasonable attorney's fees as part of WERC's authority to fashion a remedy that is consistent with the purposes of the Municipal Employment Relations Act." That the County offered evidence of misconduct assembled after the termination should have no bearing on the remedial issue. The County timed the termination decision to prevent the application of just cause considerations, including progressive discipline, to Complainant. Nothing in the evidence indicates reason to doubt that Complainant was "educable and trainable."

Against this background, an award of front pay is particularly appropriate. Reinstatement poses the "tricky transaction" [citing Kempfer v. Automated Finishing Inc., 211 Wis. 2d 100, 564 (1997) and Avita v. Metropolitan Club of Chicago, Inc., 49 F.3d 1219, 1232 (7th Cir., 1995)] of reinstating Complainant to the final fifteen minutes of a probationary

period. An award of front pay "avoids the difficulty of reinstatement" and specifically addresses the "particularly egregious" nature of the County's conduct. The chill on the exercise of employee rights is a logical and a proven point. Complainant states the appropriate remedy thus: "(T)he hearing examiner should grant (Complainant) full back pay through the date of the hearing, front pay for six months, add credit for COBRA payments made by her and lost Wisconsin Retirement benefits that she would have received, minus unemployment compensation benefits and wages from her new employment."

The County's Brief

After a review of the evidence, the County contends that a just cause standard does not apply to the termination of a probationary employee. Commission and judicial precedent establish that such a termination is governed by a "rational basis" test. The County had a "legitimate business reason for terminating the Complainant's employment -- her personality style was perceived by management as arrogant, aggressive, overconfident and one which snubbed authority." Since the County views "attitude" as "a key element of a successful employee," and since the Complainant manifested a poor attitude toward supervision, it follows that the County had a rational basis for the termination.

The record will not support a conclusion that the Complainant was engaged in lawful, concerted activity "in protesting her placement on the salary schedule." Schultz, unlike the Complainant, voted in the ratification of the salary schedule change. Unlike the Complainant, Schultz had access to the grievance procedure, and was well-versed in its usage having benefited from the process when "she was spared termination and placed in a position in a different unit, at the same rate of pay." Schultz questioned the Union regarding the matter and voluntarily chose not to file a grievance.

Against this background, Complainant's claim to act on Schultz's behalf cannot be credited. Rather, "both individuals pursed the matter individually using their own resources and in their own respective manners." Complainant's attempts to muster the support of other employees failed, and Schultz declined to pursue the matter. In spite of this, and unwilling "to accept the County's interpretation of how the salary schedule costing worksheets worked," Complainant pursued the matter solely on her own behalf. Neither Schultz nor any other unit member "supported or condoned the Complainant's attitude and methods." Commission case law will not support labeling such actions "concerted", nor will it condone her disrespectful means of action.

The standards governing a claim under Sec. 111.70(3)(a)3, Stats., are well defined. Complainant was not engaged in concerted activity, and even if she had been, "the evidence overwhelmingly indicates that the County bore no hostility toward the Complainant for challenging her particular placement on the salary schedule." The County repeatedly answered

Complainant's questions, and arranged a meeting involving Union representatives. In each case, the meetings lasted until every question had been answered. The difficulty posed in this case is the timing of the decision, and that timing had nothing to do with proscribed hostility. Rather, the County was forced to act prior to the close of the probation period. Nor is there evidence that the County would have acted otherwise had the probation period ended on a different date. A review of the evidence establishes that the termination is rooted solely because "her aggressive and disrespectful attitude did not make her a good candidate for long-term County employment."

Nor will the evidence support a violation of Sec. 111.70(3)(a)1, Stats. The evidence shows neither a "threat of reprisal" nor any "promise of benefit" that might tend to interfere with lawful, concerted activity. Beyond this, the County had a valid business reason for the termination. The County did no more than weigh the benefits of retaining Complainant against the potential long-term risks of making her a permanent employee. This action cannot "reasonably be expected to chill employee exercise of protected rights." A review of the evidence establishes no "broader employee interest" in the dispute than Complainant's individual frustration with the implementation of the salary schedule changes. In sum, Complainant "was not terminated for the activity she engaged in, she was terminated for the manner in which she carried out this activity."

Should any violation of MERA be found, "reinstatement is not a viable remedy." A review of the evidence establishes Complainant treated her own caseload with the same willfulness as she did the costing sheets. "Gross misconduct" should not be rewarded, and the fact that proof of the misconduct was not discovered until after the termination should not be held against the County as a remedial matter. Beyond this, Commission case law will not support a request for attorney's fees and costs.

The Complainant's Reply Brief

After a review of mistakes within the County's statement of the facts of the complaint, the Complainant argues that the County's "lead argument is irrelevant and immaterial" since "her termination is wrongful *notwithstanding* her probationary status." MERA rights do not turn on probationary status. Beyond this, the County's attempt to base the termination on Complainant's attitude is a pretext.

More specifically, the County "has no documentation . . . that would even remotely suggest that . . . attitude was a concern during her period of probation. Petkovsek's testimony fails to establish conduct outside of the normal range of employee responses to disputes. That Johnson was not prepared to fire Complainant prior to the January 16, 2002 meeting is significant. No less significant is the attendance of Board members at that meeting. Neither attending Board member had work-based contact with the Complainant. The meeting

demonstrates that the "highest authorities in Clark County . . . lean on the direct supervisor to do their dirty work for them." Nothing in the record indicates the Complainant behaved in a belligerent or disrespectful manner.

The County understates the proven degree of concerted activity by obscuring that other employees invited Complainant's involvement. Beyond this, the dispute over the salary schedule affected a number of employees beyond Complainant.

The elements to a Sec. 111.70(3)(a)3, Stats., violation have been met. That Complainant was "more outspoken than the other employees in her expression of displeasure for the County's changing the schedule" falls short of establishing a poor work attitude. The evidence amply supports an inference that the County was hostile toward Complainant's exercise of protected activity. Nor will the evidence support an inference that the end of the probation period forced a decision on the County. Rather, the evidence establishes that the coincidence of Complainant's dispute with the end of her probation period afforded the County an opportunity to be rid of her. Viewed from an objective perspective, the action appears retributive.

Nor can the asserted poor attitude be bootstrapped into insubordination. There is no documentation to support the charge, and no evidence of any such conduct. More significantly, the termination had a proven chilling affect on other employees such as Schultz and Jasmer. Even in the absence of such proof, the chilling affect is apparent.

In light of the Commission's "substantial powers and remedies to effectuate the purpose of MERA, "the policy and purpose of MERA is best expressed and promoted by an award of back pay, front pay, costs and attorney's fees." The County's attempt to "mitigate a back pay award" through "after-discovered evidence of wrongdoing" cannot be credited. The absence of Union assistance to Complainant also complicates the issue of remedy, since "one reason why her probationary status may not have been extended is because the union itself felt that she was anti-union." The Fair Employment Act, by analogy, offers instructive guidance on the remedial issue. Since Complainant "has been acting . . . effectively as a private prosecutor" an award of attorney's fees and costs is appropriate. The Complainant concludes: "To maintain the purpose and policy of MERA, she should be awarded back pay, six months of front pay, costs, reasonable attorney's fees, as mitigated by the unemployment compensation she previously received."

The County's Reply Brief

After an extensive review of factual errors in the Complainant's brief, the County denies the assertion that it accepts Complainant's contention that she was engaged in lawful, concerted activity. In fact, once Complainant personally attacked Petkovsek, "her speech

became unprotected and (she) may be disciplined." Beyond this, Complainant's citation of MUSKEGO-NORWAY is inapposite. Unlike that case, Complainant was probationary. Beyond this, Complainant did not act with the backing of fellow employees on behalf of a union. Unlike MUSKEGO-NORWAY, there is no demonstrable chilling affect traceable to the employer's action.

Beyond this, the Complainant mischaracterizes the dispute. There were no "discrepancies" or mistakes within the salary schedule. Rather, it "remained constant, as approved by the Union and all bargaining unit members."

Nor will the record support the inferences sought by Complainant. Landini and Petkovsek did not play a determinative role in the termination decision, which was forced on them by the closing of the probation period. That Complainant received no advance warning reflects no more than her probationary status. There is no statutory obligation on the County to warn Complainant of adverse personnel actions or of the basis for her termination. The disrespectful conduct that prompted the termination came at the January 15, 2002 meeting, not that of January 11. A review of the evidence establishes that Johnson had a series of performance based concerns with Complainant's work. The timing of the discharge "was dictated by the timing of the expiration of (Complainant's) probationary period."

MERA rights are not dependent on an employee's probationary status, but that cannot obscure that Complainant improperly asserts just cause protections. Nor can Complainant's characterization of the evidence obscure gross misconduct on her part that is not remediable through progressive discipline. The County also challenges the assertion that the evidence indicates a chilling affect on other employees traceable to the discharge.

On balance, the record does not show an employee fired for challenging authority. Complainant was afforded "a complete, unfettered right to ask questions and express her opinions with respect to the salary schedule progression issue." However, this right cannot be considered unqualified. Complainant's unfounded, personal attack at Petkovsek and others "was not undertaken in good faith." Thus, it was unprotected, and thus no violation of either Sec. 111.70(3)(a)1 or 3, Stats., has been proven. The "complaint must be dismissed, in its entirety, with prejudice."

DISCUSSION

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

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 Complainant 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) Complainant was engaged in activity protected by Sec. 111.70(2), Stats.; (2) the County was aware of this activity; (3) the County was hostile to the activity; and (4) the County terminated Complainant, at least in part, based upon hostility to her 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. The existence of lawful, concerted activity is a more difficult issue than Complainant contends, but for purposes of addressing the alleged Sec. 111.70(3)(a)3, Stats., violation, the existence of the first two elements can be taken as a given to focus the allegation on whether the County acted, at least in part, in hostility to Complainant's exercise of protected activity.

There is no persuasive evidence of statutory hostility on the part of any County agent. The "statutory" reference warrants some comment. It is evident that by the time Petkovsek approached the Union regarding the extension of the probationary period, Complainant's advocacy regarding the differences between the Spreadsheet and the Ratification Document had worn out Union and County officials. Aggravation manifested in their conduct can be characterized as "hostility" in the normal sense of the word. Hostility in the statutory sense, however, connotes more than a characterization of an inter-personal relationship, see MILWAUKEE COUNTY, DEC. NO. 28951-B (Nielsen, 7/98), AFF'D BY OPERATION OF LAW DEC. NO. 28951-C (WERC, 9/98). Rather, it connotes an aggressive response by an employer to encourage or discourage membership in a labor organization.

There is no persuasive evidence of such a response. Schultz testified that no County official put pressure on her during the discussions about the Ratification Document and the Spreadsheet. Jasmer perceived no County hostility toward the participants in the dispute. Nor is there solid evidence to infer County hostility toward Complainant. Complainant points to the timing of the termination, but those implications center on Sec. 111.70(3)(a)1, Stats., which focuses on the impact of conduct rather than its intent.

More significantly, there is no evidence of any gain on the County's part in terminating Complainant. The dispute neither began nor ended with her role in it. The County did not silence a critic whose advocacy could have embarrassed it. Complainant and Schultz saw the differences between the Ratification Document and the Spreadsheet as a mistake or a misrepresentation. There is no persuasive evidence that they are either. Rather, the characterization of the differences as a mistake or a misrepresentation reflects a misunderstanding
of a costing document. There was no evident risk to the County in a prolonged dispute. Nor

was the dispute unexpected. The County expected the revised wage schedule to cause some dispute among employees. Nor will the evidence support an inference that the County sought to limit its financial exposure to Complainant's advocacy. Johnson assisted the Child Support Specialist II appeal that produced a higher pay grade. The County consistently sought to insulate employees from losing pay as a result of the Carlson study. In sum, terminating Complainant afforded the County no evident gain.

Nor is it possible to link the termination to encouraging or discouraging Complainant's "membership in any labor organization." Complainant's advocacy drew on a salary schedule negotiated by the Union and the County, but pushed it in a direction favorable to herself, Schultz and other employees. She viewed the Union and the County as equally culpable in their "misrepresentation" of the Ratification Document. No explanation offered by any Union or County representative swayed her view. At the end of the hearing on this matter, she persisted in the view that the Ratification Document was less a costing document than a promise of a wage rate. The termination, as each explanation of the differences between the documents, had no impact on her view. There is no reason to believe any County official believed that, or cared whether, the termination would influence her desire to join or not to join the Union.

Witness testimony undercuts an inference of hostility. Johnson testified that Schultz was an excellent employee, but preoccupied with wage-based issues. This testimony is candid, and the candor regarding the quality of Schultz' work undercuts the allegation that the County was hostile toward Complainant's advocacy. Schultz is the source of the misunderstanding Complainant asserts prompted her termination. Why Johnson would become hostile toward Complainant for a dispute prompted by Schultz is less than apparent. Beyond this, the testimony reliably accounts for Schultz' and Complainant's conduct. Johnson's perception of how Schultz would react to the Spreadsheet was prescient, and underscores the single-mindedness with which Schulz and Complainant listened to others. Neither could accept any explanation that the Ratification Document was a costing document. Beyond this, Johnson's and Petkovsek's attempt to extend Complainant's probation period undercuts Complainant's assertion of County bad faith.

Johnson's evaluation of Complainant's work performance was similarly balanced and candid. She acknowledged that she had no work performance based reason to terminate Complainant as of January 16, 2002. This is impossible to reconcile with the assertion the County fabricated a basis to rid itself of Complainant to retaliate against her exercise of lawful, concerted activity. Similarly, Petkovsek assisted in shielding Schultz from a prior termination attempt. The noteworthy exception to the candor and balance of Johnson's and Petkovsek's testimony is their unpersuasive attempt to discredit Complainant's resume. The misplaced zeal shown on that point is not, however, characteristic of their testimony viewed as a whole.

The testimony of Smagacz, Johnson and Petkovsek show a common theme. The theme is that Complainant's advocacy reflected a stronger tendency to moral zeal than to patient reflection.

Their testimony manifests frustration with Complainant's inability and apparent unwillingness to understand what the Ratification Document was. Whatever aggravation is traceable to that is the sole proven source of hostility. Such hostility falls short of the statutory standard.

In sum, there is no reliable evidence of statutory hostility in the County's actions toward Complainant, and the Order dismisses the alleged 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 employees 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 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 . . . (E)mployer conduct which may well have a reasonable tendency to interfere with employe exercise of Sec. 111.70(2) rights will not be found violative of Sec. 111.70(3)(a)1, Stats. if the employer has valid reasons for its actions. 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.

This is the most troubling allegation of the complaint. Threshold to the application of Sec. 111.70(3)(a)1, Stats., is whether the Complainant engaged in lawful, concerted activity. There is reason to question each. Whatever is said of the single-mindedness of Schultz' and Complainant's view of the Ratification Document, it is apparent that each held and discussed their view in good faith. It is no less apparent that the documents are not an easy read. The good faith expression of concern to a municipal employer over a matter of the integrity of a wage

schedule is lawful. Sec. 111.70(4)(d)1, Stats., codifies this point by noting "(a)ny individual employee, or any minority group of employees in any collective bargaining unit, shall have the right to present grievances to the municipal employer in person or through representatives of their own choosing . . ."

This does not mean Complainant's advocacy enjoyed unfettered protection. It is at least arguable that she and Schultz were attempting to get the County to bargain with them as individuals. For example, Complainant's discussion with Rueth appears to be an attempt to block the implementation of Spreadsheet, presumably to enforce the Ratification Document as a wage schedule. The County cannot lawfully bargain with employees as individuals, and an attempt by Schultz, Complainant or other employees to provoke individual bargaining is arguably unlawful. Similarly, Complainant's zeal in advocacy could stray beyond the lawful. There is, however, no evidence that Complainant was anything beyond forceful in her advocacy. At most, she was disrespectful. Schultz could not remember Complainant's conduct at the January 11 meeting, which affords no support for an inference that a significant confrontation occurred. Petkovsek testified that Complainant's conduct shocked her. The severity of the conduct underlying the shock is, however, subject to doubt. Petkosek was not threatened, and labeled the conduct as "very condescending" (Transcript, Vol. II at 60). She acknowledged her concern with Complainant's conduct grew as it was discussed among management and Union observers. Complainant neither swore nor yelled. At most, it appears she placed her hands on a table and leaned toward the people to whom she was speaking. This falls short of unlawful expression.

Thus, Complainant's good faith advocacy of her and Schultz' view of the Ratification Document is lawful. Although the County forcefully argues each employee acted alone, the evidence will not support this view. Shultz sought Complainant's advice prior to and after the January 11 and January 14 meetings. Schultz, Jasmer and Complainant considered joint action to grieve the matter, and Opelt and Social Services Department employees discussed their mutual concern with the Ratification Document, cf. VILLAGE OF WEST MILWAUKEE ET. AL., DEC. NO. 9845-5 (WERC, 10/71). Complainant's view of the Ratification Document could have affected employees, such as Bus Drivers, beyond the Child Support Agency. Against this background, the conduct involves concerted activity. Thus, Complainant's good faith advocacy concerning the Ratification Document is lawful, concerted activity under Sec. 111.70(2), Stats., and is thus protected by Sec. 111.70(3)(a)1, Stats.

This conclusion effectively dictates a finding of a violation of Sec. 111.70(3)(a)1, Stats. Complainant was terminated, without warning, fifteen minutes prior to the close of her probation period, within days of her forceful advocacy concerning a misunderstanding shared by a number of employees. Her supervisor had no work performance based reasons to terminate her employment as of January 16, and communicated none to her. The termination shocked employees in the Child Support Agency, who had not been contacted regarding Complainant's "bad attitude" and had no reason to believe that she had experienced problems warranting

termination. County Board members played at least an active role in the termination. The termination was at least arguably in violation of the County's personnel policy, which demands formal annual evaluations and retention based on work performance. Against this background, County employees could reasonably perceive the termination as retaliation for Complainant's advocacy. The evidence underscores this. Jasmer and Schultz were sobered by the termination, and Schultz testified it altered her thinking regarding processing a grievance.

The County cites "valid reasons" under CEDAR GROVE to defend against this conclusion. Those reasons, however, demand the consideration of evidence arising well after the termination decision. Johnson acknowledged that whatever her reservations concerning Complainant, she did not believe Complainant's deficiencies were irremediable until Jasmer alerted her to problems in Complainant's processing of case files turned over to Jasmer after the termination. This evidence may bear on the validity of the County's opposition to a reinstatement order, but has no bearing on employee perception of the termination. To apply the "valid reasons" exception in this instance would permit the exception to swallow the rule.

That the County faced the end of Complainant's probationary period falls short of establishing a valid reason to overcome the chilling effects of the termination. It is not simply the timing of the termination that is a problem. The timing coalesces with other factors, such as the widely understood dispute regarding the Ratification Document and Complainant's role in it. Other factors thus come into play, including that the termination came without notice or explanation. Granting that the County had no duty to warn or to explain the termination to Complainant or to any other employee does not address the issue under Sec. 111.70(3)(a)1, Stats. Rather, the absence of warning and explanation complicates employee perception of the termination. Complainant's work performance was generally perceived as solid. No employees were consulted regarding her "bad attitude." In the absence of other information, employees could reasonably infer that the termination was linked to her advocacy effort.

This poses the troubling issue of remedy. Commission remedies under Sec. 111.07(4), Stats., seek to make a complainant whole for respondent violations of MERA. Typically, reinstatement and back pay effect this. This is not a typical case. Complainant does not seek reinstatement, and Respondent actively opposes it for reasons based on conduct discovered after the termination. Beyond this, reinstatement poses questions regarding whether Complainant should be returned as a probationary or as a non-probationary employee and regarding the impact of the Union's refusal to agree to a probation extension.

The Order entered above includes notice posting and damages measured by attorney fees and costs incurred by Complainant through the final day of evidentiary hearing. The relationship of the Order to current case law is discussed below. As preface, the basis of the Order in the Commission's remedial authority under Sec. 111.07(4), Stats., is necessary. The notice posting is to remedy the chilling effect of the termination on unit employees. The Order

is detailed to clarify to employees that the absence of a reinstatement order rests on Complainant's request and Commission action rather than a County determination.

The balance of the Order is less traditional, and seeks to put the Complainant in no worse a position as a result of the litigation than she would have been in had the County not violated MERA. The change in personnel records is made contingent on Complainant's request since resignation is an individual choice. The absence of a request for reinstatement indicates this is a desired option. If it is not, this may become an issue for appeal. The amendment of her personnel records extends to County responses to inquiries from prospective employers to cut off potential adverse employment consequences from the termination.

A remedial Order, traditional or not, must be rooted in the proven extent of a MERA violation. As the Court puts it, the remedy should reflect the "'affirmative action' reasonably necessary to 'effectuate the policies' of the act" WERC v. EVANSVILLE, 69 WIS. 2D 140, 159 (1975), citing FOLDING FURNITURE WORKS v. WISCONSIN LABOR RELATIONS BOARD (1939). That Complainant does not seek reinstatement argues strongly against it. Beyond this, there is no persuasive basis to reinstate Complainant as other than a probationary employee given the weakness of the evidence of the alleged violation of Sec. 111.70(3)(a)3, Stats., and the fact that the excesses of Complainant's advocacy arose during the probationary period. There is no reliable evidence of County bad faith. In the absence of a MERA violation, the County could effectively treat Complainant's probationary employment as at will employment. Finding of Fact 17 notes the County's good faith belief regarding Complainant's performance difficulties. No determination on the merit of that belief is appropriate here other than to note that neither party seeks to put the matter to a test via a reinstatement order. Complainant's unwillingness to seek reinstatement and the County's opposition to it make reinstatement a poor remedial choice even without regard to the troublesome issue of statutorily requiring an action opposed by each party to the applicable labor agreement.

The factual ambiguity of the record on reinstatement mirrors the uncertain policy background to the proven violation. The ultimate source of the County's violation is less the County's conduct toward Complainant as an individual employee than other employees' perception of the action. Complainant's proposed remedy ignores the fineness of this line by making the remedy a financial matter in which Complainant, as a "private attorney general" is individually compensated for exposing County bad faith. As noted above, no bad faith is proven, and it is less than apparent how Complainant's individual financial reward addresses the concerted (emphasis mine) nature of the rights at issue. An examination of Complainant's conduct further undercuts this line of argument. Schultz and Complainant attempted, as individual employees, to alter a prolonged course of conduct through which the County and Union sought to rationalize their bargained wage schedule. Schultz' and Complainant's desire to combine what they viewed as the desirable features of the old and the new wage schedules is understandable, and their good faith concerns about the difference between the Ratification

Document and the Spreadsheet reflect concerted activity. This cannot, however, obscure that Schultz' and Complainant's views sought to turn a costing document for a wage schedule into an offer of a wage rate to a specific employee. This is bargaining by any other name. MERA places that conduct in the hands of employers and labor organizations, not individual employees. Complainant's proposed remedy, if effected, risks creating not a shield for the rights of individuals but a sword for employees unsatisfied with the personal impact of benefits collectively bargained in good faith, as MERA seeks under Sec. 111.70(6), Stats.

The County's responsibility in this case is that in the absence of Complainant's litigation, there was no statement of why the termination took place. Neither Complainant nor any other employee had any factual basis on which to evaluate the termination beyond their individual perception of the circumstances surrounding it. Complainant should not be financially worse off for forcing the termination decision into the open. The reimbursement of certain fees and costs thus makes her whole in the sense it is possible. The award is terminated by the close of evidentiary hearing. This reflects that by then Complainant secured access to the full basis for the termination, including extensive testimony showing the Ratification Document as a costing document rather than a promise of a wage rate. Litigation past that point reflects Complainant's unwillingness to consider any explanation conflicting with her view of the Ratification Document. In my view, the County should not be compelled to subsidize that unwillingness. The assessment of interest is a function of existing law, see WILMOT UNION HIGH SCHOOL DISTRICT, DEC. NO. 18820-B (WERC, 12/83). This underscores that the costs and fees are the measure of a make-whole remedy rather than a supplement to it.

Before closing, it is necessary to address the source of this non-traditional remedy in existing law. In my view, the remedy falls within the framework of Sec. 111.07(4), Stats., without extending or violating existing case law. The statute calls for a case by case measurement of financial damages by providing for "reinstatement with or without pay, as the commission deems proper." This demands a case-by-case determination of the appropriate measure of damages. Existing case law provides for fees and costs "as part of an extraordinary remedy in an exceptional case", DEPARTMENT OF EMPLOYMENT RELATIONS ET. AL., DEC. NO. 29093-B (WERC, 11/98) AT 4, citing MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 16471-D (WERC, 5/81). In my view, the award of fees and costs in the Order is not that discussed in prior cases by the Commission. In those cases, the Commission assumed that traditional remedies were appropriate and the issue on fees and costs was whether they should be added, in total, to them. Thus, the Commission linked the "extraordinary" and "exceptional" references to cases in which "frivolous" defenses had to be addressed, or in which bad faith (such as in duty of fair representation cases) existed.

In this case, the fees and costs are not awarded in total as a supplement to a traditional remedy. Rather, they are awarded to establish the measure of damages otherwise set by

reinstatement with back pay. This arguably puts the remedy outside of the Commission case law noted above. However, the remedy can be supported from within that case law, since the "extraordinary circumstance" is that traditional measures of damages are unavailable. The award of fees and costs is, then, not an expansion of existing remedies, but an alternative means of measuring the make whole value of the claim, cf. The Restatement of Contracts, Second (ALI, 1981) at Sections 344 to 349; Corbin on Contracts, (Matthew Bender, 1979) at Chapter 57 "Alternative Measures", specifically sections 1029 and 1037; and cf. Baptist Memorial Hospital, 95 LRRM 1043 (1977), aff'd 97 LRRM 3165 (6th Cir., 1977).

This conclusion is perhaps better illustrated mathematically. At the first day of hearing, Complainant entered an exhibit that estimated the requested gross damages at roughly $40,000.00, of which roughly $4,000.00 reflected attorney fees and costs. The Commission's DER analysis questions when and whether the $4,000.00 should be added to the $40,000.00. The remedy set forth in the Order focuses on the $4,000.00 as the measure of Complainant's make-whole entitlement. This is not a rationalization to lower a claim, nor a means to sanction bad faith conduct. Rather, it is my view of the most persuasive means to measure the make-whole value of the statutory violation. It makes Complainant whole for having to litigate the purpose of her termination, which would otherwise have been shrouded in individual employee perception. Any remedy beyond this forces an employment relationship on parties unwilling to assume it, and grossly overvalues the extent of the County's MERA violation. The Order does not state final figures, which cannot be reliably determined from the existing record.

In sum, the limited award of attorney fees and costs entered in the Order measures the value of the proven Sec. 111.70(3)(a)1, Stats., violation by attempting to place Complainant in the position she would have been in had the County not violated MERA. This reflects the absence of traditional means to measure the violation. That no party seeks to reestablish the employment relationship points toward some measure other than reinstatement with back pay. That the reinstatement would be to a probationary position poses issues concerning the applicable labor agreement as well as regarding the implementation of the remedy. The award of front pay coupled with back pay presumes bad faith on the County's part, and unpersuasively presumes that Complainant's advocacy enjoys unfettered protection demanding payment to her as an individual. The notice addresses the chilling impact of the termination on County employees. Regarding Complainant, the goal of the Order is to put her as close as the evidence permits to the position she would be in had the County not violated MERA. The amendment of her personnel records will cut off the potentially adverse impact of the termination action on Complainant's future employment. The award of attorney fees and costs through the evidentiary hearing reflects that the circumstances of the termination effectively forced Complainant to litigate the matter if the basis of the termination was to be made transparent. Capping the award at the close of the evidentiary hearing sets an end point that is reconcilable to the evidence. By the end of evidentiary hearing the basis for the termination was apparent, as was the fundamental misunderstanding that plagued Complainant's advocacy and verges on individual bargaining.

One final point bears mention. The facts treat the Ratification Document and Spreadsheet as two clearly defined documents. The record shows a difference between the document Schultz claims to have taken from Johnson's office (Complainant Exhibit 8) and the document Complainant believed Schultz took from Johnson (Complainant Exhibit 5). These two spreadsheets are not the same, and it is not clear how to reconcile the difference between Complainant's and Schultz's testimony. The Findings of Fact treat Complainant Exhibit 8 as the Spreadsheet. Precision on this point is neither possible nor necessary. The confusion between the Ratification Document and the spreadsheets generated around it is the fundamental issue. Complainant's and Schultz' advocacy was that no spreadsheet other than the Ratification Document could be used to generate a wage schedule. The Findings of Fact treat Complainant Exhibit 8 as the statement of that point.

Dated at Madison, Wisconsin this 20th day of May, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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