STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THERESA J. McCRAW, Complainant,

vs.

AFSCME COUNCIL 24, AFL-CIO, and
WISCONSIN DEPARTMENT OF EMPLOYMENT RELATIONS, Respondents.

Case 523
No. 60893
PP(S)-324

Decision No. 30369-A

Appearances:

Johns & Flaherty, S.C., by **Attorney Ellen M. Frantz,** 600 Exchange Building, 205 Fifth Avenue South, La Crosse, Wisconsin 54602, appearing on behalf of the Complainant.

Lawton & Cates, S.C., by **Attorney P. Scott Hassett,** Ten East Doty Street, Suite 400, Madison, Wisconsin 53703, appearing on behalf of the Respondent, AFSCME Council 24.

Attorney David J. Vergeront, Chief Legal Counsel, Wisconsin Department of Employment Relations, 345 West Washington Avenue, Madison, Wisconsin 53707, appearing on behalf of the Respondent, State of Wisconsin Department of Employment Relations.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On February 13, 2002, the Complainant, Theresa J. McCraw, filed a complaint with the Wisconsin Employment Relations Commission (WERC) against AFSCME Council 24, AFL-CIO, herein the Union, Martin Beil, the Executive Director of Council 24, and the Wisconsin Department of Employment Relations, herein the State. The complaint alleged that the Respondents committed unfair labor practices under the State Employment Relations Act, Sec. 111.80 *et seq*, Wis. Stats., with respect to a number of grievances filed by the Complainant against her employer, the University of Wisconsin-La Crosse, concerning disciplinary action taken against her by UW, up to and including termination, and the refusal of the Union to advance the grievances to arbitration. On June 12, 2002, the Commission

appointed John R. Emery, a member of its staff as Examiner for the purpose of making and issuing Findings of Fact, Conclusions of Law and Order as provided in Secs. 111.07 and 111.84(4), Wis. Stats. The State and the Union filed answers to the complaint on July 2, 2002, and July 23, 2002, respectively, and a hearing was conducted on August 27, 2002, in La Crosse, Wisconsin. The proceedings were transcribed and the transcript was filed on September 18, 2002. The issues were briefed by the parties and the briefing schedule was completed by December 6, 2002, whereupon the record was closed.

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

The Examiner, having considered the evidence, the applicable law and the arguments of the parties and being advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. Theresa J. McCraw, herein the Complainant, was at all times material hereto an employee within the meaning of Sec. 111.81(7), Wis. Stats., and was employed at the University of Wisconsin – La Crosse as a police officer.

2. Respondent, State of Wisconsin Department of Employment Relations, herein the State, is an employer within the meaning of Sec. 111.81(8), Wis. Stats., with offices located at 345 West Wisconsin Avenue, P.O. Box 7855, Madison, Wisconsin 53707-7855

3. Respondent Wisconsin State Employees Union, AFSCME Council 24, AFL-CIO, herein the Union, is a labor organization within the meaning of Sec. 111.81(12), Wis. Stats., with offices located at 8033 Excelsior Drive, Suite C, Madison, Wisconsin 53707.

4. At all times material hereto, the Union was the exclusive collective bargaining agent of a bargaining unit comprised of State of Wisconsin employees, of which the Complainant was a member.

5. Over the years, the State and the Union have entered into a series of collective bargaining agreements. At the time of the commencement of the events that are the subject of this proceeding, the parties were operating under an agreement covering the period October 11, 1997 – June 30, 1999. That agreement contained a grievance procedure that provided, in pertinent part:

ARTICLE IV

Grievance Procedure

Section 1: Definition

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

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

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

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

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

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

Section 2: Grievance Steps

4/2/1 Pre-Filing Step: When an employe(s) and his/her representative become aware of circumstances that may result in the filing of a Step One grievance, it is the intent of the parties that, prior to filing a grievance, the Union Representative will contact the immediate supervisor of the employe regarding the matter in a mutual attempt to resolve it. The parties are encouraged to make this contact by telephone. The State's DAIN line facilities will be used whenever possible.

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

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

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

4/2/5 Step One: Within twenty-one (21) calendar days of receipt of the written grievance or within twenty one (21) calendar days of the date of the supervisor contact provided for in 4/2/1, whichever is later, the designated agency representative will schedule a hearing and respond to the Step One grievance. By mutual agreement of the parties, the parties are encouraged to hold grievance hearings by telephone or video conferencing. The State's DAIN line facilities will be used whenever possible.

4/2/6 Step Two: If dissatisfied with the Employer's answer in Step One, to be considered further, the grievance must be appealed to the appointing authority or the designee (i.e., Division Administrator, Bureau Director, or personnel office) within fourteen (14) calendar days from receipt of the answer in Step One. Upon recent of the grievance in Step Two, the department will provide copies of Step One and Step Two to the Division of Collective Bargaining of the Department of Employment Relations as soon as possible. Within twenty-one (21) calendar days of receipt of the written grievance, the designated agency representative(s) will schedule a hearing with the employe(s) and his/her representative(s) and a representative of Council 24 (as Council 24 may elect) and respond to the Step Two grievance unless the time limits are mutually waived. By mutual agreement of the parties, the parties are encouraged to hold grievance hearings by telephone or video conferencing. The State’s DAIN line facilities will be used whenever possible.

4/2/7 Step Three: Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party within thirty (30) calendar days from the date of the agency's answer in Step Two, or from the

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

Time Limits

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

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

Section 3: Arbitration Panel Procedures

4/3/1 Within seven (7) calendar days from the date of appeal to arbitration, the parties shall meet to select an arbitrator from the panel of arbitrators according to the selection procedures agreed upon.

4/3/2 Where two or more grievances are appealed to arbitration, an effort will be made by the parties to agree upon the grievances to be heard by any one (1) arbitrator. On the grievances where agreement is not reached, a separate arbitrator from the panel shall be appointed for each grievance. The cost of the arbitrator and expenses of the hearing, including a court reporter, if requested by either party, will be shared equally by the parties. Except as provided in Section 11 of this Article, each of the parties shall bear the cost of their own

witnesses, including any lost wages that may be incurred. On grievances where the arbitrability of the subject matter is an issue, a separate arbitrator shall be appointed to determine the question of arbitrarily, unless the parties agree otherwise. Where the question of arbitrarily is not an issue, the arbitrator shall only have authority to determine compliance with the provisions of this Agreement. The arbitrator shall not have jurisdiction or authority to add to, amend, modify, nullify, or ignore in any way the provisions of this Agreement and shall not make any award which in effect would grant the Union or the Employer any matters which were not obtained in the negotiation process.

4/3/3 Both parties agree that there will be a panel of twelve (12) arbitrators selected to hear arbitration cases that are covered under the Agreement between the parties. The procedure for selecting this panel of twelve (12) arbitrators is as follows:

A. Both parties will make an attempt to mutually agree on a panel of twelve (12) arbitrators.

B. If mutual agreement cannot be reached on the total twelve (12) arbitrators, then the remaining number of arbitrators needed to complete the panel will be selected equally between the two parties.

C. After one (1) year from the date the panel was selected, either party shall have the right to eliminate up to two (2) arbitrators from the panel.

D. In replacing the arbitrators that were eliminated from the panel, the procedure in B., above shall again be used, but, it is noted that any arbitrator eliminated in C., above may not be placed back on the panel.

4/3/4 The procedure for selecting an arbitrator from the panel to hear a particular case is as follows:

A. Each arbitrator shall be assigned a number one (1) through twelve (12).

B. In selecting an arbitrator for a case, the parties shall draw five (5) arbitrator numbers at random from the total twelve (12). Then the elimination process will be used to select one (1) arbitrator from the group of five (5).

C. If both parties mutually disagree with the arbitrator number that has been selected in B., above, then the original process of selecting an arbitrator shown in B., above will again be used.

D. If, after two (2) attempts, the parties mutually disagree with the arbitrator number that has been selected, then both parties shall jointly request a panel of arbitrators from the Federal Mediation and Conciliation Service.

E. Both parties shall jointly send letters to the twelve (12) arbitrators selected and request these arbitrators to agree to participate on the panel and comply with specific requirements.

F. Both parties agree to some type of retainer fee for each of the selected arbitrators in addition to a set daily fee allowed each arbitrator for his/her services.

4/3/5 Both parties shall jointly contact court reporters from around the state and develop a listing of these reporters who will agree to return the transcript of a hearing with ten (10) days from the date of the hearing.

4/3/6 If briefs are to be filed, both parties shall file their briefs within fourteen (14) days from the date of their receipt of the transcript. This time limit may be extended if mutually agreed by the two parties.

4/3/7 The decision of the arbitrator will be final and binding on both parties of this Agreement. When the arbitrator declares a bench decision, this decision shall be rendered within fifteen (15) calendar days from the date of the arbitration hearing. On discharge and 230.36 hazardous duty cases, the decision of the arbitrator shall be rendered within fifteen (15) calendar days from receipt of the briefs of the parties or the transcript in the event briefs are not filed. On all other cases the decision of the arbitrator shall be rendered within thirty (30) calendar days from receipt of the briefs of the parties or the transcript in the event briefs are not filed.

. . .

Section 5: Exclusive Procedure

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

During the time the agreement was in force, the Union maintained an internal grievance appeal procedure that provided that in the event a bargaining unit member was discharged and grieved the discharge, and in the further event that the parties were unable to settle the grievance and the Union was unwilling to advance it to arbitration, the employee could obtain ownership of the grievance from the Union and arbitrate it individually.

6. Subsequent to the expiration of the 1997-99 agreement, the parties negotiated a successor agreement that contained an identical grievance procedure, except that the parties agreed to a provision that the losing party in any grievance arbitration proceeding would bear all costs of same, which was a departure from the language of the previous agreement which called for the parties to split arbitration costs equally.

7. On February 5, 2001, the Union changed its internal appeal procedure and subsequently has not permitted discharged employees to advance their own grievances to arbitration in cases where the Union has elected not to do so.

8. The Complainant was hired as a police officer at UW-La Crosse in 1995 and subsequently transferred to a similar position at UW-Whitewater. On October 22, 1997, the Complainant was reprimanded by her supervisor for an unauthorized alteration of the department computer's screen saver. The Complainant, through the Union steward, requested a meeting with the employer to discuss the incident, which did not take place. The Complainant later returned to work at UW-La Crosse, whereupon she filed a grievance on January 22, 1998, over the employer's failure to meet and address her previous reprimand. The grievance progressed through the contractual procedure and was appealed to arbitration by the Union on April 5, 1999.

9. On March 26, 1998, the Complainant was given a written reprimand for alleged violations of work rules as follows:

. . .

> This letter serves as an official written reprimand based on the work performance issues addressed during the investigatory meeting held on March 6, 1998, at 6:00 a.m., 233 Main Hall. The reprimand consists of two parts with each part standing on its own merits. Those in attendance were June Daellenbach, University Services; Jim Quick, Human Resources; Theresa McCraw, Police Officer; and Pat Verse, Union Steward.
>
> The issues discussed are summarized under part I and part II below and the basis for the written reprimand is detailed under each issue:
>
> I. Off Campus Policing. Shortly after beginning your 11:00 p.m., February 2, 1998, shift you informed the UW-La Crosse dispatcher that you were leaving campus in the squad car to pick up food at the downtown Burger King Restaurant. While off campus you observed a vehicle without it headlights on and followed the vehicle through the downtown area from 515 North 4th Street to a parking lot at 7th and Cook Streets. The basis for the written reprimand is:
>
> a. Failure to understand and comply with inter-jurisdictional policies.
> b. Failure to exercise good judgment.

c. Unwillingness to consider even the possibility that your actions were inappropriate.
d. Inconsistency among different versions of the story as to the reason for actually pursuing the vehicle.

II. Jefferson County Court Appearance. You did not appear for a February 9, 1998, Jefferson County court date. When this was discussed with you in our March 6, 1998, meeting you clearly stated that you were not aware of your required court appearance.

Documents indicate that on 12/11/97 two court notices were placed in your University of Wisconsin-Whitewater, Police Department, mailbox. The notices were for the February 9, 1998, Jefferson County court date for two trials for underage alcohol possession citations you issued during your probationary employment at Whitewater. Also, I was informed by the UW-Whitewater Chief of Police that you were alerted that an Assistant District Attorney from Jefferson County may be contacting you with questions about the citation prior to the court date. Finally, during your orientation meeting of January 7, 1998, when we were discussing your work schedule, you said that you had a court commitment pending from UW-Whitewater.

We are concerned that you, as a professional police officer, exercised poor judgment by not attending a scheduled court date. We are particularly concerned that, in light of evidence strongly suggesting you knew about your court commitment, you denied knowledge of it at our meeting. The basis for the written reprimand is:

a. Failure to exercise good judgment
b. Conflicting information provided during the March 6, 1998, meeting.

The incidents described above are violations of the Classified Work Rules: "I.E, Failure to provide accurate and complete information whenever such information is required by an authorized person; and IV. J, Failure to good exercise judgment, or being discourteous in dealing with fellow employees, students or the general public." This written reprimand will be placed in your personnel file and continued violation of University work rules will result in further disciplinary action, up to and including termination.

I also want to remind you of the University Employee Assistance Program (EAP). The purpose of the EAP is to provide confidential consultation and referral service for employees who are seeking help for personal problems that may be affecting their job performance. The program is supported by the Counseling and Testing Center and they may be contacted at 785-8073.

Enc: Classified Work Rules

C: Pat Verse, Union Steward
Jim Quick, Human Resources
Larry Lebiecki, Administrative Services

The reprimand was grieved on April 21, 1998, advanced through the contractual procedure and was appealed to arbitration by the Union on April 5, 1999.

10. On June 16, 1998, the Complainant was issued a one-day disciplinary suspension for alleged violations of work rules as follows:

. . .

> This letter serves as a one-day disciplinary suspension letter based on the work performance issues addressed during an investigatory meeting held on June 9, 1998, at 7:00 a.m., in 233 Main Hall. The disciplinary action consists of three parts with each part standing on its own merits. Those in attendance at the meeting were June Daellenbach, University Services; Jim Quick, Human Resources; Theresa McCraw, Police Officer; and Pat Verse, Union Steward.
>
> The issues are summarized under part I, II, and III below and the basis for the disciplinary action is detailed on page 2 of this letter:
>
> I. During the morning of Tuesday, May 26, 1998, you telephoned Officer Gary Baker, Police Officer/Administrative Liaison, at the Protective Services office regarding overtime for June 12, 1998. It was reported that during that conversation you were abusive and used profanity towards Officer Baker. However, in our investigatory meeting you denied being abusive and using profanity during the telephone conversation. You also indicated that this telephone call was made while you had "someone standing next to me" who could substantiate your version of the telephone conversation. However, after discussing this situation with this UWL employee it was found that you actually made the call in another room and only parts of your "heated conversation" with Officer Baker were overheard by this individual. The basis for disciplinary action is:
>
> a. Failure to exercise good judgment.
> b. Using abusive language towards a co-worker.
> c. Untruthfulness when questioned about your actions.
>
> II. On Saturday morning, May 2, 1998, you were the primary officer on a call regarding an intoxicated male in the lobby of White Hall, Incident Report #98-203. The male was tested by La Crosse Police Department personnel and

registered a 0.27 BAC. As you were clearing the scene, you are reported to have said to the intoxicated male, "If you want to call me the "B" word go ahead." During our June 9th meeting you said that the intoxicated male student felt you were picking on him and seemed tense. You stated that you gave the intoxicated student permission to call you a bitch to help calm the situation. The basis for disciplinary action is:

a. Failure to exercise good judgment.
b. Putting you and another officer at unnecessary risk.
c. Unprofessional behavior.

III. A May 4, 1998, student complaint was received alleging that on Friday, May 1, 1998, you approached him in a Laux Hall room and questioned him in an intimidating and rude manner about a couch that had been placed on a steam vent by other students. The statement from the student said that during questioning you pulled out your baton and started slapping it against your hand. Two other UWL students were in the residence hall room at the time.

When you were asked about the incident at our June 9th meeting you said that you don't ever remember pulling out your baton and slapping it in your hand during questioning of this or any student. You stated that you only take your baton out of the holster for the purpose it is intended for or, if you are providing requested information about the baton. The basis for the disciplinary action is:

a. Failure to exercise good judgment.
b. Untruthfulness when questioned about your actions.
c. Unprofessional behavior.

On March 26, 1998, you received a written reprimand for work rules violations I.E and IV.J. The incidents described above are a continuation of similar work rule violations. We are particularly concerned about the profane and disrespectful conversation with Officer Baker. As you may recall when you returned from your brief transfer to Whitewater in January 1998, June Daellenbach and Jim Quick met with you specifically to develop a strategy to improve your working relationships with co-workers and peers. We cannot stress enough the importance of an effective, respectful, and professional working relationship with your co-workers and peers. We also want to remind you of the importance of being truthful in your role as a police officer.

The incidents described above are violations of the following Classified Work Rules: "I.E, Failure to provide accurate and complete information whenever such information is required by an authorized person; IV.B, Threatening, intimidating, interfering with, or using abusive language towards others; and IV.J, Failure to exercise good judgment, or being discourteous in dealing with fellow employees, students or the general public."

> Based on the evidence of violations of work rules, you will receive a one-day disciplinary suspension without pay on your shift beginning Thursday, July 2, 1998, at 11:00 PM. This letter of discipline will be placed in your personnel file and continued violation of University work rules will result in further disciplinary action, up to and including termination.
>
> I want to remind you of the University Employee Assistance Program (EAP). The purpose of the EAP is to provide confidential consultation and referral service for employees who are seeking help for personal problems that may be affecting their job performance. The program is supported by the Counseling and Testing Center and they may be contacted at 785-8073.
>
> Enc: Classified Work Rules
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> C: Pat Verse, Union Steward
> Jim Quick, Human Resources
> June Daellenbach, University Services

The suspension was grieved on July 1, 1998, advanced through the contractual procedure and was appealed to arbitration by the Union on April 5, 1999.

11. On August 3, 1999, Karl Hacker, Assistant Director of AFSCME, Council 24, sent the Complainant the following letter:

. . .

> I have reviewed, along with other members of the Wisconsin State Employees Union staff, your grievance(s) relating to Article 3, 4 and 11 --- ltr. of reprimand/1-day suspension/denied steward --- which has been appealed to arbitration, will be supported by Council 24.
>
> You need not take any further action at this time. We will keep you informed of the progress concerning your case(s).
>
> Please be advised that AFSCME Council 24 Field Representative, Carol Gainer, will be representing you in this matter. For further information and/or update, please contact Carol at (608)525-6771.

At approximately the same time, Union Steward Pat Verse advised the Complainant that the grievances were scheduled for an arbitration hearing on October 21, 1999. Some time after October 15, 1999, Verse advised the Complainant that the arbitration hearing had been postponed and would be rescheduled at some point in the future. No reason was immediately given for the postponement.

12. On September 2, 1999, the Complainant was given a written reprimand for alleged violations of work rules as follows:

. . .

This letter serves as an official written reprimand for the item listed under part I below. The reprimand is based on work performance issues addressed during an investigatory meeting held on August 18, 1999 at 3:45 p.m. in my office, Information Center. Those in attendance were Scott Rohde, Protective Services; Jim Quick, Human Resources; Theresa McCraw, Police Officer; and Pat Verse, Union Steward. The basis of the written reprimand is detailed under the issue in part I:

Part 1:
Office Incident on July 28. 1999. A report was received of a very loud argument between you and Officer Tarnow that occurred during office hours on July 28, 1999. The dispute involved your concern with Officer Tarnow's presence in the Protective Services office and his use of the departmental computer. An investigation indicated that you were the only person yelling and that staff, student helpers, and customers in the front office area could hear you clearly. The incident was reported to me by the department program assistant and verified by Officer Tarnow.

During our investigatory meeting, you initially denied that this incident occurred. Later, you indicated that you could not recall if the incident occurred as reported but you insisted that you did not raise your voice and that you acted in a professional manner.
The basis for this written reprimand:

a. Failure to exercise good judgment.
b. Being discourteous in dealing with a fellow employee.
c. Untruthfulness when questioned about your actions.

The incident described above in part I is a violation of the Classified Work Rules; I.E, "Failure to provide accurate and complete information whenever such information is required by an authorized person; and IV.J, Failure to exercise good judgment, or being discourteous in dealing with fellow employees, students or the general public." This written reprimand will be placed in your personnel file and continued violation of University work rules will result in further disciplinary action, up to and including termination.

The following items listed under part II, A-C, summarize the other issues discussed during the investigatory meeting of August 18, 1999:

Part II:
A: Complaints from Art Fair On the Green: Several complaints were received regarding your attitude towards exhibitors at the annual art fair held on campus, July 24-25, 1999. Specifically questions were raised about you not allowing an elderly woman to park temporarily in a restricted area due to a health problem that was exasperated by the extremely hot weather. She reported that she felt you treated her "coldly" and did not give her an opportunity to explain her problem. Additionally, complaints were received that you directed exhibitors not to park any part of their vehicles on the grass and then you drove the squad car around their cars and across the lawn in their presence.

During our meeting you disagreed with the information provided by the woman and said you never talked with her directly; but you did speak with her son in a professional manner. You also said the reason you traveled across the lawn in the squad was in response to an alarm on campus. You said that you did not know if the lights on the squad car were activated when you drove across the grass.

Although this event occurred throughout the weekend and during the shifts of other officers and yours, your actions were the only ones that were subject to concern by the public and the event organizer. I want to stress that a major part of our mission is service. I want to emphasize that providing helpful and courteous service is a very important part of your job as a campus police officer.

B: Dispatch Issue: We attempted to bring closure to the matter involving the report of a dog in North Hall on July 28, 1999 and your insistence on being given the name of the caller so further investigation could be done. I pointed out that you were demanding that the dispatcher give you the name of the caller when the caller specifically wished not to share that information. You responded to the call, found no problem at North Hall, and somehow concluded that the call was made up by the dispatcher to harass you.

There is no evidence to suggest that the dispatcher made up the call. There is also no past history that would lead me to believe that the dispatcher would make up any call. You continue to insist that the dispatcher is "setting you up" but admit there is no evidence to support your claim. In the role of a police officer you should be familiar with the quantum of evidence needed to make an accusation of wrongdoing. I am concerned that you would jump to a conclusion of this type without supporting evidence. An important part of your job is to make good judgments based on a thorough assessment of evidence, not on conjecture. Also, the attitude you displayed at our meeting suggests you are unwilling to even consider the possibility that your accusation is incorrect even though there is no supporting evidence.

C: Addressing a co-worker: A report was received that you referred to Jon Borgen, Maintenance Services, as "Boy" or "Jon Boy" in a derogatory manner. This allegedly occurred during the past year when you and Jon Borgan were both working the second shift. You denied ever calling Jon Borgen these names but said you "might" have called him "Big Jon" in a friendly tone of voice.

As an employee in a highly visible position it is extremely important that you have respect for the individual dignity of all people you come in contact with. I do not know why Mr. Borgen would have said he found the comments derogatory if they were made in a friendly way. You must improve the human relations aspects of your performance.

I want to remind you of the University Employee Assistance Program (EAP). The purpose of the EAP is to provide confidential consultation and referral service for employees who are seeking help for personal problems that may be affecting their job performance. The program is supported by the Counseling and Testing Center. They may be contacted at 785-8073.

Enc: Classified Work Rules

C: Pat Verse, Union Steward
Jim Quick, Human Resources
June Daellenbach, University Services
Larry Lebiecki, Administrative Services

The reprimand was grieved on October 1, 1999, advanced through the contractual procedure and was appealed to arbitration by the Union on June 20, 2000.

13. On December 23, 1999, the Complainant was issued a one-day disciplinary suspension for alleged violations of work rules as follows:

. . .

This letter serves as a one-day suspension letter based on work performance issues addressed during an investigatory meeting held on December 18, 1999. In attendance at the investigatory meeting were Scott Rohde, Protective Services; Scott McCollough, Protective Services; Theresa McCraw, Police Officer; and Al Lesky, Union Steward.

The disciplinary action is based on your conduct on December 3, 1999 and is summarized below:

A report was received during the evening of December 3, 1999 that you angrily confronted the dispatcher, Sally Helgeson, during work hours that evening. The

altercation involved your attempt to verbally chastise Ms Helgeson regarding what you perceived as improper conduct on her part pertaining to the performance of her dispatching duties. It was reported that you extended your arm and shook your finger at Ms. Helgeson and, in a loud and mean tone, accused her of poor performance of her job without specifying your concerns. Ms Helgeson was extremely upset and frustrated by the confrontation.

In addition, when you were questioned during the investigatory meeting of December 18, 1999 about your actions of December 3, 1999 there were a number of inconsistencies. The inconsistencies were between your original version of events as you relayed them to Sergeant McCollough on the evening of December 3, 1999 and the information you provided at the investigatory meeting. Also, there are inconsistencies between the report from the dispatcher and your report of the events of the evening of December 3, 1999.

As a result of an investigation conducted by Chief Scott Rohde, it has been determined that you exceeded your authority, exercised poor judgement, was discourteous in dealing with a fellow employee, and was untruthful when questioned about your actions.

The incident described is a violation of the following Classified Work Rules: I.E., Failure to provide accurate and complete information whenever such information is required by an authorized person; and IV.J. Failure to exercise good judgment or being discourteous in dealing with fellow employees, students, or the general public.

Based on the evidence of violations of work rules, you will receive a one-day disciplinary suspension without pay on your Wednesday, January 5, 2000 11 p.m. to 7a.m. shift. You will be expected to resume your regular work schedule on Thursday, January 6, 2000 at 11 p.m. A record of this documentation will be placed in your personnel file and continued violation of University work rules will result in further disciplinary action up to and including termination. If you feel this action was not based on just cause, you may appeal through the grievance procedure as provided in Article 4 of the WSEU Agreement with the State of Wisconsin.

I want to also remind you that you have been mentored, counseled, and reprimanded in the past for acting in an inappropriate manner in dealing with co-workers as documented in letters dated August 23, September 2, and October 7, 1999. It has been previously stressed to you that an employee in the Protective Services Office is a highly visible individual and that there are expectations that you will work to improve your human relation skills pursuant to the performance of these duties. In addition, you have been told and advised in writing that your role is not supervisory and that concerns about specific employee performance should be routed through your supervisor.

I want to remind you of the University Employee Assistance Program (EAP). The purpose of the EAP is to provide confidential consultation and referral service for employees who are seeking help for personal problems that may be affecting their job performance. The program is supported by the Counseling and Testing Center. They may be contacted at 785-8073.
ENC: Classified work rules

Cc: Al Lesky, Union Steward
James Quick, Human Resources
June Daellenbach, University Services
Scott Rohde, Protective Services

The reprimand was grieved on January 21, 2000, advanced through the contractual procedure and was appealed to arbitration by the Union on June 21, 2000.

14. On February 2, 2000, the Complainant was issued a notice of termination for alleged misconduct and work performance issues, as follows:

This letter serves as official notification of termination of your employment as a Police Officer on the University of Wisconsin-La Crosse campus effective Thursday, February 3, 2000, at 7:00 a.m. This action is taken based on misconduct and work performance issues addressed with you during the two investigatory meetings held on 12/23/99 and 1/ 19/00 as summarized below.

In attendance at the December 23, 1999 meeting were Scott Rohde, Chief, Protective Services; Scott McCuIlough, Sergeant, Protective Services; Theresa McCraw, Police Officer, Protective Services; and Al Lesky, Union Steward. In attendance at the January 19, 2000 meeting were Scott Rohde, Chief, Protective Services, Scott McCuIlough, Sergeant, Protective Services; Theresa McCraw, Police Officer, Protective Services, Pat Verse, Union Steward; and Jim Quick, Associate Director, Human Resources.

I: Improper Police Conduct You knowingly left an intoxicated and handcuffed student either unattended and/or unmonitored by a trained professional on three (3) separate occasions during an arrest on the University of Wisconsin-La Crosse campus on the morning of December 19, 1999:

During the early morning of Sunday 12/19/99 you responded to a noise complaint in Hutchison Hall. During the course of the call, you arrested and handcuffed an intoxicated UW-L male student, incident report #99121130, and eventually transported him to the Protective Services Office within the Information Center.

You removed the student from his room in handcuffs and placed him in the back seat of the squad car. He was wearing only a tee shirt, pants, and shoes. The temperature in the early morning hours of 12/19/99 was 8 degrees above zero. You left the handcuffed student in the back of the squad car and returned to Hutchison Hall to administer a Preliminary Breath Test (PBT) to the other student involved in the same noise complaint.

The arrested student was left locked and unmonitored in the back seat of the squad car with his hands handcuffed behind his back for approximately ten minutes. According to your testimony at the 1/19/00 investigatory meeting, that upon your return to the squad, you observed that the student had repositioned his handcuffs. The student had maneuvered his arms under his buttocks and legs causing the handcuffs to be positioned in front of his body. At that time, you ordered him out of the car, released the handcuffs, and re-applied them again behind his back.

You then drove from Hutchison Hall to Drake Hall in response to another call. The student was, for a second time, left unmonitored in the back seat of the squad car with his hands handcuffed behind his back. He was left unattended for approximately twelve minutes on this occasion while you were in Drake Hall. Upon your return to the squad car, the student was driven to the Information Center and taken into the officers' room within Protective Services for processing. You could be heard in the dispatch room saying in a raised voice, "Shut up Vince." "What did l say?" "Shut your mouth." The dispatcher could not hear the arrested student talking.

While you were dealing with the student in the officer's room, a call was received by dispatch requesting an officer in White Hall. You heard the call come in and indicated to the dispatcher that you would meet the caller in the residence hall in a few minutes. You brought the arrested student in handcuffs from the officers' room to the kitchen of the building. The kitchen is directly across from the dispatch room within the Information Center.

You directed the student dispatcher on duty to make sure he (the arrested student) stayed seated and quiet and for her (the student dispatcher) to "keep an eye on him." The student dispatcher did not have prior law enforcement training nor training in monitoring handcuffed persons. She did not have a key to the handcuffs in case of an emergency. You left the building and proceeded to White Hall leaving the student dispatcher and the handcuffed student alone in the Information Center building.

When you returned to the Information Center building approximately twenty minutes later and asked the student dispatcher if the arrested student gave her

any problems and if he "behaved", the student dispatcher said yes that he had. You then took the arrested student back into the officers' room. When you were finished with the arrested student, you drove him back to Hutchison Hall. The arrested student wanted to walk back but you said you were not letting him walk anywhere dressed like that. He was wearing only a tee shirt, pants, and shoes.

Scott Rohde, Chief of Protective Services, learned of the incident when another officer reported it to Sergeant McCullough as a concern after learning about it from the student dispatcher. During the evening shift of 12/19/99 Sergeant McCullough directed that you complete your reports for your shift beginning 12/18/99. You did not complete the reports by the end of the shift as directed by Sergeant McCullough. Your reports, including incident report #99121130, were completed several days later after the Sergeant again directed you to do your 12/18/99 reports.

You wrote your original incident report, #99121130, on a computer in the front parking office within the Information Center building on 12/22/99. Sergeant McCullough reviewed and approved reports on that same computer on 12/22/99. The incident report #99121130 was pulled up on the computer screen and the narrative had been read by Sergeant McCullough when you came into the building from patrol. Sergeant McCullough left the room for supplies telling you not to use the computer until he had exited out of the computer program. The incident report #99121130 was on the screen at that time. Sergeant McCullough returned to the office area approximately a minute later and observed you leaving the room. When he returned to his review of the report, the narrative of the report had disappeared from the screen.

You rewrote the incident report #99121130 on 12/23/99. Sergeant McCullough noticed several discrepancies between the first narrative he had read on the computer screen on 12/22/99 and the second narrative completed by you on 12/23/99. In the second report there was no mention of the trip to Drake Hall and leaving the handcuffed student unattended in the squad car, nor was there any mention that on one occasion that the student had slipped the cuffs to the front of his body while unattended.

12/23/99 Investigatory Meeting: When you were asked about the incident during the first investigatory meeting of 12/23/99, you said that you did not remember if the student was handcuffed or not. You said, "if that is what somebody is saying, if I did apply handcuffs, it was for my safety." You also stated you frequently leave arrested students under the supervision of a dispatcher. You replied, "Scott, I do this all the time." You said that leaving students with a dispatcher has been a common practice and occurred many

times when you worked on the weekend. When asked by Chief Rohde, you were unable to give any other incidents involving either yourself or any other officer leaving a handcuffed person alone in the building under the supervision of a dispatcher.

1/19/00 Investigatory Meeting: During the second investigatory meeting of 1/19/00, you had a greater recollection of the incident, report #99121130, than during the previous 12/23/99 investigatory meeting. In fact, on 1/19/00 you denied saying during the 12/23/99 investigatory that you did not remember whether or not you had handcuffed the student.

During the 1/19/00 investigatory meeting you confirmed that you removed the student from the hall without a jacket or other warm clothing; that the student, while in custody, did complain of being uncomfortable; and that the student had moved the handcuffs to the front of his body after being left unattended by you for about ten minutes. You confirmed on 1/19/00 that your second report on this incident lacked detail compared to your original report.

You also admitted leaving the handcuffed student unmonitored during three separate times on the morning of 12/19/99. You said that you felt your actions (handcuffing) were justified for safety reasons. When asked if you felt leaving the student handcuffed in the squad car on two separate occasions and also leaving the student alone with a student dispatcher was appropriate, you stated, "I would not have done anything I did not feel was justified." You further stated that your actions were appropriate.

Summary of Findings - Improper Police Conduct:
--The information you provided at the two investigatory meetings was inconsistent.

--Your conduct during the arrest, transport, and processing of the student, incident report #99121130, demonstrated misconduct and extremely poor judgment by a police officer in the performance of their duties.

--Proper police procedures were not followed thus putting the arrested student, the student dispatcher, and the University at substantial risk. Your misconduct during the detainment of the student is in direct conflict with the training provided you in your recruit school class. According to your instructor, proper monitoring of an arrested person is the responsibility of the arresting officer. In addition to cognitive instruction in monitoring of arrested persons, you have also had practical training at the police recruit school. The practical training again stressed proper monitoring of an arrested person so that any signs of medical or other problems can be detected promptly. In the training class it was determined that you demonstrated that you could properly perform this aspect of the arrest process.

--Your conduct put the arrested student at great risk on three separate occasions during his arrest, transport, and processing during the early morning hours of 12/19/99. Due to the intoxicated state of the student, monitoring by a trained professional is even more critical. The student had demonstrated that he could maneuver the handcuffs and had the ability to attempt to escape. He also informed you, based on your response to a question during the 1/19/00 investigatory, that he was uncomfortable.

--Your conduct placed a student dispatcher without law enforcement training at risk by having her watch an intoxicated and handcuffed student. By leaving the arrested student in the custody of the dispatcher a number of serious circumstances existed. The arrested student had demonstrated earlier to you the capability to move his hands to the front while handcuffed. The student demonstrated that he was capable of attempting to escape. In the kitchen where the arrested student was placed, sharp knives were within his reach.

--Your conduct placed the Department and the University at great risk for civil liability if harm had come to the arrested student or the student dispatcher due to failure on your part to monitor the arrested student. For example, manipulation of the handcuffs could cause serious injury and is a frequent cause for claims to be filed. The student dispatcher had no means of releasing the cuffs, nor authorization to release the cuffs from the arrested student, if he had suffered a medical problem or complications of intoxication. The student dispatcher was left alone in the building with the arrested and handcuffed student. No other of our UW-La Crosse officers have left an arrested and handcuffed person alone in the Information Center building with the dispatchers.

The incident described is a violation of several Classified Work Rules:

1 I.E., Failure to provide accurate and complete information whenever such information is required by an authorized person;
2 I.F., Failure to comply with health, safety, and sanitation requirements, rules, and regulations;
3 I.G., Negligence in performance of assigned duties; and
4 IV.J., Failure to exercise good judgment or being discourteous in dealing with fellow employees, students, or the general public.

II: Unauthorized Absence:

On December 29 you contacted Officer Friell at the protective service office and indicated that you would be off until 11:00 p.m. on January 6, 2000. You asked that he mark you off sick for the days that you were not scheduled off or on vacation. You had called in sick for 12/28/99 and 12/29/99. A medical certification was requested of you for the advanced sick leave. However, the medical certification you provided to Chief Rohde did not verify the need for your absence.

You were observed on campus in Graff Main Hall on 1/4/00, a day claimed as sick leave. During the 1/19/00 investigatory you were offered the option of taking the day, 1/4/00, as vacation versus unpaid leave but you declined at that time.

The above incident is a violation of the Classified Work Rule: II.B., Unexcused or excessive absenteeism.

III: Discourteous Interactions:
The following items are a violation of the Classified Work Rule: IV.J., Failure to exercise good judgment or being discourteous in dealing with fellow employees, students, or the general public.

During your performance evaluation meeting of 1/7/00 with Chief Rohde and Sergeant McCullough, you spoke to Chief Scott Rohde in a threatening tone. You said, "You are getting closer to answering to a higher authority." When Chief Rohde asked you during the 1/19/00 investigatory meeting who you were referring to as the higher authority, you initially said that you did not recall making the comment. A short time later in the meeting, you admitted that you had said something similar to that comment during the//7/00 meeting. Your reply was, "Oh, I don't know Scott, maybe God." You accused Chief Rohde of conducting investigatory meetings with you after you had told him that you had filed a lawsuit against him.

During the 1/19/00 investigatory meeting you accused Sergeant McCullough of lying about directing you to complete your incident reports from the weekend, including the handcuffed student incident. The Sergeant has clear recollection of directing you to complete the reports.

Also addressed during the investigatory was a call to the chancellor's office by an alumnus of UW-La Crosse. The individual complained that you had been rude and belittling when you stopped him on campus on Sunday, 11/28/99. When asked about the complaint during the 1/19/00 investigatory meeting, you said you did not remember the Badger Street contact. There is no field contact report for this contact, which is routine procedure in Protective Services. Respectful interactions during enforcement contacts have been a constant problem of yours.

You have been mentored, counseled, reprimanded, and suspended in the past for acting in an inappropriate manner in dealing with co-workers, your supervisors, students, and the general public. There has been no evidence of improvement on your part in this area nor indication that you are willing to make an effort to improve. For example, when Chief Rohde reached you by telephone at your

home on 1/5/00 regarding your sick leave he asked if you had received the message that he left with the person at the residence on 1/4/00. You responded that Chief Rohde was a liar and that he had not called and left a message on 1/4/00. Also, during the 1/7/00 performance evaluation meeting you said that your coworkers, Officer Parker, Officer Tarnow, Shirley Paine, Sally Helgeson, and Hedy Otto have lied about you and should not be trusted.

You have resisted and/or refused to take direction from your supervisors and management on several occasions. During your performance evaluation meeting of 1/7/00 you refused to discuss any goals for the next year. You told Chief Rohde that you would be issuing a written attachment stating your goals. Chief Rohde directed that the goals be submitted within two weeks of the meeting. You were reminded on 1/19/00 about the submission of your goals. Your goals have not been received to date. All other officers participated in goal setting during their performance evaluation meetings.

It has been previously stressed to you many times that an employee in the Protective Services Office is a highly visible individual and that there are expectations that you will work to improve your human relation skills pursuant to the performance of these duties. However, during investigatory meetings with you on 12/23/99 and 1/19/00 and in the past, you have refused to even consider the possibility that your actions have been inappropriate and needed improvement.

Your employment at the University of Wisconsin-La Crosse is terminated effective at 7:00 a.m. on Thursday, February 3, 2000. You are required to immediately turn in all keys, badges, clothing, ID cards, supplies, equipment, and any other items issued to you as an employee and Police Officer on the University of Wisconsin-La Crosse campus. All University property in your possession but not on the premises must be returned to Chief Rohde at an agreed upon time and within 48 hours of receipt of this letter.

If you feel this action was not based on just cause, you may appeal through the grievance procedure as provided in Article 4 of the WSEU Agreement with the State of Wisconsin.

. . .

The termination was grieved on February 9, 2000, advanced through the contractual procedure and was appealed to arbitration by the Union on June 21, 2000.

15. In early October, 2000, Union Field Representative Carol Gainer met with Assistant Director Hacker to review Complainant's grievances prior to arbitration. As a result of the meeting, Hacker decided that the Union would not support the October 1, 1999,

January 21, 2000, and February 9, 2000, grievances, referenced in Findings #12, #13 and #14 above, to arbitration and, on October 16, 2000, sent the Complainant the following letter:

. . .

I have reviewed, along with other members of the Wisconsin State Employees Union staff, your grievance(s) relating to Article 3, 4 and 11 letter of reprimand/1-day
Suspension/discharge — which has been appealed to arbitration.

Based on the circumstances surrounding these cases we could not prevail in arbitration and therefore we will not pursue these cases.

Please be aware that you may appeal this decision not to support your grievance(s) by carefully following the Council 24 Appeal Procedure, a copy is enclosed.

For further information regarding your case(s), contact your field representative, Carol Gainer at (608) 525-6771.

. . .

AFSCME COUNCIL 24 EXECUTIVE DIRECTOR'S APPEAL PROCEDURE

Grievances which have been processed through the third step of the grievance procedure shall be dealt with by Council 24 in the following manner:

1. Once an appeal has been filed on a third step grievance denial, the field representative having jurisdiction, will then meet with the assistant director of Council 24 to review the case on its merits. After this review, the assistant director will issue a decision, **IN WRITING**, either to support or not support the grievance to arbitration based on the merits of the case, previous precedent and the effect on the union and its membership. This written decision, including the reasons for denying support, will be sent to the grievant and steward. Explanation of Appeal Procedure will be included.

2. If the grievant has grounds to dispute the decision, he/she may, within thirty (30) days of receiving the decision not to support the grievance to arbitration, appeal said decision to the executive director of Council 24.

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

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

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

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

A. The grievant must file a WRITTEN request, VIA CERTIFIED LETTER, for ownership of the grievance with the executive director of Council 24; and

B. The grievant must sign a WAIVER OF INDEMNITY holding Council 24 harmless in any future proceedings on the matter.

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

16. Subsequent to receiving Hacker's October 16 letter, the Complainant filed a 13-page appeal with Martin Beil, Executive Director of AFSCME, Council 24, setting forth her version of the circumstances underlying each of the grievances and requesting that Beil reverse Hacker's decision and agree to support the grievances to arbitration.

17. On November 29, 2000, Beil sent the Complainant an acknowledgement of receipt of her appeal, indicating that the matter was under review.

18. On February 12, 2001, in response to the Complainant's appeal, Beil sent the following letter:

. . .

Thank you for sending the information accompanying your appeal relating to the Union's position not to pursue the above-mentioned cases to arbitration. After a careful review of the documentation, the information from WWTC and the City of Madison, while interesting background, would undoubtedly be given little, if any, weight by an arbitrator even if ruled admissible. Regrettably I must concur with the decision not to pursue these cases.

It is my understanding that Karl Hacker and Carol Gainer devoted an unusual amount of time to making the initial determination. Long discussions have been held with both of the Union stewards, potential witnesses, and the Employer. As a result, it is my sense that the Employer would sustain their burden of proof that a preponderance of evidence demonstrated sufficient and repeated work rule violations to support termination.

With this decision, the remaining grievances listed below will also be with drawn as the relief sought becomes moot:

#17097	meals on duty
#17080	work rules cited in yearly evaluation
#16476	employer's refusal to meet (UW Whitewater)

UW case #2341, not appealed to arbitration; tuition reimbursement: The Employer agreed April 28, 2000, that if you would send them a transcript showing that you had taken classes, completed them satisfactorily, and paid for them in full, you would be reimbursed in accordance with the contract. On September 29, 2000, you sent Ms. Gainer a copy of a fee/tuition invoice from UW-Milwaukee dated 9/3/99 and an unofficial transcript from UWM dated 7/15/97 stating "no action". Neither document showed any proof of payment.

Ms. Gainer forwarded them to Owen Bradley of UW Systems. Since you did not receive reimbursement, it appears Mr. Bradley considered it insufficient proof.

I also understand there was a sick leave issue regarding a doctor's excuse which Mr. Bradley agreed to rectify. (As you have retained an attorney, you may ask him to pursue this.) I have directed Ms. Gainer to continue to follow up with Mr. Bradley on these two final issues.

. . .

19. On February 27, 2001, the Complainant sent Beil a letter requesting ownership of the grievance of her termination and all information in the Union's possession relative thereof, and also requesting that the he reconsider his decision to withdraw support for the initial three grievances.

20. On March 23, 2001, Beil sent the Complainant a letter denying her request to take ownership of her grievance pursuant to a recently revised Union policy, and attached a copy of the new policy, as follows:

. . .

We are in receipt of your letter dated February 27, 2001 requesting ownership of your grievance Case No. 17079.

Your request must be denied due to a revision of the appeal procedure that was adopted by the Executive Board on February 5, 2001. A copy of the new Internal Appeal Procedure is enclosed.

Also included is a copy of a Memorandum that was sent to all local presidents and leadership outlining the reasons why the previous appeal procedure could no longer be in effect. As you can clearly see, upon advice of legal counsel, it was necessary to make these revisions due to new contract language (Article 4/3/2), and the Wisconsin Employment Relations Commission ruling. Also, the Department of Employment Relations, as the employer, legally determined they would not arbitrate discharge cases if we, the Wisconsin State Employees Union, AFSCME Council 24, relinquished ownership.

Consequently, your request for ownership is denied and all other information and documentation will not be forthcoming and your case files remain closed.

. . .

INTERNAL GRIEVANCE APPEAL PROCEDURE

The Council 24 Executive Board, on advice of legal counsel, recently reviewed and modified our Grievance Appeal Procedure that is now called INTERNAL APPEAL PROCEDURE.

A copy of the procedure is enclosed, and the primary change involves the elimination of provisions allowing discharged employees to pursue their own cases to arbitration, at their own expense, in cases where the Union has declined to pursue the grievance to arbitration. There are several reasons for this action.

First, the new contract contains a "loser pays" provision (Art. 4/3/2) for court reporter costs and arbitration fees and expenses. Court reporters and arbitrators will be looking to the contractual parties for payment, however, and we do not want to be involved in administering these expenses nor be held liable if the losing party fails to pay.

More importantly, a recent decision by the Wisconsin Employment Relations Commission (WERC), in UW Hospital & Clinics, has clearly reaffirmed the principal that the Union owns the grievance, as a party to the contract, and only a party may take a grievance to arbitration. We support this decision and allowing discharged employees to pursue grievances to arbitration on their own is arguably inconsistent with that position.

Furthermore, the Department of Employment Relations (DER) has now taken the position, based on the WERC decision, that they will not arbitrate discharge cases when the WSEU has relinquished ownership. Our counsel advised us that this position is legally sound and recommended that the grievance process end with a final determination by Council 24, as set forth in the enclosed procedures adopted in February by Council 24 Executive Board.

Enclosure
Cc: Field Representative

AFSCME COUNCIL 24 EXECUTIVE DIRECTOR'S

INTERNAL APPEAL PROCEDURE

Grievances which have been processed through the second step of the grievance procedure shall be dealt with by Council 24 in the following manner:

1. Once an appeal has been filed on a second step grievance denial, the field representative having jurisdiction will then meet with the assistant director of Council 24 to review the case on its merits. After this review, the assistant director will issue a decision, **IN WRITING**, either to support or not to support the grievance to arbitration based on the merits of the case, previous precedent, and the effect on the union and its membership. This written decision, including the reasons for denying support, will be sent to the grievant and steward. Explanation of Appeal Procedure will be included.

2. If the grievant has grounds to dispute the decision, he/she may appeal said decision to the executive director of Council 24 within thirty (30) days of receiving the decision not to support the grievance to arbitration.

3. The postmark date shall determine the time limits for the appeal.

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

5. The executive director will then meet with the assistant director and respective field representative to conduct an executive review of the disputed case. Upon completion of this review, the executive director will issue a written determination whether to uphold or reverse the decision not to support. This decision shall be final.

6. If the determination is not to support the grievance to arbitration, the grievance will not be pursued and the case file will be closed.

21. The Union's conduct in refusing to arbitrate the Complainant's grievances was not arbitrary, discriminatory or in bad faith and was not a violation of the Union's duty of fair representation to the Complainant.

22. The Union's conduct in refusing to release ownership of the Complainant's termination grievance was not arbitrary, discriminatory or in bad faith and was not a violation of the Union's duty of fair representation to the Complainant.

CONCLUSIONS OF LAW

1. Respondent, Wisconsin State Employees Union, AFSCME Council 24, AFL-CIO, did not violate its duty of fair representation to the Complainant herein in refusing to arbitrate her grievances or in refusing to release ownership of her termination grievance and, thus, did not commit unfair labor practices within the meaning of Sec. 111.84, Wis. Stats.

2. Respondent, State of Wisconsin Department of Employment Relations, did not commit unfair labor practices within the meaning of Sec. 111.84(1)(e), Wis. Stats.

ORDER

IT IS ORDERED that the complaint herein be, and hereby is, dismissed in its entirety.

Dated in Fond du Lac, Wisconsin this 1st day of April, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner

DEPARTMENT OF EMPLOYMENT RELATIONS

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

BACKGROUND

From 1995 until 2002, the Complainant worked as a police officer for the University of Wisconsin system, working briefly at UW – Whitewater, but primarily at UW – La Crosse. Beginning in March, 1998, the Complainant was subjected to a series of disciplinary actions as a result of alleged work rule violations and/or improper conduct in performance of her job duties. Two disciplinary actions were grieved in Spring, 1998, and were supported to arbitration by the Union, along with a separate grievance concerning an incident that occurred at UW-Whitewater in late 1997, with an arbitration hearing to have taken place in Fall, 1999. The Complainant was disciplined for a third time in September, 1999, and grieved the action in October, at which time the previous arbitration was cancelled, ostensibly because the Union wished to consolidate all the grievances into one action. The Complainant received a fourth discipline in December, 1999, and a fifth in February, 2000, resulting in her termination. Both disciplinary actions were grieved and advanced by the Union through the second step of the grievance process.

The complaint filed herein alleges that the Union breached its duty of fair representation to the Complainant in its handling of a series of grievances filed by the Complainant challenging discipline issued to her beginning in March, 1998, and ultimately resulting in her termination in February, 2000. The complaint alleges that the Union was initially supportive of her position, but that the Union withdrew its support after her termination. It further alleges that the Complainant subsequently requested ownership of her termination grievance, which the Union denied. The complaint alleges that the Union's actions in regard to the Complainant's grievances were arbitrary, capricious, lacking in good faith and discriminatory. In addition, the complaint alleges that the actions of the Employer's actions in disciplining and ultimately terminating the Complainant violated Sec. 111.84(1)(e), Wis. Stats. The Union denied that its actions in representing the Complainant were in any way arbitrary, capricious, in bad faith or discriminatory. The Employer denied that any of its actions were in violation of law.

POSITIONS OF THE PARTIES

The Complainant

The Complainant contends that the Union violated its duty of fair representation to the Complainant in its handling of her grievances against the University. She contends that the Union did not conduct an adequate investigation of her claims, did not interview witnesses supportive of her position, did not take into account the effect her sexual preference had on her

working relationships with other employees, did not give an adequate explanation for its ultimate refusal to arbitrate the grievances and did not follow its own internal procedures in evaluating and responding to her claims. When she appealed the refusal to the Union's executive director, there was an inordinate delay in reviewing the appeal, during which time the Union changed its policy regarding transferring ownership of discharge grievances, with the effect that when the appeal was denied she was left without recourse. The length of the delay was suspicious given the apparently perfunctory treatment her appeal received.

In other instances occurring at about the same time, the Union has supported discharged employees and gained their reinstatement despite more serious infractions by the employees. One incident involved a custodial employee who handcuffed a graduate assistant resulting in injury to her. The employee was criminally charged and terminated. After the employee pled guilty to a reduced misdemeanor charge, the Union negotiated his reinstatement. A second incident involved an employee who was terminated after a physical confrontation with a food service manager. The Union also negotiated his reinstatement prior to an arbitration hearing. No negotiations took place between the Union and University regarding the Complainant, despite the fact that her alleged acts were less serious than those of the other employees, suggesting possible collusion between the University and the Union to get rid of the Complainant in exchange for reinstating the other employees. The Union has also failed to explain why the original three grievances were not arbitrated, not updated her on their status

In summary, the Union's actions denied the Complainant her remedies under the collective bargaining agreement. Its actions were taken in bad faith and were a violation of its duty of fair representation to the Complainant. The Union should be required to advance the grievances to arbitration against the University on the Complainant's behalf.

The Union

The Union argues that the Complainant has the burden to prove a breach of the duty of fair representation by a clear preponderance of the evidence. This requires her to prove that the Union's actions were arbitrary, discriminatory or taken in bad faith, which rises above a finding of mere negligence (*citations omitted*). Federal courts have consistently held that conduct meeting this standard must be sufficiently egregious so as to rise almost to the level of intentional misconduct. The Complainant has failed to meet this standard.

The disciplinary actions assessed against the Complainant grew out of at least 15 separate incidents of improper conduct involving students, members of the public, co-workers, other officers and supervisors. There was a recurring pattern of abusive and unprofessional actions, as well as a credibility problem which ultimate led the Union to withdraw its support. Contrary to the Complainant's assertion, the evidence shows that the Union expended considerable time and resources investigating her grievances, much more than typical in such cases, and ultimately concluded that she could not prevail. The diversity of events shows that this was not merely a case of a personality conflict or a "bad supervisor," nor was it an anti-lesbian conspiracy.

Karl Hacker and Carol Gainer did an extensive investigation before concluding the case should not go forward. In part, this was because law enforcement officers are held to a higher standard than other employees. This factor distinguishes her case from those of the other two employees who were reinstated. Also, those cases involved single, isolated incidents, whereas the Complainant had numerous infractions. That and her general lack of credibility justify the Union's action and warrant the dismissal of the complaint.

The Employer

The Employer observes that the thrust of the Complainant's case is primarily her contention that the Union failed to fairly represent her. The evidence does not support her claim. She had conflicts with everyone she worked with, both at UW–La Crosse and UW-Whitewater, but in no case admitted any degree of fault. This is a very unlikely scenario.

The Union's conclusion that the Complainant's credibility was poor was correct and would have made winning in arbitration very difficult. With the variety of different incidents and actors, the Union could have reasonably concluded that the Complainant was the problem when it decided not to proceed to arbitration. This is a valid concern in making such a judgement.

There is, further, no evidence to support the Complainant's conspiracy theory and she, herself, admitted that it was her opinion and would be difficult to prove. Clearly, the Complainant has failed to prove her case in any sense and it should be dismissed.

The Complainant in Reply

The Complainant argues that the Respondent does not contend that the grievances were meritless, merely that the Complainant was not believable. The Union did not raise this argument until hearing, however. At the time it withdrew its support, its only statement was "Based on the circumstances surrounding these cases we could not prevail. . . " Further, the Union made no attempt to speak to the other witnesses in the grievance cases, which could have cleared up any credibility issues.

But for the Union's agreement to support the first three grievances, the Complainant could have sought their removal from her personnel file after a year and they would not have been available for consideration at the time the later discipline was imposed. She was thus injured by the Union's initial support for those grievances when it was later withdrawn. The fact that 15 months separated her June, 1998, and September, 1999, disciplines shows she was improving. Further, the disciplines issued in 1999 and 2000 were excessive considering the alleged acts. The Union clearly did not consider the context of the discipline, which was that the Complainant was the only lesbian female officer on the force and had filed a discrimination action against the University for failure to promote her before the September, 1999, incident.

The Union also ignored its own internal policies in handling her grievances, which was in itself unreasonable. It did not do a thorough investigation of the cases and did not consider that the University had no written policies regarding use of handcuffs, or that she had been commended for similar actions in the past. It held up ruling on her appeal for three months and only then informed her of a change in Union policy, which would deprive her of the right to pursue the grievance of her termination on her own. In sum, the Union acted in bad faith with respect to the Complainant and the Complaint should be upheld.

DISCUSSION

In this case, the Complainant has asserted that the Union violated its duty of fair representation to her in that it acted arbitrarily, discriminatorily and in bad faith in its management of various grievances she filed against the University of Wisconsin – Whitewater and University of Wisconsin – La Crosse between 1998 and 2000. While the Complainant raises a number of objections to various procedural matters, ultimately her argument focuses on two things: the Union's decision to not arbitrate the grievances filed over discipline she received in 1999 and 2000 leading up to and including her termination and the Union's subsequent refusal to release ownership of the termination grievance to her.

The duty of fair representation is derived from the Union's position as the exclusive collective bargaining agent for all the employees covered by the collective bargaining agreement, pursuant to Article II, Section 1, thereof. In VACA V. SIPES, 87 S.CT. 903, 64 LRRM 2369 (1967), the U.S. Supreme Court established standards for determining compliance with the duty of fair representation, which were subsequently adopted by the Wisconsin Supreme Court in MAHNKE V. WERC, 66 WIS.2D 524 (1974). In VACA, the Court stated:

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.

ID. at 2376. Expanding on that proposition, the Court made it clear that this standard does not require the Union to arbitrate all grievances, regardless of its perception of the grievance's lack of merit, even if another body later determines the grievance to have been meritorious. This view was also expressed by the Wisconsin Supreme Court in MAHNKE, SUPRA., wherein the Court, quoting MOORE V. SUNBEAM CORP., 459 F. 2D 811 (7TH CIR., 1972) said:

> . . .that opinion (Vaca) also makes it clear that the union may exercise discretion in deciding whether a grievance warrants arbitration. Even if an employee claim has merit, a union may properly reject it unless its action is arbitrary or taken in bad faith. . .

ID. at 531.

Subsequent rulings by various courts have interpreted the VACA standard to establish a significant burden for a complainant to prove failure of the duty of fair representation. Thus, a violation of the duty of fair representation cannot be based on mere negligence. PETERS V. BURLINGTON NORTHERN R.R., 931 F. 2D 534, (9TH CIR., 1991). Rather, ". . . a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' . . . as to be irrational." AIR LINE PILOTS V. O'NEILL, 499 U.S. 65, 136 LRRM 2721 (1991).

The Complainant here asserts that the Union's conduct in handling her grievances was arbitrary and discriminatory. Her discrimination claim is based upon the fact that she is lesbian and believes that the Union's actions were, in part, motivated by bias against her on the basis of her sexual orientation. At the hearing, she testified that she believed the University sought to terminate her due to a discrimination complaint she had filed concerning a failure to promote her. She further testified that two heterosexual male employees had been terminated in early 2000, both due to allegations of criminal assault, but that the Union had supported them and obtained their reinstatement. It is her belief that the Union withdrew its support from her as part of a deal with the University to obtain the reinstatement of the other employees. The record, however, is totally devoid of evidence supporting this allegation. In fact, the Complainant testified that she was unaware whether Union officials Karl Hacker and Martin Beil, who made the decisions to not arbitrate her termination or surrender ownership of her grievance, even knew of her sexual orientation. She also could produce no evidence of collusion between the University and Union beyond the reinstatement of two other employees roughly coinciding with the Union's withdrawal of support for her termination grievance. This falls far short of the clear preponderance of evidence necessary to support her claim of discrimination.

I now turn to the Complainant's contentions that the Union's actions in failing to arbitrate her termination grievance or surrender ownership of it to her were arbitrary. The first contention arises out of the October 16, 2000 letter from Karl Hacker advising her that the Union had determined not to pursue arbitration of the grievances arising from the September 2, 1999 reprimand, the December 23, 1999 suspension and the February 2, 2000 termination and her subsequently denied appeal to Martin Beil. The Complainant testified that prior to receiving Hacker's letter she was satisfied with the representation provided by Union Stewards Al Lesky and Pat Verse and Union Field Representative Carol Gainer. The crux of the case, therefore, is whether Hacker's decision to not arbitrate the grievances was arbitrary or in bad faith and, likewise, whether Beil's decisions to deny the Complainant's appeal and to refuse to transfer ownership of the termination grievance were arbitrary or in bad faith. From the Complainant's perspective, the Union's actions were inexplicable, inasmuch as the Union had supported her grievances up to the issuance of Hacker's letter. Add to that the fact that Hacker failed to communicate the basis for his decision to her satisfaction and the Complainant's confusion turned into suspicion. Her suspicions were confirmed in her mind when her appeal to Executive Director Beil was denied and her subsequent request to obtain ownership of the termination grievance was refused.

There is no question that the Complainant feels that her grievances were justifiable and that had they been supported she would have prevailed. Her lengthy summation of each grievance and her defense of her actions contained in her appeal letter confirm that she believes she was wronged in each instance. Whether or not she is correct, however, is not the point under consideration. As VACA, SUPRA, holds, the relative merit of the Complainant's grievances is not the standard by which the Union's actions are to be judged. Rather, the issue is whether in deciding not to pursue the grievances the Union acted discriminatorily, arbitrarily, or in bad faith. Having determined that the Union's action was not discriminatory, I turn now to the question of whether it was arbitrary.

The Complainant first became aware that the Union was withdrawing its support from her grievances when she received Karl Hacker's October 16, 2000 letter. According to Hacker's testimony, that letter resulted from a meeting he had sometime earlier with Carol Gainer regarding the grievances. According to Hacker, the Union processes more than a thousand grievances per year and he personally approves the arbitration of all grievances processed by the Union after meeting with the staff representative handling the grievance to discuss the merits. Due to the volume of cases he handles, he does not conduct an independent investigation of each grievance, but relies on the staff representative to advise him as to the merits of the case and any potential problems before making his decision. In this case, he testified that he met with Gainer for a considerable length of time due to the number of grievances and discussed the merits of the cases. He also reviewed the file information regarding the grievances and after the meeting concluded that there was little likelihood of prevailing. His opinion was based upon the number and nature of the occurrences that led to the various impositions of discipline, his knowledge and experience in dealing with law enforcement grievances over many years and his perception that a higher performance standard is expected of law enforcement personnel than other classifications of employees. His decision was also influenced by the fact that the new collective bargaining agreement between the Union and the State contained a "loser pays" provision in the grievance procedure which would have required the Union to bear the entire expense of the arbitration if it lost.

Carol Gainer testified that she spent many hours investigating the Complainant's grievances and advancing them through the second step hearing process. She met with the two Union stewards, Al Lesky and Pat Verse, and went over their case files. She also spoke with representatives from the other Council 24 Local at UW-La Crosse about a dispute which had occurred between the Complainant and a member of their Local. She estimated that she spent two to three workdays investigating, preparing and advancing each grievance. At the time of the hearing, she had not seen the Complainant's files in over two years and could not recall what specific information was contained in them. She testified that her meeting with Hacker lasted over an hour, which was an unusually long time due to the number of grievances, and that they tried but were unable to find a way to support the grievances to arbitration. In her view, the totality of the incidents, the seriousness of the allegations and the high standard of care imposed on law enforcement officers would have made it difficult to overturn the termination. She also was concerned about the Complainant's lack of credibility, both from

her personal experience and what she had learned from others in the course of her investigation. She further concluded that if the Union could not effectively challenge the termination, the other grievances, based on lesser degrees of discipline, were moot.

In MAHNKE V. WERC, SUPRA, the Court stated:

> *Vaca*, *supra*, provides that suit may be brought subsequent to an arbitrary, discriminatory or bad faith refusal to arbitrate by the union. *Vaca* also requires the union to make decisions as to the merits of each grievance. It is submitted that such decision should take into account at least the monetary value of his claim, the effect of the breach on the employee and the likelihood of success in arbitration. Absent such a good faith determination, a decision not to arbitrate based solely on economic considerations could be arbitrary and a breach of the union's duty of fair representation.

ID. at 534. The MAHNKE Court also cite with approval ENCINA V. TONY LAMA CO. (W. D. TEXAS 1970, 316 FED. SUPP 239, AFFIRMED (5TH CIR. 1971), 448 FED. 2D 1264, wherein the Court found no violation of the duty in a case where the union had considered the cost of arbitration, the requirements of the collective bargaining agreement and the highly speculative chance of prevailing in its decision to not arbitrate a grievance. MAHNKE thus clearly requires more than a cost analysis, therefore, when evaluating a Grievant's case in order to meet the duty of fair representation.

I am persuaded on this record that the Union here has satisfied the requirements of MAHNKE. The Complainant focuses on Hacker's actions in evaluating and rejecting her case, but Hacker's decision was not made in a vacuum and thus the entirety of the Union's representation of the Complainant must be considered in determining whether it met its duty. In the initial phase of the grievance process, the Complainant was represented by the Union stewards, Al Lesky and Pat Verse. Although Lesky and Verse did not testify at the hearing, the Complainant indicated she had no objections to their representation or efforts on her behalf. At the Step Two level, Carol Gainer, the Union Field Representative, took over the Complainant's representation. Again, the Complainant had no objection to Gainer's efforts. According to all indications in the record, these individuals did all the investigative work on the grievances prior to Gainer's meeting with Hacker. At the meeting, Hacker relied on the information in the file, largely compiled by Lesky and Verse, as well as Gainer's analysis of the cases, in making his determination. The record indicates that this is standard operating procedure within the Union and that, as a practical matter, Hacker could not personally investigate the many hundreds of individual grievances that he evaluates annually. Although the evidence is not dispositive on this point, it may be that not all witnesses to the incidents were interviewed by the stewards or the field representative. Even if so, however, this falls short of establishing that the Union's actions were arbitrary or taken in bad faith. Gainer testified that she spent many hours investigating the grievances, reading the files and meeting with the stewards and the Complainant. Her meeting with Hacker to discuss whether to

arbitrate the grievances was the longest such meeting she has had with him in over 16 years as a field representative. She testified that they attempted to find a justification for arbitrating the grievances, but were unable to, given the number of separate incidents involved, the high standard of performance expected of law enforcement officers and their concerns over the Complainant's lack of credibility. Gainer's testimony was uncontroverted and I credit it as credible. Hacker's decision was largely based on the information he received in his meeting with Gainer and his reliance on her opinion as the field representative closest to the cases and most aware of the issues and evidence. This was consistent with the Union's longstanding practice and there was no evidence that he gave any less attention to the Complainant's case than to any other. If anything, the evidence suggests that he spent more time than usual or customary in evaluating the Complainant's case. I find, therefore, that Hacker's decision to not arbitrate the Complainant's grievances was not arbitrary or in bad faith.

Likewise, I find that the denial of Complainant's appeal by Executive Director Martin Beil was neither arbitrary nor in bad faith. The appeal procedure information supplied to the Complainant with Hacker's October 16 letter indicated that if an appeal was properly filed Beil would conduct an executive review of the case an issue a final decision on whether the grievance would be arbitrated. The document does not elaborate on the meaning of the term "executive review." Beil was not called to testify at the hearing. Hacker, however, testified that upon receipt of the appeal, Beil instructed him to review the case again and report his findings, which was the typical procedure followed in appeal cases. Hacker then went over the case files again and had a second meeting with Carol Gainer, as well as one with Union Steward Pat Verse, to discuss the merits of the cases. He further met with Steven Williams, a former Union President and Wisconsin State Highway Patrolman, to discuss issues regarding acceptable police procedures as they related to some of the allegations against the Complainant. Subsequently, Hacker met with Beil and advised him that he still did not believe they could succeed in arbitration. Beil accepted the recommendation and thereafter advised the Complainant that her appeal was denied. 1/

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1. Beil's February 12, 2001 letter upheld Hacker's decision refusing to arbitrate the grievances filed over the discipline issued to the Complainant in September, 1999, and December, 1999, as well as her February, 2000 termination. The letter also withdraws three previously filed grievances – one which resulted from a verbal reprimand, one which resulted from a written reprimand and a third wherein the Complainant grieved the citation of work rules in her annual evaluation – on the basis that the relief sought became moot upon the Complainant's termination. Left unaddressed by both Hacker and Beil is a grievance filed by the Complainant over a one-day suspension she received on June 16, 1998 (Comp. Ex. 5). This grievance was appealed to arbitration by Carol Gainer and was supported to arbitration in an August 3, 1999 letter to the Complainant from Karl Hacker. Inasmuch as the grievance involved a suspension and concomitant loss of pay, it was not rendered moot by the Complainant's termination. So far as the record shows, this remains a viable grievance from which the Union has not apparently withdrawn support and, thus, remains arbitrable.

The Complainant characterizes the appeal review as perfunctory, noting the facts that the Union did not contact witnesses she identified or attempt to discover whether there were written policies and procedures applicable to her alleged infractions. She argues that the failure to do so was an act of bad faith. I disagree. The Union's appeal procedure does not require a *de novo* review of the case, as the Complainant appears to suggest. Rather, it requires the executive director to review the decision of the assistant director and the information on which it was based, along with any additional information provided by the grievant. The pertinent language of the appeal procedure is contained in paragraph 4:

. . .

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

. . .

I read this language to require no more from the appeal process than that the executive director review the appeal materials and the file and meet with the assistant director to discuss the case, after which a determination is to be made. The record indicates that this procedure was followed and, furthermore, that, at Beil's direction, Hacker made additional inquiries prior to their meeting to gain additional information. I do not read the appeal procedure, nor the holding in MAHNKE, to require the Union's executive director to track down individual witnesses or conduct a more extensive investigation of the case than that conducted by those primarily responsible for handling it. On this basis, therefore, I cannot find that Beil's review or ultimate denial of the Complainant's appeal was arbitrary or in bad faith.

Finally, the Complainant takes issue with the Union's refusal to transfer ownership of her termination grievance. After receiving the denial of her appeal, the Complainant wrote to Beil on February 27, 2001, requesting ownership of her termination grievance. The record indicates that it had been the Union's former practice to allow grievants to take ownership of termination grievances if the Union elected not to support them to arbitration. On February 5, 2001, the Union changed its policy resulting in the issuance of a new Internal Grievance Appeal Procedure. According to the terms of this procedure, the Union no longer permits ". . . discharged employees to pursue their own cases to arbitration, at their own expense, in cases where the Union has declined to pursue the grievance to arbitration." The memorandum cites several reasons for the change. These include new contract language which requires the losing party to assume all arbitration expenses, a recent WERC decision holding that only a contractual party (i.e., an employer or Union) can take a case to arbitration, and a resulting directive from the State of Wisconsin Department of Employment Relations that it would no longer arbitrate discharge cases with individual grievants after the Union had relinquished ownership.

The Complainant is particularly at odds with the decision because of delay between the filing of her appeal in November, 2000, and the issuance of Beil's determination on February 12, 2001. She argues that the delay in responding was unjustified given the perfunctory nature of the appeal review and denied her the opportunity to take over the grievance because the policy change occurred in the interim. She implies that the delay was, in part, intended to forestall her until the policy change specifically to deny her the opportunity to take ownership of the grievance and was, therefore, in bad faith. Simply stated, there is no evidence in the record to support this contention. The Union's policy change is not irrational on its face and there is nothing in the record indicating that the decision to modify the policy was in any way connected with the Complainant's case. Nor is there any evidence that the Complainant's appeal review was held up until the policy change came into effect. Ultimately, the objection rests on the fact that the change in the Union's policy occurred during the pendancy of the Complainant's appeal review. This, while an unfortunate coincidence for the Complainant, is insufficient to find arbitrary conduct or bad faith on the part of the Union.

Insofar as this decision makes a determination that the Union did not violate its duty of fair representation to the Complainant, under MAHNKE I have no jurisdiction to rule on the Complainant's underlying contractual claims against the Employer and they are, accordingly, dismissed.

Dated at Fond du Lac, Wisconsin, this 1st day of April, 2003.

John R. Emery /s/

John R. Emery, Examiner

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