STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LYNN GRAP, ANTOINETTE PEREZ, ROSALIE KUBIC and JACQUELINE GARCIA, Complainants,

vs.

MILWAUKEE COUNTY and AFSCME DISTRICT COUNCIL 48, AFL-CIO, Respondents.

Case 526
No. 61770
MP-3872

Decision No. 30523-A

Appearances:

Ms. Lynn Grap, Milwaukee, and **Ms. Antoinette Perez**, Milwaukee, appearing on behalf of themselves and one another.

Attorney Timothy R. Schoewe, Deputy Corporation Counsel, 901 North Ninth Street, Room 303, Milwaukee, WI 53233, appearing on behalf of Respondent County.

Attorney Alvin Ugent, Podell, Ugent & Haney, 611 North Broadway, Suite 200, Milwaukee, WI 53202, appearing on behalf of Respondent Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On November 7, 2002, the above Complainants filed a complaint with the Wisconsin Employment Relations Commission alleging that Respondent Milwaukee County had committed prohibited practices within the meaning of Secs. 111.70 (3)(a)1, 3 and 5, Stats., by actions the County took against Complainants and other employees, and further alleging that Respondent AFSCME District Council 48 had committed prohibited practices within the meaning of Sec. 111.70(3)(b)1, Stats., by actions and inactions with respect to the Complainants and other employees. The Respondents each filed an answer denying that they had committed the prohibited practices alleged by Complainants.

The Commission appointed a member of its staff, Marshall L. Gratz, as Examiner to conduct hearing and make and issue Findings of Fact, Conclusions of Law and Order in the matter. Pursuant to notice, a hearing was held before the Examiner on January 22 and 23, 2003, at the Milwaukee County Courthouse in Milwaukee, Wisconsin. A stenographic transcript was made of the hearing. Complainants Kubic and Garcia did not appear at that hearing in person or through any representative. A post-hearing brief was submitted on behalf of Complainants Grap and Perez, and post-hearing briefs were submitted by each of the Respondents. The last of the briefs was received and exchanged by the Examiner on March 23, 2003, marking the close of the hearing.

Based on the evidence and arguments of the parties, the Examiner issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainants Lynn Grap, Antoinette Perez and Jacqueline Garcia are individuals residing in Milwaukee, Wisconsin. Complainant Rosalie Kubic is an individual residing in St. Francis, Wisconsin. (References in this decision to the Complainants are to all four Complainants unless otherwise noted, except that references to arguments by Complainants are to Complainants Grap and Perez only.)

2. Respondent Milwaukee County (County) is a municipal employer with principal offices at 901 North Ninth Street, Milwaukee, WI 53233. At all material times, the County has operated, among others, a Department of Human Services (DHS), which includes a Financial Assistance Division, which includes a Day Care Section (Day Care Section). At various times material to this case, Paul Kern, Vanessa Robertson (V. Robertson), Maurice Hughes, Gloria Guitan, Michael Poma, Paula Lucey, Candace Richards, John Thomas, Al Eldridge and Scott Walker have been agents of Respondent County, as follows: Kern, V. Robertson, Guitan and Hughes as supervisors within the Day Care Section; Poma as holder of one and then another higher level manager positions; Lucey as acting DHS Director; Richards as DHS Human Resources Manager; Thomas as DHS Assistant Human Resources Manager; Eldridge as a member of the staff of the County's Department of Labor Relations; and Walker as County Executive.

3. Respondent Milwaukee County District Council 48, AFSCME, AFL-CIO (Union) is a labor organization with offices at 3427 West St. Paul Avenue, Milwaukee, WI 53208. AFSCME Local 594 is one of several locals affiliated with and served by the staff of District Council 48 that represent employees of Respondent County. Local 594's jurisdiction includes the Department of Human Services employees at issue in this case. At all material times, David Eisner, Lee Henderson, Gerty Purifoy and Richard Abelson have been officers or agents of Respondent Union, as follows: Eisner as Chief Steward of Local 594;

Henderson as President of Local 594; Purifoy as District Council Staff Representative serving Local 594 and various other locals affiliated with District Council 48; and Abelson as District Council Executive Director.

4. At all material times, Complainants have been Account Clerk II/Fiscal Assistants (ACIIs) employed by Respondent County in the Day Care Section. At various material times, the Day Care Section has consisted of approximately 13 ACIIs, (including the four Complainants, Roger Uscila, Marione Weinert, Martha Karge, Marsha LaRoux, George Robertson (G. Robertson), David Cisney, Wanda Lewis, Lois Greene and Eugenia Perkins), two clerical employees (Angela Dickerson and Lucky Crowley), seven Case Managers, four Economic Support Specialists, and three supervisors.

5. There was significant turnover among supervisors in the Day Care Section during the first half of 2002. Sometime before April 1 (date references are to 2002 unless otherwise noted), Kern retired and Guitan moved up from being immediate supervisor of the ACIIs to a higher level of supervisory responsibility within the Section. V. Robertson was brought in to replace Guitan as the immediate supervisor of the ACIIs. The third supervisory position in the Section, with responsibility for the supervision of the Economic Support Specialists, was vacant for a period of time not specified in the record, after which that position was awarded to Maurice Hughes.

6. The primary responsibility of the Day Care Section ACIIs is to review, enter and edit data from time sheets/attendance reports submitted by day care service providers seeking payment for those services from the County. The County's administration of payments for day care services is performed pursuant to a contract with the State of Wisconsin.

7. At all material times, Respondents have been parties to a collective bargaining agreement (herein Agreement) covering calendar years 2001 and 2002-04. The Agreement contains a multi-step grievance procedure ending in final and binding grievance arbitration. The Agreement defines grievances as "matters involving the interpretation, application or enforcement of the terms of this Agreement." The Agreement does not make an express exception from the definition of matters subject to the grievance and arbitration procedure for disputes regarding the meaning and application of grievance settlements reached in the course of grievance processing. The grievance procedure is outlined in Agreement Sec. 4.02, which also provides, "[t]he County recognizes the right of an employe to file a grievance, and will not discriminate against any employe for having exercised their rights under this section."

8. On February 27, a grievance signed by Complainant Kubic and seven other ACIIs was filed. On March 27, following a hearing at Step One of the Agreement grievance procedure, Richards answered the February 27 grievance as follows:

DECISION AND BASIS FOR DECISION
Present: Rosalie Kubic, David Eisner, Gloria Guitan, Lee Henderson, L. Greene and M. Weinert.

This is an et al grievance that was filed by Account Clerk IIs in the Day Care Section, within the Financial Assistance Division. Since 12/1/01, the grievants claim they have been assigned as front desk clerical coverage for the Day Care area. The duties, according to the grievants and union representatives, are not consistent with their classification. The grievants cite violations of Sections 1.03, 1.05, 2.10, 3.1412 and 8.02, and request as relief that they are made whole; management cease and desist the assignment of Account Clerk IIs and Fiscal Assistants as front desk clerical coverage. The coverage to be provided by the appropriate clerical classification.

Management, represented by Gloria Guitan, states that the practice of assigning Account Clerks to cover the front reception area dates back to 1999. Guitan stated that additional coverage is necessary due to the fact that the Day Care Section employees have clients scheduled for as early as 7:30 a.m., thus, clerical coverage is necessary between 7:30 and 8:30 a.m. everyday. The official hours of operation for the reception desk are 7:30 a.m. to 4:30 p.m. When asked by the hearing officer why the two clericals assigned to the reception area are not covering during this time, management responded that one clerical does not begin work until 8:30 a.m., and the other has health issues which prevent her from being at work. Management also stated that the clerical duties are below the grievants' job classification, thus enabling them to perform the duties.

Grievance sustained on a non-precedent setting basis. Management presented no compelling argument as to why the two clericals assigned to the Day Care reception area cannot cover the hours of operating between 7:30 a.m. and 4:30 p.m. Within fifteen days from the date of this decision, management shall assign work hours to the two clerical employees so as to cover the reception desk needs. Management shall utilize Account Clerk IIs/Fiscal Assistants to cover the front reception area on an emergency basis as determined by management.

9. Because Richards' March 27 Step One disposition was not appealed further by the Union, it became a settlement of the grievance binding on both the County and the Union, and a collective bargaining agreement within the meaning of the Municipal Employment Relations Act (MERA).

10. The ACIIs' participation in the filing and processing of the February 27 grievance constituted lawful concerted activity protected by MERA, of which various County agents had knowledge.

11. On April 19, V. Robertson issued a one-line memo addressed to "Day Care Unit" stating that "Effective May 6, 2002, hours for all of the day care staff will be 8:00 a.m. to 4:30 p.m." Prior to that time, the Account Clerk IIs in the Day Care Section had been subject to a flex time arrangement under which various of them had worked hours beginning as early as 7:00 a.m. to 3:30 p.m.

12. The record does not establish by a clear and satisfactory preponderance of the evidence either: that V. Robertson was hostile to the ACIIs' participation in the filing and processing of the February 27, grievance; or that V. Robertson's issuance of the April 19 hours change memorandum, above, was motivated, in whole or in part, by hostility toward the ACIIs' participation in the filing and processing of that grievance.

13. On April 22, a grievance signed by Complainant Grap and 10 other ACIIs was filed. The grievance alleged that the County's announced plan to change the ACIIs' hours constituted retaliation for the ACIIs' participation in the filing and disposition of the February 27 grievance.

14. In communications from Eisner to Richards and Thomas on April 30, and from Henderson to Richards on May 5, the Union sought to schedule the Step One hearing concerning the April 22 grievance for a date prior to the announced May 6 effective date of the hours changes, or to delay the effective date of those changes until after there was an opportunity for a meaningful discussion of the issues raised by the April 22 grievance. Response communications from Richards to Eisner and Henderson on May 7 and 9 indicate that rather than holding an expedited Step One meeting, a more general meeting of Union and County representatives on the subject of the hours changes was scheduled that week, and that the effective date of the hours changes was being pushed back to May 16.

15. By agreement of the County and Union, the Step One hearing regarding the April 22 grievance was held on May 17. To that effect, a Request for Extension of Grievance Time Limit form was completed and signed, stating that the agreed-upon extension of the Agreement time limit for a Step One hearing until May 17 was being requested by "Human Resources." The form was signed by Eisner and Richards. A third signature line for "Grievant" was also signed by Eisner's entering "Lynn Grap, et al" followed by Eisner's initials, "DE." Complainant Grap was not informed that an extension of time was being requested in the matter, and she neither signed the form nor otherwise approved of the time limit extension.

16. On May 2, V. Robertson issued Attendance Review Forms to each of the ACIIs in the Day Care Section. The forms paralleled the Attendance Review Forms utilized in various other work units throughout the DHS, but their May 2 distribution marked the first

time the forms had ever been utilized in the Day Care Section. The record does not establish whether those forms were also distributed on or about May 2 for the first time to Day Care Section employees besides the ACIIs. The forms reviewed the employee's attendance record during a previous period of time, e.g., 12-9-01 to 3-30-02, in terms of the number hours absent and the percentage of the employee's total number of hours scheduled that those hours represented. Four boxes were available to be checked along with a space for Supervisor's Comments. The four boxes related to records of: 0% to .99%, identified as "excellent"; 1%-2.49%, identified as "good"; "2.50%-2.99%, or patterns of sick absence/absence," identified as "approaching the mark at which the disciplinary process will begin"; and "exceeds the 3% or patterns of absence which are not acceptable under the [DHS] Attendance Policy" which is followed by, "[t]herefore you should consider this as a formal Counseling Notice. Failure to improve this pattern will result in further discipline." Depending on what the employee's percentage of attendance was, the ACIIs were either commended for excellent or good attendance, cautioned, or treated as receiving a formal Counseling Notice. The Supervisor's Comments area contained handwritten remarks specifying the employee's rolling year attendance percentage and a comment regarding it. The Attendance Review Forms were consistent with Department-wide attendance standards provided for in the DHS Attendance Policy distributed to all Department employees in 1997. However, Day Care Section management's May implementation of the attendance review forms did not follow Sec. IV.B. of the DHS Attendance Policy which lists as one of the "Supervisor Responsibilities" the following: "[a]s absenteeism approaches excessiveness or patterns develop, meet with the employee, review the policy and offer counseling stressing the seriousness of the action, and documenting the date of the counseling. The supervisor shall advise the employee that progressive disciplinary action will be taken if absenteeism becomes excessive for a rolling year per the standards of the attendance policy."

17. The record does not establish by a clear and satisfactory preponderance of the evidence: that V. Robertson and/or Guitan was hostile to the Complainants' participation in the filing and processing of the February 27 or April 22 grievances; or that the issuance of the Attendance Review Forms beginning on May 2 was motivated, in whole or in part, by hostility toward the ACIIs' participation in the filing and processing of those grievances.

18. On June 4, following a Step One hearing, Richards issued a denial of the April 22 grievance as follows:

> DECISION AND BASIS FOR DECISION
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> Present: Lynn Grap, Marcia LaRoux, Marione Weinert, Lee Henderson, David Eisner, Vanessa Robertson and Gloria Guitan.
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> The grievance was filed by Lynn Grap on behalf of Account Clerk IIs and Fiscal Assistants in the Department's Day Care area. On April 19, 2002, the grievants received a memo from management, which indicated a change in their working

> hours to 8:00 a.m. to 4:30 p.m., effective May 6, 2002. Prior to the change, the grievants were all working varying starting and ending times. The grievants and union representatives claim that management's decision to make such a change is a direct result of a previous grievance that the grievants filed and was ultimately sustained by the hearing officer. In addition, the change in hours, according to the grievants, had no business necessity. The hours change has had significant impact on the grievants in terms of traffic patterns to and from work as well as family care issues. The grievants and union representatives cite violations of sections 1.01, 1.03, 1.05, 2.27, 3.141, 4.01 and 8.02 of the [Agreement]. The grievants request as relief that they are made whole; and that they are allowed to maintain their previous work hours.
>
> Management indicated that lack of supervisory coverage, attendance and customer flow as driving issues behind the change, not retaliation as identified by the grievants. Management stated there was not sufficient supervisory coverage to accommodate all of the grievants' starting and quitting times. Staff attendance patterns and tardiness became an issue, as staff was not reporting to work on time. Finally, providers were not utilizing the early morning hours for appointments, etc., thus the need for staff to work 7:00 to 3:30 shifts were no longer necessary.
>
> Grievance denied. Management was within its right to change the working hours of the grievants to meet the needs of the Day Care operation, so long as the grievants were given sufficient notice as agreed to by management and the union.

19. The hours changes announced on April 19 were not implemented on May 6, but they were implemented on May 16. Richards' June 4 denial of the April 22 grievance was appealed to Step Two of the grievance procedure. A Step Two hearing was initially scheduled for August 1.

20. On July 12, prior to the scheduled August 1 Step Two hearing, Day Care Section management orally announced that, effective on July 29, most but not all of the ACIIs would be permitted to opt to return to their pre-May 16 work hours, with hours preferences based on seniority. At all material times after May 16, however, at least two ACIIs, G. Robertson and Roger Uscila, had not been restored to their pre-May 16, 2002 hours, and that situation continued through the dates of the complaint hearing in this case in January of 2003.

21. As a result of Day Care Section management's hours restoration announcement and implementation, most of the ACIIs' original hours were restored two days prior to the scheduled August 1 Step Two hearing regarding the April 22 grievance. The timing of the

implementation of those restorations shortly before the scheduled Step Two hearing regarding the April 22 grievance was not coercive in nature and was not reasonably likely to discourage employees from engaging in grievance processing or other activities protected by MERA.

22. On July 31, Eisner contacted the employees who signed the April 22 grievance regarding whether and to what extent the concerns giving rise to the April 22 grievance remained unresolved following management's restoration of some of the ACIIs' hours. G. Robertson and Uscila responded that their hours remained changed, and Complainant Perez responded that management's actions would not restore some of the employees' hours and would leave the employees subject to a further hours change in the event of a future change in a more senior employee's hours preference. Similarly, Complainant Grap told Henderson that the County's restoration of hours left two employees' hours unrestored and left unresolved the April 22 grievance claim that the change in hours was discriminatory retaliation for grievance filing and processing by the Complainants and others ACIIs.

23. At the Union's request, the August 1 Step Two hearing regarding the April 22 grievance was canceled and ultimately rescheduled for September 18, 2002. The cancellation and rescheduling occurred because of Purifoy's unavailability due to her husband's suffering a stroke.

24. At some point in time between July 22 and August 30, Grap asked Henderson why the Step Two hearing regarding the April 22 grievance had been postponed. Henderson said it was postponed because Purifoy's husband had a stroke. Henderson also stated that she should not have to defend herself on that subject after having spent time earlier that day defending a co-worker of Grap's whom management had caused to be involuntarily escorted from the workplace. Henderson also told Grap that Henderson had no control over other people's vacation and sick time and that Purifoy was responsible for serving as Staff Representative for multiple other Locals besides Local 594.

25. At some point in time after July 22, Complainant Grap, after speaking with various senior Day Care Section ACIIs, told Henderson that she and other senior ACIIs were concerned that Day Care Section management would be reassigning work duties within the Day Care Section and that employees should have an opportunity to select their work assignments based on seniority. Thereafter, on July 26, Henderson met with V. Robertson and expressed the various employee concerns that Grap had shared with her regarding restructuring of the work in the Day Care Section.

26. Complainant Grap's participation in the gathering and communicating of those employee concerns to Henderson, and through Henderson to V. Robertson, constituted lawful concerted activity protected by MERA, of which V. Robertson had knowledge.

27. In an August 22 Day Care Section staff meeting, V. Robertson announced various operational and working condition changes affecting the ACIIs (a/k/a liaisons) in the Day Care Section. Those announcements were issued in individualized memo form on August 23, as follows:

This is a directive. Effective August 26, 2002, Liaisons will see providers **all day** on Tuesdays and Thursdays during timecard processing weeks. On non-timecard processing weeks, Liaisons are required to see providers everyday, all day.

The providers are to be seen at Window A, or at your desk. NO EXCEPTIONS.

To recap on the Unit Meeting (8/22/02), the following will apply:

- Timesheets are to be filled in correctly EVERYDAY, for arrival, lunch, and departure. The binder with timesheet will be located in my office. Any late occurrences should be documented and the proper time is deducted from whatever available time you have.

- Lunch Hours- You can no longer combine your lunch hour and breaks. They will be taken at separate intervals. Assigned times for lunch (30 minutes) and breaks (2- 15 minutes each) will be given at my discretion. Note: If you are meeting with a provider and your lunch hour approaches, see a supervisor or myself. **(use** professional **discretion)**

- Timesheets (Provider) should be entered as they come in, and NO ONE should be leaving timesheets at the front reception, for more than one day, unless they are ill.

- The seating arrangement will be changing in the near future for the entire Unit.

The individual memos issued to each ACII had a space for "Supervisor's Comments," in which the start and end times for the employee's lunch and breaks were handwritten, and signature and date blanks for the employee to complete after receiving and reviewing the memo. All of the scheduled break and lunch periods were shared by at least two of the 14 employees with the following exceptions. Complainant Grap's lunch period was scheduled for 11:15-11:45 a.m.; no other employee's lunch period began that early, but Complainant Perez' and Marsha LaRoux' lunch period overlapped Complainant Grap's by 15 minutes. Two of the other 14 employees were scheduled for 1:30-1:45 p.m. breaks, and 12 of the other 14 were scheduled for breaks beginning at 2:00 p.m. or later. Only Roger Uscila's morning break was scheduled for 10:15-10:30 a.m. Only Complainant Grap's afternoon break was scheduled for 1:45-2:00 p.m. And only Marione Weinert's afternoon break was scheduled for 2:00-2:15 p.m. The record does not establish whether the clerical employees received similar memos to those issued to the ACIIs on August 23.

28. Prior to the August 26 effective date of the August 22 memo, Day Care Section employees had not been required to see day care providers on Tuesday and Thursday afternoons of the alternating weeks in which their workload was routinely heavier; they had not

been required to record their hours of arrival and departure on timesheets; they had been allowed to combine their lunch and break periods; and the schedule of lunch periods had groups of between three and eight Section employees beginning lunch at 11:30 a.m., noon, and 12:30 p.m., and one employee, Weinert, beginning lunch at 12:20 p.m.

29. The record does not establish by a clear and satisfactory preponderance of the evidence: that V. Robertson or anyone else in County management was hostile to Complainant Grap's participation in the gathering and communication of employee concerns outlined to V. Robertson by Henderson on July 26.

30. On August 28, Complainants and six other ACIIs signed and sent a three-page letter to Poma, with copies to Richards, Henderson and Eisner. That letter states that it was intended "to address our concerns that problems have arisen within the Day Care unit due to ineffective management . . . [because] "[c]onditions within the unit have escalated to the point where harassment and intimidation are used as an attempt to direct the flow of work. This type of management strategy virtually stops the flow of work owing to staff's continual need for union representation whenever unfair labor practices are in question." Among other things, the letter asserts that there has been "ineffectuality of management . . . when it comes to addressing staff's requests for the guidance and training and tools and resources to do monitoring;" that "due to the 2002 State contract requiring the implementation of monitoring," additional funding should be but has not been allocated for training and support services; that, instead, "staff has been [reassigned] to either work with unanswered questions regarding the tasks expected of them or has made attempts to work outside the scope of their qualifications"; that ". . . management has disallowed any room for constructive measures within the unit by resorting to tactics aimed at humiliating and demoralizing staff [by, among other things,] [t]hreatening job loss due to out-sourcing of the unit, even though staff has alerted management to the major flaws in State policy"; that "staff members within the day care unit have observed management exhibiting behavior that we ourselves would be disciplined for"; and that "the Day Care Manager has accused staff of misusing their time, yet apparently feels no obligation to set the same standards for herself or other non-accounting Day Care unit staff under her authority." The letter concludes that ". . . it is unfair that our productivity is being measured within a unit that has defects beyond our control. Your immediate response is anticipated and would be greatly appreciated."

31. Complainants' participation in the signing, creation and communication of the August 28 letter to Poma constituted lawful concerted activity protected by MERA of which Poma and V. Robertson had knowledge.

32. On August 29, Poma met with the Day Care Section ACIIs (of whom nine were present) along with five supervisors and one clerical employee. During the course of the meeting, Poma variously stated that workers and management, as part of the same system pursuing customer service and quality work, must follow State policies whether workers have difficulty with them or not; that workers are employed to work a 40 hour week; and that

V. Robertson answers to Poma such that it is not the ACIIs concern what she does. There was no indication given by Poma during the meeting of a desire to discuss the bad feelings or poor morale or the possible causes of them. During the course of the meeting, Poma stated that staff should not be working in the Department if they were going to question State policy, and that staff were naive to think their jobs were secure. On three occasions during the meeting, Complainant Grap requested that a Union representative be allowed to attend the meeting; Poma refused each of those requests, and near the end of the meeting denied that he had refused any such request.

33. Poma's August 29 meeting statements and conduct described above: did not constitute verbal reprimand discipline of the Complainants by Poma or by the County and have not been shown by a clear and satisfactory preponderance of the evidence to have been motivated in whole or in part by hostility toward Complainants' exercise of MERA protected rights.

34. On August 30, V. Robertson informed Complainant Grap that her job duties were being reassigned effective on the following work day. The duties to which Grap was reassigned were duties within the ACII classification. Grap testified that she liked the duties she was performing prior to the reassignment. The record contains no other information regarding the nature or extent of the change in Grap's duties.

35. V. Robertson's change in Complainant Grap's duties does not constitute a verbal reprimand discipline of Grap by V. Robertson or by the County. The record does not establish by a clear and satisfactory preponderance of the evidence that V. Robertson's August 30 change in Complainant Grap's duties, whatever it was, was motivated in whole or in part by hostility toward Complainant Grap's MERA protected activities.

36. The record contains no evidence that Complainants were placed under a new directive, on August 30 or at any other time, that supervisory permission was necessary to leave the floor of their workplace.

37. On September 6, Henderson wrote a letter to Poma identifying what the Day Care Section workers assert "could be done to improve the environment and working conditions in that unit." Henderson sent copies of the letter to, among others, the "Daycare staff", Eisner, Purifoy, Abelson, Lucey and Walker. The letter detailed concerns and criticisms of management in the areas of training, resources, guidance, tools to do the job better, support and harassment. Henderson's letter requested a meeting with Poma and some Day Care Section staff "to address these issues and to see if we can achieve a level of cooperation from everyone."

38. Complainants' participation in providing information conveyed by Henderson in her September 6 letter to Poma constituted lawful concerted activity protected by MERA of which Poma and V. Robertson had knowledge.

39. On September 17 and 23, respectively, Complainants Perez and Kubic were assigned to perform front desk duty of the sort that was the subject of the February 27 grievance and Richards' March 27 grievance disposition. Perez and Kubic informed Henderson of those facts on those respective dates and asked her what could be done. Kubic's communication noted that it appeared management would continue utilizing ACIIs for front desk until late October or early November when clerical employee Dickerson was expected to return from her sick leave. Henderson responded that her thought was to have both another grievance filed and a prohibited practice complaint. Henderson's response to Kubic further stated that she had brought the issue to Richards' attention, and that Richards was investigating the matter and was expected to get back to Henderson on it shortly.

40. At various times since at least June of 2002, affected ACIIs have communicated reports to various Union representatives that, despite the March 27 grievance settlement, Day Care Section management was variously assigning ACIIs to front reception desk duty. At various times beginning in June of 2002, Union representatives including Eisner and Henderson have attempted unsuccessfully in various ways to cause management to reduce or eliminate use of ACIIs on front desk duty. On June 12, Eisner offered to allow Grievant Grap to use the Local 594 office and fax for the purpose of sending a letter to set the record straight regarding statements attributed to management in Richards' June 4 denial of the April 22 grievance. Eisner discussed with Complainant Grap the latter's expressed interest in having a letter sent to the County Executive outlining the ACIIs' concerns. The Union sought and achieved a meeting involving Lucey, Day Care Section ACIIs and others to discuss various of the ACIIs' concerns including front desk duty, as a result of which some changes regarding at least the issue of break times were implemented. On two separate occasions, Purifoy and Eisner discouraged Complainant Grap from filing a new grievance on the hours change subject because of concerns that doing so would prompt Lucey not to go ahead with the meeting the Union was asking for with her concerning various issues concerning the Day Care Section ACIIs. Henderson contacted various persons in County management in attempts to reduce or eliminate the use of ACIIs at the reception desk, as well, including communications to V. Robertson in August and again on September 17, and to Richards on or shortly before September 19. The County's ultimate basic response to those various Union efforts has been that the March 27 grievance disposition allows the County to use ACIIs for front desk duty in emergencies as determined by management, and that one of the two clerical employees referenced in the March 27 grievance disposition has been absent from work on sick leave. In late September or early October, the Union ultimately took steps to have one or more employees initiate a new grievance including the subject of on-going front desk assignments to ACIIs. Specifically, Eisner wrote up a grievance which was signed by Grap and initiated on October 3 on behalf of the Day Care Section ACIIs. That grievance is more specifically identified in Finding of Fact 43, below. Contrary to the concerns previously expressed by Purifoy and Eisner, the filing of that grievance did not cause Lucey to cancel an October 3 meeting with the Day Care ACIIs and others regarding various of the Day Care ACIIs' concerns.

41. Neither Purifoy and Eisner's discouraging Complainant Grap from filing a new grievance about the hours change issue before a meeting with Lucey was held, nor the time taken by the Union before taking steps to assist Complainant Grap and others to file the October 3 grievance, has been shown by a clear and satisfactory preponderance of the evidence to have been arbitrary, capricious or in bad faith.

42. On September 18, a Step Two hearing was convened regarding the April 22 grievance. At that hearing, Union representatives advanced the claim that the County's continued refusal to restore the original hours of Uscila and G. Robertson violated the Agreement both because the changes constituted discriminatory retaliation due to the successful filing and processing of the February 27 grievance and because Uscila and G. Robertson were not the two least senior ACIIs in the Day Care Section. Management representatives denied that the hours changes were discriminatory retaliation and insisted that management had a business need for at least two employees to work through until 4:30 p.m. which marked the time after which the office was closed to receiving additional reports from Day Care providers. The County and Union ultimately reached a tentative agreement that management would be allowed to require two ACIIs to work 8:00 a.m. - 4:30 p.m. time slots, and that those slots would be filled first by management seeking volunteers, and then, if necessary, by assignments in reverse seniority order.

43. On October 3, a grievance initiated by Complainant Grap on behalf of herself and other ACIIs was filed. That grievance was handwritten by Eisner, just as the February 27 and April 22 grievances had been. In it, Complainant Grap asserted that the County had been violating various provisions of the Agreement, the DHS Harassment in Workplace Policy, past practices and any other relevant clauses of the Agreement, Civil Service rules, ordinances and statutes, as follows:

> As a direct result of exercising their rights under the contract by having filed grievances, and on an ongoing and continuous basis, grievants are being subject to harassment, discrimination, and retaliation by management which has created a hostile work environment for grievants. Grievants are being treated differently than other staff in the Day Care area in the assignment of breaks and lunch periods, duration of lunch periods, and have been assigned work out of the scope of their job duties, have been assigned to cover the reception desk when grievance settlement exists which indicates only in an emergent nature, and since resolve of [the April 22] Grievance #38348, Rosalie Kubic, et al has been ongoing since 4-19-02.
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> [relief requested] Grievants to be made whole. Management to cease and desist this treatment of grievants. Any adverse action which has resulted from this treatment, including disciplinary action, to be expunged (removed) from grievant's personnel files.

As of the time of the January, 2003, complaint hearing in this matter, the October 3 grievance remained pending and unresolved. It had been heard at Step One, a Step One disposition had been issued with which the Union did not agree, a December 10 appeal of the grievance to Step Two had been filed, and the matter awaited Step Two hearing scheduling.

44. By a letter to Purifoy dated October 20, following the September 18 Step Two hearing, Eldridge issued his Step Two disposition regarding the April 22 grievance. That letter, which was signed by Eldridge, read in pertinent part, as follows:

> Grievant: Lynn Grap, ET AL
> Grievance No. 38371
> Appeal No. 594-1296
> Issue: Hours changed
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> Disposition: Grievance is resolved on a non-precedence-setting basis. The two slots in question will be filled first by volunteers, and should there be insufficient volunteers, then by reverse seniority. The Department will abide by the Agreement.
>
> Grievance resolved.
>
> If you agree with the disposition of the grievance, please sign the original and return to our office.
>
> If you do not agree with the disposition, please indicate as such when returning the original to our office. If we do not receive an answer within 45 days from the date of this disposition (as specified in [Agreement Sec.] 4.02(7)(c) Step 3), we will assume that you are in agreement.

45. Eldridge's Step One disposition was not appealed further by the Union. Because it was not appealed further, it became a settlement of the grievance binding on both the County and the Union, and a collective bargaining agreement within the meaning of the MERA.

46. The Union's non-appeal of Eldridge's October 20 disposition to arbitration and the Union's consequent settlement of the April 22 grievance on the basis of that disposition has not been shown to have been arbitrary, capricious or in bad faith.

47. Complainants Kubic and Garcia each were sent and received notice of the complaint hearing, but neither appeared in person or through a representative. Complainants Kubic and Garcia each were also sent and received a letter dated February 11, 2003, from the Examiner offering them an opportunity to review the hearing transcripts and exhibits and to state a position in response to Respondents' various contentions that the complaint should be

dismissed. Neither Complainant Kubic nor Complainant Garcia has ever requested an opportunity to review the hearing transcripts and exhibits, and neither has stated any position in response to Respondents' contentions that the complaint should be dismissed.

CONCLUSIONS OF LAW

1. Respondent County has not been shown to have committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 or 3, Stats., by any of the conduct alleged in the complaint, or by:

a. its change in work hours conduct described in Findings of Fact 11-12 and 19;

b. its use of attendance reviews described in Finding of Fact 16-17;

c. its lunch and break time changes and sign-in/sign-out procedure described in Findings of Fact 27-29; or

d. its conduct on August 29 and 30 described in Findings of Fact 32-34.

2. Respondent County has not been shown to have committed prohibited practices within the meaning of Sec. 111.70(3)(a)1, Stats., by the restoration of some ACIIs' work hours shortly before a Step Two grievance hearing, described in Findings of Fact 20 and 21.

3. Respondent Union has not been shown to have committed prohibited practices within the meaning of Sec. 111.70(3)(b)1, Stats., by any of the conduct alleged in the complaint, or by:

a. its conduct regarding enforcement of the March 27 grievance settlement and regarding the filing of a second grievance about reception desk assignments, described in Findings of Fact 8, 9, 39-40 and 43.

b. its failure to submit Complainants' April 22 grievance to arbitration and its other conduct regarding the processing of that grievance, described in Findings of Fact 13-15, 18-19, 22-24, 40-42 and 44-45.

4. Because the Examiner has concluded, above, that the Union's conduct regarding enforcement of the March 27 grievance settlement has not been shown to have been arbitrary, capricious or in bad faith, the Examiner declines to exercise the Commission's MERA collective bargaining agreement enforcement jurisdiction to determine the merits of Complainants' claim that the County has violated the terms of the March 27 grievance settlement agreement.

5. Because the Examiner has concluded, above, that the Union's non-appeal to arbitration of the April 22 grievance was not arbitrary, capricious or in bad faith, the Examiner has declined to exercise the Commission's MERA collective bargaining agreement enforcement jurisdiction to determine the merits of the April 22 grievance.

6. Under MERA, it is appropriate to deprive Complainants Kubic and Garcia of their status as named complainants in this matter because of their failure to prosecute the complaint in this matter.

7. Under MERA, the Commission lacks statutory authority to order complainants to pay respondents' defense costs and fees.

ORDER

1. On the basis of their failures to prosecute the complaint, Complainants Kubic and Garcia shall no longer be treated as named Complainants in this case. However, they shall be treated the same, for decision and remedy purposes, as the other Day Care Section ACIIs who were not among the four named Complainants in this case.

2. The Complaint is dismissed in all respects on its merits.

3. The Respondents' requests that Complainants be ordered to pay Respondents' costs and attorneys fees are denied.

Dated at Shorewood, Wisconsin, this 5th day of March, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/

Marshall L. Gratz, Examiner

MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In their complaint, Complainants advanced the allegations quoted below. The Respondents' answers admitted the allegations except as noted in the brackets following each of the numbered complaint paragraphs.

5. The employer and union are parties to a memorandum of agreement including the latest one covering calendar years 2001 and 2002-2004. The agreement prohibits discrimination against any employee for having exercised their rights to file a grievance and contains a multi-step grievance procedure ending in final and binding grievance arbitration. [Union admits County should not discriminate against any employee for filing a grievance but denies that the Agreement contains specific language prohibiting County discrimination on account of grievance filing.]

6. On 3/27/02 complainants sustained a grievance against employer to cease the utilization of the complainants for job duties not within their classification. [County alleges that the grievance was sustained on a non-precedent setting basis.]

7. On 4/19/02 complainants were notified that effective 5/6/02 complainants' work hours would be changed.

8. By adversely changing past practice to the detriment of the complainants the action in paragraph 7 was in violation of Sec. 111.70(3)(a)1 and 3 of the Wisconsin Statutes. [Denied by County and Union.]

9. On 4/22/02 complainants filed a grievance claiming change in work hours was a direct result of filing a prior grievance and having prior grievance sustained. [Denied by County and Union; County alleges grievance was handled at the department level.]

10. On 5/2/02 complainants received Attendance Review Forms relative to negative evaluation with the possibility for disciplinary action. [County alleges attendance reviews were pursuant to work rules and department procedures.]

11. Based on non-historical practice, employer's use of Attendance Reviews was motivated, at least in part, by complainants' grievance initiation and a [prohibited] practice in violation of Sec. 111.70(3)(a)l and 3 of the Wisconsin Statutes. [Denied by County and Union.]

12. On 6/14/02 the complainants' grievance of 4/22/02 was recorded for pending hearing before labor relations and then later scheduled for 8/1/02. [Admitted by County, denied by Union.]

13. On 7/12/02 complainants were made aware that effective 7/29/02 work hours would be restored based on seniority. [Denied by Union; County alleges work hours were restored upon hiring of additional personnel to provide supervisory coverage.]

14. Restoring the complainants' work hours prior to hearing was coercive in nature and in violation of Sec. 111.70(3)(a)1 of the Wisconsin Statutes. [Denied by County and Union.]

15. Prior to 8/22/02, one complainant (Lynn Grap) on behalf of certain co-workers discussed with union representative the need for adherence to seniority rights due to re-structuring job duties within the department. [Denied by County and Union.]

16. On 8/22/02, after union discussion with management, directives were given to complainants which re-scheduled their lunch times, scheduled their break times and required complainants to sign in & out, among other things. [Denied by Union; County alleges due to excessive breaks by staff, as well as excessive tardiness and absenteeism staff was required to sign in and out.]

17. Changes in past practice to adversely affect complainants, was motivated by Lynn Grap's engaging in union activity and a violation of Sec. 111.70(3)(a)1 and 3 of the Wisconsin Statutes. [Denied by County and Union.]

18. On 8/28/02 complainants submitted correspondence claiming harassment and intimidation in the workplace. [Denied by Union; County admits staff wrote a letter to Mike Poma dated August 28, 2002, and that the letter was not part of the grievance process and merely represented a point of view by certain employees.]

19. On 8/29/02 and 8/30/02 complainants were verbally reprimanded and on 8/30/02 complainants were placed under new directive that supervisory permission was necessary to leave the floor. [Denied by County and Union based on lack of information.]

20. Adverse actions included in paragraph 19, but not limited to, violated Sec. 111.70(3)(a)1 and 3 of the Wisconsin Statutes. [Denied by County; denied by Union based on lack of information.]

21. On 9/6/02, on behalf of complainants, the union submitted correspondence regarding harassment and hostility in the workplace. [County admits correspondence between union president and a department manager, and asserts that the correspondence was outside the grievance process and by itself is evidence of no violation.]

22. On 9/l3/02 complainants were again assigned job duties outside their classification that they had previously aggrieved and had sustained on 3/27/02. [Union denies based on lack of information; County alleges it has remained in compliance with grievance decision and that the assignments to reception desk duty were on an emergency basis.]

23. By violating an existing grievance settlement, the employer committed a prohibited practice in violation of Sec. 111.70(3)(a)5 and 1 of the Wisconsin Statutes. [Denied by County and Union.]

24. Beginning 6/6/02 the union failed to timely file a grievance and failed or refused to file grievances on behalf of certain complainants. Furthermore, District Council 48 failed to submit complainants' initial grievance to the final and binding arbitration set forth in the 2001 and 2002-2004 agreement. [Denied by County based on lack of information; County alleges grievance process requires the grievant, not the union, to initiate a grievance. Denied by Union.]

25. District Council 48's failure to submit a timely grievance, refusal to file grievances and failure to submit complainants grievance to arbitration is capricious and in bad faith. As such it constitutes interference with complainants' MERA rights and a [prohibited] practice violative of Sec. 111.70(3)(b)1 of the Wisconsin Statutes. [Denied by County based on lack of information; denied by Union. Union alleges it has properly represented Complainants as their union representative, has processed all grievances that were determined to have merit, has not engaged in any prohibited practices and has and continues to represent all Complainants in the handling of their grievances.]

26. Because District Council 48 has failed to submit complainants' 4/22/02 grievance to arbitration, the Commission should decide the merits of the grievance without deferring to the results reached in the grievance procedure. [Denied by County based on lack of information; denied by Union. County

alleges timely grievance filing is responsibility of grievant, not union, and that not every grievance is, can or should be advanced to arbitration under the Agreement.]

27. As the remedy for the prohibited practices noted, the Wisconsin Employment Relations Commission should declare that the respondents have committed the prohibited practices alleged and should order both respondents to cease and desist from such violations in the future and post notices to that effect. The Commission should also order Milwaukee County to strictly enforce their anti-harassment workplace policy; make complainants whole by returning historical practices, expunging any disciplinary actions from complainants' personnel file, restoring the loss of accrued hours certain complainants incurred from use of sick allowance or excused time and/or financially whole from loss of wages owing to absences without pay due to disciplinary action or medical necessity, any and all experienced by reason of complainants' discriminatory treatment and hostile working environment. In addition, effectuate, such other, further and different relief as this Commission may deem necessary and proper. [The County and Union requested that the complaint be dismissed in all respects and that Complainants be ordered to pay the Respondents' defense costs and fees.]

Complainants Kubic and Garcia did not appear at the hearing despite having received notice of the proceedings. Complainants Grap and Perez stated on the record that they were appearing only on behalf of one another and not on behalf of Complainants Kubic and Garcia. (Tr. 8)

At the hearing, Complainants Grap and Perez amended complaint paragraph 27 to delete the words, "restoring the loss . . . environment."

Complainants Grap and Perez presented their evidence in the form of various documentary exhibits and testimony by Complainant Grap. At the conclusion of the Complainants' case, both Respondents moved for dismissal. The Examiner reserved ruling on those motions, and the Respondents presented their evidence. Respondent County presented various documentary exhibits and testimony by Richards. Respondent Union presented various documentary exhibits and testimony by Eisner, Purifoy and Henderson. The resultant record consists of 299 transcript pages and 98 documentary exhibits. Citations to the transcript are in the form of "(Tr.__)" and citations to exhibits are in the form of "(Ex.__)."

POSITIONS OF THE PARTIES

Complainants Grap and Perez

The Complainants' closing argument is quoted below, in its entirety.

The complainants wish to clarify evidence already presented in this case in order to satisfy all legal requirements for a decision in favor of complainant's allegations of all of the [prohibited] practices claimed.

The most compelling facts in this case being, neither the union nor the employer presented evidence during the hearing to disprove the primary issues brought into evidence by the complainants.

The union failed to dispute the documented evidence of the unauthorized signature of complainant Grap on an extension for a grievance hearing. By law, that unauthorized signature was a forgery. Regardless of ascertaining what the union had to gain by their dishonesty, there was certainly no benefit to the complainants in having that extension. A labor organization being the exclusive representative of the employee is not upheld to negotiate with the employer to the detriment of the members they serve. The union also left undisputed the documented evidence that they concurred with the complainants claims, yet failed to give any explanations in testimony for their delay in taking action against the employer. Without testifying to any rationale for not filing a grievance or a [prohibited] practice, the union can be reasonably perceived as deceitful. Based on the time frame of those documents the union made a promise without any intention of performing it. By the union's inaction those written words are the perfunctory proof that complainants were either misled or lied to. Also, based upon the union's own submitted evidence of a second step grievance dated 10/30/02, they failed to present that document to complainants until this case was heard. The union clearly established their deceit when they presented that letter almost two months after it was dated and furthermore failed to elaborate on why that letter had not been signed. The union suppressed facts that it was bound to disclose, again demonstrating complainants were unfairly represented by the judicially developed duty the union has to exercise its discretion with complete good faith and honesty. Even if the union had found no merit in the complainants claims against the employer the documents conveyed otherwise and if not substantive of bad faith grievance handling the documents substantiate the capricious behavior in the union's representation. The union's behavior has been at least characterized as unpredictable, if not arbitrary, by what was communicated to the complainants as opposed to what was done for the complainants.

> The employer not only failed to prove that the changes in employment practices had not served in any significant way the legitimate employment goals of the employer, but also failed to prove the need for restoring those same changes. By restoring past practices, the employer clearly demonstrated there had never been a business necessity for their initial actions. However, that restoration in no way invalidated the complainant's claims of discrimination. The burden of proof was thereby put upon the employer to give rationale for their motivation. The employers claim of managerial rights was not supportive of abusing its authority in discriminatory management practices. The complainant's employment agreement is inclusive of the act of reasonableness in the employer's right to manage. In addition the employer lied about its reason for restoring complainants work hours and failed during the hearing to refute that accusation. The employers' credibility was also suspect, based on their own documented evidence of an attendance policy that had not been adhered to in its entirety. The attendance policy was enforced without regard to applying the required supervisory responsibility, thus quashing the employer's claims of diligence. By partial adherence to the attendance policy the employer nullified its intent, which was to use the policy as a tool and not as a threat. On the totality of the relevant facts, that the employer continually failed to explain the motivation behind taking adverse action against complainants, there is no doubt the protected activity of the complainants played a part in the employer's motives.
>
> In conclusion, the Complainants involved in this hearing were representative of an entire unit of employees subjected to the same [prohibited] practices. From the facts of this case, the probability of intimidation to others was a viable contention. In consideration of the individuals who were no less discriminated against or unfairly represented, any applicable legal jurisdiction should be applied based on the seriousness of the charges presented. Barring any inference, but based on a reasonable conclusion of fact, discrimination has an objective to intimidate.

Additional contentions advanced by Complainants in their lines of questioning at the complaint hearing are summarized in a September 12, 2002 letter sent by Complainant Grap and six other ACIIs to Lucey, with copies to County Executive Walker, Eisner and Henderson (Ex. 26). The body of that letter reads as follows:

> The undersigned employees are requesting that a higher authority would intervene to expeditiously investigate charges of harassment in the workplace. These same employees as Account Clerk II/Fiscal Assistants in the Child Day Care Unit under DHS at 12th and Vliet strongly feel they are being continually subjected to discrimination, humiliation and hostility by management. The already undue stress and tension within our work environment has resulted in

one employee being escorted from the workplace due to unsubstantiated allegations that the employee had posed a threat to management. The gravity of our request is due to fears of further retaliation owing to the enclosed letter [August 28 letter to Poma described in Finding of Fact 30] and the outcome of a meeting between the DHS Bureau Manager and the Day Care Unit accounting staff on August 29, 2002. The Bureau Manager accompanied by six other individuals (five in a supervisory or administrative capacity and one non-represented clerical) convened the aforementioned meeting to address our concerns relative to the enclosed letter. We felt our concerns were inappropriately addressed when the Bureau Manager proceeded to dictate policies regarding management's expectations of staff and reproaching staff on issues of employee infractions, thereby collectively berating staff in attendance. The meeting's resemblance to a disciplinary hearing made the Bureau Manager's approach extremely disadvantageous to staff. These circumstances prompted staff at three separate intervals to request that the Bureau Manager allow them union representation, each one of these requests was denied by the Bureau Manager. In earnest, we presented clear documentation and legitimate concerns to a Bureau Manager who used bullying tactics in response. This form of conduct leads us to believe that the Bureau Manager's intent was to assemble staff to humiliate them in reprisal for exercising the rights to voice their concerns.

On August 30, 2002, union representatives arranged to meet with staff and they were informed as to what transpired at the meeting held on August 29, 2002. Our local union president made notation of our concerns and indicated a letter would be drafted for forwarding to the director's office. Our own letter's objective is not only to present the urgency of our requests but to also denote the personal levels to which we are affected. Human emotions are involved when individuals feel a need to defend themselves or in defense of others. An individual's capacity to tolerate differs based on those emotions; yet, all of us are definitive in our feelings that harassment is intolerable. Therefore, these feelings make it paramount that we regain our right to an equitable and non-hostile working environment. We are further impelled due to the fact that Human Resources have improperly ignored the seriousness of conditions within the Day Care Unit. Considering none of our concerns were of a petty or frivolous nature. Human Resources' dereliction gives added protection to management for any further retribution towards the Day Care Unit accounting staff. We are now vulnerable to a Bureau Manager who confronts managerial issues of impropriety by answering to the effect that staff is not to concern themselves with a manager's right to direct work. Prevailing logic is, managers in the course of directing work, as tax paid county employees, have no right to violate civil service rules or violate another individual's civil liberties.

It now appears evident that management is not desirous of resolutions regarding the Day Care Accounting Unit operations. Staff, nevertheless, is seeking resolve. The unit's successful operation is tantamount to maintaining our jobs. Therefore, we are also asking for any clarification that staff inquiries and observations provoked the actions of management. Staff has notified management that we are ill equipped to do quality monitoring of childcare payments without the training and support services necessary. Consequently. staff is viewed as uncooperative when appeals are made for needed enhancements to the units operation versus restructuring the employees. We are not the opposition and our input is based on the fact that frontline staff is witness to millions of taxpayer's dollars spent on erroneous and fraudulent childcare payments. Adversarial conditions have become even more apparent when staff have been unable to fulfill management's requests without the additional resources. By contract, the state paid for services and therefore the Day Care Unit staff is contractually obligated to provide that service. It would seem imperative that resources would be necessary in adhering to this contract, especially one with added provisions. Not allocating funds for the implementation of monitoring childcare payments would be contrary to the state's 2002 contract, mandating this requirement. Management has also been either vague or inconsistent when identifying a unit of one ESS supervisor and four ESS's under the direction of the Day Care Manager. We have no clear understanding of this unit's job functions relative to daycare monitoring or if they are even accessible to the Day Care Accounting staff for support services. What is clear to us, is the blatant favoritism that management has bestowed upon this unit. The general consensus being, management has used their position of authority as a venue for their own self-interest, showing lack of consideration for their responsibilities to the taxpayers. Granted without clarifying information these concerns are speculative at this time. However, our feelings in regard to the manner in which we are being treated by management are not presumed.

We are earnestly anticipating your response and appreciative of such action deemed appropriate.

Respondent County

The complaint should be dismissed in all respects, and Complainants should be ordered to pay the County's costs and fees for defending in the matter.

Because Complainants Kubic and Garcia failed to appear at the hearing, the complaint should be dismissed as to them for lack of both evidence and pursuit. The remainder of the complaint should also be dismissed in all respects as to Complainants Grap and Perez for lack of merit. Complainants' only witness was Complainant Grap, and her testimony did not fulfill the Complainant's burden of proof as to any aspect of the complaint.

With regard to the change in Complainants' hours, the Complainants have failed to prove that the County's action in that regard was improperly motivated. Grap admitted in her testimony that the County has the right under the Agreement to change the times when employees work and that the County management claimed that it needed for business reasons to make the changes in hours it was implementing. Grap acknowledged the existence of a legitimate business reason for the change by admitting that an employee was out for an extended period on medical leave, thereby leaving the reception desk function shorthanded, and by admitting that half of the supervisory staff was vacant for much of the time period to which the complaint relates. Management, therefore, had the right to make the hours changes it made in the circumstances, and no prohibited practice has been proven in that regard.

With regard to alleged harassment, Candace Richards testified: that she was unaware of any harassment campaign; that the Department has an anti-harassment policy; but that none of the Complainants followed the steps set forth in the policy for initiating a complaint about harassment.

With regard to the Department's enforcement of its attendance policy, the record establishes that the attendance policy involved had been in existence for many years prior to the events giving rise to the complaint. Grap admitted that the County had a right to evaluate attendance. While Grap testified that she found the County's enforcement of its attendance policy threatening, her attendance was treated no differently than anyone else's.

With regard to the Complainants' claims that the County violated the terms of a settlement agreement, the Complainants must first prove that the Union failed to fairly represent them. Complainants have failed to meet that burden. As conceded by Grap, and as established by the unrebutted testimony of Eisner, the Union represented the interests of the Complainants and adjusted the grievance initiated on April 22, in a manner favorable to the Complainants. Hence, the Union more than adequately fulfilled its duty of fair representation, so there is no basis on which to reach the merits of Complainants' claim that the County violated the terms of the settlement agreement.

Respondent Union

The complaint against the Union is frivolous. It should be dismissed and Complainants should be required to pay the Union's costs and fees incurred in defending itself in the matter. The complaint against the County is also without merit and should also be dismissed, as well.

The record establishes that under the Agreement only employees can file grievances, not the Union. Accordingly, the Union could not have violated Complainants' rights by failing to timely file a grievance or by refusing to file grievances on behalf of certain Complainants.

The Union did not submit Complainants' April 22 grievance to arbitration because the Union was satisfied with the County's resolution of that grievance. That settlement resulted in the restoration of the work hours of all but two of the grievants, including both Complainant

Grap and Complainant Perez. While two other of the grievants did not get their hours restored immediately, there appears to have been a good business purpose served by a continued change in the hours of two of the affected employees. There is, therefore, no merit to the claim that the Union's settlement of the grievance in the circumstances violated Sec. 111.70(3)(b)1, Stats.

While Complainant Grap testified that the Union's settlement of the grievance initiated on February 27 is not a part of the Complainants' case against the Union, it can be noted that the Union processed that grievance on the Complainants' behalf and succeeded in achieving a remedy for the Complainants.

In sum, the Union's representation of Complainants Grap and Perez has not been shown to have been in any way arbitrary, capricious or bad faith in nature.

DISCUSSION

After examining the record in detail, the Examiner has dismissed the complaint on its merits in all respects. The Examiner has tried to enter Findings of Fact in the same general order of the complaint allegations quoted above.

The Examiner's explanations of the ultimate Findings of Fact and of the Conclusions of Law and Order in this decision follow, beginning with the issue of the status of Complainants Kubic and Garcia, then outlining the legal standards applicable to the various prohibited practices alleged in the complaint, and finally explaining the rationale for the ultimate findings and conclusions reached regarding each of the prohibited practices alleged in the complaint and regarding the Respondents' requests for costs and fees.

Status of Complainants Kubic and Garcia —Lack of Prosecution

Despite having received notice of the hearing and having been offered other opportunities to state a position regarding whether the complaint should be dismissed, Complainants Kubic and Garcia did not appear at the January 22 and 23 hearing in this matter, and have not stated any such position. Complainants Grap and Perez stated on the record: that all four Complainants had received notice of the hearing; that Complainants Grap and Perez were the only two Complainants who intended to appear at the hearing; and that they were appearing and presenting evidence only on behalf of themselves and not on behalf of Complainants Kubic and Garcia. (Tr. 8)

On February 11, 2003, the Examiner wrote Complainants Kubic and Garcia offering them an opportunity to review the transcript of the hearing and the exhibits received into evidence at the hearing and to state their position in response to Respondents' various contentions that the complaint should be dismissed. Complainants Kubic and Garcia did not respond to that communication.

The only communication the Examiner has had from either of them was in the form of a telephone call from Complainant Garcia on October 9, 2003. In that conversation, Ms. Garcia stated that her non-attendance at the hearings was due to the facts that she did not feel she could afford the loss of pay she would have experienced by attending the hearing during work time, and that Complainant Grap told Complainant Garcia that Ms. Garcia's attendance at the hearing was not necessary. Ms. Garcia did not, in that phone conversation, express an interest in reviewing the transcript or exhibits or in stating a position in response to the Respondents' requests for dismissal of the complaint.

On those bases, the Examiner has ordered that Complainants Kubic and Garcia no longer be treated as named complainants in this matter, on grounds of their failure to prosecute the complaint. SEE, MILWAUKEE PUBLIC SCHOOLS, DEC. NO. 29482-B (WERC, 5/99) at 12, CITING, PRAIRIE HOME CEMETERY, DEC. NO. 22316-B (WERC, 10/85) ("[w]here the failure to appear is intentional . . . we believe it appropriate to dismiss a complaint for lack of prosecution or to grant relief to a party based upon an ex parte record." ID. at 3.)

Even with Complainants Kubic and Garcia removed as named Complainants, and despite Complainant Grap's and Perez' assertions that they spoke at the hearing for one another and not for Complainants Kubic and Garcia (Tr. 8), the collective nature of many of the complaint allegations leaves among the issues for resolution in this case whether Respondents violated the MERA rights not only of Complainants Grap and Perez, but also of various other ACIIs, including Complainants Kubic and Garcia. Therefore, while Complainants Kubic and Garcia are no longer to be accorded the status of named complainants, they are nonetheless left in the same status as those other ACIIs who are not named complainants.

Applicable legal standards

The complaint contains allegations that the County violated Secs. 111.70(3)(a)1, 3 and 5, Stats., and that the Union violated Sec. 111.70(3)(b)1, Stats. It also requests that the Commission exercise its collective bargaining agreement enforcement jurisdiction to determine the merits of two other claims.

Section 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer "[t]o interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2)." Under Section 111.70(2), Stats., the rights protected by Sec. 111. 70(3)(a)1, Stats., include, among others, "the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

The Commission has recently held that allegations of independent violations of Sec. 111.70(3)(a)1, Stats., are to be analyzed by use of the four-part test outlined below regarding violations of Sec. 111.70(3)(a)3, Stats., "in cases . . . where the essence of the violation lies in the employer's motive for taking adverse action against one or more employees, such as claims of retaliation. In such cases, if lawfully motivated, adverse actions will not be found violative of (3)(a)1 "simply because it could be perceived as retaliatory." CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03) at 15.

For other claimed violations of Sec. 111.70(3)(a)1, Stats., a prohibited practice occurs when employer conduct has a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Sec. 111.70(2) rights. WERC v. EVANSVILLE, 69 WIS.2D 140 (1975). If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employee(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights. BEAVER DAM SCHOOLS, DEC. NO. 20283-B (WERC, 5/84); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84); JUNEAU COUNTY, DEC. NO. 12593-B (WERC, 1/77). However, exceptions to that general rule have been recognized by the Commission in prior cases. For example, in recognition of the employer's free speech rights and of the general benefits of "uninhibited" and "robust" debate in labor disputes, employer remarks which inaccurately or critically portray the employee's labor organization and thus may well have a reasonable tendency to "restrain" employees from exercising the Sec. 111.70(2) right of supporting their labor organization generally are not violative of Sec. 111.70(3)(a)1, Stats., unless the remarks contain implicit or express threats or promises of benefit. ASHWAUBENON SCHOOLS, DEC. NO. 14474-A (WERC, 10/77); JANESVILLE SCHOOLS, DEC. NO. 8791 (WERC, 3/69).

It is also established that employer conduct which may well have a reasonable tendency to interfere with employee exercise of Sec. 111.70(2) rights will generally not be found violative of Sec. 111.70(3)(a)1, Stats., if the employer had a valid business reason for its actions. E.G., BROWN COUNTY, DEC. NO. 28158-F (WERC, 12/96); CEDAR GROVE-BELGIUM SCHOOLS, DEC. NO. 25849-B (WERC, 5/91); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84); see generally, WAUKESHA COUNTY, DEC. NO. 14662-A (GRATZ, 1/78) at 22-23, AFF'D -B (WERC, 3/78) and KENOSHA SCHOOLS, DEC. NO. 6986-C (WERC, 2/66) (In relation to a claim of interference, "[r]ules established by a municipal employer in effectuation of its public function, which regulate, on a non-discriminatory basis, the activities of its employes and their representatives on the employer's time and premises, and which may arguably limit the rights and protected activities of employes, as established in Section 111.70, Wisconsin Statutes, shall be presumed valid. Whether said rules constitute . . . prohibited practices, will depend on the facts in each case. The rights of the employes and their representatives must be balanced with the obligation and duties of the municipal employer. Those challenging such rules must establish that they were adopted for the purpose of . . . interfering with the lawful organizational activity of the employes involved . . . ". ID. at 22-23).

Section 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer: "3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; but the prohibition shall not apply to a fair-share agreement." Under the four-part test to establish a violation of Sec. 111.70(3)(a)3, Stats., it must be proved by a clear and satisfactory preponderance of the evidence that the municipal employee was engaged in protected, concerted activity; that the municipal employer's agents were aware of that activity; that the municipal employer, or its agents, were hostile towards that activity; and that the municipal employer's actions toward the municipal employee were motivated, at least in part, by its hostility toward the municipal employee's protected, concerted activity. MUSKEGO-NORWAY SCHOOLS v. WERB, 35 WIS.2D 540 (1967); EMPLOYMENT RELATIONS DEPARTMENT v. WERC, 122 WIS.2D 132 (1985).

Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer "to violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees. . . ." Prior cases have recognized that a grievance settlement agreement may be a collective bargaining agreement within the meaning of Sec. 111.70(3)(a)5, Stats. CITY OF PRAIRIE DU CHIEN, DEC. NO. 21619-A (SCHIAVONI, 7/84), AFF'D BY OPERATION OF LAW, DEC. NO. 21619-B (WERC, 8/84); WONEWOC-UNION CENTER SCHOOLS, DEC. NO. 25093-A (CROWLEY, 6/88), AFF'D BY OPERATION OF LAW, DEC. NO. 25093-B (WERC, 7/88).

In the Wisconsin Supreme Court's decision in MAHNKE v. WERC, 66 WIS.2D 524 (1975), relying on the U.S. Supreme Court's decision in VACA v. SIPES, 386 U.S. 171, 190 (1967), the Wisconsin Court held that: (1) where the contract grievance procedure has not been exhausted, in order for the complaining employee to bring suit against the employer for a breach of contract claim the union must be shown to have breached its duty of fair representation in refusing to process the grievance; (2) such a breach of the 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;" and (3) "a union has considerable latitude in deciding whether to pursue a grievance through arbitration," however, in exercising its discretion "a union must, in good faith and in a nonarbitrary manner, make decisions as to particular grievances." 66 WIS.2D at 531-32.

Section 111.70(3)(b)1, Stats. provides: "(b) It is a prohibited practice for a municipal employee, individually or in concert with others: 1. [t]o coerce or intimidate a municipal employee in the enjoyment of the employee's legal rights, including those guaranteed in sub. (2)." (The pertinent sub. (2) language is quoted above.) The reference in Sec. 111.70(3)(b)1, Stats., to "a municipal employee . . . in concert with others" has historically been interpreted to extend the prohibitions in Sec. 111.70(3)(b)1, to labor organizations. RACINE UNIFIED SCHOOL DISTRICT, DEC. NOS. 14308-D, 14389-D, 14390-D (WERC, 6/77). Section (3)(b)1 has also been held to incorporate a labor organization's duty to fairly represent those in the bargaining unit for which it serves as the exclusive collective

bargaining representative. E.G., CITY OF JANESVILLE, DEC. NO. 15209-C at 6 (HENNINGSEN, 3/78), AFF'D BY OPERATION OF LAW, -D (WERC, 4/78). As noted above, to prove a violation of that duty of fair representation, it is necessary to show, by a clear and satisfactory preponderance of the evidence, that the "union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." In that regard, "a union has considerable latitude in deciding whether to pursue a grievance through arbitration," however, in exercising its discretion "a union must, in good faith and in a nonarbitrary manner, make decisions as to particular grievances." E.G., MAHNKE, SUPRA, 66 WIS.2D at 531-32.

Complaint para. 8 — alleged County discrimination
by change in work hours
[Findings of Fact 11-12 and 19]

Applying the four-part MUSKEGO-NORWAY analysis, it is clear that Complainants' participation in the filing and processing of the February 27 grievance constituted MERA-protected activity of which Day Care Section management had knowledge.

However, there is no direct evidence of hostility by V. Robertson or anyone else in County management toward the Complainants' participation in the filing and processing of the February 27 grievance.

Regarding timing, the record indicates that the April 19 hours change memorandum followed closely in time not only the filing and Step One disposition of the February 27 grievance, but also V. Robertson's arrival as supervisor of the ACIIs (Tr. 226), Guitan's moving up to a position immediately supervising Robertson (Tr. 226, 230), and Guitan's April 1 notice to Child Care Providers shortening the Child Care Front Desk hours by one-half hour in the morning, to 8:00 a.m. to 4:30 p.m. (Ex. 35).

Regarding discriminatory impact, while the hours changes were issued only to the ACIIs and not to the clerical employees (Ex. 4, Tr. 102) the record shows that neither of the clerical employees was working hours beginning earlier than 8:00 a.m., whereas several of the ACIIs were working such earlier hours. (E.g., Ex.4, 21-22).

Regarding Complainants' claim that management's stated reasons for the hours change have been shown to have been an untrue pretext, the record does not persuasively undercut most of the reasons offered by management at the Step One hearing regarding the April 22 grievance (Ex. 12, described in Findings of Fact 13 and 18.) While Complainants assert that day care staff tardiness was not as widespread a problem as was suggested by the wording of the Step One disposition's summary of the position taken by management at the Step One hearing (Ex. 12-13, Tr. 34), the record indicates that there was apparently a problem with at least one staff member's tardiness (Ex. 13). While Complainants have shown that management has identified various supervisors from other areas as persons to be called during absences of

Robertson or Guitan (Ex. 15-18), the County has shown that one of the two first line Day Care Section supervisor positions was vacant for a time. (Tr. 220-221, 229) For that reason, and generally, management had an arguable business interest in aligning the ACIIs work hours with those of supervisors V. Robertson and Guitan. Finally, the fact that management restored most of the employees' hours in July does not persuasively establish that there was no business reason to have changed the hours in the first place. Rather, just as the issue was ultimately resolved at Step Two of the grievance procedure, the conclusion was apparently reached that the operational needs that were served by the hours change could be accommodated with two ACII slots working 8:00 a.m. - 4:30 p.m. rather than by having all ACII slots working those hours.

For those reasons, the Examiner finds Complainants have not met their burden of proving hostility and in-part motivation regarding the April 19 hours change memo by the requisite clear and satisfactory preponderance of the evidence.

Complaint para. 8 — alleged County interference
by change in hours
[Findings of Fact 11-12 and 19]

Under CLARK COUNTY, SUPRA, the allegation that the County committed an independent Sec. 111.70(3)(a)1, Stats., retaliation violation by issuing the April 19 change of hours memo would turn on the same four-part test on the basis of which no violation was found as discussed immediately above.

The Examiner would reach the same conclusion if the pre-CLARK COUNTY mode of interference analysis were applied. Various written communications from ACIIs to management and others show that the ACIIs were aware that Day Care Section management was expressing concerns about the Section's productivity and purporting to make various changes in working conditions on the basis of those concerns. (Ex. 24, 26, 72) In that context, and in the context of the April 1 change in operating hours during which the of the Front Reception Desk was open to walk-in day care providers, the Examiner concludes that the August 19 hours change memo was not such as would have unlawfully interfered with the ACIIs' exercise of MERA protected rights.

Complaint para. 11 — alleged County discrimination
by use of attendance reviews
[Findings of Fact 16-17]

Applying the four-part MUSKEGO-NORWAY analysis, it is clear that prior to Day Care Section management's May 2 introduction of attendance review forms, the Complainants and other ACIIs had participated in initiating the February 27 (which resulted in the March 27

disposition) and in initiating the April 22 grievance. Day Care Section management unquestionably had knowledge of those MERA-protected activities on Complainants' part.

However, there again is no direct evidence of hostility on the part of Guitan or V. Robertson or anyone else in County management toward the Complainants' participation in the filing and processing of the February 27 and April 22 grievances.

Regarding timing, the record indicates that the May 2 introduction of attendance review forms followed closely in time not only the filing of the April 22 grievance, but also V. Robertson's arrival as supervisor of the ACIIs (Tr. 226) and Guitan's moving up to a position immediately supervising Robertson (Tr. 226, 230).

Regarding pretext, while Day Care Section supervisors have not met one of the Supervisor Responsibilities outlined in the DHS Attendance Policy, it is nonetheless significant that the forms and attendance standards implemented in the Day Care Section are those prescribed in the longstanding DHS Attendance policy formally published and distributed to all employees in 1997, and that those forms and standards parallel those in active use in many other DHS work units (Tr. 216, 219, 223-4). Complainants have not shown that attendance review forms were introduced on May 2 only with regard to the ACIIs and not with regard to other Day Care Section personnel. The record also reflects that V. Robertson told Henderson when they met on July 26, that after she became the ACIIs' supervisor and observed the work of the Section, V. Robertson became concerned that the ACIIs were not getting their task done effectively, that files were not being monitored and that adjustments were not being completed. (Ex. 60 at 1-2). In that context, and even without it, it is not surprising for a newly-assigned supervisor (V. Robertson) and a newly moved-up manager (Guitan) to begin applying the established DHS attendance standards and forms to the employees in the Section. (Tr. 226)

For those reasons, the Examiner finds Complainants have not met their burden of proving hostility and in-part motivation regarding the May 2 introduction of attendance review forms, by the requisite clear and satisfactory preponderance of the evidence.

Complaint para. 11 — alleged County interference
by use of attendance reviews
[Findings of Fact 16-17]

Under CLARK COUNTY, SUPRA, the allegation that the County committed an independent Sec. 111.70(3)(a)1, Stats., retaliation violation by introducing attendance reviews beginning on May 2 would turn on the same four-part test on the basis of which no violation was found as discussed immediately above.

The Examiner would reach the same conclusion if the pre-CLARK COUNTY mode of interference analysis were applied. As noted above, the ACIIs' various written communications to management and others show that they were aware that Day Care Section

management was expressing concerns about the Section's productivity and purporting to make various changes in working conditions on the basis of those concerns. (Ex. 24, 26, 72) In that context, the Examiner concludes that the May 2 introduction of attendance review forms was not such as would have unlawfully interfered with the ACIIs' exercise of MERA protected rights.

Complaint para. 14 — alleged County interference by restoring some employees' work hours shortly before Step Two hearing
[Findings of Fact 20-21]

The Examiner applies the "reasonable tendency" analysis to this allegation because it does not appear to involve alleged retaliation. Rather, Complainants are apparently contending that the reasonable tendency of County management's restoration of most of the ACII's pre-May 16 hours effective two days prior to the scheduled date of the Step Two hearing regarding the April 22 grievance, was to discourage the Complainants and other employees from filing and processing grievances.

Day Care Section management gave the affected employees no reason why it chose to restore the hours of most of the ACIIs as it did or when it did, (e.g., Tr. 241), and the record does not definitively establish why management acted as it did in that regard. Because the record does not establish precisely when Hughes was promoted to fill the supervisory vacancy that existed in the Day Care Section (Tr. 174), the record does not establish that the County's answer to complaint para. 13 (that the hours were restored upon hiring of additional personnel to provide supervisory coverage) was an untrue pretext.

In any event, restoration of the original hours for all of the ACIIs, regardless of seniority, was a central remedial element requested in the April 22 grievance; and that grievance remained unresolved following Richards' Step One denial of it on June 4. The extent to which Day Care Section management's partial and seniority-based restoration of hours differed from the full restoration requested in the grievance does not establish that either management's actions or the timing of those actions was intended to or likely to discourage employees from filing and processing grievances. On the contrary, in the Examiner's opinion, the restoration of hours of most of the affected employees' hours, based on seniority, just prior to a scheduled grievance hearing on the subject would, if anything, tend to support and encourage use of the grievance process rather than discourage and undercut the use of the grievance process as a method for effectively resolving workplace disputes.

Finally, regarding delay between the announcement and the implementation of the hours restorations, there are indications in the record that Day Care Section management believed it was required to give the employees whose hours were being changed the advance notice of a change in work hours required by the Agreement (Ex. 40). While the language of the Agreement on that subject has not been made a part of the record, the existence of such an advance notice requirement was referred to indirectly in the last sentence Richards' June 4 grievance denial quoted in Finding of Fact 18.

The Examiner has, therefore, found that the prohibited practice alleged in complaint para. 14 has not been proven by the requisite clear and satisfactory preponderance of the evidence.

Complaint para. 17 — alleged County discrimination by lunch and break time changes and sign-in/sign-out procedure
[Findings of Fact 27-29]

Applying the four-part MUSKEGO-NORWAY analysis, the record establishes that Complainant Grap gathered senior ACIIs' concerns regarding the extent to which seniority would be respected if ACIIs' job duties were reassigned/restructured. The record also establishes that Grap shared those concerns with Henderson who, in turn, shared them with V. Robertson. Complainant Grap's participation in bringing those employee concerns to the attention of management was MERA-protected activity of which of which Day Care Section management had knowledge.

The record also clearly and satisfactorily establishes that the individual directive memos issued by V. Robertson on August 23 had the effects of making the ACIIs workloads more stressful by requiring them to see providers on a walk-in basis on Tuesday and Thursday afternoons of their alternately heavy workload weeks, without offering overtime or relief from other aspects of their workload. Those directives also had an adverse impact on the working conditions of the ACIIs by requiring them to sign in and out on time sheets and by imposing the various limits on them regarding lunch and break periods. The lunch and break schedules imposed had the effects of reducing the employees' opportunities to interact with one another during breaks and lunch periods, especially as regards the periods of time during which the schedule foreclosed certain of the employees from interacting with any of the other 14 affected employees, to wit, Uscila's morning break, the first half of Complainant Grap's lunch period, and Weinert's, G. Roberson's and Complainant Grap's afternoon break.

There is no direct evidence of hostility by V. Robertson or anyone else in County management toward the Complainants' pre-August 22 MERA-protected activities, including Complainant Grap's participation in gathering and communicating through Henderson to V. Robertson the views of senior ACIIs regarding the extent to which seniority should be respected in any future restructuring of work assignments among the ACIIs.

The record does indicate that, in August of 2002, V. Robertson continued to be relatively new to her supervisory responsibilities in the Day Care Section. The evidence also indicates that V. Robertson told Henderson when they met on July 26, that after becoming the ACIIs' supervisor and observing the work of the Section, V. Robertson became concerned that the ACIIs were not getting their task done effectively, that files were not being monitored and that adjustments were not being completed. (Ex. 60 at 1-2) In that context, it is not surprising for a newly-assigned supervisor to take steps to improve the overall performance of her work

force. The County has shown that the actions taken by V. Robertson are generally authorized by the DHS Work Rules which were generally re-issued and distributed to all employees most recently in 1997. On the other hand, it is also clear that Complainants and other ACIIs and their Union have repeatedly made it known to their supervisors and managers and others in County leadership that they consider V. Robertson's August 23 directives and other changes made by Section supervision to be ineffective and counterproductive (Ex. 24, 26). Assuming without deciding that the August 23 directives were unwise or counterproductive, they nonetheless arguably constituted steps by which V. Robertson sought to improve the overall performance of the Day Care Section work force.

The record does not establish that the August 22-23 changes were applied in all respects only to the ACIIs. Contrary to Complainant Grap's assertion that the lunch and breaks schedule established by V. Robertson included only the ACIIs, a review of that document (Ex. 19) reveals that clerical employees Crowley and Dickerson and their break and lunch times are listed on that schedule the same as the ACIIs are. On the other hand, Complainant Grap's undisputed testimony establishes that only the ACIIs were required to sign in and out on timesheets kept in a binder outside V. Robertson's office window (Tr. 57). Whether the clerical employes were issued August 23 directives is not established one way or the other in the record.

All things considered, the Examiner concludes that Complainants have not met their burden of proving hostility or in-part motivation as regards the August 23 memos by the requisite clear and satisfactory preponderance of the evidence.

Complaint para. 17 — alleged County interference
by lunch and break time changes and sign-in/sign-out procedure
[Findings of Fact 27-29]

Under CLARK COUNTY, SUPRA, the allegation that the County committed an independent Sec. 111.70(3)(a)1, Stats., retaliation violation by the August 23 directives would turn on the same four-part test on the basis of which no violation was found as discussed immediately above.

The Examiner would reach the same conclusion if the pre-CLARK COUNTY mode of interference were applied. The ACIIs' various written communications to management show that they were aware that Day Care Section management was expressing concerns about the Section's productivity and purporting to make various changes in working conditions on the basis of those concerns (Ex. 24, 26, 72). In that context, the Examiner concludes that the August 23 directives concerning lunch and break time changes and sign-in/sign-out procedure were not such as would have unlawfully interfered with the ACIIs' exercise of MERA protected rights.

Complaint para. 20 — alleged County discrimination and interference by verbal reprimands and requirement of supervisory permission to leave floor
[Findings of Fact 32-34 and 36]

This complaint paragraph relates to conduct alleged to have occurred on August 29 and 30. The August 29 verbal reprimand portion of the allegation relates to Poma's statements and actions at the August 29 meeting, but it is not clear to what the August 30 verbal reprimand allegation relates. There is evidence that on August 30, V. Robertson informed Complainant Grap that there would be a change in Grap's duties effective on the following work day, so the Examiner has analyzed that evidence in relation to the August 30 verbal reprimand allegation. As stated in Finding of Fact 36, the Examiner has found no evidence to support the allegation that a new directive was issued on August 30 or at any other time, requiring that employees obtain supervisory permission before leaving the floor.

The Examiner has concluded that Poma did not impose a verbal reprimand on the Complainants or the other ACIIs during the August 29 meeting. While he apparently made it clear during the meeting that he did not agree with much of what the employees had written in their August 28 letter, he has not been shown to have told the Complainants or the other ACIIs at that meeting that they were being disciplined. (Ex. 26, 72, Tr. 71-72)

There is also no evidence that the employees were being questioned during the meeting such that it could have been reasonably viewed by Complainant Grap or the other ACIIs present as an investigatory interview that could produce information on the basis of which the employees could be disciplined. Complainant Grap and the other assembled employees, therefore, did not have a MERA right to Union representation at the meeting. SEE, WAUKESHA COUNTY, SUPRA, at 26-29 (where employee reasonably believes investigatory interview may result in discipline, employer presented with request for Union representation must either allow representation or terminate the interview; however MERA right to representation does not apply to meetings where employer is imposing already decided-upon discipline or to non-investigatory meetings.)

Poma's denial near the end of the meeting that he had earlier denied requests for Union representation would have been understandably objectionable to Complainant Grap and the others, but not in a way that has been shown to be violative of MERA.

Poma's statement that employees are naive to think their jobs are secure could be viewed as a threat, but it could also be viewed as a defense of Day Care Section supervision's expressions of concern that poor performance of the Section's function could result in the County's losing the State contract and the Section employees losing the work associated with that contract. (Ex. 24) Without more than the barest of contexts provided by the record (Tr. 71), the Examiner cannot conclude that the Poma's remark in that regard constituted a threat or, therefore, that Poma's remarks constituted a violation of Sec. 111.70(3)(a)1, Stats.

SEE, ASHWAUBENON SCHOOLS, DEC. NO. 14474-A (WERC, 10/77) at 7-8 ("Just as employes have a protected right to express their opinions to their employers, so also do employers enjoy a protected right of free speech . . . ". An employer's remarks, even if inaccurate or critical, do not violate Sec. 111.70(3)(a)1, Stats., unless they contain implicit or express threats or promises of benefit.) While Poma clearly did not agree with, and may well have been angry about (and therefore hostile toward), the content of the ACIIs' letter to him, the record does not clearly and satisfactorily establish that he threatened the ACIIs with adverse consequences if they were to collectively communicate further with Poma or others in County management.

For those reasons, the Examiner has concluded that no violation of either Sec. 111.70(3)(a)3 or 1 has been proven by the requisite clear and satisfactory preponderance of the evidence in relation to the allegations concerning Poma's August 29 meeting statements and actions.

The nature of the change in Complainant Grap's duties on August 30 is not revealed in the record, except that the newly-assigned duties were within the ACII classification (Tr. 179). While Complainant Grap testified that she liked the duties she was performing before the change (Tr. 73), she did not state whether she liked the duties she was performing after the change or whether the change caused her to perform duties that she or others considered less desirable. She also did not state whether the changes affected all or most of the duties she had previously been performing or only some small aspect of those duties. For that reason, and because Complainant Grap and other senior ACIIs were aware on or before August 22 (i.e., before the August 29 meeting with Poma) that management was considering reassignments of ACII duties (Tr. 46; complaint para. 15), the Examiner concludes that the August 30 change in Complainant Grap's duties, whatever it was, has not been shown by a clear and satisfactory preponderance of the evidence to have been motivated in whole or in part by hostility toward Complainant Grap's MERA protected activities or that the change was such as would unlawfully interfere with the ACIIs' exercise of MERA protected rights.

Complaint para. 23 — alleged County violation of
reception desk duty grievance settlement
[Findings of Fact 8, 9, 39-40 and 43]

The Complainants allege that the County has violated the terms of a collective bargaining agreement within the meaning of Sec. 111.70(3)(a)5, Stats., by failing to comply with the March 27 grievance disposition, which ripened into a grievance settlement agreement binding on the Union and County.

Complainants are correct when they assert that the March 27 grievance disposition has become a collective bargaining agreement within the meaning of MERA. However, with very limited exceptions, it has long been the Commission's policy not to exercise its collective bargaining agreement enforcement jurisdiction regarding a dispute that is subject to resolution

under an agreed upon and presumptively-exclusive grievance procedure like the one contained in the County's 2001, 2002-04 Agreement with the Union. E.G., MILWAUKEE COUNTY, DEC. NO. 28525-B (BURNS, 5/98) at 12, AFF'D -C (WERC, 8/98).

By its terms, the Agreement grievance procedure relates to "matters involving the interpretation, application or enforcement of the terms of this Agreement . . . ." No express exception has been shown to exist as regards claims that a grievance settlement previously reached under that procedure is being violated.

Accordingly, the Commission will only decide the merits of a claim that the March 27 grievance settlement has been violated if it is shown that the Complainants' access to the applicable grievance procedure is being prevented by a Union failure to fairly represent the employees' interests on the subject through the grievance procedure. E.G., MILWAUKEE COUNTY, SUPRA. A Union failure to fairly represent, in turn, requires a showing that the Union's conduct in relation to the employees' claimed agreement violation was arbitrary, capricious or in bad faith. MAHNKE, SUPRA.

In this case, the Examiner finds that Complainants have failed to show that the Union's conduct has been arbitrary, capricious or in bad faith as regards Complainants' claim that the County is violating the March 27 grievance settlement agreement. The record shows that Day Care Section management assignments of ACIIs to perform front desk duties have been on-going to a greater or lesser extent since at least April of 2002. (Tr. 96, 98) The affected employees have advised various Union officers and agents of that fact (e.g., Ex. 27, 28, 51, 75, 85, 88); but the assignments have variously continued to be made. However, the record also reveals that the Union has variously attempted on numerous occasions to cause County management to reduce or eliminate those assignments. (E.g., Ex. 50, 55, 61, 76, 80) The ultimate management responses that the Union has received appear to have been that the March 27 grievance disposition allows the County to use ACIIs for front desk duty in emergencies as determined by management, and that one of the two clerical employees referenced in the March 27 grievance disposition continues to be absent from work on a lengthy sick leave.

Significantly, when its various informal efforts failed, the Union took steps to assist ACIIs in filing another grievance on October 3. That grievance prominently includes a claim that the County has violated the Agreement and the March 27 disposition/settlement on an ongoing basis since April 19 by assigning Complainant Grap and others work out of the scope of their job duties in other than emergency circumstances (Ex. 31). As of the date of the complaint hearing in this case, the Union had processed the October 3 grievance through a Step One hearing, received a Step One disposition from Thomas with which the Union did not agree, and on December 10, appealed the grievance further in the Agreement grievance procedure. (Tr. 243)

In all of the circumstances, the Complainants have not proven that the Union failed to fairly represent them regarding their claim of on-going front desk duty assignments after the March 27 grievance settlement was issued. For that reason, the Examiner has declined to exercise the Commission's contract enforcement jurisdiction as regards the merits of the claim that the County has violated the March 27 grievance settlement agreement.

Portion of complaint para. 25 — alleged Union restraint or coercion
by failure to timely submit second grievance
about reception desk assignments
[Findings of Fact 8-9, 39-40 and 43]

Complainants are alleging that the Union violated Sec. 111.70(3)(b)1, Stats., by failing to timely file a second grievance about continued front desk duty assignments to ACIIs. Analysis of this allegation closely parallels that in the discussion immediately above, but there are additional contentions that need to be addressed, as well.

As discussed above, the record reflects that the Union had achieved a March 27 Step One grievance disposition which, by its terms, appeared intended to place some limit on management's use of ACIIs at the front desk by limiting the permissible use to emergencies as determined by management.

The record also indicates that settlement agreement did not, in fact, stop Day Care Section management from assigning ACIIs to the reception desk, and it is not clear to what extent, if any, the settlement agreement reduced such assignments from pre-settlement levels. One contributing factor in that regard was the long-term sick leave absence of one of the two clerical employees to whom the March 27 disposition stated the front desk assignments should be given.

In any event, as noted in Finding of Fact 40, the record indicates that when informed that front desk assignments continued, the Union sought in various ways to cause Day Care Section management to reduce or eliminate assignments of ACIIs to front reception desk duty and to comply with the March 27 grievance disposition.

One such effort was a Union request for a meeting involving DHS Director Lucey and ACIIs to discuss various of the ACIIs' concerns including front desk duty assignments. (Tr. 184) Eisner and Purifoy discouraged Complainant Grap from filing a new grievance regarding on-going front desk duty assignments because of stated concerns that the filing of such a grievance would result in Lucey deciding not to meet with the ACIIs about their concerns. (Tr. 78, 80) While Eisner's and Purifoy's concerns did not turn out to be correct, their expression of those concerns has not been shown to have been arbitrary, capricious or in bad faith. It was not unreasonable for Eisner and Purifoy to view a meeting with Lucey as a potentially important step toward resolving the numerous problems ACIIs were having with

Day Care Section management. Eisner's and Purifoy's expressed concern about not giving management a reason not to convene such a meeting was an understandable precaution in the circumstances, even though it turned out to be unnecessary.

When the Union representatives' various informal efforts at reducing or eliminating front desk assignments proved unsuccessful, Eisner wrote up the October 3 grievance and the Union actively pursued that grievance through Step One and a December 10 appeal to Step Two, where it stood unresolved as of the date of the complaint hearing in this case. Technically speaking, however, any of the Complainants could have filed a new grievance about continued front desk assignments whenever they chose to do so. The record evidence regarding grievance processing supports the portion of the County's answer to complaint para. 26 and the portion of the Union's opening statement (Tr. 10) asserting that the Agreement grievance procedure authorizes only employees and not the Union to initiate grievances. Accordingly, each of the grievances in evidence in this case was signed by one or more employees in a blank labeled "Signature of Grievant," and the record further establishes that grievance forms are made available at the various work sites, normally in the human resources office of the department involved. (Tr. 271) While Eisner's expertise in fashioning an effective statement of the grievance would no doubt have been desirable to Complainant Grap or others concerned about continued front desk assignments, Eisner's and Purifoy's discouragement of filing until after the meeting with Lucey was completed did not preclude the filing of a grievance by any of the affected ACIIs.

It is quite understandable that Complainants are dissatisfied with the extent, if any, to which the March 27 disposition reduced their being assigned to reception desk duty. Nevertheless, for the reasons noted above, the Examiner concludes that Union's failure to actively assist Complainants in filing another grievance on that subject, prior to the October 3 grievance, was not arbitrary, capricious or in bad faith.

The Examiner has, therefore, found that the prohibited practice alleged in complaint para. 14 has not been proven by the requisite clear and satisfactory preponderance of the evidence.

Portion of complaint para. 25 — alleged Union
restraint and coercion by failure to
submit Complainants' April 22 grievance to arbitration
[Findings of Fact 13-15, 18-19, 22-24, 40-42, and 44-45]

In effect, this allegation is that the Union has failed to fairly represent Complainants in violation of Sec. 111.70(3)(b)1, Stats., by failing to submit "complainants' initial grievance" to grievance arbitration under the Agreement. It is unclear from the face of the complaint whether the "initial grievance" referred to is the February 27 grievance (i.e., the first of the three grievances filed by the Complainants) or the April 22 grievance (i.e., the first of the

Complainants' two grievances referencing changes in ACII hours). However, at the hearing, Complainants stated that the complaint was not intended to allege that the Union failed to fairly represent the complainants as regards the February 27 grievance. (Tr. 114) Accordingly, the "initial grievance" reference in complaint para. 25 must be a reference to the April 22 grievance.

The Examiner finds the Union's settlement of that grievance on the basis of Eldridge's October 20 disposition was not arbitrary, capricious or in bad faith. It is true that the October 20 disposition did not achieve the full measure of relief sought in the April 22 grievance. It is also true that the October 20 disposition did not include a finding that management was guilty of retaliation/discrimination as had been asserted in the grievance. However, the record reflects that Eisner took steps prior to the Step Two hearing to obtain an update as to the ACIIs' hours and the extent to which the April 22 grievance remained unresolved by the restoration of hours that had occurred. (Ex. 20-23) The record also reflects that, at the September 18 Step Two hearing, management's representatives continued to deny that the hours changes were discriminatory retaliation and insisted also that management had a business need for at least two ACIIs to be scheduled work through until 4:30 p.m. which marked the time after which the office was closed to receiving additional reports from Day Care providers. (Tr. 255-6) The Union's willingness to ultimately accept a grievance resolution that provided a clearly specified limit on the number of 8:00 a.m. - 4:30 p.m. time slots that ACIIs would have to fill, that used volunteers first, and that then called for filling any remaining slot(s) by reverse seniority (Tr. 255-6), appears to have been a nonarbitrary, noncapricious and non-bad faith choice in the circumstances. While that resolution did not achieve everything the grievance sought, it provided a clearly-defined and conventional means of limiting the extent to which ACIIs were required to work hours consisting of 8:00 a.m. - 4:30 p.m. It also included a statement expressly calling for Department management to abide by the terms of the settlement agreement. (Ex. 32 quoted in Finding of Fact 44)

To the extent that the October 20 disposition has not been honored, Eisner testified that he was not aware before the complaint hearing that there remained an issue in that regard, but that if there were such an issue, then the Union would pursue that matter to obtain County compliance with the terms of the settlement. (Tr. 254, 259-260)

The fact that no Union representative told Complainant Grap at any time during the pendency of the April 22 grievance that they disagreed with the grievance in any respect does not render arbitrary, capricious or bad faith the Union's ultimate decision to resolve the grievance on the compromise basis described above.

Clearly, the Union should have provided the Complainants with a copy of the October 20 disposition prior to the time when the Union offered it into evidence at the complaint hearing. However, the Union's failure to keep Complainants properly informed about the status of the April 22 grievance following the Step Two meeting is not a sufficient basis on which to conclude that the Union's decision not to appeal the case to arbitration or the

Union's general handling of the grievance was arbitrary, capricious or in bad faith. SEE, MARINETTE COUNTY, DEC. NO. 19127-C (HOULIHAN, 11/82) at 10, AFF'D BY OPERATION OF LAW, -D (WERC, 12/82) and UNIVERSITY OF WISCONSIN - MILWAUKEE HOUSING DEPARTMENT , DEC. NO. 11457-F (WERC, 1977) at 34 (under MAHNKE, SUPRA, failure of a union to notify a grievant about the disposition of his or her grievance is an inadequate basis for finding a breach of the duty of fair representation.)

The absence of a Union signature on the blank provided for that purpose on the October 20 disposition does not establish that the grievance was not settled on the basis of that Step Two disposition or that the Union's decision not to appeal was reached in an arbitrary, capricious or bad faith manner. The concluding sentence of Eldridge's October 20 disposition, itself, anticipated the possibility that the disposition would become binding on the County and the Union without a Union signature (Ex. 32, quoted in Finding of Fact 44). Similarly, Eisner confirmed in his testimony that once 45 days passed from the date of the October 20 disposition without the Union notifying the County that it was appealing the disposition, the disposition became a resolution of the April 22 grievance that was binding on the County and the Union. (Tr. 264) In any event, Purifoy testified (Tr. 269-70) that she followed her regular procedures for determining whether an appeal would be filed in response to the October 20 disposition. That testimony by Purifoy also reflects that, once it was determined that the Union was not going to file such an appeal, Purifoy informed the County's Labor Relations Department on January 14, 2003, that the Union accepted the October 20 disposition. The fact that there was no Union signature provided to the County to that effect does not draw into question either the fact that the April 22 grievance was settled on the basis of the October 20 Step Two disposition or the propriety of the procedures followed by the Union in deciding not to appeal that disposition.

Complainants' closing arguments assert that the Union's agreement to extend the time for the Step One hearing regarding the April 22 grievance was inappropriate. The Examiner concludes that Eisner's agreement to extend the Agreement time limit for the Step One hearing regarding the April 22 grievance has not been shown to have been arbitrary, capricious or in bad faith. Extensions of that sort are not uncommon in the operation of grievance procedures generally, and they seem especially likely to occur from time to time in a procedure that is utilized as heavily as the one between Local 594 and Milwaukee County (Tr. 278). Eisner's and Henderson's special (and apparently successful) efforts to arrange for a Union-County discussion of the hours change issues before the changes were implemented (Ex. 43, 44, 49, 50) show that the Union was sensitive to the need for attempting to resolve the April 22 promptly, and, if possible, before the hours changes took effect at all. The approval of the Step One hearing date extension by Local 594 chief steward on behalf of the 11 employees who initially signed the grievance does not appear inappropriate in the circumstances, either. Eisner's entry of "et al" and his initials after "Lynn Grap" on the form made it clear that Eisner was signing for the group of grievants, and that Complainant Grap herself had not signed the form.

For all of those reasons, the Examiner finds no basis on which to conclude that the Union's non-appeal of the April 22 to arbitration violated MERA in any way.

Complaint para. 26 — request for WERC adjudication
of the merits of the April 22 grievance
[Finding of Fact 46]

Because the Examiner has concluded, above, that the Union's non-appeal to arbitration of the April 22 grievance was not arbitrary, capricious or in bad faith, the Examiner has declined to exercise the Commission's collective bargaining agreement enforcement jurisdiction to determine the merits of the April 22 grievance.

Respondents' requests for costs and fees

The Examiner has denied the Respondents' requests for an order that the complainants pay the Respondents' defense costs and fees because the Commission has held repeatedly in recent years that it is without statutory authority to grant the relief the Respondents are requesting in this case. E.G., MILWAUKEE AREA TECHNICAL COLLEGE, DEC. NO. 30254 (WERC, 1/4/02) at 4 ("We deny the Respondents' request for costs and attorneys' fees because we do not have the statutory authority to grant same in complaint proceedings to responding parties. STATE OF WISCONSIN, DEC. NO. 29177-C (WERC 5/99).")

Dated at Shorewood, Wisconsin, this 5th day of March, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/
Marshall L. Gratz, Examiner

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