STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CHRISTOPHER OCHALEK and
MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO, Complainants,

vs.

MILWAUKEE COUNTY, Respondent.

Case 522
No. 61061
MP-3810

Decision No. 30790-A

Appearances:

Mark A. Sweet, Law Offices of Mark A. Sweet, LLC, 705 East Silver Spring Drive, Milwaukee, WI 53217, appearing on behalf of Milwaukee District Council 48, AFSCME and Christopher Ochalek.

Timothy Schoewe, Deputy Corporation Counsel, 901 North 9th Street, Room 303, Courthouse, Milwaukee, WI 53233, appearing on behalf of Milwaukee County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel Nielsen, Examiner: On March 29, 2002, the above-named Complainants, Christopher Ochalek and Milwaukee District Council 48, AFSCME, AFL-CIO, filed with the Commission a complaint, alleging that the above-named Respondent, Milwaukee County, violated the provisions of Ch. 111.70, MERA, by disciplining Ochalek in retaliation for his protected activities. The Commission appointed Daniel Nielsen, an examiner on its staff, to conduct a hearing and to make and issue appropriate Findings, Conclusions and Orders. Hearings were conducted in Milwaukee, Wisconsin, on February 25 and April 12, 2004, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. A stenographic record was made of the hearings, and a transcript was received on April 18, 2004. The parties submitted briefs. The County submitted a reply brief, and on August 13, 2004, the Union waived reply, whereupon the record was closed.

On the basis of the record evidence, the arguments of the parties, and the record as a whole, and being fully advised in the premises, the Examiner makes and issues the following, Findings of Fact, Conclusions of Law and Order

FINDINGS OF FACT

1. Milwaukee County (hereinafter referred to as either the County of the Respondent) is a municipal employer providing general governmental services to the people of the County, in southeastern Wisconsin. The County's business address is the County Courthouse, 901 North 9th Street, Room 303, Courthouse, Milwaukee, WI 53233.

2. Among the municipal services provided by the County is the operation of a Department of Public Works, which includes a Highway Division. The Highway Division runs a number of shops, including the South Shop. The supervisor of the South Shop is Martin Mendola. At various times relevant to this dispute, Greg Heisel, Chuck Smeltzer, and Rick Jurewicz have been Assistant Supervisors in the South Shop. The Highway Superintendent is Mark Schmidling. The Director of Highway Operations is Keith Ponath.

3. The employees of the Department of Public Works are represented by Local 882, affiliated with Milwaukee District Council 48, AFSCME, AFL-CIO (hereinafter collectively referred to as the Union). District Council 48 is a labor organization maintaining its offices at 3427 West St. Paul Avenue, Milwaukee, WI 53208. At all times material to this complaint, William Mollenhauer was the staff representative assigned to service Local 882.

4. Christopher Ochalek (hereinafter referred to as either Ochalek or the Complainant) was employed in the Department of Public Works from 1990 through July 9, 2001, when he was discharged. At the time of his discharge, Ochalek was a Highway Maintenance Worker 2 working out of the South Shop.

5. In 1998, Ochalek became vice president and chief steward of Local 882. In those capacities, he initiated and processed numerous grievances, prohibited practice complaints, discrimination complaints, and safety complaints on behalf of Local 882 members. He also served as a member of District Council 48's bargaining team for the 2000-2001 negotiations.

6. Ochalek received time off his duties as necessary for his activities on behalf of Local 882, subject to a requirement of signing out for his time.

7. The Highway Division's work rules specify that 7:30 a.m. is the normal starting time for the day shift. Employees must punch in by that time to be considered on time. The rules further require that employees call their supervisor prior to the start of the shift if they are going to be late or absent. If an employee does not call in by that time, the employee is docked for all time between the start of the shift and the time they call in. Once the employee does call in, he or she may use leave time for the period of absence after the call.

8. Between 1998 and 2001, the Complainant was disciplined 17 times, including the instant discharge. Twelve of disciplines were for punching in late, not punching in or being late for work. One discipline, a five-day suspension in September of 1999, was overturned by the County Personnel Review Board. In May of 1999, he was disciplined for not punching in for work. In the course of a grievance meeting with Ochalek, Mark Schmidling, Keith Ponath and Steward Kurt Zunker over the May, 1999, failure to punch in, Ponath advised Ochalek that as a Steward he should know the rules better than anyone else, and would be held to knowing them. Schmidling commented that, as a Steward, he should be an example for other employees.

9. During a snow call-out in 1999, the Complainant returned to the shop and encountered Assistant Supervisor Chuck Smeltzer. Smeltzer asked him what he was doing in the shop, and he replied that he was on his contractual break, and was going to get a hot sandwich. Smeltzer responded with something to the effect of "well, we need you out there, and you're going to play this union game of using your contractual break, you know it cuts both ways."

10. Chris Pegelow is a Highway Maintenance Worker at the South Shop, who is also active in the Union. At some point in the year 2000, Assistant Supervisor Rick Jurewicz told Pegelow that members of management at the South Shop considered Ochalek and him to be "troublemakers." In 2001, Assistant Supervisor Greg Heisel had a social conversation with Pegelow in a bar. At the time, Heisel was about to be transferred from the main shop to the South Shop. Heisel mentioned to Pegelow that Ponath, Schmidling and Night Superintendent Bill Lindstrom had told him to watch out for Ochalek and him because they were both "troublemakers."

11. Ochalek was assessed a one-day suspension for punching in late on September 23, 1999. The one-day suspension was held in abeyance for six months providing no further incidents during that time. On November 30, 1999, he was again accused of not punching in. The one-day suspension was reinstated, and Ochalek appealed to the County's Personnel Review Board.

12. In a written decision dated April 4, 2000, the Personnel Review Board summarized the proceedings before it, including a notation that the Complainant had argued that, based on his review of time records for other employees, he was being subjected to discipline while other employees were not disciplined for their attendance related infractions. He attributed the discipline to retaliation for this concerted activity as chief steward. The Board concluded that the Department had just cause to impose discipline and reinstated the one-day suspension.

13. In December of 2000, in connection with several pending disciplines, Ochalek wrote to Henry Zielinski, the County's Labor Relations Director, and requested "All Highway Maintenance Workers I, II and III's time card from Period 1 of 1998 to present." The stated

reason for the request was that the documents were necessary to represent himself. The information was not provided until sometime after July of 2001. The cards revealed that there were many instances in which employees who punched in late were not issued formal discipline.

14. On April 3, 2001, Ochalek appeared with then-Union counsel Alvin Ugent before the County's Personnel Review Board on three disciplinary matters – a one-day suspension, a ten-day suspension and a discharge – all of which were based on reporting late for work and/or failing to call in prior to the start of the shift. In discussions prior to the hearing, Ochalek and his attorney arrived at a settlement agreement with the County, the terms of which were accepted by the Board and memorialized in an April 5th letter to the parties:

> This is to confirm that the Milwaukee County Personnel Review Board at its meeting held April 3, 2001 accepted an oral settlement agreement reached by the parties.
>
> The terms and conditions are as follows:
>
> 1) The charges are well founded.
>
> 2) All time off for discharge and two suspensions stand.
>
> 3) Employee will not be discharged and shall, instead serve a twenty-five (25) working day suspension. This suspension includes the time imposed in the two suspension cases.
>
> 4) Effective January 1, 2001, employee shall serve 2,080 straight time hours worked reevaluation period. The employee's conduct shall be reevaluated pursuant to the Personnel Review Board's Rules for the Civil Service Rules cited in the charges seeking his suspension and discharge from county service. Specifically, this evaluation period pertains to the employee arriving at work on time or notifying the Highway Division of his inability to arrive prior to the start of his regularly scheduled shift.
>
> 5) If during the period of his reevaluation, the employee violates said rules, he may be discharged from county service without further hearings before the Personnel Review Board.
>
> Mr. Ochalek appeared personally and stated that he understood and agreed with the terms of the settlement agreement and that no one had used any undue pressure to obtain his acceptance of the agreement.

Mr. Parker moved, Mr. Schroeder seconded and the Board by unanimous vote (5-0) voted to accept the stipulation on all three matters and closed these cases.

. . .

15. On June 27, 2001, Ochalek called in to work at 7:45 a.m. and spoke with Assistant Supervisor Greg Heisel. He told Heisel he had a flat tire and would be late. He later called and asked for leave for the balance of the day. That request was granted.

16. The County terminated the Complainant for violating his April agreement by calling in late on June 27th, and by calling in at 8:16 a.m. on June 28th to report that he was taking that day off.

17. Ochalek and the Union sought a hearing on the termination before the Personnel Review Board, but the County refused, citing the provision in the agreement that he could be discharged without further hearings before the Board.

18. The Union brought a petition for a writ of certiorari in the Milwaukee County Circuit Court, asserting that the Complainant was entitled to a due process hearing to determine whether he had violated the April agreement. The Union did not ask for any determination by the Court about the substance of the Complainant's case, and limited its request to an Order that a hearing be convened. The County opposed the petition.

19. The Circuit Court, by Judge Donnegan, ruled on March 19, 2002, that, while the April agreement was clear on whether a further attendance rule violation would be just cause for discharge without further opportunity for a hearing, the Complainant was entitled to a due process hearing before the Personnel Review Board on the issue of whether he had in fact violated the rules on attendance.

20. On March 29, 2002, the instant complaint of prohibited practices was filed. It was held in abeyance at the request of the parties.

21. The Personnel Review Board convened a hearing on June 11, 2002, to hear the Complainant's case. The Complainant argued that he was tricked into entering into the April, 2001 settlement agreement, since he did not have full access to employee time cards at that time, and thus did not know that he was being disparately treated. The Board determined that this claim was outside the scope of the order remanding the matter, and that it was in any event without foundation, since the Complainant had been represented by counsel and had expressly told the Board that he signed the statement voluntarily and without coercion. As for the merits, the Board considered the Complainant's claim that he had called as timely as possible on June 27th, but had not received an answer when he dialed the number of the South Shop, and his claim that when he did reach someone on the 27th, he also asked for and received

permission to take the day off on the 28th. It determined that the testimony of Assistant Supervisor Greg Heisel was more credible. Heisel testified that he had been in his South Shop office before 7:30 a.m. on the 27th and did not receive a call from the Complainant until 7:45. Heisel denied that the Complainant asked for the following day off, and said that he received a call from the Complainant at 8:16 a.m. on the morning of the 28th, saying that he was taking the day off. The Board concluded that the Complainant was guilty of violating the April agreement, and sustained the decision to terminate him. Board Member Thomas Parker dissented, arguing that the County did not bear its burden of proof, since there was no mechanism to prove when the Complainant called, nor whether he might have called during a period when Heisel might have stepped out of the office for some reason.

22. The Union filed another petition for a writ of certiorari with the Circuit Court, asserting that the hearing before the Personnel Review Board was not an adequate due process hearing as required by the previous Court order. The Union alleged that the Complainant should have been permitted to introduce evidence that he was tricked into signing the settlement agreement, and that he was prevented from introducing evidence that his discharge was in retaliation for concerted activities. The County opposed the petition, arguing that the validity of the settlement agreement was never argued before Judge Donnegan and that the order for a due process hearing was limited to determining whether he violated the attendance rules in June of 2001. The County argued that the court's task on review was limited to determining whether the Board acted outside its jurisdiction, outside the law, or was arbitrary, oppressive or unreasonable, none of which were alleged.

23. On May 5, 2003, the Circuit Court, by Judge Sullivan, issued an Order Affirming the Personnel Review Board. Citing PEACE LUTHERAN CHURCH & ACADEMY V. VILLAGE OF SUSSEX, 246 WIS. 2D 502, 511 (CT. APP. 2001), the Court ruled that its review was limited to:

> (1) Whether [the Board] stayed within its jurisdiction;
> (2) whether it acted according to law;
> (3) whether its action was arbitrary, oppressive or unreasonable, representing its will and not its judgment; and
> (4) whether the evidence was such that [the Board] might reasonably have made the determination under review.
>
> (Joint Exhibit 14 – Case No. 02-CV-010070)

The Court concluded that the decision not to hear the claim of trickery did not exceed the boundaries set for the Board. Overall, the Court concluded that the hearing before the Personnel Review Board satisfied "all of the elements of fair play, and that Petitioner received a due process hearing." The Court did not address the specific claim that the termination was retaliation for concerted activity on behalf of the Union.

24. The Complainant's activities on behalf of Local 882 constitute protected concerted activity for the purpose of mutual aid and protection.

25. The County was aware of the Complainant's activities on behalf of Local 882.

26. The County managers at the South Shop were hostile to the manner in which the Complainant conducted himself in his role as a Union representative, and labeled him a "troublemaker."

27. The April, 2001 settlement before the Personnel Review Board, and the resulting last chance agreement, were entered into by the Complainant on a voluntary basis, with full knowledge of the pertinent facts.

28. The Complainant's late call-in on June 27, 2001, violated the terms of the last chance agreement.

29. The termination of the Complainant was based upon his violation of the last chance agreement, and was not motivated in whole or in part by the County's hostility to his actions on behalf of Local 882, nor the manner in which he conducted himself in his role as a Union representative, nor any other concerted activity.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the Respondent, Milwaukee County, is a municipal employer, within the meaning of Sec. 111.70(1)(j), MERA.

2. That the Complainant, Milwaukee District Council 48, AFSCME, AFL-CIO, is a labor organization within the meaning of Sec. 111.70(1)(h), MERA.

3. That the Complainant, Christopher Ochalek, was a municipal employee within the meaning of Sec. 111.70(1)(i), MERA.

4. That filing and processing grievances and other complaints, and engaging in collective bargaining on behalf of other employees, is lawful, concerted activity within the meaning of Sec. 111.70(2), MERA.

5. That the termination of the Complainant, Christopher Ochalek, was not in retaliation for his lawful, concerted activity on behalf of himself and/or other employees, nor did it have a reasonable tendency to interfere with the exercise of protected rights under MERA.

6. That the Milwaukee County Personnel Review Board does not have jurisdiction over alleged violations of Sec. 111.70(3)(a), MERA.

7. That the decisions of the Milwaukee County Personnel Review Board do not have preclusive effect with regard to the Wisconsin Employment Relations Commission's consideration of alleged violations of Sec. 111.70(3)(a), MERA.

8. That the decisions of the Milwaukee County Circuit Court reviewing the adequacy of decisions of the Milwaukee County Personnel Review Board do not represent final judgments by courts of competent jurisdiction as to issues of alleged violations of Sec. 111.70(3)(a), and do not have preclusive effect with regard to the Wisconsin Employment Relations Commission's consideration of alleged violations of Sec.111.70(3)(a), MERA.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

It is ORDERED that:

The instant complaint be, and the same hereby is, dismissed in its entirety.

Dated at Racine, Wisconsin, this 3rd day of February, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Examiner

MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

The Complainant was employed with the County Department of Public Works from 1990 through the summer of 2001, when he was discharged, allegedly for poor attendance. From 1998 onward, he served as vice president and chief steward of Local 882, and was active in pressing employee grievances and complaints. At the time of his discharge, he was subject to a last chance agreement negotiated in April of 2001, which provided among other things that if during the year following the agreement he failed to report on time or to call in on time, he could be discharged without further recourse to the Personnel Review Board. His termination was based on the allegation that he failed to report or call in on time on June 27, 2001, and that he failed to make a timely call-in on the following day.

The Complainant sought a Personnel Review Board hearing on his termination, and the County refused, citing the settlement agreement. The Complainant proceeded to Circuit Court on a writ of certiorari, arguing that he was entitled to a due process hearing on whether he had, in fact, violated the settlement agreement. The Court ruled that he was entitled to such a hearing, and remanded the matter to the Personnel Review Board.

A. Arguments on Claim Preclusion

The County raises as a threshold issue the claim that Ochalek is precluded from litigating his termination before the WERC, because he already has litigated before the Personnel Review Board, has been denied relief in that forum, and has had the PRB's decision affirmed by the Circuit Court of Milwaukee County. The County points to the doctrine of claim preclusion, whereby a final judgment is conclusive as to all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceeding. Here, the County asserts, the parties are the same, the underlying transaction (Ochalek's termination) was the same, and the PRB case was ultimately decided by a circuit court, which has concurrent jurisdiction with the WERC for prohibited practices. Thus, the County asserts that the claim before the Examiner is precluded by the prior judgment in the PRB action and should be dismissed.

In response to the County's preclusion arguments, the Union asserts that the County must be estopped from even raising such a claim. The Union argues that the County prevented Ochalek from raising the issue of union animus and retaliation before the PRB, and having prevented him from making his arguments cannot now point to the PRB proceeding as precluding him from making the arguments to this Examiner. This would be fundamentally unfair, and would deny this employee and future employees the opportunity to ever have their claims heard.

The Union further argues that, even if the Examiner does not find a basis for estopping the County's preclusion argument, the claim is misplaced. As noted, the issue of union animus was not and could not be litigated before the PRB. The PRB has no jurisdiction to decide claims arising under 111.70, and given the limited scope of a certiorari proceeding, the circuit court never had that issue presented fro determination. Thus, there can be no identity of actions between the PRB case and the instant WERC complaint, and no preclusion.

B. Arguments on the Merits

Turning to the merits, the Union asserts that all four elements of a discrimination case have been established on this record. The Complainant was plainly active in Union affairs and the County was well aware of his activity. He was an active official of the Local, filing grievances, ERD complaints and safety complaints. The County may have felt some of these were not meritorious, but that is not a defense to terminating him for that activity. It is clear from the record that the alleged basis for this termination – attendance problems – is purely pretextual. It is based in part on a coerced last chance agreement and in whole on charges that have not yielded discipline for other employees. The Complainant's attendance was no worse than that of many other employees who were not disciplined at all. Taken together with the County's characterization of him as a "troublemaker," long recognized as code for "union activist," the discharge for conduct that has not caused discipline for other employees can only lead to one conclusion – that the Complainant was terminated in retaliation for his protected concerted activities. Thus, the Examiner must reinstate him and make him whole.

The County dismisses the Union's claim of discrimination as wholly unproved. The Complainant clearly had an attendance problem, and no one disputed that fact. He had been disciplined repeatedly, without improvement. His attendance record was worse than any other worker in the Highway Department. He voluntarily entered into a last chance agreement, allowing him to be discharged if he had an attendance violation within the year following the agreement. Within three months, he had an attendance infraction. He may have been an active Union official, though the County believes his claims of leadership are overstated. However, activity in the Union does not exempt an employee from the rules of the work place nor immunize him from discipline when he breaks those rules. The Complainant in this case simply reached the end of the disciplinary road, and was properly terminated. Thus, the complaint should be dismissed in its entirety.

DISCUSSION

The threshold issue in this proceeding is whether the prior proceedings before the Personnel Review Board and the Circuit Courts preclude consideration of this matter by the Examiner and the Commission. If the prior decisions do not preclude consideration, the question becomes whether the termination of the Complainant constitutes a prohibited practice. Each of these issues is addressed in turn.

A. Preclusion

Preclusion applies where a final judgment has been entered between the same parties as to matters which were or could have been litigated in a prior proceeding. There are three elements to preclusion: (1) identity of the parties; (2) identity between the causes of action; and (3) a final judgment on the merits by a court of competent jurisdiction. NORTHERN STATES POWER CO. V. BUGHER, 189 WIS.2D 541, 550 (1995). There is no dispute in this case that the parties to the prohibited practice are the same parties who litigated before the Personnel Review Board and the Circuit Court. Neither is there a dispute that the underlying transaction before the Board and the Examiner is the same – the termination of Ochalek. However, there has been no final judgment by a court of competent jurisdiction as to the issue of whether the termination of the Complainant was, in part, in retaliation for Union activity.

The Personnel Review Board is concerned with whether an employee has violated the Civil Service Rules and, if so, whether the measure of punishment is appropriate. It has no jurisdiction to make findings as to union animus or the application of Sec. 111.70(3)(a)3. That jurisdiction rests exclusively with two other venues – the WERC and the Circuit Courts. The Wisconsin Employment Peace Act provides for concurrent jurisdiction over unfair labor practices between the Commission and the Circuit Courts:

> Any controversy concerning unfair labor practices may be submitted to the commission in the manner and with the effect provided in this subchapter, but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction. [Sec. 111.07, Stats.]

This arrangement is equally applicable to prohibited practices arising under MERA (Sec. 111.70(4)(a), Stats.). The County argues that since this matter was appealed to the Circuit Court, which affirmed the Board, a final determination has been made by a court of competent jurisdiction. That overstates the Court's role in this specific case. The Court review was by means of certiorari, and was limited to consideration of whether the Board acted properly, within the Board's limited jurisdiction, to provide a due process hearing to the Complainant. The Personnel Review Board did not consider the question of union animus, nor could it have considered that issue. 1/ The Circuit Court, in turn, did not consider any issues not considered by the Personnel Review Board. If the question in this case was whether Ochalek had been afforded due process, the circuit court's conclusion would open up an argument for claims preclusion. That is not the question, and I find that there has been no final judgment by a court of competent jurisdiction as to the merits of the prohibited practice claim. It follows that the doctrine of claims preclusion is not applicable to this case.

1/ It bears remembering in considering the difference between the Personnel Review Board's jurisdiction and an action under Sec. 111.70(3)(a)3, that a finding of just cause for discharge does not answer the prohibited practice. While it is not a common outcome, there is no contradiction in saying that just cause exists for a discharge and that the discharge violates the statute. The standard under

Sec. 111.70(3)(a)3 is not whether a discharge could be justified on the record as a whole – it is whether any part of the decision to discharge was attributable to Union animus. MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 WIS.2D 540, 151 N.W.2D 617 (1967).

B. Merits

The complaint asserts that the Complainant was terminated for his activity on behalf of other employee while he was the vice president and chief steward of the Local. Under the Commission's long-standing MUSKEGO-NORWAY line of cases, the test of whether an employer's actions constitute discrimination in violation of Sec. 111.70(3)(a) 3 has four prongs:

1. The employee was engaged in protected activity;

2. The employer was aware of the activity;

3. The employer was hostile to the activity;

4. The employer's conduct was motivated, in whole or in part, by hostility to the protected activity.

As is typically the case, there is no dispute about the Complainant's activities nor the Employer's knowledge of the activities. The dispute instead centers on whether the Employer was hostile to his activities and whether that hostility triggered the adverse action. The Union argues that there is some direct evidence of hostility – in that the Complainant was warned against "playing this union game," was told he would be held to a higher standard of attendance than someone who was not a steward, and was labeled a "troublemaker" by members of management. The Union principally argues, however, that evidence of hostility and retaliation lies with its conclusion that the alleged attendance infraction was a pretext.

The reference to "playing this union game" was in the context of a 1999 conversation with Assistant Supervisor Chuck Smeltzer. According to the Complainant, he came into the shop during a snow removal operation and Smeltzer asked him what he was doing in the shop. He told Smeltzer he was on his contractual break, and was going to get a hot sandwich, to which Smeltzer replied with something to the effect of "well, we need you out there, and you're going to play this union game of using your contractual break, you know it cuts both ways." The evidence of this comment is the hearsay testimony of the Complainant. On its face, the comment is at most evidence of hostility to him insisting on taking a break during a snow removal operation, a break which is not, in fact, guaranteed by the written contract but rather is a matter of custom in the Department. Whether Smeltzer was right or wrong in believing the Complainant's insistence on his break at that time was inappropriate, it seems fairly clear that the comment was directed at his immediate conduct. It is a considerable stretch to read it as some generalized expression of management's hostility to concerted activity.

With respect to the reported conversation in 1999 during which Ponath advised Ochalek that as a steward he should know the rules better than anyone else, and would be held to knowing them, and Schmidling commented that, as a steward, he should be an example for other employees, I do not find this a threat or evidence of hostility. It is not unusual for an employer to believe that a steward would know the rules, since the steward is more intimately involved with those rules in the course of representation than other employees would be. Neither, given that he was in the process of being disciplined for violating those rules, is it particularly noteworthy that the Complainant would be told he was going to be held to knowing the rules. Finally, telling a steward that he should be an example for other workers is not a particularly sinister act.

The "troublemaker" comment was reportedly made twice to Chris Pegelow. Pegelow stated that Assistant Supervisor Rick Jurewicz told him sometime in 2000 that management at the South Shop considered Ochalek and him to be troublemakers. A year later, when Greg Heisel was to be transferred to the South Shop as Assistant Supervisor, he reportedly told Pegelow that Ponath, Schmidling and Night Superintendent Bill Lindstrom had told him to watch out for Ochalek and him because they were both troublemakers. Heisel categorically denied making such a statement to Pegelow. On balance, I am persuaded that it is more likely than not that the troublemaker comment was made to Pegelow, and that it constitutes evidence of hostility to the Complainant and his activities on behalf of the Union.

The central argument here is that the alleged tardiness violation is merely a pretext. A finding that the proffered reason for an act of discipline is a pretext is, in and of itself, evidence of hostility and illegal motive. 2/ The Complainant alleges that he was essentially set-up for the discharge, by being tricked into signing a last chance agreement in April of 2001. His theory is that he had requested information on other employees' attendance and that information was not provided. Because he did not have the information, he did not know that other employees were not being disciplined for attendance problems in the same manner that he was. If he had known, he would never have signed the last chance agreement. His claims in this regard simply cannot be credited.

2/ ". . . where, as here, the respondent's stated motives for discharge are discredited, it may be inferred that the true motive for discharge is an unlawful one which respondent seeks to disguise." HEARTLAND FOOD WAREHOUSE, 256 NLRB 940, 107 LRRM 1321 (1981). See also, CESA #4, SUPRA; TOWN OF MERCER, DEC. NO. 14783-A (GRECO, 3/77); CITY OF MEDFORD ELECTRIC UTILITY, DEC. NO. 28440-D (NIELSEN, 5/97), AFF'D, CITY OF MEDFORD ELECTRIC UTILITY, DEC. NO. 28440-E (WERC, 10/97); LEMON DROP INN, 269 NLRB 1007, 116 LRRM 1443 (1984).

The Complainant's claim that he did not know that he might be able to claim disparate treatment is contradicted by the record evidence. He had already argued in the course of prior disciplinary proceedings that he was being disciplined for conduct that other employees were

being allowed to get away with. In April of 2000, he made this claim while defending himself before the Personnel Review Board against a one-day suspension, and he asserted that the true reason for discipline was his Union activity. At that time, he said the defense was based on his review of time cards. (See, Union Exhibit No. 3, ¶3). These are the same claims he now argues he did not realize were available to him a year later. At the time he was allegedly being duped, he had been the Chief Steward for three years, and in that role he would have been well aware of which employees were being disciplined and on what grounds. At the Personnel Review Board, he was being represented by a very experienced labor relations attorney who was the longtime counsel for the Union. Despite being aware of the availability of the argument, his familiarity with the disciplinary practice of the Department, his own experience in labor relations and that of his attorney, the Complainant seeks to have the Examiner conclude that he admitted that all of the charges were true and entered into a last chance agreement solely because the County had not responded to his information request. That is not a reasonable reading, nor even a plausible reading, of the record. I am instead persuaded that the Complainant entered into the last chance agreement of his own free will, with knowledge of all of the pertinent facts, and free of any confusion as to what he was doing or why.

I find that the last chance agreement was knowingly and voluntarily entered into and was binding on the Complainant. The issue then, comes down to whether the County's determination that he should be cited for a late call-in on June 27 and June 28, 2001, was motivated by hostility to the Complainant's activities, or was instead simply the result of his violating an agreement by which he had conceded that further tardiness would result in immediate discharge. There are two aspects to this. The first is whether the Complainant actually violated the last chance agreement, and the second is whether the enforcement of the last chance agreement was, in and of itself, an act of illegal discrimination.

The Complainant concedes that he did not speak to anyone at the South Shop until 7:45 a.m. on June 27th, some 15 minutes after the start of his shift. His explanation is that he tried calling before 7:30 a.m. but got no answer. The County counters that Heisel was in the office before 7:30 a.m. and that if the Complainant had actually called, he would have received the call. As between these two theories, I credit the County's argument. In the normal course of business, the County would have someone in the office to take call-ins, and there is no way for that person to have known that it was the Complainant calling and to have ignored the call so as to cause him trouble. For his part, the Complainant has a record of chronic tardiness and late calls. Moreover, if the Complainant had attempted to make a call prior to 7:30 a.m., and had received no answer, it seems very unlikely that he would have simply left it at that and waited until 15 minutes after the start of his shift to call again. He knew he was subject to a last chance agreement for just this type of behavior. A call to the main shop, or further efforts to reach the South Shop would have been the more expected course of action for someone in the position he describes. On balance, I do not find the Complainant's version believable. I conclude that he waited until 7:45 a.m. to call the shop and tell them he would be late, and thereby did violate his last chance agreement by having a late call-in on June 27th.

The Union vigorously asserts that, whether or not the Complainant violated the last chance agreement, formal discipline for tardiness is unheard of in the Highway Division. I agree that the evidence shows it is rare. In part, this may be attributable to the fact that formal discipline is not resorted to until after counseling has been employed to correct behavior, and has failed. The Complainant himself does not dispute that he was counseled regarding his tardiness prior to any formal discipline. The question, though, is whether the Complainant was treated differently than other similarly situated employees, and I find it impossible to conclude that he was, since there were no other employees who had voluntarily executed a last chance agreement, acknowledging that they had properly received formal discipline for tardiness and failure to call, accepting a five-week suspension for the conduct, and agreeing that any further incident within a one-year period would trigger discharge. The agreement specifically defined what would constitute a violation and specifically contemplated the consequences of a violation. The parties agreed to accept those consequences. The Complainant violated the agreement, and the agreed upon consequences followed. The existence of just cause for discharge does not eliminate the possibility of animus, but it does demonstrate that the stated grounds for the discipline were not a pretext.

The record as a whole demonstrates that the Complainant was an aggressive Union representative, and that management had some hostility towards him because of the manner in which he pursued his protected activity on behalf of the Union. It also demonstrates that the Complainant had a chronic attendance problem over a long period of time, culminating in two suspensions and a recommendation for discharge in 2000. Those cases were settled through a last chance agreement, which the Complainant entered into on a voluntary basis, being fully aware of his other options and of the implications of the agreement. The central implication of the agreement was that he would lose his job if he had another tardiness or late call-in. Ten weeks later, he had a late call-in, and he lost his job. I conclude that the loss of his job was not the result of his activities on behalf of the Union, nor management's hostility to him. Instead, the record evidence demonstrates that he caused the loss of his job through his own attendance problems.

Dated at Racine, Wisconsin, this 3rd day of February, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Examiner

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