

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**WISCONSIN LAW ENFORCEMENT ASSOCIATION,
LOCAL 2 AND ANDREW STARCH, Complainants,**

vs.

**UNIVERSITY OF WISCONSIN – STEVENS POINT
PROTECTIVE SERVICES, Respondent.**

Case 826
No. 69400
PP(S)-402

Decision No. 32985-A

Appearances:

Sally A. Stix, Stix Law Offices, Attorneys at Law, 700 Rayovac Drive, Suite 117, Madison, Wisconsin 53711, appearing on behalf of Complainants.

William H. Ramsey, Chief Legal Counsel, Office of State Employment Relations, 101 East Wilson Street, Fourth Floor, P.O. Box 7855, Madison, Wisconsin 53707-7857, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On December 15, 2009, Complainants filed a complaint of unfair labor practices alleging Respondent had violated Secs. 111.84(1)(a), (c) and (e), Stats., by terminating Starch's employment during his probationary period in retaliation for his exercise of lawful, concerted activity and by conducting an investigatory interview without giving him access to representation by the Wisconsin Law Enforcement Association. At hearing, Complainants amended the complaint to remove the alleged violation of Sec. 111.84(1)(e), Stats., in recognition of a pending grievance. On February 23, 2010, the Commission appointed Richard B. McLaughlin, a member of its staff, to act as Examiner. Hearing on the matter was conducted in Stevens Point, Wisconsin on April 27 and 28, 2010. Mariann Merkel filed a transcript of each day of hearing on May 19, 2010. The parties completed the briefing schedule on August 16, 2010.

FINDINGS OF FACT

1. Wisconsin Law Enforcement Association, Local 2, (WLEA) is a labor organization which represents certain classified employees of the State of Wisconsin, including certain law enforcement officers in the classification of Police Officer. Andrew Starch is an individual who served as Police Officer, on a probation period, for the University of Wisconsin – Stevens Point Protective Services from February 2, 2009 until October 23, 2009. WLEA's and Starch's mailing address is c/o 700 Rayovac Drive, Suite 117, Madison, Wisconsin 53711.

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2. The University of Wisconsin – Stevens Point (UWSP) provides educational services to students and has a campus located in the City of Stevens Point. Fourth Avenue is the primary city street that intersects the campus and is often inaccessible to vehicle traffic during the day as students cross from the campus’ residential quadrant to academic core facilities. Other streets within the campus are often clogged with pedestrian traffic.

3. UWSP provides police protective services within its campus through its Protective Services Department (UWSP-PS), which maintains its offices at 001 Stein, Maria Drive, UWSP, Wisconsin 54481. UWSP-PS uses police officers, security officers and student cadets to provide police, security and student assistance services and is administratively divided into a security division and a law enforcement division. Bill Rowe is the Director of UWSP-PS. Prior to 2000, none of the employees of UWSP-PS had the power of arrest and many were student cadets. As of March of 2009, Karen Dombrowski reported directly to Rowe and served as the Office Operations Associate. John Taylor was the Security Supervisor, and the direct supervisor of three employees classified as Security Officer and twenty-four student cadets. Taylor’s working title is Assistant Director and he is second in command to Rowe. Employees classified as Security Officer are within a bargaining unit represented by the Wisconsin State Employees Union (WSEU). As of March of 2009, UWSP-PS held a vacant position of Law Enforcement Supervisor which, when filled, serves as direct supervisor of the Criminal Investigator position, occupied by James West, and three Police Officer positions. During Starch’s tenure, the three employees who occupied the Police Officer position were: Starch; Amanda Schramm; and Terra Thompson. UWSP-PS hired Schramm and Thompson in October of 2008 and hired West in 1973. Employees in the Police Officer position have the power of arrest, those in the Security Officer position do not. UWSP-PS jurisdiction is restricted to the property of the State of Wisconsin and does not extend to the City of Stevens Point. The UWSP-PS and the City of Stevens Point Police Department do not have a mutual aid agreement, which would permit the UWSP-PS to exercise law enforcement authority outside the bounds of UWSP property.

4. WLEA and the State of Wisconsin are parties to a collective bargaining agreement, in effect by its terms between June 7, 2008 and June 30, 2009. The agreement includes the following provisions:

ARTICLE IV GRIEVANCE PROCEDURE

. . .

4/6/2 Each Local union shall designate their grievance representatives for each region, district, or campus.

A. When a grievance representative is requested, the Local’s closest grievance representative in the same region, district, or campus shall provide grievance representation.

B. If no grievance representative is available from the employee's local in the same region, district, or campus, the employer will contact the local chief steward or chapter vice president who will try to find a local grievance representative located from the nearest region, district, or campus, where a designated union representative is located, or as mutually agreed otherwise. If no local grievance representative is found by the local chief steward or chapter vice president within 24 hours of notification, the employer may find a grievance representative from other locals within the region, district, or campus.

. . .

4/9/2 An employee shall be entitled to the presence of a designated grievance representative at an investigatory interview if he/she requests one and if the employee has reasonable grounds to believe or has been informed that the interview may be used to support disciplinary action against him/her. . . .

4/9/4 If any discipline is taken against an employee, both the employee and local Union president, or his/her designee, will receive copies of this disciplinary action. If the supervisor and the employee meet to explain or discuss the discipline, a Union representative shall be present, if requested.

. . .

Section 10 Exclusion of Probationary Employees

4/10/1 Notwithstanding Section 9 above, the retention or release of probationary employees shall not be subject to the grievance procedure except those probationary employees who are released must be advised in writing of the reasons for the release and do, at the discretion of the Wisconsin Employment Relations Commission, have the right to a hearing before the WERC.

5. Starch graduated from UWSP in December of 2008 with a bachelor's degree in sociology and environmental law enforcement. While a UWSP student, he served as a student cadet and as a Security Officer on a limited term basis. As part of his degree requirements, he completed police academy training at Mid-State Technical College in April of 2007. While a student cadet and a Security Officer, Taylor served as his direct supervisor. While a Police Officer, Rowe was his direct supervisor. The first two months of his training as a Police Officer involved observing West and completing a field training manual. The training manual consisted of various checklists to document tasks and to require Starch and either Rowe or West to sign off on Starch's completion of those tasks. The manual includes extensive documentation of UWSP-PS policies and procedures. While with West, Starch worked a day shift, from 7:00 a.m. to 3:00 p.m. Starch neither observed nor participated in an arrest during this training period. After completing his training period, Starch moved to the 11:00 p.m. through 7:00 a.m. shift. No supervisors are regularly scheduled on that shift. Starch occasionally rotated from that shift to a 3:00 p.m. to 11:00 p.m. or an 8:00 p.m. through 4:00 a.m. shift. Rowe typically worked a day shift, and his hours rarely overlapped Starch's. At sometime early in his probation period, Starch joined the WLEA.

6. Starch exhibited a wide-ranging interest in departmental issues from early in his tenure. He advised the department that the force continuum module equipment it issued him did not include pepper spray, and he also sought extra handcuffs. He approached Rowe initially with these concerns, then approached Taylor when he sensed that Rowe was not acting on the requests. By April of 2009 he had received the pepper spray and extra handcuffs. In early April of 2009, Starch advised Rowe that he considered the department's preliminary breath tester to need calibration from an outside agency. Starch also advised Rowe that ongoing problems with the department's single squad car demanded a procedure by which officers could share portable emergency lights, which were powered through a vehicle's cigarette lighter. When the squad was out of commission, UWSP-PS employees had to use vehicles from the UWSP fleet. Those vehicles were not equipped for use as an emergency vehicle.

7. Starch's interests in UWSP-PS issues expanded over time. He and Thompson shared an active interest in overtime distribution and in shift scheduling. In early May, Thompson and Starch approached Rowe with concerns that overtime and shift schedules reflected favoritism. Both were concerned that Schramm was not working as diligently or as competently as she should and that Taylor protected her. They also shared a concern that Schramm and some Security Officers were able to have schedules modified for their personal convenience and that overtime flowed to personnel based on personal considerations. These concerns crystallized in a May 6, 2009 e-mail, headed "Needed Change" from Starch to Rowe, which reads thus:

I am concerned about the work atmosphere at our department. There seems to be no change at all, with anything in general and it is becoming very discouraging. There seems to be a large lack of accountability, competence with certain employees which reflects on our department and unfairness when it comes to specific employees. It is my opinion that there is clear and distinct favoritism within the department.

Apparently there was a large amount of overtime hours allowed last week (4-27-09 to 05-01-09) due an employee's leave of absence. During this allotted time only two people were offered these extra hours. This is a clear and distinct violation of the union agreement on overtime. I am discouraged that there is a huge lack of equality in the department which creates a poor work atmosphere.

Scheduling is another issue that is brought to attention. You personally told me that there were going to be scheduling changes back in February. No changes have been made and we are now scheduled through July 4 with no changes. The current schedule has many lapses on it; it has NO accountability or stability. There are multiple instances which shift changes do not allow a 12hr break in between shifts which you told me was not allowed. I currently switch from 8p-4a to 3p-11p every week, NO stability. In addition, past schedules on multiple occasions have not been issued more than five days of notice which is another clear union violation. It is not that difficult to schedule 7 people, as I have given you multiple different example schedules to maximize law enforcement coverage.

When it comes to scheduling of specific people there is a clear sign of favoritism. When Terra or myself had to work a month straight of our shifts we did, there was no shift variation. With the current schedule specific person(s) are allowed different shifts in avoidance of working the 3rd shift. What is going to be done about this??? Due to my heartfelt issues with such scheduling issues I have sought advice from other professionals in law enforcement, all had the same reaction to our scheduling system, astonishment in the sloppiness. It doesn't matter who creates the schedule you are the person who approves of it. Let's get accountability.

Accountability seems to be the key point that you strive to but specific person(s) within our department have a major lack of accountability. When I have a scheduled shift, I work the scheduled shift I don't arrange it so I can work whatever hours I want to. Specifically Amanda has recently been brought to your attention about abusing this issue and even occurred tonight 05/05/09 instead of working her 11p-7a shift Amanda came in at 9:45p and will leave her shift earlier. You may recall that back in February I brought to your attention this same issue, I told you of this exact occurrence, you assured me that this wasn't happening and that Jim never putdown overtime for coming in early. The proof is in the timesheets. What will be done about this? What accountability will be held? Where is the line between a qualified officer??? Butthis issue stems deeper than just the surface it involves multiple employees including other management and you recently have been made aware of this.

There are so many things that are not followed through with. This is something that I am seeing as a trend and am becoming very discouraged with. I would like to know a few of them:

Do we have a training scheduled for long gun certification?

Has a time been set to have our new equipment installed in our vehicle?

Has a time been set to un-decal our vehicle?

Have you even picked-out a squad computer and gotten the specific details of what is necessary?

Have the spare emergency lights been ordered?

What is going to happen with scheduling? (In reality the answer to our query could be the 12hr rotating schedule that numerous departments are switching to, we would have 24/7 LE coverage)

How much longer are we going to dilly-dally around initiating traffic stops? (It doesn't get much clearer than the state statute.....if the DA wants to drop fought citations that will be on his hands, not ours)

What changes are going to be made????

Rowe responded in a May 6 e-mail which states:

I understand and share your frustration with many of the same concerns; unfortunately what I thought was done had never been attempted and was just recently learned. Instead of pouring over this again and again, we should discuss in person. Let me know when you're available.

Rowe and Starch agreed to meet on May 8, 2009.

8. At the start of the May 8, 2009 meeting Starch presented Rowe with a document entitled "Meeting Agenda", which is headed "To Be Discussed" and which reads thus:

- Mutual Aid Agreement (What is it? Where is it? Concurrent Jurisdiction? Radio Operations?)
- Overtime allotment (Union Contract clarification, how does security fit in who has higher standings? Documentation Needed)
- Traffic Enforcement (Status? What/who is stopping us as police officers from performing our job?)
- Police Officers Work Area / Locked area (Needed for Police Work)
- Fire Arms Instructor Course (Certification Teaching / Register for a class)
- Security Personnel Need Restrictions as to not interfere with Police Work. (Vehicle, Work area, Responding to calls)
- Security v. Law Enforcement Confusion (Uniforms)
- Equipment (Emg. Lights, Install eqp. (cage, computer, long guns) into squad dates set? Removal of security decalcs)
- Long gun certification?
- SCHEDULING!!! (Shifts, Union....)

Rowe and Starch discussed at least some of these points during their meeting. In an e-mail to Rowe dated May 8, Starch questioned, "Have I been officially denied my request for safety glasses or where do we stand?" They continued an e-mail discussion on this point through Rowe's May 13 e-mail stating "we need to complete a hazardous assessment, survey and analysis . . . I will keep you apprised." Rowe ultimately determined UWSP-PS was not legally required to supply safety glasses to Police Officers.

9. Starch continued to advance his interest in UWSP-PS issues following the May 8 meeting. On May 10, 2009, he e-mailed Rowe a proposed work schedule, which gave Police

Officers twelve hour shifts and Security Officers 10 hour shifts. Starch's e-mail characterized the schedule thus:

During times of vacation or personnel calling in sick it is easily possible to use security or off duty LE to fill-in. Again this schedule maximizes the LE coverage with what we have, even better than the other three example schedules I have presented to you back in February. With this schedule security can work during the times that best fit their description (Locking Buildings, Admittances, ect.) In addition this schedule would allow for proper detective work by keeping the detective position on days and allowing adequate timeframes for detective work.

Please take this into consideration as it fits the both the union's and university's recommendation for alternate work patterns. . . .

On May 12, 2009, Starch e-mailed Brian Kelly, a UWSP information technology employee, to determine the status of a request he had made of Rowe at, or shortly prior to, the May 8 meeting, which was to limit access on two UWSP-PS computers to "POLICE OFFICERS only." One of Starch's goals was to restrict student access to the e-time data base, which is a Wisconsin database that draws on data bases maintained by the National Crime Information Center. E-time tracks criminal and Department of Motor Vehicle records and is available only to law enforcement personnel certified to access it. In an e-mail dated May 12, Starch asked Rowe about the status of his request. Rowe responded that he had told Kelly "to hold the work order" in an e-mail dated May 13. In an e-mail response on the same date, Starch stated:

I'm kind of confused, you gave me the O.K. in our meeting and now your retracting it? I have already discussed with you, as police officers we need a proper area for police work to be completed, with our specific e-time requirements the students and security staff shouldn't even be in the same room. Please let us know the reasoning behind this. I have discussed this issue with both Amanda and Terra, we all agree that this needs to occur as a minimum.

Access to e-time requires log-on information which cannot be obtained until an individual is certified to access e-time. A person who is not certified to use e-time, including Rowe, cannot access e-time simply by accessing a personal computer.

10. In mid-May, Starch contacted Jason Burt, a WLEA Union Steward and Chapter Vice President, who is employed as a police officer for the University of Wisconsin – Whitewater Police Services. Sometime in May of 2009, Burt introduced himself to the Police Officers at UWSP-PS because the WLEA had yet to establish an official presence with UWSP. Thompson and Starch returned his contacts and informed him of issues they were experiencing at UWSP-PS. Via e-mail, Starch gave Burt a two-page document headed "Topics of Concern" (the Topics Memo). The Topics Memo consists of the following major points: "Chief Bill Rowe's Relation to supervisors"; "Accountability and Hours of work"; "Staff Reviews"; "Scheduling issues";

“Hostile Environment”; “Uncooperative to work with other agencies”; “Secondary employment”; “Poor departmental technology”; “Field Training”; “Overtime agreement”; “Impeding job duties of Police Officers”; “Liability”; “Policies”; and “Unnecessary Remodeling in department (Point or Purpose? Departmental Cost?)”. Nine of the major points were broken into specific bullet points. Indicative of this are the entries under “Hostile Environment” which read thus:

- Intimidation
- Complaints from public of Director
- Controlling (Demonstration of Authority)
- Negativity
- Female Discrimination (Not same treatment as males, Timesheets, Stamina Comment, other comments)
- Claiming No Responsibility
- No Honesty
- Deception
- Narcissism
- Judgmental
- Threats – (“At-Will Employees” Reminded routinely)
- Fear of Job Security everyday
- Fear of not having liability during duty
- We have to modify our police documentation to fit Bill’s satisfaction for our job security.

Burt reviewed their concerns, indicated that he might not be able to address some of the issues within the labor relations context, and informed them that the most expeditious means to address their concerns was through WLEA negotiation of a local agreement with UWSP. WLEA filed a grievance to address Thompson’s concern that she had been issued a protective vest fit for a male, and could not comfortably wear it. Rowe advised her, early in the processing of the grievant that she would be fit for a new vest, and by May or June she was fit for, and issued a new one. Thompson complained of the improperly issued vest to Rowe before filing the grievance, and understood Rowe’s view of the grievance to be that she should have first raised the issue within the department.

11. In an e-mail to Rowe dated May 18, 2009, entitled “Meeting Follow-Up”, Starch noted, “Per our meeting on May 8, 2009 I would like to follow-up on the issues discussed.” The e-mail sets forth the bullet points noted in the “Meeting Agenda” set forth Finding of Fact 8, and includes the following commentary under each specific bullet point:

- Where do we stand on this issue? Have we made any progress or attempts?
- Not sure that anything was even clarified in our meeting by you about this issue, I never got any documentation as requested. It was again brought to my attention that a cretin employee was offered day work hours on May 11-13 and 18-20 and by offering it to only this one person overtime hours were avoided. Between May 4-6, 11-13, and 18-20 for a total of 68 hours were offered to only two fulltime staff members. I don’t mind that the students fill-in, but when it is offered to only specific fulltime staff before the students and other fulltime staff are offered there is

an issue.

- What is the status of this issue? You told me there was a tentative date of May 20. I have heard nothing. I am requesting documentation from you of whether or not, as police officers we are denied the enforcement of traffic regulations on the adjacent city streets per the Wisconsin state statute.
- I have plead my case with you on this issue, I'm not sure what the final result is. Please inform me.
- Do I have authorization to register for a class before they fill up?
- What's the status on restricted access to the Police Vehicle?
- Has progress been attempted on this? Have you looked into ordering patches that state University Police, if so what is the status?
- Any update on the new vehicle?
- Has anything been scheduled for this? You said you were going to look into this.
- Any update?

Thank you for your time . . .

12. Rowe was aware that Starch had experience with website construction, and asked Starch if he could modify the UWSP-PS website to update statistics on it and to add a hyperlink "Shots Fired On Campus" to the website's front page. Starch agreed to upgrade the UWSP-PS website. When Starch completed the upgrades, he added photographs of the separate badges for Security Officers and for Police Officers, as well as text that Rowe thought unnecessarily highlighted differences between Security and Police Officers, and obscured their common mission. Starch also added a photograph of a squad with its warning lights flashing. Beyond that, Starch stated contact information for Police and for Security Staff under separate headings, with "University Police Staff" above "University Security Staff". Starch listed Rowe's contact information under "University Police Staff", and listed contact information for the police officers in this order: Starch; Thompson; Schramm; and West. After West, he listed "Office Operations, Karen Dombroski;" which was followed by the "University Security Staff" heading. Taylor's name appears first under that heading. The website had originally been designed by a UWSP student who had listed the UWSP-PS contact information under a single heading which followed the chain of command, starting with Rowe, then listing Taylor and then listing Police and Security Officers in seniority order from most to least senior.

13. On June 5, 2009, Starch and Rowe met. Rowe issued Starch two forms, one headed "PROBATIONARY SERVICE REPORT 2 MONTH" and one headed "PROBATIONARY SERVICE REPORT 4 MONTH". The forms are identical except for the heading, and include eight categories for evaluation: "Quality of work"; "Judgement"; "Quantity of work"; "Dependability"; "Initiative"; "Rate of learning"; "Work habits"; and "Ability to get along with others". Next to each of the eight categories are boxes to be checked to rate performance in each category, ranging thus: "Excellent"; "Very Good"; "Average"; "Poor"; and "Unsatisfactory". Each category includes a blank line for "Comments". Rowe filled out each form. Neither contains any comments. The boxes are all checked "Average" with the exception of a "Very Good" entry on each form for the category "Rate of learning." After this meeting, Starch met with Robert Tabor, UWSP Director of Personnel Services, and voiced his concern with

the absence of specific comment from Rowe on how he could improve

his performance. Starch understood Tabor's comments to indicate Starch should meet with Rowe to address these concerns. Starch reported back to Rowe and sought to get further input from Rowe on how to improve his work performance. Starch was unsuccessful in his attempt to get Rowe to further specify how Starch could improve.

14. At sometime perhaps as early as March or as late as June or July of 2009, after some remodeling work at the UWSP-PS office, Starch noted that there were several bulletin boards installed in the office. He reviewed the labor agreement noted in Finding of Fact 4, and concluded the WLEA was entitled to a bulletin board. He cleared the bulletin board, which contained material of a personal nature posted by Security Officer Dave Cummings, on the bulletin board in Cumming's work area. Starch posted on it a WLEA flyer, excerpts from the labor agreement and other WLEA related materials. Starch had no authorization from the WLEA or UWSP-PS to create a WLEA bulletin board. Rowe learned of the matter from Cummings, who complained to Rowe. Rowe discussed the matter with Taylor and decided to leave the bulletin board as Starch had left it, treating it as a WLEA bulletin board. The WSEU once represented Police Officers, but represented only Security Officers at this time, and already had a WSEU sponsored bulletin board in the break room.

15. Sometime in late June or early July of 2009, Thompson and Starch discussed their work related concerns, including issues regarding unequal treatment of officers. Taylor was at the conversation and suggested that the concerns could be voiced to the EEO office of UWSP. Thompson and Starch spoke with that office, voicing the concerns summarized on the Topics Memo. Thompson articulated specific concerns on harassment and discrimination. Thompson and Starch had two conversations with employees in that office. Thompson and Starch received information on their legal rights, but did not file a formal complaint. Their contact with the EEO office resulted in contact between EEO office personnel and Rowe.

16. In an e-mail to Starch dated July 16, 2009, Rowe stated:

It has been brought to my attention that you failed to report to duty on July 12, 2009 for a 3pm – 11 –pm shift. Please provide your reasoning for this incident before you leave work this evening.

Starch's e-mail response, dated July 16, 2009 states:

There was an unforeseen oversight that makes me partially responsible. My personal schedule at my residence was our original schedule with my normal days off being Sunday and Monday, thus I was acting under good faith that I was scheduled off on the date of July 12, 2009. Due to our constantly changing schedule that was changed on June 27, 2009 there was an oversight on my behalf that my shift had been changed and I was rescheduled work on my normal day off. Further more on July 12, 2009 when I did not report for my shift I was not notified in anyway by the staff working prior to 3:00p.m. questioning why I did not report or requesting me to report for duty. Had I been notified there was an oversight I

would have reported immediately for my shift with only a minor delay.

There are more underlying factors dealing with our scheduling that need to be addressed, I will further discuss the matter with you next week. If you have any further immediate questions please contact me by phone.

Rowe read this response and was concerned about why Starch had not accepted full responsibility for missing the shift. He asked Taylor to detail how the shift had been scheduled. Taylor responded in a memo dated July 19, 2009, which states:

On 7/12/2009 Officer Cummings reported to me that Officer Starch was AWOL from his 3p - 11p shift. Cummings, who had just worked the 7a - 3p shift, stayed to cover this shift as there was nobody else on duty.

On 7/14/2009 I asked Officer Cummings if he had worked the entire 3p - 11p shift that Starch was AWOL from on 7/12/2009 and he stated "yes".

Officer Starch requested to switch days off so he would be working Sunday, July 12th and Monday, July 13th. He made this request because he cannot use vacation, as he is a probationary employee. He stated that he wanted to attend a family function Friday, July 17th - Sunday, July 19th. I made the switch and then send out an e-mail of the amended schedule to the entire staff on 6/27/2009.

17. Thompson and Starch met with Taylor on August 27, 2009. Starch recounted his view of the meeting in an e-mail to Rowe dated August 28, which states:

Terra Thompson and I have talked with John Taylor on 08/27/09 at 10:20p and asked him politely if it would be possible for himself and other security to use other vehicles, other than the emergency vehicle when police officers are on duty for this coming semester. Police officers are required to have the proper equipment when on duty and have access to it, including an emergency vehicle.

When security takes the emergency vehicle this eliminates police officers ability to respond to an emergency with proper response time. John Taylor's response was that he or other security would not stop using the emergency vehicle when Police officers are on duty and he would take the squad whenever he felt like it, unless directed by you.

This poses a serious liability in the event of an emergency. Without proper response time from police personnel when available, could result in a significant liability for the University. I would like to ask for a documented clarified response on this matter. . . .

Rowe responded in an August 31 e-mail, which states:

I am aware of your concerns and was told by John that you had approached him regarding this. While I appreciate your concerns about the university's liability, this issue falls outside of your responsibility. The topic of vehicle sharing will be discussed on Thursday; I will follow up with you on your decision to action this issue independently separate from Thursday's discussion.

Taylor set forth his view of the conversation in an e-mail to Rowe dated September 13, which states:

1. On 8/27/09 at approximately 10:20p Officer Thompson entered my office and stated that Officer Starch wanted her to be there as he needed to talk to me. She appeared nervous and uncomfortable.
2. Officer Starch entered my office a few moments later and made small talk for a few moments. He then came to the heart of the matter. He stated that he did not want me or any other "security staff" to use the squad car while a police officer was on duty. He stated that he may need to make a police response to a situation and he need the squad car to do so. He then stated that I could check out a car from the fleet if I needed to use a vehicle.
3. I informed him that I would continue to use the squad car when I wanted to unless directed not to by Bill Rowe.
4. Although his manner was polite the subject manner of the conversation was well above his pay grade. He was attempting to direct the assistant director from his position of probationary police officer.
5. After Officer Starch departed my office I drove the squad on patrol with Officer Thompson. She stated to me that she did not want to be part of the previous conversation but Officer Starch wanted her there. I felt that she was caught in the middle of an unfortunate situation.

Rowe conducted a staff meeting on Thursday, September 3, 2009. Use of the squad car was one of the items covered.

18. At sometime around 2:30 a.m. on August 31, 2009, Starch was dispatched with a student cadet to a UWSP parking lot to check on students who might require medical transport. They found two UWSP students in the parking lot, with four males standing in an area adjacent to Topper's Pizza, a private facility not on UWSP property. Starch and the cadet attended to the wounded students and called an ambulance. The students asserted they had been attacked by a group, including four men and a woman. A City of Stevens Point police officer responded to the scene at roughly the same time the ambulance arrived, and initiated an investigation of the incident. The students were hospitalized. Suspected criminal activity is, by policy, recorded on a Uniform Crime Reporting Incident Sheet, although the policy calls for UCR incident reports to

be issued for incidents occurring “within the jurisdiction of the University of Wisconsin Stevens Point.” Rowe learned of the incident at roughly noon of August 31, when the UWSP Vice-Chancellor phoned him in response to an inquiry from the hospitalized students’ parents concerning the status of the assault investigation. Had the incident been recorded and filed on a UCR Incident Sheet, Rowe would have learned of it on reporting to work. Rowe documented his concerns regarding the reporting of the incident in an e-mail to Starch that noted “I am personally following up on this case. I would like to know why you handled it in this manner.” Starch responded by e-mail later that day, noting:

To my knowledge and as trained, all we do for medical assists is a gold sheet. I apologize that (the cadet) did not state the exact location of the incident; I only had time to briefly look over his gold sheet. Had the event occurred in our jurisdiction, you would have seen an incident report completed by myself.

Rowe’s investigation of the incident led him to conclude that the UWSP students sustained significant injuries in the fight, including lacerations, a broken nose and a concussion.

19. At the September 3, 2009 staff meeting, Rowe discussed the issue of traffic enforcement. He did so because he had heard that Starch was running radar from a UWSP parking lot that borders State Highway 10, which borders the UWSP campus as a street within the City of Stevens Point. He informed Police Officers that traffic enforcement, including use of radar, even though within UWSP-PS jurisdiction under Wisconsin Statutes, was not to be a part of their regular duties and that officers should not run radar checks as a function of their normal duties. On the shift following that meeting, Starch took the radar unit in the squad during patrol and ran it. He did not issue any traffic citations. He left the radar unit in the squad at the close of his shift.

20. In an e-mail dated September 20, 2009, Taylor stated:

We have had a series of situations this weekend where Starch showed a lack of proper judgment.

I told Terra to write these situations up and get them to you ASAP. She will be coming in here this afternoon complete the report to you.

I believe that at least 2 of these situations will cause parents to call either you or other UWSP officials tomorrow for explanations.

Here is a brief summary of the situations.

1. The arrest and transport of Michael A. Greiner on Friday morning. Apparently Starch displayed unsafe tactics and had Terra hand cuff the subject because, he was intimidated by Greiner.

2. A situation on Saturday morning where a student would not answer their res hall door. He tried to get a CA to key in. They refused. He was trying to morph it to a welfare check when it was only an attempt to issue a alcohol citation. He called the students parents at 3:30a. in an attempt to get them to call their student.
3. This morning a student was issued a citation for underage drinking. Starch made some type of error and thought the student was on probation with a no drink stipulation. He called SP-PD for a jail transport. When they arrived at the jail the SP-PD officer had determined that this student was not on probation. SP-PD brought him back and released him. The student came here today looking for some answers. Dave referred him to you. The report was not completed before he left so that is all I have on it. . . .

The first allegation will be referred to as the Greiner incident; the second will be referred to as the Hansen Hall incident; and the third will be referred to as the Gross incident. Rowe responded to this e-mail by notifying UWSP's insurance representative and his own supervisors that he thought the report posed potential liability issues. Rowe considered terminating Starch immediately, but determined to investigate the allegations further. In a letter to Starch dated September 24, 2009, Rowe stated:

Effective this date you are placed on paid administrative suspension for an indefinite period of time pursuant to an investigation of performance related issues, including those on September 19, 2009 and September 20, 2009. You are further directed to relinquish your firearm, badge, credentials and keys. You are prohibited from coming onto campus or contacting Protective Services personnel during this time. You will be notified once this investigation is complete and a decision is made concerning your employment. . . .

Thompson e-mailed her report to Taylor on September 20, 2009, and Taylor forwarded it to Rowe on that date. Rowe interviewed Thompson on September 30, 2009, and summarized the interview in a memo. He did not record the interview and did not have Thompson sign his memo documenting the interview. The interview covered the August 27 conversation between Thompson, Taylor and Starch; Starch's use of radar on September 3; the Greiner, Hansen Hall and Gross incidents; and whether Thompson knew if Starch was recording conversations with UWSP-PS personnel. Rowe reviewed Starch's report on the Greiner incident and the citation Starch issued in the Gross incident. He interviewed the Hall Director who was present during the Hansen Hall incident and documented the interview in a memo dated September 22, 2009. He did not record the interview and did not have the Hall Director sign his memo documenting the interview. Rowe took two reports from Schramm, one dated September 23, 2009 and one undated, which document Schramm's concerns with Starch's conduct. Rowe interviewed Jacob T. Gross on September 23, 2009, and summarized the interview in a memo. He did not record the interview and did not have Gross sign his memo documenting the interview. This process spanned the period of time between his receipt of Taylor's e-mail and September 30, 2009.

21. The Greiner incident involved a belligerent and uncooperative individual, who Thompson and Starch observed carrying an open can of beer on UWSP property. Starch's report of the incident reads thus:

On 09-18-09 at about 1:50a.m. Officer Thompson and I Officer Starch were on patrol when we observed a male individual . . . carrying an open can of keystone light beer on the UWSP sidewalk adjacent to parking lot E. Officer Thompson then turned the vehicle around at which time Greiner and the group he was walking with crossed the street.

I then activated the emergency lights and exited the vehicle yelling, "POLICE STOP" but Greiner continued to walk. Officer Thompson then observed Greiner throw his beer can on the ground and proceed to walk away. I then said, "Person in the black shirt stop!" at which time Greiner stopped and I asked him for identification. Greiner then asked, "What did I do? I'm 21" in a defensive tone of voice and I informed him that it was illegal to have an open intoxicant on the university. Greiner then said, "This is bull shit, your finding me guilty without a court of law! So just write me the FUCKING ticket."

I then contacted Stevens Point PD dispatch to check Greiner for any warrants and received a response of Greiner having a very long record and that he was on probation. Officer Thompson then called the probation record to check for conditions of probation, Greiner was on a no drink probation. The probation office then placed Greiner on a probationary hold and requested we transport him to the Portage Co. Jail. Greiner was then placed in handcuffs by Officer Thompson I observed Officer Thompson double lock the cuffs and checked for fit.

SPPD was contacted to transport Greiner to the jail. I then informed Greiner that I was going to search his person for any weapons or contraband. I then slowly placed my right foot on the inside of Greiner's left foot as trained to search an individual at which time Greiner stated, "Stop kicking me", I then informed Greiner that I needed to place my foot on the inside of his foot in order to search him. I then asked if Greiner had any sharp objects on his person at which time he remained silent. After searching Greiner SPPD transported him to the Portage Co. Jail where I issued him citation . . .

Rowe concluded from his investigation that Starch's report did not fully document his conduct. Rowe concluded that Starch's conduct was improper, including that: Starch's conduct toward Greiner exacerbated Greiner's level of hostility; Starch relied on Thompson to defuse the situation, including asking Thompson to place Greiner in handcuffs; and that while Thompson placed Greiner in handcuffs, Starch stood behind her, thus removing himself from a position to assist if Greiner resisted her. Rowe's conclusions on the Greiner incident reflect his good faith evaluation of Starch's conduct and are based on fact. The Hansen Hall incident involved Thompson's and Starch's response to a call regarding disorderly conduct from a dormitory room.

Rowe concluded from his investigation that: Starch used a flashlight to knock on the door to attempt to get the occupants of the room to open the door; that the room became quiet once the Police Officers announced their presence; that Starch sought and received the phone number of one of the students from the Hall Director; that such a phone number is typically that of the student's parents; that Starch got the number and phoned it, reaching the student's parents at roughly 3:30 a.m.; that Starch made calls to another family member; and that Starch obtained the phone numbers and used them by asserting he was checking on the student's welfare, with no evidence that the incident involved anything beyond excessive noise. Rowe considered Starch's response to have been excessive and unnecessary. He felt Starch's response turned a service call into a law enforcement issue for no reason, since the disorderly student would have been held accountable by the Hall Director as an educational rather than a criminal matter. Rowe's conclusions reflect good faith and are based in fact. The Gross incident involved a student, Jacob T. Gross, to whom Starch issued a citation for underage drinking. Rowe concluded from his investigation that: after issuing the citation, Starch returned to the UWSP-PS office and searched e-time, concluding from e-time that Jacob T. Gross was on probation; the student he had issued the citation was not on probation, but shared the same first and last name with another UWSP student, Jacob J. Gross, who was; that Starch neglected to notice the discrepancy in the middle name and date of birth of the two students; that Starch asked Thompson to assist him in the arrest of Jacob T. Gross; that during transport of Jacob T. Gross by a City of Stevens Point Police Officer to the jail, a dispatcher advised the City of Stevens Point Police Officer that he had the wrong student in custody; and that the wrongful arrest occurred due to Starch's failure to notice the discrepancies between the personal data of the Jacob T. Gross and Jacob J. Gross. Rowe's conclusions reflect a good faith evaluation of the incident and are based in fact.

22. Rowe summoned Starch to a meeting at the UWSP personnel office to be conducted on October 20, 2009. Starch confirmed his attendance at the meeting in an e-mail dated October 19, 2009, which states:

Per our phone conversation this morning on 10-10-09 I am confirming that I will attend the meeting requested by you in the Personnel's office 10:00 a.m. on 10-20-09. In addition if this meeting will result in any disciplinary actions I am requesting again that a WLEA union steward be provided for my representation.

Rowe denied Starch's phone and e-mail request for WLEA representation. Starch's phone request was his first for WLEA representation during a meeting with UWSP-PS staff. Starch, Rowe and Tabor met at Tabor's office on October 20, 2009.

23. Rowe started the October 20, 2009 meeting by informing Starch that the meeting was the culmination of an investigation into recent performance issues and into his performance as a probationary employee. Rowe and Tabor noted to Starch that his status as a probationary employee meant he was not entitled to WLEA representation. Rowe then questioned Starch on whether he was recording the interview. Starch responded in the affirmative, and turned off the recorder when Rowe so directed him. Rowe then questioned Starch on a number of issues,

including the extent of Starch's recording of office conversations, including the September 3 staff

meeting; Starch's conduct during the Greiner, Gross and Hansen Hall incidents; his running radar on September 3; his August 27 conversation with Taylor about use of the squad; his comments to Schramm regarding the arrest of student suspects who flee; and his derogatory comments about UWSP-PS, including its supervisors. After completing this questioning, Rowe and Tabor asked Starch to leave the interview room while they remained. When summoned back into the interview room, Rowe handed Starch a document headed "PROBATIONARY SERVICE REPORT 7 MONTH" and a letter dated October 20, 2009 from Tabor to Starch. The seven-month probationary report is the same type of form described in Finding of Fact 13. It contains no entries under the "Quantity of work" and "Rate of learning" categories. The "Quality of work" category is checked as "unsatisfactory" and includes the following under the "Comments" section:

He did not complete the proper reports and investigate a student assault that occurred in both campus and in the city jurisdictions. He attempted to incarcerate a student without properly verifying the student's identity causing the student to be taken into custody and transported to the Portage County Jail.

The "Judgement" category is checked as "unsatisfactory" and includes the following under the "Comments" section:

He has used very poor judgment on several occasions, attempting to action issues that are far beyond his level of responsibility. He also deferred responsibility back to a student for lack of proper reporting and investigation on the student assault that occurred on 8/31/09. It has been reported that he was seen running radar out of Lot W without supervisory approval and installed the radar unit in the PS vehicle immediately following a meeting where traffic stops were discussed and placed on indefinite hold.

The "Dependability" category is checked as "poor" and includes the following under the "Comments" section:

He recently missed a shift and was late for a departmental meeting.

The "Initiative" category is checked as "poor" and as "unsatisfactory" and includes the following under the "Comments" section:

Co-workers report that he throws his duty bag when coming to work and remarks he has "given-up" when they confront his behavior.

The "Work habits" category is checked as "unsatisfactory" and includes the following under the "Comments" section:

Co-workers report that he has become very aggressive with students. Tried to convince co-worker that all students who flee should be taken to jail.

The “Ability to get along with others” category is checked as “unsatisfactory” and includes the following under the “Comments” section:

It has been reported by co-workers that he has been surreptitiously digitally recording conversations he has with co-workers, supervisors and meetings.

Tabor’s letter to Starch reads thus:

This letter is to inform you that your probationary appointment as Police Officer in the Protective Services Department at UW -Stevens Point is terminated at the end of your normal shift Friday, October 23, 2009. . . . This action is being taken upon the request of your supervisor who reports that you have failed to make satisfactory progress in meeting the probationary standards for your position.

This action has been taken under Wisconsin Administrative Code, Section ER-MRS 13, *Probationary Periods*, which explain the probationary process, as well as defines your state employment rights upon dismissal during a probationary period.

At no point prior to October 20, 2009, did Starch receive formal discipline or warning that any specific aspect of his work performance could result in termination of his employment. Neither Rowe nor Tabor specifically asked Starch to offer his own account of the performance deficiencies noted in the documents provided him during the October 20, 2009 meeting. Thompson passed her probation period.

24. WLEA filed a grievance regarding Starch’s termination. The form, captioned as UWS-09-83, states the following description of the grievance:

UW-Stevens Point Police Officer Drew Starch was terminated of his employment by UW-Stevens Point P.D. Management. Drew Starch was not provided Union Representation when requested. The WLEA was not informed of Drew Starch’s termination nor was it allowed to provide Drew Starch Union Representation.

The grievance form requests the following remedy:

Follow the contract and reinstate Drew with back pay and interest. Recognize that the Central Bargaining Agreement applies to probationary employees except where it specifically states otherwise.

The grievance alleges Respondent violation of contract sections 4/6/2, 4/9/2 and 4/9/4.

25. Rowe believed Starch’s conduct as a probationary Police Officer revealed poor judgment and poor performance as a Police officer including his running radar on September 3 after having been informed not to do so; his participation in Greiner’s arrest; his conduct during

the Hansen Hall incident; his arrest and referral of Jacob T. Gross to the City of Stevens Point

based on a hold that, in fact, was for Jacob J. Gross; a pattern of conduct manifesting an unwillingness to assume responsibility for his own conduct; and a pattern of conduct that undermined cohesiveness among employees classified as Security Officers and those classified as Police Officers. Rowe's belief is based on a good faith evaluation of Starch's conduct and is based on fact. Rowe's belief is documented in substantial part on Starch's seven month probationary service report.

26. Starch engaged in the exercise of lawful, concerted activity during his employment as a UWSP-PS Police Officer including: joining the WLEA; discussing departmental issues with Burt; discussing departmental issues with co-employees; and advocating departmental issues with Rowe, including the overtime and scheduling concerns shared by Thompson and Starch. Starch's interest and advocacy of departmental issues extend beyond the exercise of lawful, concerted activity, including: his attempt to get Rowe to act on issues, such as schedule revisions and overtime distribution, that are either covered by the WLEA labor agreement or, if not, are mandatory subjects of bargaining; Starch's modification of the UWSP-PS website to reflect his personal view of departmental structure; and his unauthorized use of radar. Rowe was aware of Starch's exercise of lawful, concerted activity as well as Starch's performance issues. Rowe did not terminate Starch's probation period based even in part on Starch's exercise of lawful, concerted activity, but entirely on Rowe's good faith and unfavorable evaluation of Starch's performance as a Police Officer.

27. Respondent has indicated its willingness to arbitrate the grievance noted in Finding of Fact 24, and to renounce technical objections that would prevent a decision on the merits by the arbitrator. The collective bargaining agreement noted in Finding of Fact 4 clearly addresses itself to the issue of Starch's right to a WLEA representative at the October 20, 2009. The dispute regarding the scope of Starch's right to a WLEA representative at the October 20, 2009 meeting does not pose an important legal issue that can be decided prior to, or without the benefit of, an arbitration decision construing the collective bargaining agreement noted in Finding of Fact 4.

CONCLUSIONS OF LAW

1. Starch was, during his tenure as a Police Officer on a probation period with UWSP-PS, an "Employee" within the meaning of Sec. 111.81(7)(a), Stats.
2. WLEA is a "Labor organization" within the meaning of Sec. 111.81(12), Stats.
3. UWSP-PS is an "Employer" within the meaning of Sec. 111.81(8), Stats.
4. UWSP-PS termination of Starch's employment as a Police Officer on a probation period with UWSP-PS did not violate Secs. 111.84(1)(a) or (c), Stats.
5. Those portions of the complaint alleging a violation of Sec. 111.84(1)(a), Stats., for Respondent's refusal to provide Starch access to a WLEA representative at the October 20,

2009 meeting satisfy the Commission's criteria for holding processing of a complaint in abeyance pending completion of the ongoing grievance arbitration proceeding.

ORDER

1. Those portions of the complaint, as amended, which allege Respondent committed unfair labor practices within the meaning of Secs. 111.84(1)(a) and (c), Stats., by interfering with and discriminating against Starch's exercise of lawful, concerted activity are dismissed.

2. Those portions of the complaint, as amended, which allege Respondent committed unfair labor practices within the meaning of Sec. 111.84(1)(a), Stats., by refusing to provide Starch access to a WLEA representative at the October 20, 2009 meeting are held in abeyance pending completion of the ongoing grievance arbitration proceeding.

Dated at Madison, Wisconsin, this 14th day of October, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

University of Wisconsin – Stevens Point Protective Services

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

The Parties' Positions

Complainants' Brief

After a review of the evidentiary background, Complainants contend that the record poses two fundamental issues. The first is whether Respondent committed an independent violation of Sec. 111.84(1)(a), Stats., and the second is whether Respondent discriminated against Complainants in violation of Sec. 111.84(1)(c), Stats. That Starch was a probationary employee has no bearing on the application of either section.

The evidence shows that “Starch engaged in lawful, concerted activities to improve the UW-SP police officers’ wages, hours and working conditions and to enforce the CBA.” More specifically, Complainants contend Respondent was aware of Starch’s advocacy of a number of issues, including “the equitable distribution of working off shifts and overtime and frequent schedule changes without proper notice”; the WLEA bulletin board; safety equipment; use of a properly equipped squad car; uniforms to distinguish “police officers . . . from non-sworn security officers”; and police officer training. Respondent was aware of and hostile to this exercise of lawful concerted activity.

Proof of proscribed hostility is evident from Respondent’s consistent refusal “to resolve scheduling or overtime inequities.” Rowe’s testimony shows “his refusal to do anything, including asking someone for an interpretation of the WLEA CBA”. His refusal to discuss this and other issues manifests disdain and establishes a basis upon which to infer hostility. When Rowe offered rationale for refusing to address scheduling or overtime issues, the rationale is incomprehensible. Ignoring issues of hostility within the meaning of Sec. 111.84(1)(c), Stats., his indifference or hostility to the issues posed by Starch constitutes interference within the meaning of Sec. 111.84(1)(a), Stats., which does not require evidence of specific intent to interfere with the exercise of lawful, concerted activity.

Starting at least on August 7, 2009, Rowe consistently ignored Burt’s requests to “schedule local negotiations which included unresolved issues Starch brought up about scheduling, overtime and equipment.” This poses a troublesome background to Rowe’s testimony regarding Starch’s termination. Examination of the purported bases for the termination rest on such a scant evidentiary base that the asserted “incidents” must be considered “pretextual.” There is no evidence to support Rowe’s assertion that he had any performance based issues with Starch prior to the seven-month probationary service report. Rowe’s assertion is belied by Starch’s and Thompson’s testimony and rests “on information he elicited purposely to terminate Starch”.

The absence of notice of disciplinary interest is evident. Starch missed his July 12, 2009 shift, but did not learn of any concern until four days later, and was never notified the incident constituted a basis for discipline. Rowe's August 31 memo was authored "without discussing or waiting for a response from Starch". Rowe's concern with Starch's failure to properly document the incident rests on his unproven assumption that the underlying incident occurred within Respondent's jurisdiction. The allegedly "significant" incidents of the weekend of September 18 also rest on unproven bases. The reports Rowe relies on are rebutted by Thompson's testimony. Detailed examination of the evidence will not support a conclusion that Rowe's assertion of the underlying facts rests on anything other than "hearsay and self-serving" reports. Rowe's depiction of the Hansen Hall incident is hyperbolic. Evidence on the "two Jacob Gross' incident" will not support Rowe's evaluation of its significance. Starch cannot be faulted for the failure to properly identify that two UWSP students share the name Jacob Gross and one of them had an outstanding warrant. Stevens Point City Dispatch had sufficient information to properly identify the student with the warrant. Starch apologized for the mistake once it had been confirmed by the City. Rowe's assertion that Starch failed to provide sufficient information to Stevens Point Dispatch ignores that there is no established procedure Starch violated; that "Starch had not made many arrests as a probationary officer"; and that the occurrence of two individuals with the same first and last name is a unique occurrence.

Rowe's attempt to document other performance problems is no more persuasive. Starch's attempt to keep "non-sworn security officers" from using squad cars was defensible as a matter of policy. His use of radar cannot be considered ill-advised unless one ignores state statutes, Respondent's position descriptions, and Respondent's field training guidelines. Rowe never told Starch he was being insubordinate until Rowe terminated him. The assertion Starch threw his duty bag has no basis. The assertion that Starch was over-anxious to arrest students is uncorroborated and, in fact, contradicted in the record. Against these unsubstantiated allegations stands solid proof of proscribed hostility. That Rowe did not employ progressive discipline under Respondent's personnel policy is evidence of hostility.

Beyond this, "Rowe wrongfully denied Starch union representation at the October 20 meeting." By phone and e-mail, "Starch requested a WLEA representative at the meeting if it could result in discipline." Rowe asserted a probationary employee has no right "to a union steward". This assertion is factually and legally unpersuasive. The assertion that the October 20 meeting "was not disciplinary . . . is just . . . game-playing." It is contradicted by Rowe's September 24 letter. Beyond this, Respondent's assertion that Starch "was not protected by the CBA" is misplaced. The agreement denies probationary employees access to the grievance procedure, but the agreement otherwise covers probationary employees, as is evident by Respondent's payment of wages and benefits established in the agreement. Case law confirms that Weingarten rights apply to State employees and that they apply to probationary employees. Rowe's testimony that he had not decided whether to terminate Starch prior to the October 20 meeting confirms that the meeting was investigatory in nature. Respondent's denial of Starch's Weingarten rights constitute a violation of Secs. 111.84(1)(a) and (c), Stats.

As the remedy for Respondent's violation of SELRA, Complainants seek that "Starch be reinstated and in all ways be made whole including restoration of seniority and interest on backpay"; Respondent's management "be trained in appropriate labor relations . . . including 'Weingarten' rights for probationary employees"; Respondent be ordered to comply with contractual and statutory protection of the exercise of lawful, concerted activity; Respondent post "an appropriate notice"; and "Any other remedy the WERC believes is just and proper."

Respondent's Reply

After a review of the evidence, Respondent notes that the Commission applies a four-element test to address claims of retaliation in violation of Secs. 111.84(1)(a) and (c), Stats., and that the "burden is not upon the employer to establish just cause" but upon Complainants "as to each of the four elements."

More specifically, Respondent contends that while "Starch may have engaged in some concerted activities, most of the activities alleged to be concerted are not." Examination of the evidence underlying the allegation of "protected activity concerning hours of work and overtime" demonstrates that "(m)ost do not constitute protected activity." Thompson's e-mails to Rowe reflected her "personal concern that a fellow bargaining unit member was not doing her share of work" or was "receiving preferential treatment." Even if these personal concerns could be considered collective, the record demonstrates no hostility on Rowe's part and no connection to Starch's termination.

Starch's May 6, 2009 e-mail lists myriad concerns. Rowe met with Starch to address them. Viewing the alleged concerns regarding scheduling, the evidence affords scant support of concerted activity. Starch's concerns with scheduling track his move from day shift to night shifts. His proposed changes to schedules reflect "a schedule he would prefer." His scheduling concerns in response to Rowe's request that he explain why he missed a shift in July cannot be seen as anything but personal. To the extent any concerns beyond his individual concerns are implicated, "the draft schedules Starch prepared favored the law enforcement officers."

Complainants' depiction of the bulletin board issue ignores that Rowe had received a complaint from a WSEU member regarding seeking to have the bulletin board maintained by Starch be removed or relocated. Rowe permitted Starch to dictate the placement of the bulletin board, in arguable violation of the WLEA agreement. It is not apparent that Rowe's permitting conduct on Starch's part that undermines the WLEA agreement can be considered concerted activity. If it can, it "can in no way support an inference that Rowe was hostile to" Starch.

The allegedly concerted activity regarding safety and equipment either fails to constitute concerted activity or fails to demonstrate hostility on Rowe's part. Starch sought, and eventually received pepper spray. Starch sought a new squad car. Rowe supported the request. Even if the activity is concerted, there was no Respondent hostility and no connection to the termination. Starch's request for a uniform patch to distinguish police from security officers is similar. The patch reflects Rowe's idea and cannot be connected to the termination. Starch's request "for long-

gun certification” is no different.

In any event, the scheduling and overtime issues arose in May of 2009. In June of 2009, Rowe “gave Starch ‘good’ performance reviews on his two and four month probationary reports.” While this may not dispose of the hostility claim, the gap in time between this activity and the initiation of the termination process weakens the inference of hostility that Complainants seek. That Thompson joined Starch in voicing concerns on scheduling and other issues similarly weakens the inference of hostility, since Thompson “passed probation.”

More significantly, Rowe’s inability to accommodate Starch’s scheduling concerns “reflects the reality of the workplace.” WSEU-represented Security Officers opposed the schedules. Burt’s testimony establishes that WLEA had to initiate “negotiations for a local agreement” to address Starch’s concerns. If Rowe’s inability to accommodate Starch’s scheduling concerns reflect hostility, then WLEA was no less hostile to Starch. In fact, Rowe’s refusal to accommodate Starch reflects his conclusion that “it wasn’t equitable to the entire organization.” Beyond potential bargaining issues, Thompson’s then-pending confidential request for maternity leave aggravated staffing issues that made revising schedules essentially impossible. Nothing in the chain of e-mails or events from May through August of 2009 manifests anything like proscribed hostility. Nor can Rowe’s scheduling of a meeting to negotiate a local agreement be considered to rest on hostility toward Starch. Rowe experienced e-mail problems that complicated the scheduling. Close examination of the record demonstrates the delay between the request for a meeting and the scheduling of the meeting in November rests on a refusal or unwillingness on Rowe’s part to meet with WLEA. In any event, for Complainants to prevail, the hostility must be directed to Starch.

Complainants failed to prove the reasons for the termination were pretextual. Starch’s conduct in the Topper’s Pizza incident confirms this. UWSP students fled the site of the incident onto UWSP property, making “an investigation . . . warranted and necessary.” Starch delegated the incident report to a student and was less than candid in discussing the matter with Rowe. This constitutes “an attempt to place blame on the student”, not a pretext. Starch’s responses to Rowe, when questioned for missing his July 12 shift, manifests similar conduct to avoid personal accountability. Starch’s direct approach to Taylor to keep Security Officers from using the squad car reflected poor judgment and an absence of discretion. Starch “practiced” with radar after having been instructed that officers should not run radar checks. This conduct constitutes poor judgment, if not insubordination. That Starch surreptitiously recorded conversations and meetings with co-workers is another example of an ongoing pattern of poor judgment. The poor judgment is proven, not pretextual.

The series of incidents on the September 19 weekend brought these performance based problems to a head. A review of the evidence establishes that the Grievant’s inability to handcuff Greiner or meaningfully assist Thompson constitutes “inappropriate behavior for a police officer.” The Hansen Hall incident reflects consistent over-reaction to an event that should not have risen to a police issue. Starch took no action to accept responsibility for his conduct in falsely arresting a UWSP student who committed no offense beyond having a name similar to a person with outstanding warrants. Rowe investigated each incident and appropriately concluded that “Starch’s probationary employment should be terminated”.

Respondent's contention that Rowe acted on hearsay misplaces the statutory burden of proof. Whether or not the information Rowe acted on is hearsay at the hearing level is irrelevant to a determination of statutory hostility. The issue is not whether Rowe acted on the best information. Rather, the issue is whether his conclusions were a pretext to mask hostility toward Starch's exercise of lawful, concerted activity. Even if this were not the case, Commission rules and Sec. 227.45, Stats., permit the access to hearsay to determine Rowe's motivation. Close examination of the evidence submitted at hearing establishes the credibility of Rowe's account and the thoroughness of his investigation.

Complainants' attempt to establish that Starch was entitled to notice of performance issues or to progressive discipline lacks any foundation in the record. Sec. 230.28(1)(a), Stats., read with applicable administrative rules, establish that Starch was entitled only to "the list of reasons for dismissal". He received them. Ignoring this, "most of the events Starch contends he should have received notice of" are either too obvious or trivial to demand notice. Probationary employees have no claim to progressive discipline under contract, civil service or case law.

Nor can Complainants demonstrate a basis on which Starch can claim a right to WLEA representation. The October 20 meeting did not result in discipline. Probationary employees "are not subject to discipline" since they have no entitlement to their position. Rather, the probationary period is a time in which the employer determines "whether the employee will be a satisfactory long-term, just cause employee." The list of reasons for his dismissal came as a Probationary Service Report, not as a letter of discipline. Denying Weingarten rights to probationary employees "is consistent with the policies behind" the decision. Because probationary employees lack employment security, they can demand no representation to protect their employment security. Nor can the representation be viewed as a check on unjust punishment, because termination of a probationary employee is not punishment, but an evaluation of job performance. Beyond this, representation cannot serve as a check on needless grievances, because probationary employees lack recourse to the contractual grievance procedure.

Even if a right to representation exists, the labor agreement waives that right. Section 4/10/1 and 4/9/2 "completely removes probationary employees from the protections of the grievance procedures". This is established in Commission case law, see STATE OF WISCONSIN, DEC. NO. 26739-C (WERC, 3/92). Examination of federal case law confirms this, as does a review of Sec. 111.93(3), Stats. The right to representation is waivable, and to the extent it is necessary to interpret the agreement to determine whether the agreement clearly and unmistakably waives the right, all three of the Commission's stated criteria to defer to the grievance process are met in this case. Thus, the complaint must either be dismissed in its entirety or "be held in abeyance pending the arbitrator's interpretation of the collective bargaining agreement."

Complainants' Reply

Respondent resorts to "distortions" and "cherry-picks through the myriad of protected activities" to claim "that most all of Starch's concerns and activities were personal, not concerted." No balanced view of the record or Commission case law can support the assertion that Starch's conduct is anything other than lawful, concerted activity.

Beyond this, “Rowe’s animus toward Starch’s protected activity may be inferred from circumstances surrounding his actions.” Respondent points to “good performance reviews” while ignoring that Rowe was ignoring Starch’s requests to improve working conditions and that Rowe issued an e-mail stating Starch was “demanding” and needed “to cool off.” More than Starch’s personal concerns were present on scheduling and overtime issues. Thompson and Schramm at a minimum shared his scheduling concerns. That the WLEA has had difficulty bargaining with Rowe underscores “Respondent’s hostility toward dealing in good faith with legitimate union issues.” Had Rowe bothered to address the “unexpected” problems in staffing or listened to his employee’s concerns when scheduling issues arose, those issues could have been timely resolved.

Burt’s difficulty scheduling with Rowe manifests more than an e-mail issue. Burt mailed a scheduling letter to Rowe. The letter had no more effect than the lost e-mail. The delay in meeting and the lack of progress in those meetings point to hostility, not inadvertence. Respondent’s citation of Commission case law to obscure Rowe’s hostility cannot obscure that the cited “cases bear no resemblance to the present one.”

Rowe’s stated reasons for the termination are pretext. Respondent makes “mountains out of molehills” regarding the events of the weekend of September 19. Respondent ignores Starch’s lack of training regarding arrest procedures; his assignment to a shift without supervision; and Rowe’s ongoing ability or willingness to closely observe Starch. Greiner’s arrest “may not have been executed with complete perfection”, but was not a significant incident. Rowe’s assertion that Starch overreacted in the Hansen Hall incident lacks any corroboration. The “two Jacob Grosses incident was simply a mistake” with the student suffering “no real harm” since the Stevens Point Police Department caught the error prior to the issuance of any charges. Rowe’s investigatory findings on these incidents are “creative writing exercises” that, under Commission case law, “must be discounted.”

Examination of Rowe’s evaluation of other incidents confirms this. The evidence shows Starch approached Taylor not because he sought to operate “above his level”, but because he could not get meaningful responses from Rowe. Rowe overreacted to the Topper’s Pizza incident and ignored Starch’s responses to him. Similarly Rowe’s concern with Starch’s request that non-sworn officers not operate the squad ignores that Starch’s request is well-founded on UWSP policy. The assertion he acted in an insubordinate manner regarding the use of radar is not as reasonable a conclusion as that he “was taking initiative to practice a training task he was otherwise unfamiliar with.” Starch’s missed shift poses a fundamental issue of credibility. Starch’s testimony that “Rowe commended him for taking responsibility” is more credible than Rowe’s testimony that “Starch did not take responsibility.”

Nor can Respondent’s assertion that Complainants failed to prove hostility be rooted on evidentiary issues. The determination of hostility involves more than Rowe’s receipt of information, however unreliable. Rather, the necessary determination centers on Rowe’s use of the information and, more specifically, on whether “Starch was terminated” based on a legitimate interpretation of proven offenses, or based on “excuses to be rid of a thorn in Rowe’s side.” Rowe’s disparate treatment of Starch and Schramm points to the latter.

Starch was terminated, and termination is a form of discipline. The “assertion that discipline does not include the ending of employment is specious.” Citation of statute or the Administrative Code, which require close observation of a probationary employee, underscores the irony of Respondent’s position. Beyond this, Respondent cites no persuasive authority to establish that a probationary employee lacks Weingarten rights. Beyond this, “WLEA did not waive the right of probationary employees to have a union representative present.” At most, the labor agreement can be read to restrict access of a probationary employee to challenge the basis of a “release”. There is no basis to support a waiver of any other right, including the right to a representative “at a meeting where the employee reasonably believes discipline, including ‘release’ may occur.” Respondent’s use of DEC. No. 26739-C is misplaced because Starch “was not requesting a non-designated union representative.”

DISCUSSION

The Retaliation/Interference Allegation

The complaint, as amended, alleges Respondent violations of Secs. 111.84(1)(a) and (c), Stats. The Commission described the applicable legal standard to these allegations in STATE OF WISCONSIN (DOC), DEC. No. 31272-B (WERC, 9/07) AT 19, thus:

The complaint in this case contained both retaliation claims under the rubric of Sec. 111.84(1)(c), Stats., and interference claims under the rubric of Sec. 111.84(1)(a), Stats. Interference claims are subjected to a balancing test, weighing the degree of intrusion on the employees’ protected activity against the employer’s legitimate business reasons for engaging in the activity. STATE OF WISCONSIN, DEC. No. 30340-B (WERC, 7/04), at 17, and cases cited therein. That interference analysis is objective, examining the likely effects of employer conduct on the “reasonable employee,” and does not require evidence of unlawful motivation. In retaliation cases, however, which generally are brought under the discrimination provisions contained in Sec. 111.84(1)(c), Stats., improper motive is a pivotal element in establishing the claim . . . See generally, CLARK COUNTY, 30361-B (WERC, 11/03), and cases cited therein. Thus, the Commission has held that, whether the claim is brought under (1)(a) or (1)(c), if the essence of the claim lies in retaliation, the Commission will apply the four-part discrimination paradigm. STATE OF WISCONSIN, DEC. No. 31207-C (WERC, 3/06); STATE OF WISCONSIN (UW), DEC. No. 30534-B (WERC, 2/05).

In DEC. No. 31272-B AT 19, the Commission stated “the four-part discrimination paradigm” thus:

The four elements necessary to establish retaliation for lawful concerted activity are: (1) that the complainant engaged in lawful, concerted activity; (2) that the employer was aware of this activity; (3) that the employer was hostile to the activity; and (4) that the employer’s adverse action against the complainant was

motivated at least in part by that hostility.

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The standard is based on Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis.2d 540 (1967), as discussed by Employment Relations Dept. v. WERC, 122 Wis.2d 132 (1985).

Application of this standard turns on the third and fourth elements. Application of the first and second elements is largely undisputed, but the parties offer extensive argument on the first element, which warrants some consideration. The reference to “some” reflects the force of Complainant’s position that the existence of lawful, concerted activity directly involving Rowe and Starch is so pervasive in the record that the application of the first and second elements cannot be considered in significant doubt. However, this should not obscure the force of Respondent’s assertion that Starch’s conduct furthered no more than a personal agenda. This assertion has a solid basis in Commission case law. In VILLAGE OF STURTEVANT ET. AL., DEC. NO. 30378-B (WERC, 11/03), the Commission detailed the determination of concerted activity thus:

It is impossible to define “concerted” acts in the abstract. Analysis of what a concerted act is demands an examination of the facts of each case to determine whether employee behavior involved should be afforded the protection of Sec. 111.70(2) of MERA. At root, this determination demands an evaluation of whether the behavior involved manifests and furthers purely individual or collective concern. DEC. NO. 30378-B AT 24, citing, CITY OF LA CROSSE, DEC. NO. 17084-D (WERC, 10/83), AFF’D, CIR. CT. CASE NO.-83-CV 821 (1985).

Finding of Fact 26 exemplifies the tension in the record on this point by contrasting clear acts of lawful, concerted activity with acts with a personal or an unlawful basis.

In the former category belong Starch’s joining the WLEA; his advocacy to Rowe of his own and Thompson’s concern with favoritism concerning hours of work; as well as his discussion of departmental issues with Burt and with fellow employees, including issues appropriate for bargaining. In the latter category belongs his unauthorized modification of the UWSP-PS website to reflect his personal view of departmental command and seniority structure as well as certain misplaced advocacy. For example, he asserted he created a WLEA bulletin board based on his reading of the labor agreement. Starch’s conduct, stripped of its rationalization, consisted of Starch’s removing, without WLEA or UWSP-PS authorization, material of a personal nature posted by a Security Officer on a bulletin board in his work area. There were at least two other bulletin boards available. Nothing other than a personal concern is evident in this behavior.

This prefaces more fundamental issues. Starch and Thompson voiced concern over schedules and overtime allocation, mandatory subjects of bargaining which may or may not be covered by the labor agreement. In either event, had Rowe acted on Starch’s efforts to steer overtime and hours away from Security Officers and Schramm toward Starch and Thompson, Rowe would have opened UWSP-PS to an allegation of individual bargaining, which, if proven, would violate Secs. 111.84(1)(a) and (d), Stats. Against this background,

Complainants' dismissal of the force of Respondent's contentions on the first element is overstated. Starch engaged in considerable conduct which was not lawful or not concerted.

This prefaces analysis of the parties' fundamental dispute on the application of the third and fourth elements. The evidence affords no persuasive basis for Complainants' assertion that Rowe was hostile to Starch's exercise of lawful, concerted acts. Starch testified that his relationship with Rowe changed in late June or early July, based on his WLEA involvement and his EEO contacts with Thompson. The only WLEA involvement Starch cited was his creation of the WLEA bulletin board. He presumed Rowe knew of it because he was still on the day shift, training with West, and he "would have been the only person putting that up" (Transcript {Tr.} at 111). This inference of hostility ignores that Rowe, in spite of the complaint of a Security Officer, let the bulletin board remain. In any event, Starch's testimony dates the incident from March or April. Even ignoring credibility issues within Starch's account, it cannot plausibly be taken as a basis for a change in his relationship with Rowe months later. The EEO involvement affords no more reliable a basis on which to infer hostility. Thompson and Starch shared that involvement, and Rowe was aware of it. Thompson passed her probation period. Beyond this, the WLEA filed a grievance on Thompson's behalf regarding a safety vest. Rowe played a role in granting the grievance early in its processing. This preceded Thompson's successful completion of her probation period, which came well after her involvement in the EEO inquiry and the grievance. The record affords no persuasive support for Starch's allegation of hostility.

Complainants have not proven any other reliable basis on which to infer hostility on Rowe's part. The assertion that Rowe failed to respond to Starch's scheduling and overtime requests is unproven and misplaced. Ignoring whether Rowe was obligated to communicate with a probationary officer on matters of departmental policy, Rowe's changing schedules or overtime allocation outside of the bargaining context could have exposed UWSP-PS to a charge of individual bargaining. More significantly, he did respond. He reviewed the schedule and determined it took West away from full time day shifts, thus complicating the performance of his court officer duties. He concluded it favored Police Officers over Security Officers. Beyond his, Rowe concluded Starch's suggestions ignored the difficulty posed by a Security Officer's attempt to have her work hours accommodated to the terminal illness of her husband. He also knew he could not fit Thompson into the suggested schedule after she took leave for her pregnancy, a matter she had asked Rowe to keep in confidence.

This prefaces examination of the fourth element. The record shows that Rowe acted toward Starch based on performance, not on hostility toward the exercise of lawful, concerted activity. Rowe's behavior toward Starch is explicable from the perspective that Rowe and Starch did not share a view of how UWSP-PS should be administered, particularly regarding Rowe's view that UWSP-PS should be a unified service organization first and a sworn law enforcement agency to the degree required. Friction between them grew as Starch consistently acted against Rowe's view of appropriate conduct by a Police Officer. The inference of hostility affords no insight into Rowe's conduct.

The satisfactory performance reviews of June 5 manifest Rowe's consistent conduct toward Starch. Starch's ongoing sparring with Rowe had little evident impact on Rowe to this point in time. Rowe's restraint, following the May 8 meeting and Starch's May 18 follow-up

is noteworthy. The Agenda Starch presented Rowe for the May 8 meeting dealt primarily with

policy issues. UWSP-PS had, prior to this meeting, pursued a mutual aid agreement with the City of Stevens Point, but understood the City to have no interest in it. Allocation of overtime and schedule changes are policy issues impacting collective bargaining rather than individual accommodation. Issues of traffic enforcement are matters governed by statute, but departmental implementation of statute poses a fundamental policy issue. The locked area Starch sought for Police Officers, as well as the separation of Police Officers from Security Officers via uniform and otherwise, pose fundamental policy issues. The State of Wisconsin Department of Administration set the UWSP-PS squad for replacement in Spring of 2009. Rowe ordered a replacement, which was not delivered until the following Fall. Training and safety issues posed by the Agenda all pose ongoing departmental policy issues. This does not make Starch's advocacy of his and other employees' interests something other than lawful, concerted activity. It does, however, set the background for the events that followed. The friction traceable to those events cannot be explained with the inference of proscribed hostility, but can be explained by Rowe's good faith evaluation of Starch's inability to conform to the service model Rowe sought from his officers.

The most evident source of friction was Starch's unrelenting effort to distinguish Police Officers from Security Officers. The bulletin board problem; Starch's unauthorized modification of the website; Starch's proposal of work schedules and overtime allocation favoring Police Officers; and Starch's attempt to segregate Police Officer and Security Officer computers highlight an ongoing and persistent unwillingness on Starch's part to regard UWSP-PS as a unified service provider. This conduct came to a head in the August 27 meeting with Taylor. At that meeting, Starch essentially told a departmental supervisor not to personally use or to authorize use of the departmental squad if a Police Officer was on duty. Taylor and Rowe were upset by this conduct. That friction can be accounted for by Starch's exercise of profoundly bad judgment in advocacy, but not by hostility toward the advocacy. If nothing else, the incident highlights the irony of Starch's assertion that his approach to the EEO office prompted a change in his relationship with Rowe, based on proscribed hostility. The assertion obscures that Taylor suggested to Starch that he contact the EEO office. Starch's conduct was the source of intra-departmental friction, not management hostility to concerted activity.

Nor will the record support the assertion that Rowe used minor incidents to mask hostility toward the exercise of concerted activity. Rowe testified to, and the record confirms, an ongoing pattern of behavior by Starch denying personal responsibility for his own actions. Starch sought and received a schedule change that required him to report for duty on July 12. He did not report for duty on July 12, and in a July 16 e-mail assumed "partial" responsibility. Even ignoring that the officer from whom he sought notice of the absence was the officer whose material he took from a departmental bulletin board, Starch's response speaks for itself. The poor judgment it reflects poses no credibility issue.

Starch's poor judgment and failure to be accountable for his conduct underlies a series of incidents following the missed shift. The September 3 use of radar after a staff meeting for which Starch reported late is, if not egregious, remarkable. Rowe told officers that radar was not to be part of their routine duties. Rowe's view reflects that a UWSP-PS officer tracking

cars at any point on the periphery of the campus could not issue a citation without going out of

UWSP-PS jurisdiction. In spite of this, Starch used the radar on his shift following the staff meeting. Complainant's assertion that he was self-training on a duty recognized by law and policy ignores the existence of Rowe's admonition as well as the fact that Starch left the squad with the radar unit in it. Even if the use of the radar could be considered self-training, leaving the radar in the squad was at best negligent and, more probably, a deliberate pronouncement of his regard for the admonition of a higher ranking officer. The Topper's incident is less egregious, and Starch's assertion that the gold sheet appropriately recorded it is plausible. This cannot mask his refusal to assume any responsibility for the cadet's report.

This undercurrent colors each of the incidents from the September 19 weekend. Whether or not the record supports all of Rowe's conclusions on the severity of the incidents, the record supports Respondent's view that each incident constitutes significant misconduct. Each manifests, in varying degree, the pattern of Starch's unwillingness to assume responsibility for his behavioral excesses. Without regard to any document generated in Rowe's investigation, it is evident that Starch asked Thompson to handcuff Greiner and that he did not properly assist her. Thompson's credible testimony confirms this. Starch and Thompson received the same training, and Complainant's attempt to question that training regarding Starch affords no basis to understand Thompson's conduct. Beyond that, there is no explanation for Starch's report of the incident. That report not only glosses over any issue regarding his conduct, but also places him in an unduly favorable light. For example, the reference, "Greiner was then placed in handcuffs by Officer Thompson I observed Officer Thompson double lock the cuffs and checked for fit" is gratuitous at best.

Starch's account of the Hansen Hall incident, standing alone, establishes an over-reaction to a noise complaint. Whether or not he banged on the dorm door for several minutes, the evidence shows no basis for using a flashlight to knock on the door and no evidence to justify treating the incident as one involving student welfare. Once the noise had been addressed, there was no evident basis for further police action, and no plausible reason for repeated contact of family members in the dead of night.

The Gross incident was egregious. Starch misread e-time data, sought backup to arrest the wrong student and ignored the student's protestations that he was not on probation. City of Stevens Point Police discovered the error, probably using the same database Starch accessed. To complicate this, Starch's testimony regarding his role in the matter is equivocal at best. At one point he acknowledges, "I did overlook Jacob's middle initial and date of birth" (Tr. at 258). He later stated that he included the middle initial and date of birth in his report to City of Stevens Point Dispatch as well as "the probation and parole phone line" (Tr. at 260), and that he received confirmation of the hold on Jacob Gross prior to placing him in handcuffs. He "explained" to Gross after the error had been discovered "that there was a mix up in the system" (Tr. at 262). It is difficult, if not impossible, to understand how the error was made or discovered through Starch's testimony. Without regard to any of the documents generated by Rowe, Starch's ongoing inability to assume responsibility for his own conduct is established by the record. Complainants' attempt to characterize these incidents as insignificant is unpersuasive, particularly regarding the wrongful arrest. More to the point, inferring hostility

to the exercise of lawful, concerted activity provides no reliable insight into Rowe's or into

Starch's conduct. Tracing what friction Starch's conduct generated to an ongoing pattern of behavior that Rowe took as a poor expression of what he wanted from a police officer reliably accounts for Rowe's conduct up to, and including, the termination decision.

Nor does evidence outside of Starch's conduct afford a basis to infer proscribed hostility. Concern with delay in scheduling a meeting to negotiate a local agreement is duly noted by Complainants. However, the delay reflects to a limited degree technical issues regarding Rowe's spam filter, and to a limited degree difficulty in establishing a new relationship. More to the point, the record affords no basis on which to infer hostility regarding Starch. Rowe did not often respond with dispatch to non-student care issues or to anyone outside of those above him in the chain of command. Whatever is said of this, it affords no reason to believe he was hostile to Burt or the WLEA. There is no persuasive evidence of hostility surrounding Thompson's vest grievance. Rowe was, from Respondent's viewpoint, consistently deliberative and from Complainants' consistently belated. Neither points toward hostility.

UWSP-PS failure to notify Starch of performance issues can be a basis on which to infer hostility, but must be considered with the "circumstances as a whole", DEPARTMENT OF WORKFORCE DEVELOPMENT (UNEMPLOYMENT INSURANCE DIVISION), DEC. NO. 32689-C (WERC, 12/09) AT 5. Like DEC. NO. 32689-C, this record, viewed as a whole, affords no reason to believe Respondent bore proscribed hostility toward Starch's exercise of lawful, concerted activity. Rowe granted Starch considerable latitude to question departmental administration and to respond to those law enforcement/student services issues presented him. The issue of notice regarding performance difficulties is closer than Complainants acknowledge, since an employer can reasonably claim an interest in observing the employee's uninstructed response to job requirements. More significantly here, Starch showed little sensitivity to the instruction provided him. It is evident Rowe did not share Starch's view that Police Officers occupied an elevated stature within UWSP-PS. It is plain that their interaction on the numerous items Starch advocated on this issue strained over time. There is no doubt Starch had ample notice, prior to the August 27 meeting with Taylor, that he was addressing the occupant of the second in command position in UWSP-PS, and that he had no support from Rowe on the position he advocated. Starch's August 27 advocacy shows no sensitivity to the chain of command, and his behavior in arriving at the September 3 staff meeting late; ignoring the clear instruction given at that meeting; and flouting that instruction by leaving the radar unit in the squad is egregious. That a law enforcement officer needs notice on what the chain of command is or what is meant to comply with it is, standing alone, untenable. Starch had ample notice that he was treading on thin ice.

Absence of notice coupled with Respondent's refusal to permit Starch access to a WLEA representative can be viewed as circumstantial evidence of proscribed hostility. The right to representation as a matter of interference is addressed below. For purposes of addressing the retaliation claim, it can be presumed that Starch had the right to a WLEA representative at the October 20, 2009 meeting.

This presumption does not pose any issue regarding Respondent hostility beyond those addressed above. The evidence regarding the meeting affords no basis for an inference that Rowe acted toward Starch based on any reason other than his professed belief that probationary officers lacked that right and that Starch's termination was not disciplinary. That these beliefs have no evident basis does offer reason to infer hostility. Nothing in the meeting will, however, support the inference. Rowe's conduct was restrained and confined to conduct issues with a solid factual basis. Starch's attempt to record the meeting confirmed suspicions Rowe had from his investigation. The lack of credibility Starch showed in testifying at hearing on this point underscores that Rowe's suspicions are more reliably traced to the merits of the issues discussed than to hostility toward protected activity. More to the point, Rowe's behavior at the meeting confirms conduct consistent throughout Starch's tenure. The list of reasons afforded Starch at the end of the meeting was only marginally more detailed than the earlier evaluations. This confirms Rowe's business practices and affords no reason to see the meeting as the culmination of a long-standing effort to make a deliberate act of reprisal appear a good faith evaluation of misconduct. Rather, it confirms that Rowe took a low-key view of departmental administration, even in the face of fundamental employment issues. As with earlier issues, friction generated from the meeting traces reliably to Starch's misconduct, not to proscribed hostility.

The Interference Allegation

The asserted right of representation at the October 20, 2009 meeting raises an interference claim under Sec. 111.84(1)(a), Stats., and traces its roots to the Supreme Court's decision in NLRB v. Weingarten, Inc., 420 US 251, 88 LRRM 2689 (1975).

The parties dispute whether Starch, as a probationary employee, can claim the right; whether the October 20, 2009 meeting was investigatory; and whether the issues should be deferred to arbitration. The parties addressed the deferral issue in a pre-hearing conference, at the onset of the hearing and in their post-hearing arguments. The deferral issue proved complicated because of the parties' factual and the Commission's legal preference for consensual dispute resolution processes, see, for example, STATE OF WISCONSIN (DOC), DEC. NO. 21272-B, STATE OF WISCONSIN (WERC, 9/07); STATE OF WISCONSIN, DEC. NO. 20830-B (WERC, 8/85); and STATE OF WISCONSIN, DEC. NO. 15261, (WERC, 1/78). Preference for consensual dispute resolution is often done through deferring to arbitration prior to hearing on legal issues. The complication posed here reflects that the parties agreed that the deferral issue should not delay hearing on the merits of the retaliation claim, and that the Commission has shown sensitivity to legal issues posed by retaliation claims. The conclusions reached above resolve the retaliation claim, but thus pose again the issue of reconciling the contractual with the legal dispute resolution process.

This reconciliation is addressed by well-established Commission case law, which turns on the application of three elements to determining when to prefer the contractual forum to the statutory:

First, the parties must be willing to arbitrate and renounce technical objections, such as timeliness under the contract and arbitrability, which would prevent a

decision on the merits by the arbitrator. Otherwise, the commission would

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defer only to have the dispute go unresolved. Second, the collective bargaining agreement must clearly address itself to the dispute. The legislative objective to encourage the resolution of disputes through arbitration would not be realized where the parties have not bargained over the matter in dispute. Third, the dispute must not involve important issues of law. An arbitrator's award is final and ordinarily not subject to judicial review on questions of law. DEC. NO. 15261 AT 8.

There is no dispute on the application of the first two elements, leaving the sole issue whether the dispute involves an important issue of law.

The Commission has stated its view of the right of representation thus:

As part of their right to engage in concerted activities for mutual aid and protection, employees have a right to the assistance of a union representative in investigatory interviews, when they have a reasonable belief that the interview may lead to discipline. The right is not self-triggering – it arises upon request. Further, the right may be shaped and qualified by the terms of a collective bargaining agreement. STATE OF WISCONSIN (UWM), DEC. NO. 31527-B (WERC, 2/08) AT 8.

This statement resolves application of the third element in favor of arbitration. There is no dispute that Starch requested, and was denied, WLEA representation. Even if characterizing the interview as disciplinary can pose an issue, the issue is factual more than legal. In any event, whatever legal dimension there is to the right demands interpretation of the contract, since that is where the right is “shaped and qualified”.

At most, the legal issue is whether the labor agreement waives the right as Respondent asserts. That issue, on these facts, should be put first to the arbitration process. It is not an important issue of law, outside of the reconciliation of the roles of the statutory and contractual dispute resolution processes, and that point is resolved as a matter of law in the Commission's deferral standards. Starch's individual interest in retaining his employment is important, but resolution of the retaliation claim addresses that issue as a matter of law. If Respondent's refusal to provide access to a WLEA representative was tainted by proscribed hostility, the assertion that Respondent had no obligation to supply the representative, whether a matter of contract or law, offers no defense. Against this background, the representation claim turns on the degree to which the labor agreement defines the scope of the claim. In sum, there is no important issue of law warranting that the issue be decided prior to arbitration and significant reason to obtain the contractual answer before proceeding to the legal.

The Order entered above dismisses the retaliation claim under Sec. 111.84(1)(c), Stats., with its derivative violation of Sec. 111.84(1)(a), Stats. This leaves only an alleged independent violation of Sec. 111.84(1)(a), Stats., which the Order holds in abeyance, pending

This conclusion puts the litigation in a procedurally awkward position which warrants some comment. An order of dismissal is typically a final order in the appellate sense, which invokes a twenty day appeal period under Sec. 111.07(5), Stats., made applicable by Sec. 111.84(4), Stats. Deferral of a case to arbitration is typically an interim order, which does not necessarily invoke the twenty day appeal period. I have stated the Order as final and served the decision as final, thus posing the twenty day appeal period. In my view, this puts the litigation on the simplest path. The Commission has statutory discretion to review interim orders under Sec. 111.07(6), Stats., and has expansively read that authority, see, FLORENCE COUNTY ET. AL., DECS. NO. 32435-B (WERC, 11/09) and 32435-C (WERC, 1/10). Regarding a final order, the Commission has expressed the view that if any part of an examiner decision is appealed, it has the discretion to review the entire decision, see, for example, GREEN COUNTY, DEC. NO. 26798-B (WERC, 7/92) and CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03). Against this background, the issuance of an Order which is in part interim and in part final unduly complicates the appellate process. Treating the entire Order as final puts the litigation on the simplest path. In my view, this means that if neither party appeals the Order, after twenty days, the Order would become the Commission's, thus leaving the case open only on the interference claim. If further proceedings became necessary, the Commission could either hear the matter directly or delegate it to an examiner.

The Order does not attempt to separate Starch's and the WLEA's interest in the litigation. There is a tension between Starch's rights as an individual and those of the WLEA, depending on the allegation. As noted above, his advocacy on issues governed by the labor agreement reflects lawful, concerted activity which is a protected right of an individual employee. That right under Sec. 111.82, Stats., is not unlimited, and as noted above, his advocacy is not protected to the point it sought accommodations from Rowe on matters irreconcilable to the labor agreement or to Respondent's duty to bargain with WLEA under Secs. 111.84(1)(a) and (d), Stats. The asserted right to representation which the Order holds in abeyance poses analogous tension. Starch did not seek representation through another employee. Against this background, Starch's individual interest in the remaining claims may be limited or academic in nature. However limited the interest may be does not, however, support dismissing him as a named party in interest.

Dated at Madison, Wisconsin, this 14th day of October, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

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