

Report of Independent Counsel to the Marathon County Board Regarding the Conduct of the Marathon County Administrator¹

**von Briesen & Roper, s.c.
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I. Scope of Review & Methodology

On June 3, 2016, the law firm of von Briesen & Roper, s.c. (“von Briesen”), was engaged by the Marathon County Board, through its Executive Committee, as Independent Counsel (“IC”) to conduct an independent and privileged investigation (the “Investigation”) of the conduct of Brad Karger (“BK”), the Marathon County Administrator, related to the Dylan Yang “peace march” on May 31, 2016, in Wausau, Wisconsin, and matters related thereto. The march was organized in response to a March 18, 2016, Marathon County jury verdict that found Dylan Yang (now aged 16) guilty of first-degree reckless homicide when, on February 27, 2015, he stabbed 13-year-old Isaiah Powell in the back with a 14-inch butcher knife.

Over the course of the investigation, the IC conducted interviews of the following officials and employees of Marathon County and the Wausau Police Department:

- Captain Matt Barnes, Wausau Police Department
- Deb Hager, Marathon County Deputy Administrator
- Chief Jeff Hardel, Wausau Police Department
- Ken Heimerman, Marathon County District Attorney
- Kurt Gibbs, Chair of the Marathon County Board
- Brad Karger, Marathon County Administrator
- Shirley Lang, Marathon County Clerk of Courts
- Frank Matel, Marathon County Director of Employee Resources
- Lesli Pluster, Marathon County District Attorney’s Office
- Scott Parks, Marathon County Sheriff
- Theresa Wetzsteon, Marathon County Deputy District Attorney

In addition to various background documents provided by the interviewees, IC was provided with portions of BK’s county email account (emails dating back to March 1, 2016) by Gerald Klein (Director, City-County Information Technology Commission), which contained numerous emails and calendar entries related to BK’s participation in the march (including the events

¹ Independent Counsel previously provided a report to the County Board at its July 19, 2016, meeting detailing the facts and evidence learned through IC’s investigation. This Report is intended to supplement the July 19 report and specifically address legal questions surrounding the discipline imposed upon the Administrator.

leading up to the day of the march and the days following the march) and the reaction of county and local officials to it.

II. Executive Summary

The Dylan Yang trial was conducted from March 14 to March 18, 2016, in the Marathon County Courthouse.² Marathon County Circuit Court Judge LaMont K. Jacobson presided over the trial. BK did not attend the trial but was aware of it because he works in the courthouse building. He noted that Hmong community leaders were going in and out of the trial and actively following the case.

BK heard about a possible Dylan Yang “peace march” as early as April 4, 2016, when Mao Khang (a Hmong community leader in Wausau) sent an email to his county email address to inform him that a march was being organized.³ From that date through May 31, 2016, BK remained in close contact with Mao Khang and other organizers regarding the march. BK was aware of Mao Khang’s early concerns that the “peace” message of the march could be overshadowed by messages of other march attendees (from different cities and states) who were more interested in protesting the local criminal justice system and their belief that there was a racial or ethnic bias in its treatment of Dylan Yang. In particular, Mao Khang expressed concern to BK that outside activists would go “too far” and suggest that the Wausau Police Department and local criminal justice system were racist.

On or around April 16, 2016, BK was asked by Mary Thao (Wausau School Board member-elect at the time) to speak at the march. BK agreed to do so. However, BK recalls telling Ms. Thao that he “needed to be on his own message.” BK informed IC that he intended to speak at the march as a “private citizen” but was cognizant of the fact that people would know and recognize him as a leader of county government. Shortly after agreeing to speak, BK placed “Peace Rally” on his work Outlook calendar for May 31, 2016.

On April 22, 2016, Mao Khang attended a meeting of Marathon County’s Diversity Affairs Commission, on which BK serves as Vice Chair, in order to discuss the march. Following discussion of the proposed march, BK moved that the county support the march, provided that the following were established as the goals of the event:

1. Offer condolences to the families and the community impacted by the tragic death of Isaiah Powell.
2. Support the prevention of future tragedies including anti-bullying, improved racial/ethnic understanding, and harmony.
3. Support of a criminal justice system that provides for justice and fair treatment without regard for race or ethnicity.

² Information regarding the criminal proceedings against Dylan Yang leading up to and including his trial can be found in the appendix and attached exhibits.

³ All of the emails referenced in this memorandum were obtained through BK’s government email address account.

4. Support peace and healing that brings our community closer together as we process a tragedy which on the surface only involves a few young people, but on a deeper level involves the whole community.

The Diversity Affairs Commission voted to support the march under these conditions.

Following this vote, BK helped Mao Khang and other Hmong leaders and activists organize the march. This help included the following: resolving issues related to the march permit with the Mayor's and Clerk's offices; working with the Wausau Police Department to ensure proper police support for the march; arranging for parking for march attendees from out of town; and ensuring attendee access to public restrooms in the area. Mao Khang, in turn, repeatedly thanked BK for his leadership in helping organize the march in various emails to BK's county email address (*e.g.*, "Thanks Brad for being a champion and leader in this kind of cause . . . We need more leaders like you to keep community together."); "We just want[] to take you out to lunch, to thank you for all you have done with in our community, especially pulling the peace march together. . .you [are] such a great leader . . ."). BK indicated that many of his meetings with Mao Khang occurred in his county office; in addition, he made a county conference room available on at least one occasion for a meeting held by march organizers and participants.

By April 28, 2016, BK appears to have been committed to taking a prominent role at the march and being a "keynote" speaker: "Gina [Cornell], May 31 is the day of the Peace Rally at the 400 Block and I expect to be the keynote speaker there." On May 6, 2016, BK indicated that he would not be deterred from speaking at the march, even with the prospect of protest t-shirts and with the prospect of mixed messaging: "I am going to speak at the march whether there are tee shirts or not and whether the tee shirts have Dylan's picture or not. . . . It seems that the Wausau Hmong leaders are uncomfortable with Dylan's picture being on the shirts because they believe it may be interpreted as supporting a young person who committed a terrible crime."

As part of the preparation and logistics meetings leading up to the march, BK met with the parents of Dylan Yang but did not meet with representatives of Isaiah Powell's family. Mao Khang also placed BK in contact with out-of-state march organizer and activist Tou Ger Bennett Xiong, who asserted in an email to Wausau community leaders that, among other things, "Dylan did not receive a fair trial" and that Dylan's rights were "denied . . . by our judicial system." BK, after reading this email, responded to Tou Ger Bennett Xiong as follows: "Tou Ger, this is a very compelling e-mail. Well done. I am looking forward to taking the stage with you. Brad Karger Marathon County Administrator."

On May 16, 2016, Mao Khang emailed BK an "agenda" for the march, which states that the "[f]irst stop will be the Wausau PD, then the Wausau School District office, then the Marathon County Courthouse." BK responded that the agenda "looks good." Prior to the march BK also interacted with the media regarding the march; for instance, he spoke with Wisconsin Public Radio (in an article posted May 23, 2016) in which BK characterized the march as a "protest:" "Protest is part of the American way. And as long as the protest is peaceful, reflects well on our community and reflects well on the Hmong community, I think it will be well received." This statement suggests that there was no consensus among organizers and participants whether the May 31 event was to be characterized as a "march," "protest," "rally," or "demonstration."

On May 25, 2016, Tou Ger Bennett Xiong emailed BK with talking points as to what BK should say at the march; in addition, Tou Ger attached materials that misrepresent certain facts underlying Dylan's case (*e.g.*, referring to the stabbing as taking place in Dylan's "front yard" or in his "own home[]") when the stabbing actually occurred down the street from Dylan's house). BK responds "Thank you for the briefing Tou Ger. I will do my part." The day before the event, BK met with event organizers and viewed many of the protest signs that would be used during the march, something over which he voiced concern with Mao Khang because they were "off message."

On the day of the march (May 31, 2016), BK spoke to hundreds of march attendees at Wausau's 400 Block, dressed in a suit and tie. BK was introduced by Tou Ger Bennett Xiong, in quick succession, as the "County Commission[er]," "County Administrator" and "City of Wausau Administrator." (link to BK's introduction and his speech can be found here: <https://www.youtube.com/watch?v=9USQ5g2WDEs> (starting at 16:23)). BK did not indicate in his remarks he was attending the event as a private citizen. BK's speech contains the following statements, among others: "I've been here in county government for 26 years I've worked with Hmong leaders for 26 years trying to build this into a better community In the Twin Cities there is a lot of diversity. Here in Marathon County there's only two kinds of people. Only two. There's Hmong people and those who wish they were Hmong. I'm in that second category in case you are wondering. . . . When I was fifteen years old I was no different than Dylan Yang, no different. . . . I am Dylan!" BK was flanked by dozens of protest signs while he was speaking on the 400 Block stage, including signs protesting racism and unequal justice.

Based on interviews conducted by the IC, it appears that BK did not fully understand the underlying facts surrounding Dylan Yang's stabbing of Isaiah Powell prior to the march, or the manner in which Dylan Yang had been treated by the local criminal justice system. Nor did BK undertake any sort of investigation to determine the underlying facts. As BK noted in his interview with the IC, he did "not know enough to agree or disagree" with the manner in which Dylan Yang was treated by the local criminal justice system, but he did not have any specific criticisms of any individuals involved in the Dylan Yang case. Soon after he learned about the march, BK did speak briefly with the Marathon County prosecutor who handled the Dylan Yang case, Lesli Pluster, as well as the Marathon Deputy District Attorney, Theresa Wetzsteon. However, these conversations were relatively short and remained general in nature. BK did not inform either Attorney Pluster or Attorney Wetzsteon that he would lead the march, or that there was a recognized possibility that the march could turn into a protest of the local criminal justice system and the work of the Marathon County District Attorney's Office.

BK did not inform march organizers or participants that he was at the march in anything but his official capacity as Marathon County Administrator. BK acknowledged during his interview with the IC that he understood he was invited to speak not as a private citizen but because he was the Marathon County Administrator. BK also acknowledged during his interview that he has repeatedly advised Marathon County department heads that they represent Marathon County "24/7" and that this principle equally applies to him. BK failed to consult or inform any county officials outside his own office about his plans to lead the march.

After his speech, BK led hundreds of marchers (estimates range from 400 to 1,000) to the Wausau Police Department, a school district building and the Marathon County Courthouse.

During the march, as demonstrated by footage of the march, many participants embraced an explicit anti-law-enforcement message and a message that the local criminal justice system was racist. BK did not disavow this messaging, even though he became aware of it while he was leading the march. Many of those interviewed by the IC expressed shock, surprise, disappointment and frustration when they saw or heard BK speak at the 400 Block and saw or heard him leading the march. Those interviewees assumed or believed that that BK was acting in his role as County Administrator rather than as a private citizen throughout the May 31 event because they had no reason to think or believe differently. BK also spoke to the press the day of the march in his apparent capacity as County Administrator, including ABC Newline 9 WAOW-TV: “‘It’s really an opportunity really to discuss justice in our criminal justice system and making sure that everybody gets well represented in that system,’ said Brad Karger, the Marathon County Administrator.”

Soon after he led the marchers back to the 400 Block from the courthouse, BK returned to the courthouse building to attend an executive committee meeting; his participation in the march was not discussed at the meeting. Early the next morning, Marathon County Sheriff Scott Parks sent BK an email questioning BK’s participation in the march:

Brad, As one of the members of your Department Head team, I want to share with you comments overheard or directly received by my staff and me pertaining to your involvement in the organized protest march on May 31. The comments revolved around why you affiliated yourself with a march proclaiming this community as racist. Others referenced your leading the group and the negative chants being directed against the community.

I have no doubt there are racist individuals in and outside of Marathon County. The Yang case is a tragic event involving two underage males who made some extremely poor choices resulting in one male arming himself, leaving a position of safety, attacking another younger child, and stabbing that child to death.

As a citizen, you have the right to peaceful protest. As a community leader, you should be active in building a better society. But I caution you in the same vein that as a leader your demonstrated actions will always speak louder than the words you hope to portray. Yesterday there were many county employees and those outside who questioned why you led this organized effort. The area criminal justice community including my staff were disappointed to see you directly involved with a protest march that proclaimed an anti law enforcement message including nooses hanging from what was described as a Klan cross.

I share this with you because we are judged daily by our actions and the perceptions they cause. I would hope you would provide feedback to me if you heard similar commentary pertaining to an action I was involved with.”

BK responded to Sheriff Parks as follows: “Thank you. I know that the event broke down in its effort to be positive when the march got to the police station and the courthouse. The promise of the organizers was that it would not be anti law enforcement but once the college kids took over they got carried away with the moment.”

Later that same morning (June 1), Wausau Chief of Police Jeff Hardel also sent BK an email that was critical of BK’s actions the day before:

County Administrator, Brad Karger,

I have been asked by numerous people, among them, many of our police officers, whether you support law enforcement and their efforts to protect their community and hold those accountable who have violated someone else’s rights and endangered their community. These sentiments and questions arise from your words and actions during the rally and supporting the purpose and mission of the rally. Wausau Police officials have met with and spoken with the rally organizers numerous times leading up to this event. In fact, after Tou Ger (rally organizer) wrote a letter to the editor which was laden with inaccurate information, we invited Tou and Paula Yang to the PD for a conversation so they were aware of all the specific details of the incident and encouraged them to only propagate facts and not proliferate an agenda that was filled with inaccuracies.

The conversations we had with the rally organizers, along with following this group on social media, the message that is being disseminated by the rally protesters is identified below:

- The community is racist
- The police department is racist
- The District Attorney’s office is racist
- The Judge is racist
- The police should have prevented this incident from happening
- The police did not prevent or stop the bullying that has been given as a justification for the violence
- The police and the community labeled Dylan a gang member
- The school failed to protect these kids

- The system has failed Dylan Yang and has failed to protect kids in general, etc.

Please allow me to put things into a reasonable perspective for I don't understand the allegations that are being levied against our community and the legal system. For the record, Dylan painted himself as a gang member...he bragged about being a gang member, wore his gang colors, drew gang signs, and used his gang affiliation to threaten, bully, intimidate, invite and encourage violence against others. Dylan invited Isaiah Powell and his friends over to his house to fight and then prepared for their arrival by arming himself with a 14" knife (see attached photo). Dylan and his friends were on the porch when Isaiah and his friends arrived, Isaiah did have a BB gun and shot BB's at Dylan's group. Dylan's friend stated he knew it was a BB gun and not a real gun. Dylan and his group left the porch and ran about a half block down the street to confront Isaiah and his friends. Isaiah and one of Dylan's friends engaged in a fight...Dylan had turned around and ran back to his house to retrieve the knife that he had prepared to use. With the knife in hand, Dylan ran back to the fight and stabbed Isaiah in the back twice with such force that the blade went into Isaiah's bone [] inch.

Dylan was represented by an attorney and had his case heard by a jury. The jury found Dylan guilty and he will be sentenced. When you say the legal system failed....what part of the system do you feel failed?

The speech you gave at the rally gave me the impression that the Hmong race is the only race that matters to you, in fact, your words were....."there are two types of people in Marathon County, those that are Hmong and those that wish they were Hmong." Shouldn't we as leaders, encourage citizens to unite as one, as one community, as one family, rather than identifying with a particular race that you feel is more important than others?

If you have an interest in understanding the depth of the Dylan Yang case, we would be happy to sit down with you to discuss this case so you have all the information necessary when supporting various groups or causes. Obviously, you are aware that when you are the face of the rally, leading the protestors to the various stops and leading the protestors in various cheers about our community, Marathon County citizens will assume you feel the same way about our community as the protestors. The visual that our department has of you standing at the front doors of the police department and leading the protestors in cheers that had a message of racial injustice and painted organizations and leaders of our

community as racist is disturbing and an image that kept me awake last night and made a significant impact on our department. I could not be more appalled that the County Administrator is creating division in our community rather than attempting to unite.

I would also look for some clarity with your message to the protesters that when you were young, you were just like Dylan Yang.....in fact, you made the announcement that "I am Dylan Yang." Dylan Yang murdered a 13 year old boy. Drawing attention to this kind of violence and then overlooking the seriousness of this situation is troubling. The rally organizers and protesters claim that Dylan was targeted and arrested because he is Hmong.....that is flat out wrong. The claim that race had anything to do with this community seeking justice is inaccurate. Do you really believe that Dylan was arrested because of his race? I would be happy to discuss this with you if you so desire.

BK responded to Chief Hardel by email the afternoon of June 1. In his response, BK defended his conduct and took the position that "Dylan Yang belongs in the juvenile justice system, which while far from perfect, will treat him like a 16 year old child, a child who made not one but a series of terrible mistakes." However, BK acknowledged that "[i]f I had it to do over again I would have just left the group at the park and went back to work."

Sheriff Parks and Chief Hardel's criticism and concerns regarding BK's conduct is shared by a large number of county officials, employees and department heads with whom IC has spoken. City Alderman Dennis Smith, similarly, has sent BK emails critical of BK's conduct, including the fact BK did not explain whether he was appearing in anything but his official role as County Administrator: "You don't seriously believe that you can separate yourself, when speaking to such a group, from being the county administrator. I did not hear you indicate that you were appearing as a private citizen, and not as a representative for the county, before you began your remarks. There is an old saying that goes, 'you can't unring a bell[.]'"

After the march, BK suggested to the press that he understood his participation in the march as a "community leader" would lead to criticism: "Karger said he hadn't been criticized yet for his stance but, 'I suspect that will be coming. What's the point of being a community leader if you don't use it for something?'" (Wisconsin Public Radio) (<http://www.wpr.org/hmong-march-draws-hundreds-protesters-wausau>). Since the march, it appears BK continues to be in contact with Tou Ger Bennett Xiong through social media, and has commented on a Facebook post in which Tou Ger "applaud[ed]" BK and his "leadership" during the march and in which Tou Ger also asks "[c]an we trust law enforcement and our judicial system in that town?" In his interview with the IC, BK acknowledges that there is "a lot of misinformation out there" regarding Dylan Yang's case. Social media posts continue to express criticism of the local criminal justice system and its treatment of Dylan Yang and Hmong-Americans. These posts routinely cite to footage of the march.

BK has suggested that his actions on May 31, 2016 are protected by the First Amendment because his speech and his actions leading the march were made as "a private citizen" rather than

as the Marathon County Administrator. In support of this position, BK said he placed “PTO” on his Microsoft Outlook calendar⁴ in the time block reserved for the peace march and informed his secretary that he would be attending the march.⁵ However, it does not appear that BK informed anyone that he was speaking and leading the march as a private citizen, rather than as Marathon County Administrator—a position that requires BK to speak publicly on behalf of the county on a regular basis. In addition, BK acknowledged to the IC that any efforts he would have made to distinguish his presence at the march as a “private citizen” rather than as a public official “wouldn’t fly” because everyone would understand he was invited to speak and lead the march as the Marathon County Administrator, not as a private citizen.

III. First-Amendment Analysis of BK’s Actions on May 31, 2016

While other potential legal issues potentially exist, the overriding legal issue before the Board is the status of BK’s speech and actions as constitutionally protected under the First Amendment. Therefore, our analysis focuses on application of the facts IC has learned, as summarized above, to the law surrounding interpretation and application of the First Amendment in matters involving public employees.

The *Connick–Pickering* test, derived from *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), is a two-part test used to determine whether a public employee’s speech is constitutionally protected. See *Phelan v. Cook Cnty.*, 463 F.3d 773, 790–91 (7th Cir. 2006). “First, the speech is protected only if it addressed a matter of public concern.” *Carreon v. Ill. Dep’t of Human Servs.*, 395 F.3d 786, 791 (7th Cir. 2005). “If it did, the court must then apply the *Pickering* balancing test to determine whether ‘the interests of the [plaintiff] as a citizen in commenting upon the matters of public concern’ are outweighed by ‘the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.’” *Coady v. Steil*, 187 F.3d 727, 731 (7th Cir. 1999) (alteration in original) (quoting *Pickering*, 391 U.S. at 568). Stated as such, the test is applied to BK’s conduct as follows.

A. Did BK’s speech and actions at the march on May 31 touch upon matters of public concern?

It appears likely that a court would conclude that at least some of BK’s speech and actions on May 31 touched upon matters of public concern. While BK spent some time on matters that, arguably, are not of public concern (*e.g.*, welcoming march attendees from other cities and states), he self-identified with Hmong-Americans (*e.g.*, “there are only two types of people in Wausau, Hmong and those that want to be Hmong”) and self-identified with Dylan Yang and his actions (*e.g.*, “I am Dylan Yang!”) in a manner that has been perceived as critical of unequal treatment of Hmong-Americans and juveniles within the criminal justice system. In short, BK’s speech addressed one of the marchers’ primary messages: that it is wrong to charge, try and

⁴ Records indicate that BK entered “PTO” on his Microsoft Outlook calendar on May 13, 2016.

⁵ There is significant inconsistency in relation to whether BK actually considered himself “off duty” on May 31, 2016. For example, he attended an executive committee following the march, which is conduct consistent with his job duties. Moreover, as noted above, BK acknowledged that “[i]f I had it to do over again I would have just left the group at the park and went back to work,” in an email exchange. (Emphasis added)

sentence juveniles in adult court, especially when such charging and sentencing may be influenced by the racial or ethnic bias of the criminal justice system.

B. Are the interests of BK as a citizen in commenting upon matters of public concern outweighed by the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees?

It appears unlikely that a court would conclude that BK's private interests in participating in the march outweighed Marathon County's interests in promoting the efficiency of the public services it performs through its employees.

The *Pickering* balancing test contemplates a fact-intensive inquiry into a number of interrelated factors: (1) whether the speech would create problems in maintaining discipline or harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform her responsibilities; (4) the time, place, and manner of the speech; (5) the context within which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decision-making; and (7) whether the speaker should be regarded as a member of the general public. With regard to his conduct in relation to the May 31 march, the majority of factors weigh heavily against BK.⁶

1. Would BK's speech and actions on May 31 create problems in maintaining discipline or harmony among co-workers?

It appears likely that a court would conclude that BK's speech and actions on May 31 would create problems; moreover, a court would likely conclude that BK's speech and actions *have* already created problems (reflected, for example, in the above-referenced email from Sheriff Parks to BK), in maintaining discipline or harmony among co-workers. Marathon County's Sheriff, District Attorney, Clerk of Courts, County Board Chair and Deputy Administrator have all informed the IC that BK's actions on May 31 have created disharmony between the County Administrator's office and other county offices. They have also acknowledged that BK's actions on May 31 have undermined the trust county officers and employees had placed in BK and now worry that his official duties (for example, making budgeting decisions) may be unduly influenced by the negative reaction certain members of county government had to his conduct on May 31. This unfortunate climate of disharmony and distrust will likely remain through Dylan Yang's sentencing on September 6, 2016, and beyond. For instance, if there is a notable law-enforcement incident in Wausau involving a Hmong-American, certain interviewees are unsure whether BK will still support county and local law enforcement or, again, take actions that appear critical of county and local law enforcement. The fact that BK chose not to inform anyone outside of his office of his participation in the march has also undermined discipline and harmony within the county government workplace; for instance, many county employees openly wonder how they would have been treated (*i.e.*, negatively) if they did the same thing BK did.

Furthermore, many county employees and officials were concerned for their personal safety the day of the march and, in some cases, made preparations to ensure their safety was maintained;

⁶ This is not a purely arithmetical analysis; the factors are viewed in the totality of the circumstances.

Attorney Pluster, for instance, had an investigator assigned to protect her during the march. One departmental head bought lunch for her nervous staff so they would not have to cross the march route or the marchers. Although BK helped arrange for police support at the march itself, he did not discuss or arrange for security for his co-workers, even when he knew that the protestors were becoming more aggressive on the way to the county courthouse from the Wausau Police Department. There is now a belief among some county employees and officials that BK valued the safety of the protestors over the safety of his own co-workers. It is also clear that the march disrupted many activities within the county courthouse building and that BK was aware such disruption would likely occur.

Moreover, a showing of actual disruptiveness is not required; “a government employer is allowed to consider ‘the potential disruptiveness’ of the employee’s speech.” *Kokkinis v. Ivkovich*, 185 F.3d 840, 846 (7th Cir. 1999) (quoting *Caruso v. De Luca*, 81 F.3d 666, 670–71 (7th Cir. 1996)). The employer “is not required to wait until those working relationships actually disintegrate if immediate action might prevent such disintegration.” *Breuer v. Hart*, 909 F.2d 1035, 1040 (7th Cir. 1990). Here, with the likelihood of further marches and rallies leading up to Dylan Yang’s sentencing and beyond, the potential of even more disruption caused by BK’s speech and actions is readily apparent. Simply declining to participate in further marches and rallies will not resolve the issue; as Alderman Smith wrote in his email to BK after the march, BK cannot simply “unring the bell.” As a final matter, there is a concern that BK does not think the rules of conduct for county employees to always act in the best interests of the county apply to him.

2. Is BK’s employment relationship one in which personal loyalty and confidence are necessary?

It appears likely that a court would conclude BK’s employment relationship is one in which personal loyalty and confidence are necessary. Pursuant to Wisconsin law, the County Administrator, is appointed by the majority vote of the county board to be “the chief administrative officer of the county” who, among other duties, shall “[c]oordinate and direct all administrative and management functions of the county government not otherwise vested by law in boards or commissions, or in other elected officials” and shall “communicate to the board the condition of the county.” Wis. Stat. § 59.18. Without personal loyalty and confidence in the County Administrator employment relationship, it is highly unlikely that Marathon County government will be able to function as smoothly or efficiently as it otherwise could. The need for personal loyal and confidence is further reflected in the following: Section 1.11 (“County Administrator”) of the Marathon County Code of Ordinances (*e.g.*, “[d]evelop and maintain close working relationships with elected department heads and department heads supervised by independent boards/commissions”); Rule 21 of the General Code of Ordinances (“As the County Board’s only employee, the relationship between the County Administrator and the County Board is extremely important to the success of County government. The County Board is charged with providing direction, counsel, supervision, and support to, and conducting performance appraisals with, the County Administrator.”); Marathon County’s “Class Specification Title: County Administrator” (*e.g.*, “works with department heads to implement Board policies and directives,” “[r]epresents the County to the governor’s office, State Legislature, Congress and other organizations”); and the Marathon County position description

for County Administrator (e.g., “Serves as public representative of Marathon County government; acts as spokesperson on many issues with the news media, represents Marathon County at various legislative meetings and hearings; acts as liaison, including public speaking, to various groups, service clubs, other jurisdictions, and state and federal government.”).

Furthermore, courts recognize that “there is a particularly urgent need for close teamwork among those involved in the ‘high stakes’ field of law enforcement.” *Breuer*, 909 F.2d at 1041. “Speech that might not interfere with work in an environment less dependent on order, discipline, and esprit de corps could be debilitating to a police force.” *Id.* Thus, “[d]eference to the employer’s judgment regarding the disruptive nature of an employee’s speech is especially important in the context of law enforcement.” *Kokkinis*, 185 F.3d at 846. Here, the disruptive nature of BK’s actions on the Marathon County Sheriff’s Department and the Wausau Police Department are readily apparent with regard to the ethnic and minority communities they serve. The failure of the County Administrator to even alert the Sheriff’s department or any other county department of his participation in the march—thereby depriving others of even preparing for negative repercussions caused by such participation—does not suggest a well-working, transparent relationship between him and other members of county government.

3. Did BK’s speech and actions on May 31 impede the employee’s ability to perform her responsibilities?

It appears likely that a court would conclude BK’s speech and actions on May 31 impeded BK’s ability to perform his responsibilities, if not directly conflict with those responsibilities. As referenced above, rather than “[d]evelop and maintain close working relationships with elected department heads” (Section 1.11, Code of Ordinances), BK’s speech and actions on May 31 had the opposite effect on several elected department heads. There is now mistrust and suspicion between department heads and the County Administrator that would not otherwise be there but for BK’s actions. The County Administrator is to foster a relationship of trust and respect between the community and law enforcement; however, his actions on May 31 eroded that relationship of trust and respect. As the Seventh Circuit has also recognized, “[t]he effectiveness of a city’s police department depends importantly on the respect and trust of the community and on the perception in the community that it enforces the law fairly, even-handedly, and without bias.” *Lalowski v. City of Des Plaines*, 789 F.3d 784 (7th Cir. 2015) (omitting citations). The appearance of the County Administrator joining forces with more extreme elements of the march attendees is believed to have compromised the community’s trust in county and city law enforcement. BK had numerous opportunities to separate himself from the messages of the more militant activists, and had the option of simply leaving the march when the messaging was in conflict with those supporting law enforcement, but he chose not to do so. In addition, his actions are perceived to be critical of the jury verdict itself, which cannot serve the county well in securing the services of jurors in the future. In short, BK has failed in one of his most important duties.

4. The time, place, and manner of BK’s speech.

A court would likely conclude the time and place of BK’s speech and actions were reasonable. Although May 31 was a work day, it is apparently BK’s prerogative to leave the office and attend public events without authorization or consent from the county board. The march was

held pursuant to permit and was coordinated with necessary city and county officials. In light of this, a court would likely find the time and place of BK's actions reasonable.

However, it is likely the court would find the manner of his speech unreasonable as an official who believes he represents Marathon County "24/7" and who, by virtue of his position, "acts as [its] spokesperson on many issues with the news media . . . acts as liaison, including public speaking, to various groups, service clubs, other jurisdictions, and state and federal government." (Marathon County's "Class Specification Title: County Administrator.") BK made a special effort to rally activists from inside and outside the Wausau community and, by doing so, showed partisanship for one ethnic/minority community (Hmong-American) over other ethnic/minority communities in Wausau. He failed to consider the effect his actions would have on other ethnic or minority communities in Wausau, including those of which Isaiah Powell and his family are part. For instance, on June 10, a march for Isaiah Powell was held in response to the Dylan Yang march, at which signs questioned whether Isaiah Powell would now receive the justice he deserves (for example, "If Dylan's Life Matters, Why Doesn't Isaiah's?"; "Where is Isaiah's Justice"; "Since When is Murder Justifiable!"). BK did not attend this march. BK's words and deeds fall well below the standard of conduct the county board should expect from its chief administrative officer, who is to be, in all respects, neutral when approaching his responsibilities and his service to county residents.

5. The context within which the underlying dispute arose.

BK's actions occurred against the backdrop of his performance history which, reportedly, has been positive over the years.⁷ Many departmental heads have mentioned that they believed their working relationships with BK had been good until he participated in the march. For this reason, and based on the limited information the IC has received regarding BK's long-term performance history, this factor would likely fall in favor of BK.

6. Was the matter one on which debate was vital to informed decision-making?

The sixth factor—whether the matter was one on which debate was vital to informed decision-making—is another factor a court would likely weigh in favor of BK's speech interests. A court would not doubt that any organized protest could benefit from debate. However, BK did not expend any significant effort educating himself about the underlying facts of the Dylan Yang case, something that could give a court concern in light of BK's own knowledge that there was "a lot of misinformation out there" about the Dylan Yang case.

7. Should BK be regarded as a member of the general public with regard to his speech and actions on May 31?

It appears unlikely that a court would conclude that BK should be regarded as a member of the general public with regard to his speech and actions on May 31. Although, BK purports to have taken "P.T.O." during the march (as reflected in his Microsoft Outlook calendar, although he did not inform anyone outside of his office of this) and now asserts he spoke as a private citizen on

⁷ The scope of the IC's investigation did not extend to BK's performance history leading up to the march.

May 31, his actions appear to be a mere continuation of his work with the Hmong community as County Administrator and his involvement with organizing the march as County Administrator or the Vice Chair of the Diversity Affairs Commission. As the relevant documents demonstrate, BK communicated and worked closely with march organizers and activists leading up to the march in his apparent capacity as Marathon County Administrator; in addition, he used his county email address to communicate with march organizers and sometimes signed them “Brad Karger, Marathon County Administrator.”

Furthermore, when BK was introduced by march organizer Tou Ger Bennett Xiong as the “County Commission[er],” “County Administrator” and “City of Wausau Administrator,” BK apparently made no effort to inform the march attendees that he was there in any other capacity as a county official. BK was well aware that, during his speech and during the march, he was perceived not as a private citizen but as the Marathon County Administrator. Consequently, BK’s speech interests were diminished by the capacity in which he spoke.

i. *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006)

In 2006, the U.S. Supreme Court “reject[ed] . . . the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties.” *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006). This is because “restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe on any liberties the employee might have enjoyed as a private citizen.” *Id.* Therefore, to the extent that BK argues (in the alternative to his argument that he spoke and acted as a “private citizen”) that his speech and actions on May 31 were protected because they were made pursuant to his professional duties (for example, as a continuation of his role as Vice Chair of the Diversity Affairs Commission), such an argument would fail.

ii. *Petitioning to Repeal the Suspension*

To the extent that BK argues that he cannot be disciplined for actively supporting a petition to overturn his suspension, such an argument will likely fail because a court would not consider his support of such a petition a “matter of public concern,” which is a necessary element to prevail on a First Amendment retaliation claim. *Pickering*, 391 U.S. at 568. Whether a statement is a matter of public concern is a question of law for the court, and the court must answer this question by examining the “content, form, and context” of the statement. *Connick*, 461 U.S. at 147–48 & n. 10. Here, a petition seeking to overturn BK’s suspension is potentially of interest to the public, but this does not end the inquiry. While the content of the speech is the most important factor, *Gustafson v. Jones*, 290 F.3d 895, 907 (7th Cir. 2002), “the fact that an employee speaks up on a topic that may be deemed one of public import does not automatically render [his] remarks on that subject protected.” *Cliff v. Bd. of Sch. Comm’rs of City of Indianapolis*, 42 F.3d 403, 410 (7th Cir. 1994). Rather, the motive of the speaker is a relevant, though not dispositive, factor because speech will not be protected if the only point of the speech was “to further some purely private interest.” *Kokkinis v. Ivkovich*, 185 F.3d 840, 844 (7th Cir. 1999). Thus, “if the speech concerns a subject of public interest, but the expression addresses only the personal effect upon the employee, then as a matter of law the speech is not of public concern.” *Marshall v. Porter County Plan Comm’n*, 32 F.3d 1215, 1219 (7th Cir. 1994) (citing *Smith v. Fruin*, 28 F.3d 646 (7th Cir. 1994)).

The question, then, is whether the context, form, and particular content of the speech indicate that BK solicited support for the petition for the purely private purpose of resolving a workplace issue. The context and the form of BK's actions in this regard are consistent with the vindication of a personal interest, rather than a public concern, and the content of the grievance—while touching a subject of potential interest to the public—will likely not convince a court that his purpose was anything other than personal.

* * *

In sum, Marathon County's interests in running an efficient and effective county government should likely outweigh BK's speech interests, even in relation to his statements that directly addressed matters of public concern. The majority of factors that are relevant to the *Pickering* balancing test favor the county's interests over BK's. Consequently, it is likely a court would hold that none of BK's statements or actions on May 31 were constitutionally protected.

IV. Conclusion

BK's speech and actions on May 31, 2016, arguably conflicted with the unique responsibilities entrusted to the Marathon County Administrator to foster strong relationships within county government. BK's actions amplified messaging that local law enforcement and the criminal justice system treat Hmong-Americans differently, and implied that the local criminal justice system is corrupted by racial bias. Moreover, BK's speech and actions appeared to promote one ethnic or minority group over another, which in itself may undermine the belief of other ethnic or minority groups that their county government is representing them fairly and equally. BK's actions may likely reverberate negatively within the offices of county government for a long time and, at minimum, through September 6, 2016, when Dylan Yang could be sentenced to sixty years in prison. Social media posts from residents inside and outside the Wausau community continue to be critical of the local criminal justice system—if not Wausau and Marathon County as a whole—and its treatment of Dylan Yang and Hmong Americans. Not only has BK's conduct helped create a climate that casts such criticism on county government, there is also now a perception that BK does not believe that his familiar dictate that county officials represent the county "24/7" applies to him.

APPENDIX

TIMELINE: FEBRUARY 27, 2015 – MARCH 18, 2016

- February 27, 2016
 - At approximately 3:43 PM, via Facebook Messenger, Dylan Yang (Facebook handle “Lil-g Yang”) initiates a text conversation with another boy (Facebook handle “Cj Isastoner”) regarding an anticipated fight between Dylan’s teenage nephew and Cj Isastoner and/or one of Cj Isastoner’s friends. Belligerent texts are exchanged over the next two hours, including the following text from Dylan: “Den wassup den nigga, you gone fuck wif my nephew...??? Just wait till I show up and Imma show you wassup nigga. Fuck yur clique nigga, OTB Gang bitch wassup Bitch.” Ex. A at 2. CJ Isastoner responds, in part, as follows: “YRS to the grave nigga shut up now.” *Id.* “OTB” refers to Oriental True Bloods, a group of friends of which Dylan is a member. “YRS” refers to the Young Ruthless or Reckless Squad, a group of friends of which Cj Isastoner and Isaiah Powell are members.
 - At approximately 4:11 PM, Isaiah (Facebook handle “Fready Yrs Zamora”) initiates a text conversation with Dylan about scheduling a fight between their respective “gang[s]”: “OTBK nigga oml you a bitch ass nigga!! if really bout that bring you gang and imam bring mine and we finna duke it out don’t matter if a nigga 21 or not I got niggas after you already!!” Ex. Ex. B at 1. Dylan and Isaiah exchange threatening texts to each other until approximately 4:35 PM, including one in which Dylan refers to fighting with weapons and knives: “Hahahaha Yall fight wif no weapons and no knives. Yall some fake ass niggaz. Yall talk big behind a screen but you can’t say it to my face bitch. I’m a marked hoe..?? Nun of Yall niggaz ain’t got shit on me fuck boy. I’ve been a marked nigga by U guys. Yall haven’t done shit to me FYM..!!” Ex. B at 3.
 - Dylan obtains a 14-inch butcher knife (Ex. C) from the kitchen of his home and waits on the porch, with two friends, for Isaiah and his friends to arrive. At approximately 7:34 PM, Isaiah and his friends arrive in a car driven by 19-year-old Nia Phillips. The two groups of boys began yelling at each other. Isaiah then begins shooting a CO2 pistol (a “BB gun”) at the boys on the porch. In response, Dylan’s teenage nephew runs down the street to accost Isaiah. Dylan followed his nephew but turns around to retrieve the knife. With the knife in hand, Dylan approaches Isaiah from behind, while Isaiah is punching Dylan’s nephew on the ground. Dylan stabs Isaiah twice in the back, cutting his lung, liver and inferior vena cava. Isaiah dies later in the evening from the stabbing.

- Dylan is arrested and is taken to the Wausau police department to be interviewed. After waiving his Miranda rights,⁸ Dylan confesses the following to Lieutenant Baeten:
 - “. . . my friend went over there and tackled [Isaiah] already and then he was beatin’ like on him. So – and he was like – I don’t know what he did with the gun, but I was like really ticked off ‘cause I didn’t want my nephew to be shot at . . . So I didn’t think and I just went over there and stabbed him in the back twice. And then after that I ran back inside and then just put it away.” Ex. D at 8.
 - “So I was like, no I’m not gonna let my nephew get – get shot so I ran inside and I grabbed a knife and then I came outside. I chased after him. . . and then that’s when I stabbed him in the back twice.” *Id.* at 11.
 - “And then I guess they were taggin’ each other and then like they ended up over here. And that’s when I came in – oh probably I came in through the back right here . . . In there so I stabbed him. . . . [my nephew] was like on the bottom and then (Isaiah) was on top punching him. . . . And then I thought he was gonna shoot him from right there too so I was, like, just grabbed a knife and so boom – boom and I pulled it out and I just ran.” *Id.* at 16-17.
- March 2, 2016
 - A criminal complaint is filed in Marathon County Circuit Court by the Assistant District Attorney of Marathon County. Ex. E. The complaint consists of a single count (First Degree Reckless Homicide) supported, in part, by the following statement: “Lieutenant Todd Baeten spoke with Dylan Yang. Yang stated that he and T.W. were sitting on the porch of his house when I.M.Z.P. arrived, exited a vehicle, and began shooting a gun at them. Yang did not know if it was a real gun or not. Yang stated T.W. ran towards I.M.Z.P. Yang ran into his house and grabbed a large knife. When he came outside, I.M.Z.P. was on top of T.W., punching him. Yang did not know what I.M.Z.P. did with the gun. Yang took the knife and stabbed I.M.Z.P. in the back.”
 - The court set cash bond at \$1,000,000. Ex. F at 30. For reference, past Wausau homicide suspects and bond amounts are as follows:
 - 2012 Zachary J. Froehlich 1st Degree Reckless Homicide (\$250,000)
 - 2012 Warren Krohn 1st Degree Reckless Homicide (\$250,000)
 - 2013 Kou Thao 2nd Degree Intentional Homicide (\$1,000,000)
 - 2014 Kristopher Torgerson 1st Degree Intentional Homicide (\$2,000,000)

⁸ The validity of Dylan’s waiver of rights was not addressed at his trial by Dylan’s attorney.

- John Lewis 1st Degree Intentional Homicide (\$1,000,000)
- Jerry A. Schnabl 2nd Degree Reckless Homicide (\$250,000)
- March 9, 2015
 - Private attorney Jay Kronenwetter makes his appearance on behalf of Dylan in Marathon County Circuit Court. Ex. F.
- March 12, 2015
 - The Court holds a preliminary hearing, attended by Dylan and his attorney. Lieutenant Baeten, among others, testifies. Arguments are heard. DK is bound over for arraignment and trial. Ex. F.
- March 20, 2015
 - “School, Police, Community Discuss Keeping Youth Safe” (WSAU) (<http://wsau.com/news/articles/2015/mar/20/school-police-community-discuss-keeping-youth-safe/>): “School officials, police, and members of the Wausau community discussed how to keep kids safer, and avoid tragedies like the February 27th stabbing of a 13-year-old student. About 70 people attended the session at Wausau East High School called, ‘Safety and Your Role in our Schools.’ Much of the discussion centered on parents staying involved in their children’s lives, and the dangers kids can get into online with social media. It was also suggested that police and school officials do more outreach efforts to get this message to more parents in and out of the Hmong community. Lieutenant Todd Baeten says the vast majority of young people have their own computer or have access to a computer. ‘Twenty-three percent have a tablet computer. If you’re like me, you’ve probably got a couple in the house for the children. Seventy-eight percent have a cellphone, and forty-seven percent of those, so about half, are smartphones, so they’re going to have access to Internet. You’re going to be able to get online and do those types of things.’ When asked how many people had kids with cell phones and computers, most everyone raised their hands. When asked how many people knew the usernames and passwords of their kid’s emails and social media accounts, very few did. Police Chief Jeff Hardel says the police have taught good decision making through the D.A.R.E. program for twenty-seven years, and this year started a new curriculum, but understands there is more work to do to reach kids and families. ‘We still now have a curriculum that we teach, and we still have that same exposure, but apparently, you know, we got some feedback we still need to do some more, so I think we’re going to meet with Peter Yang to see what else we can do.’ Peter Yang is the Executive Director of the Wausau Area Hmong Mutual Assistance Association attended, and is receptive to additional outreach efforts to improve safety. Hardel says parents need to know everything they can about their children’s lives. He says it’s not denying privacy or showing a lack of trust, it’s a matter of keeping kids safe. ‘They need to be involved at a very high level in their children’s lives. They need

to know who their children's friends are, where their children are, they need to know what they're saying on Facebook, what websites they're going to, and I'm not saying daily, but if there's something that is amiss or if they see something that maybe doesn't look right, then they need to start looking into it a little bit further and then monitoring it.' When kids do get into trouble, there are laws and school policies that determine how situations are handled. Hardel says the bottom line is holding people accountable. 'We hold kids accountable if there's bullying, if there's threats, if there's, you know, fights, whatever the behavior is, we hold those kids accountable and the behavior has to be modified.' Superintendent Dr. Kathleen Williams was pleased with the discussion, and believes there will be additional follow up based on what she heard. 'We'll get together again, the Wausau School District and the police department, to say OK, here was this first effort to address a very tragic occurrence in our community. What did we learn? Where might we go next?'"

- April 21, 2015
 - "Hmong Teen Charged as Adult in Wausau (The Hmong Times) (<http://www.hmongtimes.com/main.asp?SectionID=31&SubSectionID=190&ArticleID=5473&TM=62777>): "The recent tragic death of a 13-year-old boy has generated much discussion around the topics of safety, friends, social media, gangs and parenting,' Wausau Police Chief Jeff Hardel said. 'The (school district and police) will have a panel of professionals available to provide information on these topics and answer questions from parents and community members. The goal of our organizations is to strengthen our collaboration with parents and community members to prevent similar situations from occurring in the future.' . . . The incident has been difficult for police and county administrators as well. '(We) decided by statute we had no choice but to house him in the adult facility,' said Marathon County Jail Administrator Sandra La Du-Ives. This means that Yang will be housed in jail versus a juvenile detention facility where he was originally held. But according to the Wausau Herald, 'La Du-Ives still believes the juvenile detention center would be a better place for Yang to continue his education and interact with people his age. He is considered low risk to re-offend while incarcerated, based on the jail's assessment,' she said. He is not housed with adults while in jail however. 'Juveniles and adults are separated so children are not victimized in a facility,' she said. The Herald described Yang's housing, 'Yang currently is in a two-person cell with a 17-year-old inmate, which meets legal standards. The cell block includes two rooms, each with one bed, and a common area with a picnic table, television and the ability to communicate with staff.'"
- April 29, 2015
 - The court orders a competency evaluation of Dylan. Ex. F.
- May 14, 2015

- Competency evaluation filed by Dr. Galli (DHS). *Id.*
- June 3, 2015
 - Competency hearing conducted. Dylan is found competent per Dr. Galli. Dylan testifies that he is competent. The court finds Dylan competent to proceed. *Id.*
- July 2, 2015
 - Reverse Waiver Hearing conducted. Dylan’s counsel waives right to Reverse Waiver Hearing. Court questions Dylan and counsel regarding understanding of Reverse Waiver. Court finds that Dylan has freely, voluntarily and intelligently waived the right to a Reverse Waiver Hearing. Ex. F at 25. As a result, Dylan’s case remains in adult court rather than being transferred to juvenile court.
- March 14, 2016
 - Jury trial commences. After questioning by the court and counsel, eleven jurors are stricken. *Id.*
- March 15, 2016
 - Jury trial continues. *Id.*
- March 16, 2016
 - Jury trial continues. Dylan’s confession to Lieutenant Baeten is played for jury. *Id.*
- March 17, 2016
 - Jury trial continues. Dylan chooses to testify after being advised of his rights by the court. The court finds Dylan has freely, voluntarily, and intelligently made his decision to testify. *Id.* No transcript of Dylan’s trial testimony is currently available, but his testimony is widely reported:
 - “Dylan Yang to jury: ‘I was scared and angry’” (Wausau Daily Herald) (<http://www.wausaudailyherald.com/story/news/crime/2016/03/17/dylan-yang-jury-scared-and-angry/81933890/>) “Yang admitted he stabbed Powell during his testimony, but claimed he thought Powell had a real gun — not a BB gun. ‘I was scared and angry,’ he said. ‘There were a million thoughts going through my mind when he was shooting at us.’”
 - “Dylan Yang testifies in his own defense” (WSAW-TV) (<http://www.wsaw.com/content/news/RIGHT-NOW-Dylan-Yang-testifies-in-his-own-defense-372453622.html>): “During cross examination while Yang was on the stand, Marathon County Assistant District Attorney Lesli Pluster questioned Yang about some of the statement he

made during that interview with police and during his testimony Thursday. 'You were the one that actually involved yourself in what was going on that day,' said Pluster while Yang was on the stand. 'You texted CJ first.' 'You told Baeten real g's use guns and knives.' 'You could have just ignored CJ. There was no reason you had to text him that day,' said Pluster.' 'Well yes, but I was upset,' Yang explained."

- March 18, 2016
 - After deliberating for approximately three hours, the jury finds Dylan guilty of first-degree reckless homicide. Ex. F.
- March 22, 2016
 - The court begins receiving letters from Dylan supporters requesting, among other things, leniency in Dylan's sentencing. Ex. F.