STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LA CROSSE NON-SUPERVISORY POLICEMAN'S ASSOCIATION and OFFICER THOMAS PRETASKY, Complainants, vs. CITY OF LA CROSSE, a municipal corporation and RAY G. LICHTIE, Chief of Police of the City of La Crosse, and LA CROSSE POLICE AND FIRE COMMISSION, La Crosse, Wisconsin, Respondents.	Case XL No. 24690 MP-990 Decision No. 17084-D

ORDER MODIFYING IN PART EXAMINER'S FINDINGS OF FACT, MODIFYING IN PART AND REVERSING IN PART EXAMINER'S CONCLUSIONS OF LAW AND REVERSING EXAMINER'S ORDER

Examiner Dennis P. McGilligan, having on July 9, 1981, issued Findings of Fact, Conclusions of Law and Order, together with a Memorandum Accompanying same in the above-entitled matter; and the Wisconsin Employment Relations Commission, hereinafter referred to as the Commission, having on April 2, 1982, issued an Order Affirming Examiner's Findings of Fact, Modifying in Part and Reversing in Part Examiner's Conclusions of Law and Reversing Examiner's Order, together with a Memorandum Accompanying same in the above-entitled matter; and La Crosse Non-supervisory Policeman's Association and Officer Thomas Pretasky, having on May 3, 1982, timely filed a petition for review of the Commission's decision in the matter entitled Case XL, No. 24690, MP-990, Decision No. 17084-C, with the Circuit Court for La Crosse County; and said Court having, on October 14, 1982, issued a decision in said matter in which the Court remanded said matter to the Commission "for further proceedings in accordance with this decision;" and the Commission having reviewed the Court's decision, as well as the entire record in this matter, and being fully advised in the premises, and being satisfied that the Examiner's Findings of Fact should be modified in part, that the Examiner's Conclusions of Law should be modified in part and reversed in part, and that the Examiner's Order should be reversed;

NOW, THEREFORE, it is

ORDERED

A. That paragraph 11, of the Examiner's Findings of Fact be modified in part to read as follows:

> 11. That on May 18, 1979, a conversation took place between Officer Pretasky and Officer Sutton; that the conversation occurred by accident resulting from a chance meeting of Officer Pretasky who was in the Police Department locker room to use the restroom and Officer Sutton who was putting his uniform on for airport duty at the La Crosse airport; that Officer Pretasky asked Officer Sutton what shift he and Officer Brohmer were working on; that Officer Sutton stated that he was working a special assignment and he could not talk about it; that Officer Pretasky then told Officer Sutton that he was working in violation of the contract and that a lot of guys were "irate" with him because they felt he was pulling rank on them by working daytime hours; that Officer Pretasky indicated to Officer Sutton that if he and Officer Brohmer continued to work in violation of the contract they might not be accepted into the Association; that Officer Pretasky added "If you do not get nominated into the

Association and you ever have any problems where you need financial backing or legal help, some of the guys . . . might hold this against you and not vote to pay your bills or to back you in any way"; that Officer Pretasky concluded his statement by indicating to Officer Sutton that it was not a personal bitch but he just wanted "to inform you what's going on and how some of the guys in the Association feel about this"; that although Officer Pretasky stated he was not voicing a personal bitch, he could not identify any individual Officer who had stated such concerns; that no one asked Officer Pretasky to voice his concerns to Officer Sutton; that Officer Pretasky believed, at the time of the May 18, 1979, conversation with Officer Sutton, that there was a possibility that Officer Sutton was working in violation of the collective bargaining agreement; that as of May 18, 1979, Officer Pretasky had not taken any action to file a grievance regarding Officer Sutton's shift assignment, and had not at anytime near May 18, 1979, read or reviewed the collective bargaining agreement; that the May 18, 1979, conversation between Officers Pretasky and Sutton centered on Officer Pretasky's personal concerns; that said concerns were not raised by Officer Pretasky on behalf of others, to the benefit of others, in support of others, or in preparation or encouragement of future collective action; and that the May 18, 1979 conversation between Officers Pretasky and Sutton does not constitute a concerted activity.

B. That the Conclusions of Law made and issued by the Examiner in the above-entitled matters be modified in part to read as follows:

CONCLUSIONS OF LAW

1. That the Police and Fire Commission of the City of La Crosse is a "person" within the meaning of Sec. 111.70(1)(k) of the Municipal Employment Relations Act, hereinafter referred to as MERA, acting on behalf of the City of La Crosse, within the scope of the authority granted to it by Sec. 62.13, Wis. Stats., and that, therefore said Police and Fire Commission is a "municipal employer" within the meaning of Sec. 111.70(1)(a) of MERA.

2. That the City of La Crosse is a "party in interest" within the meaning of Sec. 111.07(2)(a), Wis. Stats., and therefore has standing to file a complaint alleging that La Crosse Non-supervisory Police Association and Police Officer Thomas Pretasky, an employe of the City of La Crosse, and a member of said Association, committed certain prohibited practices within the meaning of MERA.

3. That Police Officer Thomas Pretasky, at no time material herein, was authorized to speak for, or otherwise represent the La Crosse Non-supervisory Police Association, with respect to Pretasky's statements to Police Officer Donald Sutton on May 18, 1979, and that, therefore, said Association can in no way be found to have committed any prohibited practice within the meaning of any provision of MERA, with respect to said conversation.

4. That the statements made by Police Officer Thomas Pretasky to Police Officer Donald Sutton, on May 18, 1979, did not coerce or intimidate Police Officer Sutton in the enjoyment of the latter's legal rights, including those guaranteed in Sec. 111.70(2) of MERA, and, that therefore Police Officer Thomas Pretasky did not thereby commit any prohibited practice within the meaning of Sec. 111.70(3)(b)1, or any other provision of MERA.

5. That the May 18, 1979, conversation between Police Officers Pretasky and Sutton does not constitute a concerted activity within the meaning of Sec. 111.70(2) of MERA, that said conversation thus does not constitute an activity protected from municipal employer conduct by the provisions of Sec. 111.70(3)(a) of MERA, and that, therefore, neither the City of La Crosse, nor Chief of Police Ray G. Lichte, nor the La Crosse Police and Fire Commission, either singularly or jointly, committed any prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2 or 3 of MERA with respect to Chief Lichte's interrogation and suspension of Police Officer Pretasky for said Officer's May 18, 1979, conversation with Officer Sutton.

C. That the Order made and issued by the Examiner in the above-entitled matters be, and the same hereby is reversed to read as follows:

ORDER 1/

That all complaints filed in the instant proceedings be, and the same hereby are, dismissed in their entirety.

Given under our hands and seal at the City of Madison, Wisconsin this 12th day of October, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are

(Continued on page four)

MEMORANDUM ACCOMPANYING ORDER MODIFYING IN PART EXAMINER'S FINDINGS OF FACT, MODIFYING IN PART AND REVERSING IN PART EXAMINER'S CONCLUSIONS OF LAW AND REVERSING EXAMINER'S ORDER

THE COURT'S DECISION:

The Court remanded this matter for "further proceedings in accordance with this decision." The issue which prompted the Court's remand was "whether the conversation (presumably the May 18, 1979, conversation between Officers Pretasky and Sutton) was a protected activity." In the Court's view, "(t)he examiner and the ... Commission have both failed to make a finding in this regard." In the Court's estimation, the significance of the issue on remand is that: "If the conversation was protected, then the City and its co-respondents have committed a Sec. 111.70(3) violation. If the conversation is not protected, then there is no violation."

THE PRIOR DECISIONS OF THE EXAMINER AND THE COMMISSION:

The Examiner concluded that Officer Pretasky's statements to Officer Sutton on May 18, 1979, had interfered with Officer Sutton's exercise of rights guaranteed by Sec. 111.70(2) of MERA. 2/ The Examiner addressed this conclusion in his Memorandum thus: "... Officer Pretasky was not engaged in protected activity within the meaning of Sec. 111.70(2) of MERA when he threatened Officer Sutton with a lack of union representation if he (Sutton) continued working the special assignment." 3/ Thus, the Examiner determined that Officer Pretasky had violated Sec. 111.70(3)(b)1. of MERA.

The Commission disagreed with this determination, and concluded that the conversation could not be considered violative of Sec. 111.70(3)(b)1. of MERA. The Commission addressed this conclusion in its Memorandum thus: "Under the circumstances we conclude that Pretasky's remarks, reasonably interpreted, were not likely to coerce or intimidate Officer Sutton in the exercise of his statutory rights." 4/ In reaching this conclusion the Commission stated: "We cannot accept the Association's contention that the conversation involved protected activity since it related to internal 'union' affairs." 5/

DISCUSSION:

The MERA does not refer to "protected" activities. Sec. 111.70(2) of the MERA identifies certain rights of municipal employes which, broadly stated, are "to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection ..." The rights thus identified are enforced by Secs. 111.70(3) and 111.70(4) of MERA. Protected activity is, then, a

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1/ (Continued)

filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

2/ City of La Crosse, (17076-A, 17084-B) 7/81, at 5, Conclusion of Law No. 6.

3/ Ibid. at 10.

4/ City of La Crosse, (17076-B, 17084-C) 4/82, at 6.

5/ Ibid.

shorthand reference to those lawful and concerted acts identified and enforced by the MERA. Thus, acts which are not lawful or not concerted within the meaning of Sec. 111.70(2) of MERA are not protected.

A review of the Memoranda Accompanying the Examiner's and the Commission's prior decisions reveals that each decision maker found Pretasky's May 18, 1979, statements to Sutton to be unprotected, but that the decision makers reached this conclusion with different rationales. The Examiner focused on the content of Pretasky's statements and concluded that those statements were unlawful under Sec. 111.70(3)(b)1. of MERA. Under this rationale, the conversation is not protected because not lawful. The Commission focused on both the content and the context of the conversation, and it concluded that the conversation was a locker room gripe session restricted to two employes which did not evince the coercive force necessary to constitute a Sec. 111.70(3)(b)1. violation. Under this rationale, the conversation is not protected because not concerted. Thus, the issue on remand calls for a clarification of the Commission's decision rather than a reexamination of whether the conversation was protected or not.

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 employe 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 concerns.

While the content of Officer Pretasky's May 18, 1979, statements to Sutton could be considered to manifest and perhaps further collective concerns, analysis of the context of that conversation will not support that conclusion. Pretasky had neither read nor reviewed the collective bargaining agreement anytime near May 18, 1979. In addition, Officer Pretasky did not intentionally search out Officer Sutton, but simply ran into him. No other Officer or group of Officers asked Pretasky to voice his concerns to Sutton. In fact, Pretasky stated he did not speak to anyone specifically regarding his concern about Sutton's assignment. Thus, the May 18, 1979, conversation must be considered a chance meeting in which Pretasky seized an opportunity to voice certain work related gripes to Sutton. In determining whether the griping furthered collective concerns, we find it significant that Pretasky could not, in his testimony, identify any individual officer who was "irate" because of Sutton's shift assignment. In addition, a review of the conversation, as related by Pretasky, does not reveal what information or what end Officer Pretasky was seeking beyond the immediate satisfaction of voicing his concerns. In sum, the May 18, 1979, conversation appears to have been a chance meeting which resulted in a locker room gripe session in which Officer Pretasky asserted he was not voicing a "personal bitch" in order to lend emphasis to what was, in fact, his own individual concerns.

Officer Pretasky's statement to Officer Sutton on May 18, 1979, cannot, then, be considered to have furthered collective concerns, and thus cannot be considered a concerted activity under Sec. 111.70(2) of MERA. Because it was not concerted activity, the conversation cannot be considered an act protected by MERA.

Accordingly, the Commission has expanded paragraph 11 of the Examiner's Findings of Fact, modified his Conclusions of Law, and has supplemented its own Memorandum to clarify what was implicit in its earlier decision, and to resolve the issues placed before it on remand.

Dated at Madison, Wisconsin this 12th day of October, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner