STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL UNION NO. 579, Complainant, vs. CITY OF EVANSVILLE, Respondent.	Case 15 No. 37904 MP-1903 Decision No. 24246-A

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Ms. Marianne Goldstein Robbins, 788 North Jefferson Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Complainant.

Zwicky, Hayes & Heiber, Attorneys at Law, 400 East Grand Avenue, Suite 100, Beloit, Wisconsin 53511, by Mr. William Hayes, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Teamsters Local Union No. 579 filed a complaint on December 3, 1986 with the Wisconsin Employment Relations Commission alleging that the City of Evansville violated Sec. 111, Stats., by laying off Jim Smith from his employment with the City on November 21, 1986. The Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. Hearing was originally set for March 31, 1987 but was rescheduled at the request of the City. A hearing was held in Evansville, Wisconsin on April 9 and May 20, 1987 at which time the parties were given full opportunity to present their evidence and arguments. The transcript in the matter was received August 19, 1987. Both parties filed briefs whereupon the record was closed on November 13, 1987. The Examiner, having considered the evidence and arguments of counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Teamsters Local Union No. 579, hereinafter referred to as the Union or Complainant, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.; that it is the exclusive bargaining representative for certain employes of the City of Evansville; and that its offices are located at 2214 Center Avenue, Janesville, Wisconsin 53545.

2. That City of Evansville, hereinafter referred to as the City or Respondent, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats; that its offices are located at 321 South First Street, Evansville, Wisconsin 53536; and that John Jones 1/ is Mayor of Evansville and is its agent.

3. That at all times material hereto, the Union and the City have been parties to a series of collective bargaining agreements, including an agreement effective January 1, 1986 through December 31, 1988; that said agreement provides for final and binding arbitration of unresolved grievances; and that said agreement contained the following pertinent provisions:

ARTICLE 2 - RECOGNITION

Section 1. The City recognizes Teamsters Local Union No. 579 as the exclusive bargaining agent for all regular full-time employees of the Water and Light Department, the

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1/ No relation to the Examiner.

Department of Public Works and all regular full-time non-uniformed employees of the Public Safety Department excluding supervisors, confidential employees and clerical employees. A regular full-time employee is one working on a regular basis more than twenty-five (25) hours per week, except seasonal employees.

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ARTICLE 3 - PROBATIONARY EMPLOYEES

Section 1. A new employee shall work under this Agreement, but shall be employed on a ninety (90) day probationary period during which he may be disciplined or discharged without further recourse; provided the City may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After the probationary period, the employee shall be placed on the regular seniority list, unless the City and the Union agree that an extension of this time limit is desirable in a specific case. . . .

4. That every year, the City hires seasonal employes; that although there are no set dates for their employment, these seasonal employes usually work from about June until about Labor Day; that at least two students once worked year round in the office; that in the mid-1970's, the City trained and ultimately employed full time several individuals under the federal CETA program; that for at least the last six years, there has never been a seasonal employe who converted to full-time employment status; that some CETA employes worked past Labor Day, but since the parties bargained their first labor contract, no seasonal employe worked beyond Labor Day; and that in the spring/summer of 1986, the City hired four seasonal employes: three college students and Jim Smith, the subject of the instant complaint.

5. That on July 25, 1986 2/ Mayor John Jones observed a seasonal employe working on a retaining wall at the creek bank in Evansville Park; that Jones questioned the employe about the location of his co-worker, to which the employe responded that his co-worker would be gone for the week; that upon hearing this, Jones decided to hire another seasonal worker since the job on the retaining wall required two people; that Jones sought to contact Public Works Superintendent Ken Grenawalt about hiring another employe, but Grenawalt was not available; that due to Grenawalt's absence, Jones talked with Public Works Foreman David Milbrandt, a member of the bargaining unit referred to in Finding of Fact 3 above; that Jones asked Milbrandt if he knew anyone looking for a job (who could work on the retaining wall); that Milbrandt replied that he did; that Milbrandt told Jones he planned to call Jim Smith and offer him the job and Jones approved it; that Smith is Milbrandt's brother-in-law; that Jones was not aware at that time that Smith and Milbrandt were brothers-in-law, but subsequently learned they were; that Milbrandt called Smith, offered him the job and Smith accepted; that Smith reported to work that afternoon and began working on the retaining wall at the park; and that Milbrandt told Smith at the time he was hired that his job with the City was not full-time, but rather was seasonal/temporary, and that he would get laid off at the end of the summer.

6. That for several months, Smith worked on the retaining wall with other seasonal employes; that the Mayor told him and the other seasonal workers they were doing a good job on the retaining wall; that Smith was initially paid $3.35 an hour with no fringe benefits; that he was not paid at all when he missed work due to absence or could not work due to inclement weather; and that for the entire time Smith worked for the City, he missed about half of the time he could have worked due to either absence or inclement weather.

7. That Smith wanted to obtain a permanent position with the City so he would not be laid off; that during the summer months, Smith applied for two permanent positions with the City, but was not successful in obtaining either position; and that at two different family gatherings, Smith and Milbrandt

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2/ All dates hereinafter refer to 1986.

discussed Smith's employment status with the City wherein Smith got mad with Milbrandt because Milbrandt could not get Smith a full-time job with the City.

8. That around Labor Day, the three seasonal employes who were students returned to school; that Alderman Harlin Miller, who is also the Parks Chairman, talked to Jones about getting the work finished in the parks; that Jones suggested to Miller that Smith be used to finish-up that work; that Miller then initiated a one-on-one conversation with Smith wherein Miller asked Smith if he would be willing to continue working for the City to which Smith replied that he would; that Miller then told Smith that Smith's employment would last only through mid-November or the end of leaf pick-up season; that during this conversation, Smith told Miller he was experiencing financial difficulty and asked for a raise; that in response to this request, Miller said he would talk to Jones about it; that thereafter, Miller and Jones discussed the requested raise and determined that a wage increase from $3.35 an hour to $4.50 an hour was in order since Smith was to be running the lawn mower, truck and other DPW equipment; that Grenawalt was later advised to raise Smith's hourly rate from $3.35 an hour to $4.50 an hour, which he did; that Smith continued working for the City past Labor Day; that in mid-September when the retaining wall project was completed, Grenawalt assigned Smith to DPW duties such as mowing grass, collecting leaves, brush and trash removal and plowing snow; that these were the same duties performed by full-time DPW employes; that in performing these tasks, Smith worked alongside DPW employes and drove a department jeep and flatbed truck used by the DPW employes; that sometime during the fall, Jones advised Grenawalt to begin a brush removal project on a creek bank; that his job was considered a high priority by the City because of an upcoming inspection; and that Smith and another DPW employe were assigned to the brush removal project and they started working on it on November 17.

9. That Grenawalt did not intend to convert Smith to full-time status; that Grenawalt intended on laying Smith off about November 15 because the City's leaf pick-up operation, which Smith was working on, was generally completed by that time; that Grenawalt left on vacation either November 18 or 19; that Grenawalt did not lay Smith off before starting his vacation because there was an early snow storm that year and Smith was used to haul snow; and that Grenawalt intended on laying Smith off after he returned from vacation.

10. That in mid-November, Union Steward Randy Rasmussen approached Smith about signing a union authorization card; that Rasmussen talked to Smith about signing the card for about three or four days before Smith signed it; that on November 20, Smith signed an authorization card and gave it to Rasmussen, who in turn took the card to City Clerk/Treasurer Bob Poppenberger sometime between 3:30 and 5:00 p.m. that day; that Poppenberger, who had only been on the job for ten days, was not sure how to process the paper work connected with the card, so he spoke to one of the office workers about processing it; that Poppenberger does not remember who processed the card; that Poppenberger did not tell Jones that a union authorization card had been turned in for Smith; that November 20 was the last day of work for Sylvia Dennis, the former Clerk/Treasurer; that as a result, she went out to lunch that day with a number of people from the City, including Jones; that sometime during the day, Jones told Dennis to write herself a check for her accumulated compensatory time and stop by his house so he could sign the check; and that Jones had knowledge of Smith's union authorization card being turned into the Clerk/Treasurer's office.

11. That on Friday, November 21 about 7 or 8 a.m., Jones called the DPW shop and spoke with Milbrandt; that Jones would have spoken with Grenawalt, but Grenawalt was on vacation; that Jones asked Milbrandt if Smith was still working and Milbrandt told him yes he was; that Jones then asked Milbrandt why Smith was still there, and Milbrandt replied he did not know; that Jones then told Milbrandt that Smith should have been laid off two weeks prior to that; that Jones then directed Milbrandt to lay Smith off because Smith was seasonal and the City could not keep him any longer; that Jones also told Milbrandt that a reason for laying Smith off was "lack of work"; and that Milbrandt then told Smith, who was still in the shop, that pursuant to Jones' directive, he was laid off effective immediately.

12. That upon being informed he was laid off, Smith left work and applied for unemployment compensation; 3/ that later that afternoon Smith called

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3/ He was later found ineligible for unemployment compensation.

Jones at his home; that during this phone conversation, Smith asked Jones why he had been laid off, noting that he thought there was plenty of work to be done, that he was still working (cutting brush) on the creek bank and that he needed the money; that Jones responded by saying he was laying Smith off because the City did not have money in the fund to pay another person union wages; that Jones then told Smith to contact him after his unemployment compensation benefits ran out and they would work something out; that Smith then raised the possibility of his doing snow plowing work for the City; that Smith and Jones then discussed an hourly rate for such work and mutually agreed on a figure of of $10.00 per hour for this work; that this ended the phone call between Smith and Jones; and that Smith has not worked for the City since his layoff on November 21, 1986.

13. That at the time Smith was laid off, one of the duties he had been working on was cutting brush at the creek bank with another DPW employe; that Smith had just commenced work on this project prior to his layoff and had only worked about 11 total hours on it at the time of his layoff; that this job was not completed when Smith was laid off; that several days after his layoff, Smith saw non-City employes performing this brush cutting work; that Jones contracted with his in-laws, the Stiegs, to cut brush at the creek bank; that on several occasions, City vehicles were provided to the Stiegs for their use in working on the brush cutting project; that the Stiegs' handwritten list of dates and hours they cut brush indicated they worked a total of 41 hours from December 1 through December 21; that the Stiegs billed the City for 41 hours at $8.00 an hour for a total of $328; that after the Stiegs had worked cutting brush for 41 hours, Jones terminated their employment as he felt they were not going fast enough; that Jones then hired "Brush Cutters," a brush cutting company; that "Brush Cutters" worked for eight hours on the brush cutting project and billed the City at $75 an hour for a total of $600; that this bill exhausted the amount in the City budget for brush cutting for that year (1986), and Jones then terminated their services; that in early 1987 after Jones got a new budget, he hired "Brush Cutters" again to complete the brush cutting project, which it did; that "Brush Cutters" then billed the City for 27 hours at $75 an hour for a total of $2,025; and that the City paid "Brush Cutters" a combined total of $2,625 for performing 35 hours of work at $75 an hour.

14. That Jones laid off Smith on November 21, 1986 because Smith had signed a union authorization card.

Based on the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

That the City of Evansville violated Sec. 111.70(3)(a)3, MERA, by discriminating against John Smith when it laid him off on November 21, 1986, at least in part, because he had engaged in protected concerted activity by signing a union authorization card; and the City of Evansville thereby committed a derivative violation of Sec. 111.70(3)(a)1, MERA, by interfering with the rights of municipal employes to engage in lawful concerted activity.

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

ORDER 4/

IT IS ORDERED that the Respondent, City of Evansville, its officers and agents shall immediately:

1. Cease and desist from discriminating against employes in regard to hiring, tenure and other terms and conditions

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4/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

(Footnote 4 continued on Page 5)

of employment because of an employe's protected concerted activity; and

2. Take the following affirmative action which the Examiner deems necessary to effectuate the policies of MERA:

   a. Make whole Jim Smith for losses suffered as a result of his unlawful layoff on November 21, 1986 by paying him 76 hours pay at his then existing rate of pay, together with interest thereon computed in accordance with Commission policy; 5/

   b. Notify employes by posting in conspicious places on its premises, where notices to its employes are usually posted, a copy of the notice attached hereto and marked "Appendix A".

   c. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this Order regarding what steps it has taken to comply with this Order.

Dated at Madison, Wisconsin this 25th day of March, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones
Raleigh Jones, Examiner

4/ Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

5/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83), citing Anderson v. LIRC 111 Wis.2d 245, 258-59 (1983) and Madison Teachers Inc. v. WERC, 115 Wis.2d 623 (CtApp IV, 10/83). The complaint was filed on December 3, 1986, at a time when the Sec. 814.04(4), Stats., rate in effect was "12% per year."

"APPENDIX A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

WE WILL NOT discriminate against employe(s) because he or she signs a union authorization card, and

WE WILL make whole James Smith for losses suffered because of such discrimination.

CITY OF EVANSVILLE

By _____

Dated this ____ day of _____ , 1988.

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HERETO AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

CITY OF EVANSVILLE

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

BACKGROUND

The complaint alleged that the City violated Sec. 111, Stats., when Mayor Jones laid off employe Jim Smith on November 21, 1986 because he was joining the Union. The City denied the allegation.

POSITIONS OF THE PARTIES

It is the Union's position that the City violated Sec. 111.70(3)(a)1 and 3, Stats., when it laid off Smith on November 21, 1986. The Union contends that the evidence herein establishes that Smith was laid off from his position simply because he had signed a union authorization card the day before. The Union asserts this was not mere coincidence. According to the Union, the timing of the layoff is explainable only by the Union activity that occurred the day before because Smith's work was satisfactory and there was still brush cutting work for him to accomplish. The Union further contends that the reasons tendered by the City for Smith's layoff on that date (November 21) are contrary to the available evidence and therefore must be considered pretextual. It further submits that Jones' conflicting testimony and lack of credibility further evidences the City's improper motive herein. As a remedy for the City's alleged prohibited practice, the Union seeks an order reinstating Smith to a full-time position in the bargaining unit represented by the Union. According to the Union, this remedy is warranted because Smith's status at the time of his layoff had changed to full-time because he worked beyond the regular time period for seasonal employes. It further asserts that this proposed remedy is consistent with the City's practice of seasonal employes being converted into full-time employes. Assuming arguendo that Smith is not reinstated to a full-time position, the Union argues the City could have continued Smith as a seasonal employe since work continued to be available after November 21, but Smith was deprived of that work simply because he sought union representation.

The City contends Smith's layoff did not violate MERA. According to the City, there is not one scintilla of evidence to support the Union's allegation that Jones was motivated to lay Smith off because Smith signed a union card. In support thereof, it cites Jones' testimony that he was not aware that Smith had signed a union card the day before his layoff, Poffenberger's testimony that he did not tell Jones about Smith's card being turned in and Jones' denial that he told Smith he was being laid off because he was joining the union. The City further argues that the Examiner should not draw the inference that Smith was laid off after he signed the union authorization card because that card had nothing whatsoever to do with his layoff. Instead, it asserts Smith was laid off because of his seasonal status. In this regard, it submits Smith knew from the beginning of his employment he would be laid off in the fall. Alderman Miller enforced this when he made it clear to Smith that even if he worked the extended period of time (past Labor Day), he would be laid off in mid-November. It submits this is what, in fact, happened. According to the City, if it had not snowed, Grenawalt would have laid Smith off around November 15. Unfortunately, it did snow. That, coupled with the fact that Grenawalt went on vacation about that time, resulted in Smith not being laid off until Mayor Jones saw him driving a City truck on the morning of November 20. The City asserts that what is happening here is that Smith is attempting, with the help of brother-in-law Milbrandt, to get permanent employment with the City by means outside the labor agreement and City ordinance requirements. The City also offered the following alleged non-discriminatory reasons for Smith's layoff: (1) As a seasonal employe, Smith was not even eligible to join the Union because seasonal employes are excluded from the bargaining unit; (2) Smith was not eligible for permanent employment with the City because of City ordinances concerning nepotism and job posting; and (3) Smith had a poor attendance record. The City contends that for these reasons, the complaint should be dismissed. If it is not, the City argues that the remedy should be limited to the following; Grenawalt testified that upon his return from his hunting/vacation trip he was going to lay Smith off, so that means the following Monday, Smith would have been laid off in any event. The City contends that any other remedy, including reinstatement to a full-time position, is not supported by the record.

DISCUSSION

Smith was laid off at the directive of the Mayor on November 21, 1986. If this layoff was implemented on that date simply because Smith's time as a seasonal employe was finished, as argued by the City, his layoff on that date would not be violative of MERA. However, if Smith's layoff was implemented on that date because he had just signed a union authorization card the day before, as contended by the Union, the layoff would be violative of MERA. This is because Sec. 111.70(3)(a)3 prohibits municipal employers from discriminating against persons with regard to hiring, tenure, or other terms or conditions of employment in order to encourage or discourage membership in a labor organization. Laying off an employe, even a seasonal employe, because he has signed a union authorization card clearly falls within this proscription.

In defense of its conduct herein, the City offered a number of alleged non-discriminatory reasons for Smith's layoff, to wit: (1) that as a seasonal employe, Smith was not eligible to join the union; (2) that Smith was not eligible for permanent employment with the City because of City ordinances concerning nepotism and job posting; and (3) that Smith had a poor attendance record. These defenses miss the mark. At issue here is not whether the City had valid reasons to lay off Smith on November 21 but rather whether the City's decision to do so was affected, at least in part, by union considerations. If animus formed any part of the City's decision to lay off Smith, it does not matter that the City may have had other legitimate grounds for its action. This is because under Wisconsin law, it is well established that anti-union animus need not be the employer's primary motive in order for a discriminatory act to contravene the statute. 6/ Thus, if it is established that the decision to lay Smith off on November 21 was in any part motivated by his union activities, it is irrelevant that the City had other non-discriminatory reasons for laying him off.

In order to prevail on a complaint of discrimination under Sec. 111.70(3)(a)3, the Union must show by a clear and satisfactory preponderance of the evidence 7/ that:

1) Smith was engaged in protected activities; and
2) The City had knowledge of those activities; and
3) The City was hostile toward those activities; and
4) The decision to lay off Smith was, at least in part, motivated by the City's hostility towards Smith's participation in protected activities. 8/

Section 111.70(2), Stats., guarantees, among other things, that municipal employes shall have the right to form, join or assist labor organizations. This right applied to Smith whether his employment status with the City was seasonal or full-time. It is clear that by signing a union authorization card on November 20 seeking the protection of the collective bargaining agreement, Smith engaged in lawful, concerted activity; Smith therefore satisfied the first element of the foregoing test. Whether he was right or wrong in believing himself a member of the bargaining unit is of no consequence. Whatever his contractual rights, if any, Smith still enjoyed the protection of the Municipal Employment Relations Act, and in particular, the rights guaranteed municipal employes by Sec. 111.70(2).

Turning to the second element, that of knowledge by the City of Smith's protected activity, there is no question that the City, per se, was put on notice of Smith's protected activity when his union authorization card was turned into the Clerk/Treasurer's office. However, what is disputed is whether Jones

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6/ ". . . an employee may not be fired when one of the motivating factors is his union activities, no matter how many other valid grounds exist for firing him." Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis.2d 540 (1967), at page 562.

7/ Sec. 111.07(3), WEPA (made applicable to proceedings under MERA by Sec. 111.70(4)(a), MERA).

8/ See, Town of Salem, Dec. No. 18812-A (Crowley, 2/82) at page 9, and cases cited therein at footnote 14.

personally had knowledge of Smith's union authorization card being turned into the Clerk/Treasurer's office before he ordered Smith laid off. Jones expressly denied having any knowledge of Smith's union authorization card being turned into the Clerk/Treasurer's office before he ordered Smith laid off and the Union did not present any direct evidence or testimony to the contrary. The same is true with regard to Clerk/Treasurer Poppenberger's testimony that he did not tell the Mayor of the card or talk to him about it. In light thereof, there is no direct evidence to support a finding of knowledge by Jones. The Union nevertheless contends that implied knowledge of the union card could be inferred under the circumstances herein. Specifically, it submits that former Clerk/Treasurer Sylvia Dennis could have been aware of the union authorization card being turned in and she could have told Jones of the card since she saw Jones later that day when she took her compensatory time check to Jones for him to sign. While it is indeed plausible that this could have happened, the Examiner declines to draw the inference that Dennis told Jones of the card for the simple reason that Dennis could have been called as a witness but was not. If Dennis did, in fact, have knowledge that would show that Jones knew about the card, it is reasonable to infer she would have been called as a witness by the Union.

The Union further contends that knowledge of Smith's union authorization card being turned in should be imputed to Jones under the NLRB's "small plant doctrine" 9/ which permits a presumption that the representatives of an employer are aware of union activity where the employer's establishment is small and the community in which it exists is small. Given the small size of this employer, the presumption behind this doctrine and its application here cannot be totally discounted. Under the instant circumstances, it is not an unreasonable inference that news of Smith's union card being turned in quickly came to Jones' attention since this was the first time a seasonal employe had turned in a union authorization card. Consequently the Examiner concludes that although there is no direct evidence that Jones knew Smith's union card had been turned into the Clerk/Treasurer's office, knowledge will be inferred based on the reasons developed below.

Elements 3 and 4 above involve "hostility" and "motivation". In the instant case, the evidence regarding hostility overlaps with that of motivation, so the discussion of these two elements will be subsumed.

Evidence of illegal motive may be direct (overt statements of hostility) or, as is usually the case, inferred from the circumstances surrounding the discriminatory act (timing, 10/ or a finding that the explanation offered by the Employer is pretextual). 11/ Here, there is an allegation that Jones made a hostile remark to Smith in a phone call following Smith's layoff, specifically that Jones told Smith he was being laid off because he had turned in a union card. Jones flatly denied making such a statement.

In resolving this and other issues herein, the Examiner has been presented with conflicting testimony regarding certain material facts. Accordingly, it has been necessary to make credibility findings, based in part on such factors as the demeanor of the witnesses, the incentive for each of the witnesses to present testimony favoring one version over another, and material inconsistencies in the record. The major inconsistencies in the testimony are dealt with expressly in the remainder of this rationale. Minor inconsistencies, while not expressly discussed, have been similarly analyzed and resolved in the process of formulating the Findings of Fact.

With regard to the demeanor of the witnesses, all were confident in the accuracy of their version of the events in issue. In short, there was nothing about their demeanor while testifying which caused the Examiner to attach more or less weight to the testimony of one witness over the other.

9/ Angwell Curtain Co. v. NLRB, 192 F.2d 899, 903 (1951).

10/ Town of Salem, supra, at page 10; Fennimore Community Schools, Dec. No. 18811-A (Malamud, 1/83) at page 17.

11/ City of Racine (Police Dept.), Dec. No. 17605-B (WERC, 2/81), at pages 28-29; Town of Mercer, Dec. No. 14783-A (Greco, 3/77), at pages 6-7; Fennimore Community Schools, supra, at page 17.

As to the likelihood that any of these witnesses would have reason to recast events to favor one version or the other, two of the witnesses have obvious motives. Smith stands to possibly regain his job and/or a monetary award if animus is shown to have played a part in his layoff on November 21. Mayor Jones, for his part, would plainly have an interest in denying participation in a critical element of a prohibited practice, particularly where he is alleged to have been the primary actor. To a lesser degree, Milbrandt could have been motivated to help his brother-in-law Smith get a job with the City.

The Examiner now turns to the question of whether there are material inconsistencies in the testimony which might resolve the credibility issue. Based on the following, the Examiner concludes that portions of Jones' testimony are not plausible. Foremost in this regard is Jones' response to the ultimate question herein, that being why did Jones decide to lay Smith off on November 21, the day which followed on the heels of Smith's union authorization card being turned in. Why was that particular date chosen for Smith's layoff? Jones' explanation was that on that date, he saw Smith driving a (City) truck down the street; that he was surprised to see Smith driving a (City) truck in November; and that since Smith was hired only as a seasonal employe, the City could not keep him any longer. This explanation contains several inconsistencies. First, Jones could not have seen Smith driving a (City) truck down the street the morning Smith was laid off because Smith had not yet left the shop when Jones called Milbrandt early that morning and told him to lay Smith off. Likewise, following his layoff, it is extremely improbable that Smith would have driven a (City) truck anywhere because he was no longer a City employe. Consequently, it is concluded Jones could not have seen Smith driving a (City) truck down the street on November 21. 12/ Second, Jones should not have been surprised to see Smith still working for the City in November because it was Jones himself who suggested to Alderman Miller that Smith be used to finish the park work after the other seasonal employes left to return to School. Miller followed up on Jones' recommendation by talking with Smith about his staying on. After his conversation with Smith, Miller testified he reported back to Jones that Smith had agreed to stay on and work until mid-November. In light of Miller's uncontradicted testimony on this point, Jones had to know that Smith would be working for the City until mid-November. During this same conversation with Miller, Jones also agreed to Smith's request for a pay raise. Therefore, Jones should not have been surprised to see Smith driving a (City) truck in November either because one of the reasons he authorized the pay increase for Smith was because Smith was going to be assigned regular DPW duties, and DPW employes normally drive DPW vehicles in the course of performing those duties.

In addition to the above noted inconsistencies in Jones' explanation of why Smith was laid off on November 21, it is noteworthy that no explanation was offered to why Smith had to be laid off on that particular date. For example, there is nothing indicating that the funds used to pay Smith were depleted as of November 20. Furthermore, it is unknown why Smith's layoff was not handled through the normal administrative channels, with Grenawalt handling it rather than Jones. While Grenawalt was on vacation on November 21, the fact that Jones felt Smith's layoff could not wait until Grenawalt returned from vacation shows the urgency that Jones attached to Smith's layoff.

Next, Milbrandt testified that Jones told him that a reason Smith was being laid off was "lack of work." Jones never denied making such a statement. The Examiner therefore concludes Jones made the statement attributed to him by Milbrandt. The Examiner further concludes that this reason for Smith's layoff was pretexual because no proof was presented that this, in fact, was the case. The record indicates that to the contrary, there was at least one job Smith could have continued to perform had he not been laid off, that of brush cutting. This was a job Smith and another DPW employe had just commenced. It was considered a high priority job by the City because of an upcoming inspection, was ongoing, and was not completed as of the day Smith was laid off. After Smith was laid off, Jones subsequently contracted out the remainder of this brush cutting work to non-City employes. Jones first contracted with his in-laws, the Stiegs, to perform this work and then with "Brush Cutters" to complete the project. Although there is

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12/ Although the City contends in their brief that Jones saw Smith driving a (City) truck on November 20, Jones testified it was the day Smith was laid off (which was November 21). Transcript p. 47.

nothing to indicate this brush cutting work was to be performed exclusively by Smith and the other DPW employe, Smith was obviously capable and qualified to perform this work because he was doing it at the time of his layoff.

Finally, the Examiner turns to the matter of the phone call between Smith and Jones on November 21. There was conflicting testimony given by both men as to that portion of their phone conversation dealing with the reason why Smith was laid off. Jones testified he told Smith he was laid off because he was seasonal and his time was up. Smith's testimony was as follows:

> Q Did Mr. Jones make a response to you concerning why he was letting you go at that time?
>
> A There was so much mumbo-jumbo. That's about all. He was laying me off because he found out that I was joining the Union.

It is unclear from Smith's reply above whether it was his conclusion that Jones found out he was joining the Union or whether the above statement was instead a quote attributable to Jones. Because Smith's reply is susceptible of being read either way, no weight is given to it. Smith's next response though was clearer:

> Q Did he explain -- did he say anything further about the Union in joining the Union in what that had to do with your being laid off?
>
> A Well, Jim, we ain't got the money in the fund here to pay another person union wages.

The Examiner construes the above statement to be a quote Smith attributes to Jones. Although Jones denies making the above statement, the Examiner concludes Jones made the statement Smith attributed to him for several reasons. First, in a relative sense, the phone call was of far greater consequence to Smith than it was to Jones. To Smith, the conversation dealt with his employment and lack thereof. To Jones, the conversation did not deal with his employment, but rather one of the many mayoral duties the Mayor must surely attend to. Therefore, since the phone call had more importance to Smith than it did to Jones, it is hardly surprising that Smith would be better able to recall the specific language used. Second, the remark is sufficiently unique in nature and content so that the Examiner believes Smith did not make it up. Finally, when the statement is examined in the context of what had just transpired (that Smith had signed a union card the day before), it is understandable that Jones could have made such a statement. This is because Jones knew Smith was being paid $4.50 an hour when he was laid off, roughly half what members of the bargaining unit are paid. It is unlikely that Jones would have referred in his conversation with Smith to "union wages" or told him there was not enough money to pay him "union wages" unless Jones knew that Smith was seeking inclusion in the bargaining unit and the "union wages" that go with it. The Examiner has therefore determined that Jones made the statement attributed to him by Smith.

On the basis of the foregoing, the inconsistencies noted in Jones' explanation of why Smith was laid off on November 21 and the conclusion that Jones' "lack of work" reason for Smith's layoff was pretextual, the Examiner finds that the Respondent City, through its Mayor, was hostile to Smith for signing the union authorization card. That event served as the catalyst for Smith's layoff. As a result, Jones laid Smith off, in part, because of discriminatorily related union considerations in violation of Sec. 111.70(3)(a)3 of MERA. This result necessarily leads to the conclusion that the City also committed a derivative act of interference in violation of Sec. 111.70(3)(a)1.

REMEDY

Having found that the City discriminated against Smith by laying him off after he signed a union authorization card, the Examiner is obliged to rectify that conduct by granting relief in the form of remedial and affirmative orders. In crafting remedies, the Examiner is to order that relief necessary to restore the status quo ante and effectuate the purposes of MERA. Generally speaking, such remedies are designed to cure, not to punish. These remedies are not intended to place the affected employe in a better position than what they were in prior to the employer's unlawful conduct. In the typical discrimination case where an employe is discharged for union activity, reinstatement is the

normal remedy. 13/ There are instances though where reinstatement is not ordered, such as when at some point after the unlawful discharge, the employe would have been terminated in any event. 14/

The remedy sought by the Union here is to have Smith reinstated to a full-time position in the bargaining unit represented by the Union. What makes this proposed remedy unique under the circumstances here is that it is based on the premise that Smith was not a seasonal employe at the time of his unlawful layoff but instead was a full-time employe. Inasmuch as the City challenges this assertion, and contends Smith was a seasonal employe, it is apparent that a dispute exists as to what Smith's employment status was at the time of his unlawful layoff. On its face, this question is not governed by MERA, but rather by the parties' collective bargaining agreement.

Normally, the Commission will not exercise its jurisdiction to resolve contractual questions where, such as here, the parties have agreed to submit such unresolved disputes to arbitration. One exception to this policy is when the parties waive the arbitration provision. 15/ Here, the parties fully litigated the merits of this contractual question as part of their overall case. At no time did either party take the position that the Examiner should refuse to assert jurisdiction over this contractual question or defer it to arbitration. Therefore, since the parties implicitly submitted this contractual question to the Examiner and waived the arbitration provision in their agreement with respect thereto, the Examiner will address and decide this contractual question on its merits.

It is uncontested that Smith was hired as a seasonal employe, not as a regular full-time employe. The Union contends though that Smith's employment status changed from seasonal to full-time when he worked beyond what it characterized as the regular period for seasonal employment. In support thereof, it notes that seasonal employes generally work until about Labor Day and Smith was the first seasonal to work past Labor Day. Be that as it may, in order for the Union to successfully contend that Smith's status changed from seasonal to full-time, it must show a contractual basis for such a result. Here, no such contractual basis exists. In this regard, it is initially noted that seasonal employes are specifically excluded from the bargaining unit. The agreement though does not define what a seasonal employe is. While, generally speaking, the distinction between a seasonal employe and a full-time employe is the duration of employment, this agreement does not limit the length of time a seasonal employe may be employed. For example, there is nothing in the agreement limiting the use of seasonal employes to a particular season (such as just the summer). Likewise, there is nothing in the agreement indicating that seasonal employes who work past Labor Day or who work from one season into another (such as from summer into fall) automatically become full-time employes. For that matter, there is no language in the agreement whatsover addressing the question of when and if seasonal employes convert into full-time employes. While the Union cites Article 3 (which provides a 90 day probationary period for new employes) for the proposition that a seasonal employe who works past 90 days becomes a full-time employe on the 91st day, that clause, like every provision in the agreement, applies only to bargaining unit employes. Inasmuch as seasonal employes are specifically excluded from the bargaining unit, the clear implication is that Article 3 does not apply to seasonal employes, but rather only to bargaining unit employes (i.e. regular full-time employes). Therefore, the Union has shown no specific contract language which mandates the conclusion that Smith's employment status changed from seasonal to full-time.

13/ Morris, The Developing Labor Law, (BNA Books, 1983) p. 1657.

14/ Ibid.

15/ City of Appleton, Dec. No. 14615-C (WERC, 1/78); Superior Joint School District No. 1, Dec. No. 12174-A, (Greco, 5/74); affd., Dec. No. 12174-B (WERC, 5/75).

The Union also contends, contrary to the City, that there is a past practice of seasonal employes being converted into full-time employes, and that this (alleged) practice should not be terminated now. In support of its contention that there is such a practice, the Union cites the fact that in the mid-1970's, the City trained and ultimately employed full-time several individuals under the federal CETA program. However, given the relative remoteness of this occurrence, the fact that a federal program was involved and the Union's acknowledgement that no seasonal employe has converted to full-time status in the last six years, it is concluded that no past practice is evident from the record here of seasonal employes being converted to full-time employes.

Based on the above, it is concluded that since the Union has not shown either a contractual basis or a binding practice that seasonal employes convert into full-time employes, it follows that Smith's employment status on November 21, 1986 was unchanged from what it was when he was initially hired, that of seasonal employe. In light thereof, reinstating Smith to a full-time position, as proposed by the Union, is not warranted here since this remedy would clearly place him in a better position than the one he held prior to the City's unlawful act.

Having found that Smith is not entitled to reinstatement to a full-time position, the Examiner turns to the question of whether reinstatement to a seasonal position is appropriate.

As previously noted, seasonal employes are specifically excluded from the bargaining unit represented by the Union. Consequently, said employes are not covered by any contractual provisions, including that provision covering discharge. Hence, seasonal employes can be lawfully laid off or discharged at any time without the employe having a contractual recourse. Smith admits he knew from the moment he was hired that his status the City was seasonal/temporary and that as a result, he was going to be laid off; it was just a question of when. Smith testified Milbrandt told him when he was hired that he would be laid off after a few weeks, while Milbrandt testified he told Smith upon his being hired that he (Smith) would be laid off at the end of the summer. Given the fact that Smith was hired in late July, the difference involved in their testimony ("few weeks" versus "end of summer") is not necessarily contradictory. In any event, when the other seasonal employes returned to school at the end of the summer, Alderman Miller asked Smith to continue to work for the City and Smith agreed to do so. Although Smith expressly denied that Miller informed him during this conversation that Smith's employment would last only through mid-November, the Examiner has no reason to discredit Miller's testimony on this critical point. The Union has suggested no motive whatsoever for Miller to invent this statement and the Examiner can find none in the record. Consequently Miller's objectivity about the date for Smith's impending layoff is more firmly established than Smith's on this point. Therefore, based on Miller's lack of any apparent motive to deceive and the overall objectivity of his testimony, the Examiner credits Miller's testimony on this issue and finds that Miller advised Smith he was going to be laid off in mid-November or at the end of the leaf pick-up.

Grenawalt's testimony lends credence to the proposition that the City intended to comply with the layoff date Miller gave to Smith. Specifically, Grenawalt testified that Smith would "more than likely" have been laid off at the end of November 15 because the City's leaf pick-up operation, which Smith was working on, was generally completed by that time. Grenawalt's explanation of why Smith was not laid off at that time was that there was an early snow in 1986 and he used Smith to haul snow. In the opinion of the Examiner, there is nothing inherently implausible with Grenawalt's explanation of why Smith was not laid off before Grenawalt started his vacation on either November 18 or 19. Moreover, the Union has suggested no motive for Grenawalt to invent this testimony and the Examiner can find none in the record. Therefore, the Examiner has no reason to discredit Grenawalt's testimony on this crucial point.

This means that although Smith was unlawfully laid off on November 21, he was to have been lawfully laid off about the same time. As a practical matter, this decision not only rules out reinstatement to a seasonal position as a remedy, but also substantially limits the City's backpay liability for Jones' unlawful conduct.

The Examiner turns next to the matter of determining when Smith would have been lawfully laid off, had he not been unlawfully laid off on November 21. The City contends that Smith would have been (lawfully) laid off on the Monday after

Grenawalt returned from his hunting/vacation trip. While Grenawalt testified he "probably" would have laid Smith off after he returned from deer hunting (a date not specified in the record), he did not give a specific date for Smith's impending layoff. In light thereof, it would be pure conjecture on the part of the Examiner (as well as on Grenawalt if a backpay hearing was held) to determine, in hindsight, the exact date that Smith would have been lawfully laid off had he not been unlawfully laid off on November 21.

Since it is impossible to now determine what Smith's lawful layoff date would have been, it is necessary to base the monetary remedy due Smith on an alternate ground. The Examiner has chosen the following remedy which he believes will restore the status quo herein.

As previously noted, at the time Smith was unlawfully laid off, one of the duties he was performing was cutting brush. This project was not completed when Smith was laid off and Jones subsequently contracted out the remainder of this work to non-City employes. Jones first contracted with his in-laws, the Stiegs, and they billed the City for 41 hours of work at $8.00 an hour for a total of $328. Next, Jones brought in a professional brush cutting company, "Brush Cutters," who billed the City for 35 hours of work at $75 an hour for a total of $2,625. 16/ The City therefore paid a total of $2,953 to the Stiegs and "Brush Cutters" to perform 76 hours of brush cutting work. Although it took Stiegs and "Brush Cutters" 76 hours to complete this brush cutting project, it is unknown how long it would have taken City employes to complete the project. In any event, if Smith had not been unlawfully laid off on November 21, he could have continued to work on this brush cutting project. In this capacity, he could have performed none, some, or all of the brush cutting work that was subsequently performed by the Stiegs and "Brush Cutters." Had this happened though, Smith would have been paid at his regular hourly rate of $4.50 an hour; he would not have been paid at the hourly rate paid to either the Stiegs or "Brush Cutters." Therefore, giving Smith the benefit of the doubt in terms of the number of documented hours that he plausibly could have worked on the brush cutting project had he not been unlawfully laid off on November 21, 1986, the Examiner has decided that the City shall pay Smith the total number of hours that was contracted out to the Stiegs and "Brush Cutters" (i.e. 76 hours), plus interest.

Dated at Madison, Wisconsin this 25th day of March, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Raleigh Jones, Examiner

16/ Although the record does not indicate why the hourly rate for "Brush Cutters" was far higher than that charged by the Stiegs, it is surmized that "Brush Cutters" was either a more mechanized operation or used its own equipment rather than City equipment.