STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KENOSHA FIREFIGHTERS, LOCAL UNION NO. 414, IAFF, AFL-CIO and THOMAS LEITING, Complainants, vs. CITY OF KENOSHA, Respondent.	:	Case 132 No. 39731 MP-2040 Decision No. 25226-A

Appearances:

Mr. Richard V. Graylow, Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, with Kim Castelaz on the brief, appearing on behalf of Kenosha Firefighters, Local Union No. 414, IAFF, AFL-CIO and Thomas Leiting.

Mr. Roger E. Walsh, Lindner & Marsack, S.C., Attorneys at Law, 700 North Water Street, Milwaukee, Wisconsin 53202, with Barbara Kraetsch on the brief, appearing on behalf of City of Kenosha.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Kenosha Firefighters, Local Union No. 414, IAFF, AFL-CIO, and Thomas Leiting, filed a complaint with the Wisconsin Employment Relations Commission on November 24, 1987, alleging that the City of Kenosha had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3 and 4, Stats. Scheduling of hearing on the complaint was held in abeyance to permit the parties to engage in settlement discussions. On March 2, 1988, the Commission appointed Richard B. McLaughlin, a member of its staff, to act as an Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(4)(a), and Sec. 111.07, Stats. Hearing on the matter was conducted in Kenosha, Wisconsin, on April 27, 1988. The City of Kenosha filed its answer to the complaint at that hearing. A transcript of that hearing was provided to the Examiner by May 12, 1988. The parties filed briefs by July 13, 1988.

FINDINGS OF FACT

1. Kenosha Firefighters, Local Union No. 414, IAFF, AFL-CIO, (the Union), is a labor organization which has its offices located in care of 8845 Forty-First Avenue, Kenosha, Wisconsin 53142.

2. The City of Kenosha, (the City), is a municipal employer which has its offices located at 625 Fifty-Second Street, Kenosha, Wisconsin 53140.

3. Thomas Leiting, (Leiting), is an individual who has been, at all times relevant to this matter, employed by the City as a member of its Fire Department.

4. The City and the Union are parties to a collective bargaining agreement which was in effect at all times relevant to this matter, and which contains, among its provisions, the following: Article 6, which is entitled "Overtime;" Article 7, which is entitled "Call-in Pay;" and Article 16, which is entitled "Grievance Procedure". That agreement contains, at Article 1, a recognition clause which defines the bargaining unit represented by the Union. Leiting is a member of that bargaining unit.

5. The City's Police and Fire Commission (PFC) met on September 18, 1987. Among the subjects considered at that meeting was the promotion of Leiting to the classification of Apparatus Operator. Prior to the meeting, Leiting had received a phone call from Jerome Wamboldt, who is employed by the City as an Assistant Fire Chief. Wamboldt informed Leiting of the PFC meeting and that Leiting should

wear a jacket and a tie to attend the meeting. Wamboldt can not recall if he specifically requested that Leiting appear at this meeting. Leiting interpreted the phone call as a request from Wamboldt that Leiting attend the meeting. Leiting attended the PFC meeting on September 18, 1987, and the PFC approved his promotion, which became effective on October 1, 1987. Leiting was on off-duty status when he appeared at the PFC meeting of September 18, 1987.

6. Sometime after the September 18, 1987, meeting, Leiting submitted a request for overtime for his attendance at the meeting. This request was ultimately received by Wamboldt, who determined that he would contact Leiting personally about the request, and phoned Leiting's home. Leiting and Wamboldt ultimately did have a phone conversation regarding Leiting's overtime request. This conversation occurred sometime on or about September 21, 1987, and the gist of the conversation can be summarized thus:

Wamboldt: Did you send (the overtime request) in?

Leiting: Yes.

Wamboldt: Is that a joke?

Leiting: No.

Wamboldt: That's the most ridiculous and absurd thing I've heard of, and I'm not going to pay it.

Leiting: Is that it?

Wamboldt: Yes.

7. Leiting prepared a greivance to be submitted to the City. He signed the grievance on September 22, 1987. The grievance form states that Section 7.04 of the collective bargaining agreement mentioned in Finding of Fact 4 was the provision violated by the City. Section 7.04 reads as follows:

> Off-duty employees will be called in at one and one-half times the straight time Fire Fighter classification Step C rate whenever the Fire Chief determines a need exists . . .

The grievance form states the following under the heading "Description of Grievance:"

> I was request (sic) by A/C Wambolt (sic) to attend a police & fire commission meeting on my off-duty day at the safety building . . . and was also told what to wear at this meeting.
>
> A few days later A/C Wambolt (sic) called me at home to ask me if this was a joke. I said no. He said this was "Unreasonable & absurd and would not pay it (sic). It's funny I had the same thoughts when they made him Assistant Chief but they still made him chief so I think I should receive the overtime.

Before preparing the grievance form summarized above, Leiting showed a draft of the grievance to Robert Sussenbach, who is employed by the City in its Fire Department as a Captain. Sussenbach was, at the time Leiting showed the draft to him, Leiting's supervising officer. The draft included the final sentence to the "Description of Grievance" entry set forth above, which will be referred to below as the Statement. Leiting asked Sussenbach's opinion of the grievance, and Sussenbach informed Leiting that he felt submitting the grievance would be a mistake. Leiting, however, prepared and submitted the grievance form which reads as summarized above.

8. Leiting felt the grievance should be asserted because he felt the City, by paying Captains of the Fire Department for attending meetings conducted on their off-duty days, was treating Firefighters below the rank of Captain

inappropriately. Leiting also felt that it was not normal procedure for an Assistant Chief to call an employe at home to turn down an overtime request, and to do so without any explanation beyond an assertion that the request was unreasonable and absurd.

9. Leiting was offended by Wamboldt's statements about the overtime request. Leiting prepared the Statement to use Wamboldt's language and apply it to the promotional procedure by which Leiting had become an Apparatus Operator and Wamboldt had become an Assistant Chief. Leiting intended the Statement to provoke a response from Wamboldt. Leiting hoped the Statement would result in a meeting between Wamboldt and Leiting at which both could discuss the matter and mutually apologize for the derogatory aspects of the September 21, 1987, phone conversation and of the Statement. Leiting did not intend the Statement as a personal attack on Wamboldt, or on his competence as an Assistant Chief.

10. Leiting submitted the grievance to Alan Horgen, who, at that time, served as the Chairman of the Union's Grievance Committee. Horgen read the grievance form submitted by Leiting, and suggested to Leiting that Horgen might "clean it up". Horgen did not, however, change the grievance submitted by Leiting before submitting the form to the City. The Union supported Leiting's grievance, and, through Horgen, submitted it to the City.

11. Leiting, the Union and the City met at least twice regarding the grievance. At some point during these meetings, Wamboldt informed the Union that the grievance had been denied because Leiting's attendance at the PFC meeting of September 18, 1987, had not been required. After receiving this explanation, the Union dropped the grievance regarding the City's denial of Leiting's overtime request.

12. The first meeting between the Union and the City regarding the grievance occurred on September 28, 1987. Michael Massey, the City's Fire Chief, together with Assistant Chiefs Wamboldt and Casey attended the meeting for the City. John Celebre, the Union's President, and Leiting attended the meeting for the Union. Both Celebre and Leiting spoke regarding the grievance, but Celebre controlled the presentation of the Union's position. Massey and Wamboldt interpreted the Statement as a personal insult of Wamboldt, and informed Celebre and Leiting of this fact. Leiting felt the Statement had been misinterpreted by Massey and Wamboldt, and personally phoned Massey about one-half hour after this meeting ended to explain the Statement. Massey did not find the explanation adequate.

13. At Leiting's request, a second meeting was conducted. This meeting took place on October 9, 1987. Leiting, Wamboldt and Massey attended this meeting. During this meeting, Leiting indicated he authored the Statement to reflect the offense he felt after his September 21, 1987, conversation with Wamboldt, and that he hoped to provoke a meeting between Wamboldt and himself to clear the air on the matter. Leiting also indicated he hoped to, and would, apologize to Wamboldt if Wamboldt would apologize to him. Leiting did not, however, unconditionally apologize to Wamboldt, and Wamboldt did not apologize to Leiting. The City's promotion procedure was discussed only in passing at this meeting and at the September 28, 1987, meeting.

14. In a memo to Leiting dated October 14, 1987, Massey stated the following:

> As a result of the derogatory remarks you made in writing about Assistant Chief Wamboldt you are hereby disciplined in the following manner:
>
> 1.) You are suspended without pay for one duty day, to be scheduled at the convenience of the department.
>
> 2.) To apologize in writing or in person to Assistant Chief Jerome P. Wamboldt.
>
> 3.) This letter of reprimand is added to your personnel files.

4.) Any similar conduct will be cause for further and more serious disciplinary action.

. . .

In a letter to Massey dated October 20, 1987, Celebre and Leiting informed Massey that Leiting wished to appeal the matter to the PFC.

15. Massey filed a complaint in the matter dated November 9, 1987, and the matter was heard by the PFC on January 8, 1988. The PFC, in a decision dated January 13, 1988, determined, among other things, that Massey could impose a one day suspension on Leiting.

16. Massey imposed the one day suspension, and the PFC upheld that suspension, based on the Statement. Leiting authored the Statement, and the Union processed the grievance containing the Statement, in good faith, believing the grievance conveyed a defensible claim for overtime payment and that the Statement conveyed the offense Leiting felt at Wamboldt's response to the overtime request, and the need for the City to respond to the merits of the request. The grievance, including the Statement, is a lawful statement of a position supported by the Union. As supported by the Union, the grievance, including the Statement, reflects concerted activity. The grievance, including the Statement, is not wholly unlawful in manner of presentation or purpose, and reflected, at the time of its submission, a colorable claim of a contract violation. Both Massey and Wamboldt regard the grievance as meritless, and the Statement as a personal insult to Wamboldt. Both Massey and Wamboldt view Leiting unfavorably for having filed the grievance and for having authored the Statement. However, neither Wamboldt, nor Massey, nor any other agent of the City has acted against Leiting on the basis on anti-Union animus.

CONCLUSIONS OF LAW

1. The Union is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

2. Leiting is a "Municipal employe" within the meaning of Sec. 111.70(1)(i), Stats.

3. The City is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

4. The City, by disciplining Leiting for the Statement which was included on the grievance he signed on September 22, 1987, did not commit any violation of Sec. 111.70(3)(a)3 or 4, Stats.

5. The City, by disciplining Leiting for the Statement which was included on the grievance he signed on September 22, 1987, committed a violation of Sec. 111.70(3)(a)1, Stats.

ORDER 1/

1. Those portions of the complaint asserting City violations of Secs. 111.70(3)(a)3 and 4, Stats., are dismissed.

1/ Pursuant to Sec. 227.48(2), Stats., the Examiner hereby notifies the parties that a petition for rehearing may be filed with the Examiner by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 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,

(Footnote one continued on page five)

2. To remedy its violation of Sec. 111.70(3)(a)1, Stats., the City, its officers and agents shall immediately:

a. Cease and desist from:

(1). Taking any action to discipline Leiting for any statement made on, or in connection with, the grievance he

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(Footnote one continued from page four)

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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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 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.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

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.

signed on September 22, 1987, regarding the City's denial of an overtime request.

b. Take the following action which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:

(1). Make Leiting whole for any wages or benefits lost by Leiting as a result of a one day suspension issued by the City based on the assertion of the greivance signed by Leiting on September 22, 1987.

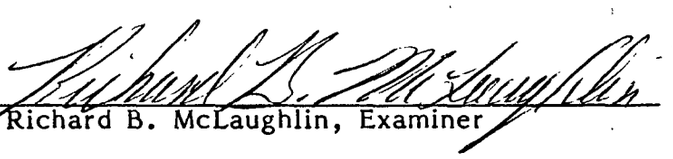
(2). Expunge from Leiting's personnel files any reference to any disciplinary action based on the assertion of the grievance signed by Leiting on September 22, 1987.

(3). Notify Fire Department employes represented by the Union by conspicuously posting the attached Appendix A in places where notices to employes are customarily posted, and take reasonable steps to assure that said notice remains posted and unobstructed for a period of thirty days.

(4). Notify the Wisconsin Employment Relations Commission within twenty days of the date of this Order as to what steps the County has taken to comply with the Order.

Dated at Madison, Wisconsin this 13th day of September, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

APPENDIX A

NOTICE TO CITY OF KENOSHA FIRE DEPARTMENT EMPLOYES REPRESENTED BY KENOSHA FIREFIGHTERS, LOCAL UNION NO. 414, IAFF, AFL-CIO

As ordered by the Wisconsin Employment Relations Commission, the City of Kenosha notifies you as follows:

1. The City of Kenosha has rescinded disciplinary action taken against Thomas Leiting for the assertion of a grievance questioning the City's denial of an overtime request, and has made Thomas Leiting whole for that disciplinary action. The City will not take disciplinary action against employes represented by Kenosha Firefighters, Local Union No. 414, IAFF, AFL-CIO, for the assertion of grievances filed in good faith, which advance colorable claims of a contract violation.

2. The grievance questioning the City's denial of an overtime request has been found, under the authority of the Wisconsin Employment Relations Commission, to constitute, in its entirety, a good faith and colorable claim of a contract violation. The processing of the grievance would not have been protected under the Municipal Employment Relations Act, and the disciplinary action noted in Paragraph 1 above would not have been rescinded, if Thomas Leiting or the Kenosha Firefighters, Local Union No. 414, IAFF, AFL-CIO, had used the grievance in bad faith to impugn the qualifications of Assistant Fire Chief Jerome Wamboldt, or any other Supervising Officer of the City of Kenosha Fire Department.

CITY OF KENOSHA

By_____ _____
Name Title

_____
Date

THIS NOTICE IS TO REMAIN POSTED FOR 30 DAYS AND IS NOT TO BE COVERED OR OTHERWISE OBSTRUCTED OR DEFACED.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The complaint consists of eleven separately numbered paragraphs, the last of which generally alleges City violations of Secs. 111.70(3)(a)1, 3 and 4, Stats., and requests a remedy for those violations. The only of the preceding paragraphs disputed by the City, with one minor exception not relevant here, is paragraph 10 which states:

> Because of the grievance activity of Fire Fighter Leiting as alleged in the immediately preceding paragraphs, the Chief of the Department, Michael A. Massey, has threatened and continues to threaten disciplinary action of Fire Fighter Leiting.

Whether the Statement can be considered protected under the First Amendment has posed a point touched upon in the processing of this matter. The Union has, as noted below, agreed that the present matter does not pose First Amendment issues, which, accordingly, will not be addressed in this decision.

THE PARTIES' POSITIONS

To initiate the argument of its initial brief, the Union notes that the facts in this matter are not in dispute, and that "(t)he only issue presented is whether or not the City violated the Act by imposing the one (1) day suspension on Firefighter Leiting". Noting that the sole basis for the discipline is the final sentence of the grievance form, and asserting that the entire grievance represents conduct protected by Sec. 111.70(2), Stats., the Union concludes that Leiting's suspension violated Secs. 111.70(3)(a)1, 3 and 4, Stats. Citing Monona Grove School District, the Union argues that "the filing and processing of a grievance is presumed to be protected activity . . . absent a strong showing that the grievance is wholly unlawful in manner of presentation or purpose". Because Leiting was "merely exercising his right to implement the bargained grievance procedure," it follows, according to the Union, that "the entire grievance is protected". Viewing the grievance in light of relevant case law of the National Labor Relations Board, the Union concludes that:

> Examining the grievance in its entirety, indicates that the (s)tatement at most is inappropriate but not so egregious as to warrant the forfeiture of the protected status . . . It is the activity of filing the grievance which is protected and comments contained therein must not be taken out of context.

Beyond this, the Union contends that "(t)he Employer's discipline of Firefighter Leiting was pretextual and motivated by union animus". In addition, the Union asserts that "(f)irefighter Leiting's conduct is protected because it is reasonable and nondisruptive". To uphold the suspension would, according to the Union, cause Leiting, or any firefighter, "to seriously consider whether or not to ever again file a grievance". The Union concludes that the record establishes that "(a)ppropriate remedial Orders must/should be entered".

The City initiates its reply to the Union's brief with a review of the record which establishes that the bulk of the facts, and the issues posed by those facts, are not in dispute. The City initiates its argument by asserting that it acted properly under the MERA since the "(s)uspension was an entirely proper response to (Leiting's) (s)tatement regarding Assistant Chief Wamboldt". To carry its burden of proving a violation of Sec. 111.70(3)(a)1, Stats., the Union must, according to the City, establish the existence of City conduct containing either some threat of reprisal or promise of a benefit which would tend to interfere with the rights granted by Sec. 111.70(2), Stats. The City argues that Commission case law establishes that to be "protected," Leiting's conduct must be "lawful" and "concerted". The record establishes, according to the City, that the Statement was not "made in the context of concerted activity," but was merely "the venting of personal anger". Since the Statement does not evince concerted activity, NLRB and Commission case law establish, according to the City, that the Statement is not "protected". While acknowledging that the filing of a grievance is protected

activity, the City urges that Leiting's Statement, by his own admission, did not further the grievance. Contending that the authority cited by the Union is distinguishable from the present facts, the City concludes that the "(m)aligning, written (s)tatement" at issue here can not be considered conduct protected by MERA. Beyond this, the City argues that Leiting's "(s)tatement does not warrant first amendment protection". Relevant judicial precedent establishes, according to the City, that courts "balance the public employer's responsibility of providing community services efficiently with a public employee's right to speak on issues of public concern". Because the Statement is a matter of purely personal interest, it follows, according to the City, that the balancing favors the disciplinary action taken by the City. In addition, the City contends that the suspension "(w)as lawful and appropriate conduct under (Sec.) 111.70(3)(a)3". The City specifically contends that at least three of the four elements set forth by the Commission to establish such a violation have not been proven on the present record. Beyond this, the City contends that "(n)o violation of (Sec.) 111.70(3)(a)4 exists". Viewing the record as a whole the City concludes that Leiting's Statement is "totally unconcerned or connected with matters of legitimate public importance or collective bargaining rights, (and) is unprotected activity". It follows, according to the City, that the complaint must be dismissed.

The Union starts its reply to the City's brief by asserting that the City's assertion that the Statement is unprotected is erroneous for three basic reasons:

> (a) the law presumes that the filing and processing of a grievance is a protected activity (b) Complainant's proof, in its Brief-in-Chief, of the (s)tatement's protectedness and (c) Respondent's failure to address the test by which gratuitous comments are held to be protected.

The Union asserts that Monona Grove establishes that the processing of a grievance is protected activity absent "a strong showing that the grievance is wholly unlawful in presentation and purpose". Because no such showing has been made by the City, it follows, according to the Union, that the entire grievance is protected. Beyond this, the Union contends that even if the Monona Grove presumption did not exist, the Union has established that the Statement was protected, since that Statement was "part and parcel of (Leiting's) grievance filing". Because the filing and processing of the grievance is protected, it necessarily follows, according to the Union, that inappropriate or gratuitous comments made in the context of the protected filing and processing can not lose their protected status. The Union asserts that NLRB and Commission case law supports this proposition, whether the comments at issue are written or verbal. Beyond this, the Union contends that the City "(f)ails to show that Complainant Leiting's comments were so unreasonable or disruptive to warrant forfeiting its protected status". In addition, the Union asserts that the record does establish the Commission's four-fold test for determining violations of Sec. 111.70(3)(a)3, Stats., violations has been met in this case. In conclusion, the Union argues that "this is not a First Amendment case and the Commission need not address (that aspect of) Respondent's argument". However, the Union does assert that the record does demonstrate the MERA violations alleged in the complaint, and that a remedy must follow.

DISCUSSION

The present matter focuses on the provisions of Secs. 111.70(3)(a)1, 3 and 4, Stats.

Sec. 111.70(3)(a)4, Stats., makes it a prohibited practice for a municipal employer to "refuse to bargain collectively with a representative of a majority of its employes . . .". There is no persuasive evidence of such a refusal to bargain in the present matter. There is no dispute that the grievance was processed in accordance with the requirements of the parties' grievance procedure. If the Union's allegation is that the City responded to the grievance in bad faith, that allegation must be rejected. Presumably the bad faith would be located in Wamboldt's September 21, 1987, response to Leiting's overtime request or in Leiting's suspension for attaching the Statement to the grievance. Neither of these acts, however, pose any issue regarding good faith bargaining by the City. The record demonstrates that the City feels Wamboldt's opinion of the grievance is

both held in good faith and correct. The City views the suspension as a good faith and correct response to the Statement, which the City views as a gratuitous insult which is separable from the processing of the underlying grievance. The dispute posed here, then, is not whether the City has acted in good faith, but whether the Statement can be separated from the processing of the underlying grievance. That issue is fully posed by the Union's allegations of a violation of Sec. 111.70(3)(a)1, Stats.

Sec. 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to "encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment . . .". To establish a City violation of Sec. 111.70(3)(a)3, Stats., the Union, by a clear and satisfactory preponderance of the evidence, 2/ must establish (1) that Leiting was engaged in protected concerted activity; (2) that the City was aware of this activity and was hostile to it; and (3) that the City took disciplinary action against Leiting based, at least in part, on this hostility. 3/

The record will not support the assertion that the City has committed any violation of Sec. 111.70(3)(a)3, Stats. The parties mutually acknowledge that the processing of Leiting's grievance is protected activity and that the City was aware of that activity. As noted above, however, the parties dispute whether the Statement can be considered part of the protected activity of processing the grievance. This dispute is irrelevant to resolution of the alleged violation of Sec. 111.70(3)(a)3, Stats., since the record fails to show that the City bore any proscribed hostility toward the processing of the grievance. That Wamboldt and Massey were hostile to Leiting's overtime request can be granted. That hostility, however, reflected their view of the merits of that request, and not the sort of hostility proscribed by Sec. 111.70(3)(a)3, Stats., which is anti-union animus. The City's suspension of Leiting did not reflect, in any part, an attempt by the City to discourage Leiting's membership in the Union. Rather, that suspension reflected the City's view that the Statement is separable from the grievance and constitutes an insult to Wamboldt, and a threat to the Department's chain of command. Because the record does not establish that the City acted toward Leiting on the basis of any proscribed hostility, no violation of Sec. 111.70(3)(a)3, Stats., has been found.

Sec. 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer to "interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2)". Sec. 111.70(2) Stats., grants municipal employes the right to "engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection". The Commission's standard for establishing an independent violation of Sec. 111.70(3)(a)1, Stats., demands that the Union prove, by a clear and satisfactory preponderance of the evidence, that the City's discipline of Leiting had a reasonable tendency to interfere with his exercise of rights protected by Sec. 111.70(2), Stats. It is not necessary for the Union to prove actual or intentional interference. 4/

The parties mutually acknowledge that the Commission has determined that the processing of a grievance is a right granted by Sec. 111.70(2), Stats. The Commission has established this point thus:

> While the specific facts of each case must always be considered . . . the filing and processing of a grievance advancing colorable claims according to a contractual

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2/ Sec. 111.07(3), Stats., made applicable by Sec. 111.70(4)(a), Stats.

3/ See Employment Relations Dept. v. WERC, 122 Wis.2d 132, 140 (1985). That case arose under the State Employment Labor Relations Act, but the "in part" test addressed in that case is derived from a case which arose under the Municipal Employment Relations Act: See Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis.2d 540 (1967).

4/ See Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84).

> grievance procedure can and should be protected activity absent a strong showing to the effect that the grievance is wholly unlawful in manner of presentation or purpose. 5/

There has been, and can be, no argument that a one day suspension for a statement on a grievance has a reasonable tendency to interfere with the processing of grievances. This does not, however, resolve the issue here which is whether the Statement can be separated from the processing of the the underlying overtime grievance. The City contends that it can be, and that the Statement reflects activity unprotected by Sec. 111.70(2), Stats. Under this view, the discipline was directly related to the Statement, and bore no relationship to the underlying overtime request. Since the Statement can be distinguished from the underlying grievance, it follows, according to the City, that the discipline does not interfere with the protected activity of processing the underlying grievance, but expresses the City's interest in protecting the chain of command in the Fire Department.

As a matter of law, the City's argument that the Statement can be separated from the underlying grievance is persuasive. If the Statement can be characterized as unlawful, or as non-concerted, there is no reason to believe the Statement warrants protection under Sec. 111.70(2), Stats. 6/ Thus, the determinative point regarding the alleged Sec. 111.70(3)(a)1, Stats., violation is whether the Statement constitutes protected activity. To be "protected" activity, the grievance, including the Statement, must constitute "lawful, concerted activity for the purpose of collective bargaining," within the meaning of Sec. 111.70(2), Stats. 7/

Applied to the present facts, however, the City's argument is not persuasive, and the Statement can not be separated from the protected activity of processing the underlying grievance. The City has not argued that the Statement is unlawful. This is appropriate, since the Statement can not be considered unlawful whether Leiting's or Wamboldt's interpretation of it is viewed as determinative.

The City has, however, argued that the Statement can not be considered anything more than Leiting's venting of purely personal anger for Wamboldt. This argument has considerable persuasive force. That Leiting was offended by Wamboldt's characterization of the overtime request is clear. In addition, the record does contain evidence that Leiting had personal reasons to dislike Wamboldt, since Wamboldt and Leiting's father competed for the position of Assistant Chief, with Wamboldt being selected. This latter consideration, however, is purely speculative on the present record. Leiting denied disliking Wamboldt, and there is no persuasive evidence to indicate any ill will on Leiting's part toward Wamboldt beyond that engendered by the September 21, 1987, conversation. For that matter, there is no persuasive evidence to indicate any ill will on Wamboldt's part toward Leiting beyond that engendered by the Statement. More significantly here, that something more than a personal vendetta was involved is demonstrated by the fact that the Union supported Leiting's grievance in the form authored by him, which included the Statement. It is apparent the Union considered the Statement an expression of the offense Leiting felt at receiving the rebuff from Wamboldt, and an expression of the need for the grievance to be addressed on its merits, not by fiat. This manifests the coalescing of Leiting's personal, and the Union's collective, interests in the processing of the grievance. In sum, the Statement does manifest lawful and concerted activity.

5/ Monona Grove School District and The Monona Board of Education of Monona Grove School District, Dec. No. 20700-G (WERC, 10/86), at 24.

6/ Sec. 111.70(6), Stats., declares the public policy underlying the MERA. If Leiting were using the grievance as a shield for unlawful or for purely personal purposes, none of the stated policy would be advanced.

7/ "'Protected activity' is merely a shorthand reference for those lawful and concerted acts protected by MERA." Monona Grove, at 24, citing City of LaCrosse, Dec. No. 17084-D (WERC, 10/83).

It does not, however, follow that the Statement is protected activity. Not every action undertaken by an individual which does not happen to be unlawful and which is supported by a union can necessarily be considered protected activity. If the Union, knowing Leiting sought to personally attack Wamboldt, supported the Statement to shield Leiting from discipline, the Statement, even if lawful and arguably concerted, would have been advanced in bad faith. Sec. 111.70(2), Stats., protects lawful and concerted activities for "the purpose of collective bargaining . . .". Collective bargaining, as defined by Sec. 111.70(1)(a), Stats., includes a duty of "good faith". Whether the Statement can be considered made in good faith represents the most difficult aspect of the present matter. The issue is whether the Statement reflects a personal insult to Wamboldt or an attempt, however inapt, by Leiting to respond in kind to Wamboldt's statements during the September 21, 1987, phone conversation.

This issue is complicated by the fact that, standing alone, the Statement can be interpreted as a personal attack on Wamboldt's qualifications. The Statement must, however, be placed in context, and when placed in context does not evince bad faith on Leiting's or the Union's part.

The initial and fundamental point regarding the context of the Statement is that it flowed directly from, and responded to, Wamboldt's gruff response to the overtime request. There is no persuasive evidence that Wamboldt and Leiting had any difficulty communicating with each other prior to the September 21, 1987, conversation. That conversation was the prelude and the cause of the Statement.

The City accurately points out that Wamboldt's statements were not personal while Leiting's Statement appears to be. Leiting's testimony that the Statement was not so intended must, however, be credited because that testimony can explain his conduct in this matter while the City's view of the Statement can not. If Leiting intended to insult Wamboldt, it is impossible to understand his conduct after the September 28, 1987, meeting. From the City's view of the Statement, that meeting only confirmed that Leiting's insult had been received. Why Leiting would attempt to clear up the matter by personally calling Massey shortly after the meeting is inexplicable. If Leiting's attempt to explain the matter is viewed as a cynical attempt to avoid discipline, his conduct after the attempted explanation is inexplicable. The Union offered Leiting whatever protection from discipline was available. Yet Leiting not only sought to explain the matter to Massey personally, but to arrange a meeting between Massey, Wamboldt and himself to clear the air, without any Union representation. If Leiting's motivation was cynical and in bad faith, this conduct served no purpose. Nor can the City's view of the Statement clarify the substance of the October 9, 1987, meeting. If Leiting's purpose had been limited to a bad faith attempt to insult Wamboldt, it would have been a small matter for Leiting to fabricate an unconditional apology to Wamboldt.

The Union's view of the Statement can account for Leiting's conduct without these difficulties. Under that view, the Statement was an attempt use Wamboldt's language in-kind to clarify that a gruff response would not answer Leiting's and the Union's concern with his appearing before the PFC on an off-duty day without compensation. This view can account for Leiting's conduct after the filing of the grievance. Under that view, the September 28, 1987, meeting was Leiting's first knowledge that the Statement had been received not as an attempt to provoke a response to a sincerely held grievance, but as a derogation of a superior officer's fitness to command. Leiting's attempt to resolve the matter by calling Massey shortly after that meeting can be accounted for by this view of the facts, since that meeting highlighted to Leiting that his attempt to provoke a response had been misunderstood and was about to get out of hand. Leiting's conduct after this call can also be accounted for under the Union's view. Under that view, Leiting asserted a matter of principle in his overtime request and used the Statement to underscore Wamboldt's inability to address the principle. This view can account for the demonstrated fact that Leiting consistently sought to have the meeting he thought the Statement would be a prelude to, in which Wamboldt could acknowledge that Leiting had a point to make, and each man could apologize for their gruff response to the other. Leiting was unable to make a cynical apology in the October 9, 1987, meeting because he felt he had a point to make, even if that point had become misunderstood. In sum, viewing the Statement as Leiting's

and the Union's attempt to assert a good faith grievance and to underscore the inappropriateness of Wamboldt's gruff response can account for Leiting's conduct. Viewing the Statement as a bad faith attempt to attack Wamboldt's fitness as an Assistant Chief can not.

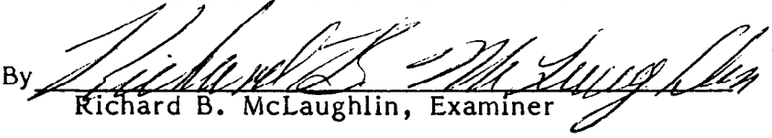
Beyond this, it appears that Leiting and the Union did not attempt to generally circulate the grievance, but to keep it "in house". That a grievance may, under certain circumstances, be a public document can be acknowledged. 8/ There is, however, no persuasive evidence to indicate the Union or Leiting sought to publically embarrass Wamboldt. Such an attempt would indicate bad faith, but no such attempt has been proven here.

In sum, the grievance, including the Statement, reflects lawful, concerted activity undertaken in good faith. The Statement is a misguided example of advocacy, but the inquiry here is not whether the Statement was a misguided attempt at advocacy, but whether it can be separated from the underlying grievance and be considered unprotected activity. The grievance stated, at the time it was asserted, a colorable claim under Section 7.04. The record demonstrates that the grievance, including the Statement, can not be considered "wholly unlawful in manner of presentation or purpose". It follows that the processing of the grievance, including the Statement, is conduct protected by Section 111.70 (2), Stats. The City's discipline of Leiting had a reasonable tendency to interfere with the processing of the grievance at issue here, as well as future grievances. It follows that the City's discipline of Leiting constitutes an independent violation of Sec. 111.70(3)(a)1, Stats.

The only part of the remedy ordered above requiring any discussion is the notice. The first paragraph of the notice has been inserted to remedy any chilling effect Leiting's suspension may have on the processing of grievances. The record does not establish that Massey has sought to threaten Leiting with reprisals, as alleged in paragraph 10 of the complaint, and the Order should not be read to confirm that specific allegation. The second paragraph has been inserted because the present record is a troublesome one, which represents something less than a clear case of right versus wrong. As noted above, the City has persuasively argued that the Statement could, as a matter of law, be separated from the underlying grievance. That the present facts will not support the application of this argument in this case should not obscure that the Statement treads the fine line between protected and unprotected activity. The second paragraph of the notice is to clarify that not all activity in the processing of a grievance can be treated as protected, and that a bad faith attempt to attack the qualifications of a superior officer while using a formal grievance as a shield from discipline will not be protected.

Dated at Madison, Wisconsin this 13th day of September, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

8/ See 73 Op. Atty. Gen 20 (1/16/84).