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-B

Appearances:

Mr. Richard V. Graylow, Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisonsin 53703-2594, 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 Ms. Barbara Kraetsch on the brief, appearing on behalf of the City of Kenosha.

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

Examiner Richard B. McLaughlin having on September 13, 1988 issued his Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he dismissed allegations that the City's imposition of a one day suspension upon Complainant Leiting violated Secs. 111.70(3)(a)3 or 4, Stats., but found that the City had thereby violated Sec. 111.70(3)(a)1, Stats.; and the Examiner therefore having ordered the City to take certain affirmative action to remedy said violation; and the City having on September 30, 1988, timely filed a petition with the Commission seeking review pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. of the Examiner's conclusion that the City had violated Sec. 111.70(3)(a)1, Stats.; and the parties having filed written argument in support of and in opposition to the petition, the last of which was received on November 22, 1988; and the Commission having reviewed the record and being fully advised in the premises, makes and issues the following

ORDER 1/

A. That the Examiner's Findings of Fact 1-8 and 10-15 are affirmed.

B. That the Examiner's Findings of Fact 9 and 16 are set aside and the following Findings of Fact are made by the Commission:

> 9. Leiting was offended by Wamboldt's statements during the telephone conversation which occurred on or about September 21, 1987. Leiting's Statement was included in the grievance as a personal attack on Wamboldt which reflected both Leiting's anger at the telephone conversation and Leiting's latent resentment toward Wamboldt for having been promoted to the position of Assistant Chief from a promotional pool which contained Leiting's father.

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

(Footnote 1/ continued on page 2)

1/ continued

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, 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 therefore 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.

16. The City's suspension of Leiting was not based in whole or in part upon hostility toward Leiting's exercise of his Sec. 111.70(3)(a)1, Stats., right to file a grievance. The City's suspension of Leiting was a response to Leiting's bad faith personal attack upon Wamboldt.

C. That Examiner's Conclusion of Law 4 is affirmed and renumbered as Commission Conclusion of Law 1.

D. That Examiner's Conclusions of Law 1-3 and 5 are set aside and the following Conclusion of Law is made by the Commission:

2. Because Leiting's Statement was made in bad faith, the City did not violate Sec. 111.70(3)(a)1, Stats., by suspending him for the Statement.

E. That paragraph 1 of the Examiner's Order is affirmed.

F. That paragraph 2 of the Examiner's Order is set aside and the following Order is made by the Commission:

2. That the portion of the complaint asserting that the City violated Sec. 111.70(3)(a)1, Stats., is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 17th day of February, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By S. H. Schoenfeld
S. H. Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

CITY OF KENOSHA

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

BACKGROUND

The Complaint

The Complainants alleged that the City violated Secs. 111.70(3)(a)1, 3 and 4, Stats., by threatening 2/ to discipline Complainant Leiting for filing a grievance.

The Examiner's Decision

The Examiner's decision contained the following Findings of Fact which established his view of the factual context in which this dispute arose:

. . .

> 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 5, 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 (sic) 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 wa 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 sent (the overtime request) in?
>
> Leiting: Yes.

2/ Subsequent to the filing of the complaint on November 24, 1987, the one day suspension imposed upon Leiting by the City was upheld by the Kenosha Police and Fire Commission.

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 grievance 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 meting 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 explan the Statement. Masey 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 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, detrmined, among other things, that Massey could impose a one day suspension on Leiting.

The Examiner initially determined that the City had not violated Sec. 111.70(3)(a)4, Stats., by suspending Leiting. He reasoned that no refusal to bargain issue was raised by the factual context in which the suspension occurred.

As to the Sec. 111.70(3)(a)3, Stats. allegation, the Examiner dismissed same finding that the record did not establish the requisite hostility by the City toward the filing of the grievance by Leiting.

However, the Examiner did find that the City's suspension of Leiting had a reasonable tendency to interfere with the exercise of employes' Sec 111.70(2), Stats., rights and thus concluded that the City had violated Sec. 111.70(3)(a)1, Stats. Examiner's Finding of Fact 16, set forth below, summarizes the factual essence of his analysis.

16. Massey imposed the one day suspension, and the PFC upheld that suspension, based on the Statement. Leiting authorized 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 of 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.

As the above Finding reflects, the Examiner rejected the City's argument that because the Statement (i.e. Leiting's remarks in his grievance regarding Wamboldt) allegedly had no relationship to the overtime grievance and reflected the venting of purely personal anger, it was not concerted activity and thus should be analytically separated from the grievance and deemed unprotected by Sec. 111.70(2), Stats. While acknowledging that Leiting was clearly offended by Wamboldt's telephone characterization of the grievance and that Leiting's father had unsuccessfully competed against Wamboldt for the Assistant Chief's position, the Examiner, noting the Union's willingness to file and process the grievance as written by Leiting, concluded that Leiting's grievance "manifests the coalescing of Leiting's personal, and the Union's collective, interests in the processing of the grievance" and in "the need for the grievance to be addressed on its merits, not by fiat." Thus, the Examiner reasoned that the grievance, including the Statement, was lawful, concerted activity which was protected by Sec. 111.70(2), Stats., if filed and processed in "good faith."

As to the City's assertion that even if lawful and concerted, the Statement was made in "bad faith" and was thus unprotected, the Examiner initially stated:

> 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 place in context does not evince bad faith on Leiting's or the Union's part.

The Examiner's rejection of the "bad faith" defense was based upon conclusions that: (1) Wamboldt's telephonic remarks to Leiting were "the prelude and the cause of the Statement;" (2) Leiting's conduct after the filing of the grievance was consistent with Leiting's asserted interest in having the merits of his grievance addressed and avoiding any misunderstandings about his motives; and (3) Leiting and the Union made no effort to publicize the grievance and thus publically embarrass Wamboldt.

By way of conclusion, the Examiner stated:

> 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 (sic) 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 in 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.

POSITIONS OF THE PARTIES

The City

The City argues that the Examiner erred when he concluded that the one day suspension imposed upon employe Leiting by the City violated Sec. 111.70(3)(a)1, Stats. The City argues that Leiting's personal attack upon a member of management

does not constitute lawful concerted activity and thus is not activity which is protected by Sec. 111.70(2), Stats. The City contends that Leiting's remarks, as contained in his grievance, were individually motivated statements reflecting only Leiting's personal anger, that the statement was made in bad faith, and that the statement, (as opposed to the grievance) had no support among other bargaining unit members. The City alleges that it was appropriate to discipline Leiting for his personal attack and that said discipline did not have a reasonable tendency to chill the exercise of Sec. 111.70(2), Stats. rights by other employes. The City urges the Commission to conclude that the discipline of Leiting was only the reasonable exercise of the City's right to discipline employes who personally attack their superiors and to separate the City's response to this attack from the fact that the attack was contained in a grievance. In the City's view, affirmance of the Examiner's decision would "open the flood gates and allow irrelevant, out-of-context attacks against Fire Department administrators and supervisors, as well as against elected and appointed officials of the City of Kenosha, to be unscrupulously included in all future grievances."

The Union

The Union urges the Commission to uphold the Examiner's decision. The Union asserts that the Examiner correctly concluded that Leiting's grievance and the statement contained therein are protected under Sec. 111.70(2), Stats., as lawful, good faith, concerted activity. Thus, the Union asserts that under no circumstances can discipline be imposed upon Leiting for the statement contained in his grievance without violating Sec. 111.70(3)(a)1, Stats.

DISCUSSION

It is clear that if the City had suspended Leiting for filing a grievance which simply alleged a violation of the overtime provisions in the contract, the City would have violated Sec. 111.70(3)(a)1, Stats. As we held in Monona Grove School District, Dec. No. 20700-G (WERC, 10/86):

> ". . . the filing and processing of a grievance advancing colorable claims according to a contractual grievance can and should be presumed to be protected activity absent a strong showing to the effect that the grievance is wholly unlawful in manner of presentation or purpose."

This conclusion flows from the fact that the filing and processing of grievances is part and parcel of the Sec. 111.70(2) Stats. right to "engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection". Disciplining an employe for filing a grievance which has been filed and processed in good faith clearly has a reasonable tendency to deter and thus "interfere" with the exercise of this Sec. 111.70(2) right and thus violates Sec. 111.70(3)(a)1, Stats.

It is equally clear that the City would not have suspended Leiting for filing a grievance which did not contain the Statement because, as found by the Examiner, the City, although believing the grievance to be lacking in merit, was not hostile toward the protected right of an employe to file and process a grievance. Thus, as found by the Examiner, it is evident that it was the inclusion of what has been termed "the Statement" in the overtime grievance which caused the City to suspend Leiting. As we noted in Monona Grove, supra, if a grievance is filed and processed in bad faith, the activity, although inherently concerted, loses its protected status. Thus, the critical question raised by this case is whether the Statement, although part of the concerted activity of filing and processing a grievance, is not protected of Sec. 111.70(3)(a)1, Stats., because it was made in bad faith. If the Statement was good faith advocacy on behalf of a reasoned consideration of a contractual claim, an interest which all employes concertedly share in the context of filing and processing a grievance, the Statement is protected by Sec. 111.70(2), Stats. If a personal attack, the Statement, even though included in a grievance, was not made in good faith and is unprotected by Sec. 111.70(2), Stats.

As noted earlier herein as part of our summary of the Examiner's analysis of the "good faith" issue, the Examiner's rejection of the "bad faith" defense was based upon conclusions that: (1) Wamboldt's telephonic remarks were "the prelude

and the cause of the Statement;" (2) Leiting's conduct after the filing of the grievance was consistent with Leiting's asserted interest in having the merits of his grievance addressed and avoiding any misunderstandings about his motives; and (3) Leiting and the Union made no effort to publically embarrass Wamboldt.

While the Examiner's view of the record is not unreasonable, we do not concur with his conclusion that the Statement was "a misguided attempt at advocacy" which therefore acquired Sec. 111.70(2), Stats., protection. While it is true that Wamboldt is responsible for triggering Leiting's response, it must be remembered that Leiting's Statement was not a spontaneous verbal response to Wamboldt's remark but rather a written communication which he was twice advised to delete from the grievance. Thus, his Statement was not akin to the occasionally insulting retorts which are spontaneously exchanged at the bargaining table and which would likely be protected by Sec. 111.70(2), Stats. Instead, it was a calculated message which was unrelated to the merits of the grievance, a message which, on its face, attacked Wamboldt and which Leiting persisted in filing despite the advice of fellow employes to the contrary. Had Leiting been genuinely interested in facilitating a meaningful discussion of his grievance, he could easily have deleted the clearly insulting language from his grievance and replaced it with general language which would have conveyed the same interest. Thus, we are satisfied that Leiting's attack on Wamboldt was not motivated by a desire to stimulate discussion of the merits of his grievance but rather by his anger at Wamboldt for the telephone conversation and by his latent resentment toward Wamboldt for having received the promotion which Leiting's father had also sought. In our view, Leiting's conciliatory efforts after the grievance was filed reflect only his tardy realization that his personal attack was an error which it would be prudent to attempt to correct. Thus, unlike the Examiner, we do not find Leiting's conduct during meeting and conversations with Wamboldt and Chief Massey to be persuasive evidence of Leiting's "good faith" when filing his Statement.

Given the foregoing, we conclude that Leiting's Statement was a bad faith personal attack upon Wamboldt which therefore is not protected from a disciplinary response by Sec. 111.70(3)(a)1, Stats. We have therefore reversed the Examiner to that extent and dismissed the complaint in its entirety.

Dated at Madison, Wisconsin this 17th day of February, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By S. H. Schoenfeld
S. H. Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner