STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS "GENERAL" LOCAL NO. 200 Complainant, vs. CITY OF GREENFIELD, Respondent.	Case 95 No. 41627 MP-2185 Decision No. 25900-A

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Mr. John Brennan, 788 North Jefferson, Room 600, P.O. Box 92099 Milwaukee, WI 53202, appearing on behalf of Complainant.
Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Kevin Krogmeier, 815 East Mason Street, Suite 1600, Milwaukee, WI 53202-4080, appearing on behalf of Respondent.

FINDINGS OF FACT
CONCLUSION OF LAW AND ORDER

Teamsters "General" Local No. 200 filed a complaint on January 23, 1989 with the Wisconsin Employment Relations Commission alleging that the City of Greenfield had violated Secs. 111.70(3)(a)1, 3 and 4, Stats., by (failing to bargain before) unilaterally implementing a performance appraisal program for employes represented by the Union. The Union filed an amended complaint on April 19, 1989 which alleged that regardless of the specific date on which the performance evaluation system was implemented, it was instituted after an election petition had been filed and thus interfered with the employes' concerted activity. 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. No hearing was held in the matter; instead, the parties waived hearing and submitted evidence in the form of stipulated facts on June 5, 1989. Both parties filed briefs and reply briefs by July 24, 1989. 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. Teamsters "General" Local No. 200, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and its principal offices are located at 6200 West Bluemound Road, Milwaukee, Wisconsin 53201.

2. City of Greenfield, hereinafter referred to as the City, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its offices are located at 7325 West Forest Home Avenue, Greenfield, Wisconsin 53220.

3. Prior to adopting the performance evaluation system at issue here, the City never had a formal system for evaluating non-represented employes.

4. On September 21, 1987, the three member City Personnel Committee in closed session discussed the subject of job evaluation and performance criteria for non-represented employes. This discussion was initiated in part because some employes wanted an evaluation system. Afterwards, the City's labor negotiator twice sent the Mayor of the City sample job evaluation forms used by other local governments in the area.

5. At their November 16, 1987 meeting, the City Personnel Committee took official action and authorized its labor negotiator to proceed with drafting guidelines for developing job evaluations and performance criteria for all non-represented employes.

6. Thereafter, the City Personnel Committee in closed session discussed job evaluation and performance criteria for non-represented employes at monthly meetings on December 21, 1987 and January 27, February 15 and March 21, 1988.

7. The City was notified on March 28, 1988 by the Union that the Union had filed an election petition with the Wisconsin Employment Relations Commission for a representation election in a proposed residual bargaining unit of unrepresented City employes. The parties later stipulated to an election. On August 25, 1988, the Commission issued a Direction of Election in the matter

and an election was subsequently scheduled for October 7, 1988.

8. While this election matter was pending, the City Personnel Committee continued to discuss job evaluation and performance criteria for non-represented employes in closed session at monthly meetings on April 25, May 16, and June 20, 1988.

9. On August 30, 1988, the City Personnel Committee in closed session adopted a performance appraisal program (which included job evaluation forms and performance criteria) for all non-represented employes. The City directed its labor negotiator to implement the (appraisal) system.

10. After the performance appraisal system was adopted, the City Personnel Committee continued to discuss it in closed session at monthly meetings on September 19, October 17, November 21 and December 19, 1988 and January 16, 1989.

11. On October 5, 1988, Mayor James Besson sent the following memo to City department heads regarding the annual performance review:

> Attached are the performance evaluation forms that we are asking you to complete for the non-represented employees within your Department. These evaluations will be used in assisting the determination of the salary increases for 1989.
>
> The performance review procedure which was established is as follows:
>
> 1. Department heads will evaluate personnel reporting to them and meet with each employee individually to review said evaluation. The employee names are indicated on the form.
>
> 2. The Mayor and Common Council will evaluate all department heads and will thereafter meet with each of you to discuss your individual evaluation and the evaluations of the employees you supervise. A sample of the department head's performance review form is attached for your reference.
>
> In the interest of completing all of the evaluations of the employees under your supervision as soon as possible, please complete your employee evaluations, place them in a sealed envelope and return to Deputy City Clerk Sue Witon by November 9, 1988. This timeline also includes the meeting with each non-represented employee within your department. The employees you will be evaluating are as follows:
>
> . . .
>
> Since this is the first time we've done these performance reviews, feel free to give us your suggestions and if you have any questions, please do not hesitate to contact me.
>
> Enclosures
>
> cc: Common Council

That same day, the Mayor also sent the following memo to unrepresented City employes regarding the annual performance review:

> In an effort to continually improve not only job performance but also communication, the City of Greenfield is attempting to encourage management/employee relations through the use of a formalized performance review system.
>
> Your Department Head _____ will be evaluating your performance and discussing it with you. Itemized below is a list of those elements which will be used to evaluate your performance. It is important that both you and _____ be able to exchange ideas with regard to your job and performance. At that time, you will also have an opportunity to record any comments you may have concerning the evaluation.
>
> Quality of Work - Accuracy, thoroughness, attention to detail, competence.
>
> Job Knowledge - Knowledge of own job, department's function, understanding of principles, methods or processes used.

Communication Skills - Written: organization, clarity, sentence structure. Oral: confidence, diction, clarity.

Productivity - Timeliness, amount of work output, effective use of workday.

Interaction with Others - Cooperation, discretion, acceptance of guidance and correction.

Dependability - the degree to which the employee can be relied upon to get the job done.

Initiative - Self-starter, finds work to do, self-motivated.

Adaptability - Accepts additional responsibilities, ability to adjust to new or different situations.

Judgment and Common Sense - Ability to make sound decisions and take corrective action.

Adherence To City Policies - Follows City policies, i.e., breaks lunches, attendance, phone calls, tardiness, etc.

12. The Commission conducted a representation election among certain non-represented City employes on October 7, 1988. The Union won the election and the 11 employes were included in a residual bargaining unit. The Commission certified the Union as the bargaining representative on October 19, 1988 for a residual unit of professional, non-professional and craft employes of the City.

13. Beginning November 3, 1988, the City started evaluating non-represented employes and employes now represented by the Union. Six employes in the 11 person residual bargaining unit were evaluated between November, 1988 and January, 1989. These performance evaluations have not been used to grant pay increases and/or discipline residual bargaining unit members.

14. On November 8, 1988, the City was advised by the Union's legal counsel to "refrain from implementing the annual performance review program and maintain the status quo pending negotiations of this and other issues." The Union's counsel indicated that "if the program is implemented, the Union will have no choice but to file a prohibited practice complaint."

15. The first bargaining session between the City and the Union for the residual unit was held on December 21, 1988. As of the date the record herein was closed, neither the City nor the Union had submitted any bargaining proposals on the subject of performance appraisals covering employes in the residual bargaining unit.

16. On January 17, 1989, the Union filed the instant prohibited practice complaint. An amended complaint was filed on April 13, 1989.

17. The City's decision to adopt/implement the performance appraisal program was not related to the Complainant Union's organizing attempts, was not in retaliation for them, and did not have a reasonably tendency to interfere with, restrain or coerce employes in the exercise of their rights protected under the Municipal Employment Relations Act, nor did it constitute a refusal to bargain collectively with the Union.

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

CONCLUSION OF LAW

Respondent, by its actions referenced above, did not violate Secs. 111.70(3)(a)1, 3 or 4, Stats.

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

ORDER 1/

IT IS ORDERED that the complaint filed herein be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 21st day of September, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Raleigh Jones, Examiner

(See Footnote 1/ on Page 5)

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

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.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In its complaint, the Union alleged that the City violated Secs. 111.70(3)(a)1, 3 and 4 Stats., by (failing to bargain before) unilaterally implementing a performance review program for employes represented by the Union. In an amended complaint, the Union alleged that regardless of the specific date on which the performance review program was implemented, it was instituted after an election petition had been filed and thus interfered with the employes' concerted activity. The City denied it committed any prohibited practice within the meaning of MERA when it implemented the performance appraisal system.

Union's Position

It is the Union's position that the City committed a prohibited practice by (failing to bargain before) unilaterally implementing a new performance evaluation system for employes represented by the Union. In the Union's view, implementation of the performance evaluation system occurred no earlier than the time the first employe was actually evaluated under the new program. The Union contends the earliest this was done with any employe was November 3, 1988. Thus, it asserts that since the City did not implement its new system until after the Union was certified as the bargaining agent, the City unlawfully unilaterally implemented a mandatory subject of bargaining without first bargaining with the Union over same. The Union further contends that even if the new performance evaluation system was implemented on October 5 (when the employes were notified that the City intended to evaluate their performance through the use of the new system), it was still unlawful because it interfered with the employes election decision which was made two days later. According to the Union, the timing of the October 5 memo suggests that it was merely a device intended to coerce employes into voting down the Union. In the Union's view, it is not difficult to see how this memo would have a tendency to interfere with the employes' pending election choice. The Union therefore asks that the City be ordered to withdraw the performance appraisal program, to cease and desist from its conduct herein, and to bargain collectively over the appraisal program before making any changes.

City's Position

The City denies that it committed any prohibited practice when it implemented the performance appraisal program for non-represented employes which included persons who would later be represented by the Union. The City's position is that the implementation of the performance appraisal program was permissive for the following reasons. First, the City contends it initiated a study to implement a performance appraisal program on September 21, 1987, and this study predates any known Union organizing activity by six months. Next, in the City's view, it had no duty to bargain with the Union over the adoption of the performance appraisal program since the Union was not certified as the employes' bargaining representative when this program was adopted. According to the Employer, this appraisal program was not adopted on either of the dates suggested by the Union, namely October 5, 1988 (when the employes received a memo concerning the program from the Mayor) or November 3, 1988 (when the first employe was evaluated under the program). Instead, the City relies on the stipulated facts for the proposition that the City announced the adoption of the performance appraisal program on August 30, 1988 and directed its labor negotiator to implement same. Third, the City asserts that it did not discriminate against the Union or any of its future members when it adopted the appraisal program because it did so for a legitimate business reason, namely to give City employes feedback on their job performance. Fourth, the Employer submits it has never refused to bargain with the Union over the subject of a performance appraisal program. Finally, with respect to the Union's contention that the adoption of the performance appraisal program during the pendency of the representation election violated MERA, the City insists there was nothing illegal about the contents of the Mayor's memos of October 5, 1988. The City notes in this regard that the first memo was to department heads asking them to review employes under their supervision and supplying them with forms to accomplish this task, and the second memo was to City employes advising them they were to be evaluated and discussing the job evaluation criteria and format. In the City's view, these memos did not interfere with the employes' rights to choose a union two days later. The City concludes that the complaint is without merit and the City has not violated Secs. 111.70(3)(a)1, 3 or 4, Stats., and it asks that the complaint be dismissed in its entirety.

DISCUSSION

The instant complaint alleges that the City violated Secs. 111.70(3)(a), 1, 3 and 4 of MERA by unilaterally implementing a new performance appraisal program for employes pending an election among those employes and by refusing to bargain with the Union over same. The Union seeks to have the performance appraisal program rescinded.

Refusal to Bargain

The Legal Framework

Section 111.70(3)(a)4 provides in relevant part that it is a prohibited practice for a municipal employer:

> To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. . . . An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the Commission.

An employer's duty to bargain with a bargaining representative arises upon the union's certification as bargaining representative following an election. 2/ Until that happens though, the employer has no duty to bargain with the Union. 3/ This means unilateral changes in wages, hours or working conditions by an employer can violate Sec. 111.70(3)(a)4 only where a labor organization is already the exclusive representative of the employes affected. 4/ Upon the selection of a bargaining representative though, any subsequent changes in wages, hours and working conditions would be subject to the duty to bargain. 5/ If the union desires to bargain over such mandatory subjects of bargaining, it must make such a demand. 6/

Application Of The Legal Framework To The Facts

The Union alleges that the City violated Sec. 111.70(3)(a)4 when it adopted the performance appraisal program and did not bargain this decision with the Union. The City denies that it had any duty to bargain its decision to adopt the performance appraisal program since the Union was not certified as bargaining representative for the affected City employes when this happened.

In deciding whether the City's actions in this matter amounted to a refusal to bargain collectively, discussion will be divided along two lines: (1) the City's obligations during the pendency of a representation question, and (2) the City's obligations after the Union was certified as the exclusive bargaining representative for certain City employes. Each of these points is addressed below.

It is clear from the stipulated facts that the Employer unilaterally adopted the performance appraisal program on August 30, 1988. This date preceded the Union's certification as bargaining representative for certain City employes by about two months. That being the case, the City's action in unilaterally adopting the performance appraisal program without bargaining with the Union over same was lawful since the Union did not have any legal rights to bargain for City employes when the program was adopted.

The Union contends that implementation of this new system, not adoption, is the important factor herein. In the Union's view, the City waited too long to implement the new appraisal system. It contends implementation of the new appraisal system occurred either on October 5, 1988 when the Mayor notified employes they would be evaluated under the new appraisal system or November 3, 1988 when the first employe was evaluated under the system. The City contends implementation did not occur on either of these dates; in its view, implementation of the program occurred simultaneously with its adoption. The implementation date is important, of course, because if it was before the Union was certified as bargaining representative, then the City would not have to bargain with the Union over same. Conversely, if the implementation date was after the Union was certified as bargaining representative, then the City would have to bargain with the Union over same.

It is unclear from the record though exactly when the program was implemented. In this regard, all the stipulated facts indicate is that the City "directed" its labor negotiator "to implement the system" after it was adopted. Thus, no specific date of implementation is found in the stipulated facts. That being the case, it is necessary for the Examiner to determine when the program was implemented.

2/ New Richmond Jt. S. D. No. 1, Dec. No. 15172-A (7/77), aff'd, Dec. No. 15172-B (WERC, 5/78).

3/ Ibid.

4/ Grant County, Dec. No. 21567-A (8/84), aff'd, Dec. No. 21567-B (WERC, 1/85).

5/ School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85).

6/ City of Janesville, Dec. No. 21264-B, (Houlihan, 9/84), aff'd by operation of law, Dec. No. 21264-C, (WERC, 10/84).

In the Examiner's view, the performance appraisal program was essentially in place as of the date it was adopted by the Personnel Committee since their action included adopting the job evaluation forms and performance criteria to be used. All that remained then was for City department heads to carry out the mechanics of using these job evaluation forms and applying the specified performance criteria when they evaluated individual employes. That being so, it is the conclusion of the Examiner that implementation of the appraisal program was effective simultaneously with its adoption.

In so finding, the Examiner has considered both dates proposed by the Union as the effective implementation dates for the new appraisal program, namely October 5, 1988 or November 3, 1988. Neither date has been recognized as the effective implementation date for the following reasons.

First, with regard to October 5, 1988 (when the Mayor notified employes they would be evaluated under the new system), it is simply noted that even if the appraisal system was implemented on that date, the Union was not yet certified as bargaining representative. As a result, the City had no duty to bargain with the Union at the time over same.

Next, the undersigned turns to the Union's contention that the appraisal system was implemented when the first employe was actually evaluated under it (i.e. November 3, 1988). It is initially noted in this regard that individual employes did not feel the impact of, and were not personally affected by, the new appraisal program until their work performance was evaluated. Having said that though, just one bargaining unit employe was evaluated on November 3, 1988; the others were evaluated, if at all, at a later date. This means that those employes who were not evaluated on November 3, 1988 were still not personally affected by the new appraisal program on that date even though that is the date proposed by the Union as the effective implementation date for all employes. Taking this reasoning a step further, if the Examiner were to accept the notion that the appraisal program was not implemented until each employe had been evaluated, the end result under the instant record would be a finding that the program still had not been implemented when, in fact, it has been. This is because although six of the eleven employes now represented by the Union were evaluated between November, 1988 and January, 1989, the other five employes in the residual bargaining unit had apparently not yet been evaluated as of the time the parties submitted the stipulated facts in June, 1989. Given the foregoing then, the Examiner rejects the Union's contention that the appraisal program became effective on November 3, 1988 when the first employe was evaluated under it.

Having found that the performance appraisal program was both adopted and implemented before the Union was certified as the exclusive bargaining

representative for certain City employes, it follows that the City was not obligated to bargain with the Union over same.

The Examiner now turns to the question of whether the City refused to bargain with the Union regarding the performance appraisal program after the Union was certified by the Commission as the exclusive bargaining representative for certain City employes.

If the Union desired to bargain over the City's performance appraisal program, it was incumbent upon it to make such a demand. Here, though, no demand to bargain was ever made nor has the Union made a proposal in the ongoing contract negotiations regarding same. That being so, there simply is no basis upon which to find that the City has refused to bargain with the Union over the performance appraisal program after it became the bargaining representative for certain City employes. Therefore, no refusal to bargain within the meaning of Sec. 111.70(3)(a)4 has been found.

Interference

The Legal Framework

Section 111.70(3)(a)1, Stats., provides that it is 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)." 7/

In order for the Complainant to prevail on its complaint of interference with employe rights it must demonstrate, by a clear and satisfactory preponderance of the evidence, that Respondent's complained of conduct contained either some threat of reprisal or promise of benefit which would tend to interfere with its employes in the exercise of their rights guaranteed by Sec. 111.70(2) of MERA. 8/ It is not necessary to show that Respondent intended its conduct to have the effect of interfering with those rights. 9/

In Town of Mercer 10/ it was held that under Sec. 111.70(3)(a)1,

> a municipal employer may not make any unilateral changes in the wages, hours, and conditions of employment during the pendency of an election that would be likely to interfere with the employes' free choice in that election. It is not necessary to find that the employer acted out of hostility to the Union to establish such a violation; however, a change during the pendency of an election is not a per se violation and no violation is established if the employer can prove a legitimate business reason for the change or a course of action that pre-dates the Union's organizational campaign.

At 6. (Citations omitted)

Application Of The Legal Framework To The Facts

In deciding whether the City's actions in this matter amounted to "interference", discussion will be divided along two lines: (1) the City's unilateral action in adopting the performance appraisal system during the pendency of a representation question, and (2) whether the City's announcement two days before the union election that employes were to be evaluated under the newly adopted appraisal system contained a threat of reprisal or promise of benefits. Each of these points is addressed below.

The stipulated facts indicate that Respondent's Personnel Committee discussed the subject of job evaluation and performance criteria for non-represented employes at its September, 1987 meeting. Afterwards, the City's

---

7/ (2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employes shall have the right to refrain from any and all such activities except that employes may be required to pay dues in the manner provided in a fair-share agreement. . . .

8/ Western Wisconsin V.T.A.E. District Dec. No. 17714-B, (Pieroni, 6/81), aff'd by operation of law, Dec. No. 17714-C, (WERC, 7/81), Drummond Jt. School District No. 1, Dec. No. 15909-A (Davis, 3/78), aff'd by operation of law, Dec. No. 15909-B, (WERC, 4/78).

9/ City of Evansville, Dec. No. 9440-C (WERC, 3/71).

10/ Decision No. 23136-C, proposed decision (Buffett, 5/86), adopted by Commission, Dec. No. 23136-D, 7/86).

labor negotiator twice sent sample job evaluation forms to the City. At its November 16, 1987 meeting, the Personnel Committee took official action and authorized its labor negotiator to proceed as directed relative to drafting guidelines for developing job evaluations and performance criteria for all non-represented employes. Thereafter, the Personnel Committee discussed job evaluation and performance appraisal at each of its monthly meetings through the time its formally adopted a performance appraisal system in August, 1988 and also into January, 1989.

The numerous discussions referenced above establish that the Personnel Committee had subjected the appraisal matter to the decision making process months before the Union filed its election petition in March, 1988. 11/ In the Examiner's view, these discussions relative to the appraisal system held at each of the successive monthly Committee meetings, together with the Committee's directive to its labor negotiator to proceed with developing an appraisal system, rise to the level of a "course of action" contemplated by Town of Mercer. Accordingly, it has been concluded that the action taken by Respondent's Personnel Committee on August 30, 1988 when it adopted a performance appraisal system for Respondent's non-represented employes was the result of a course of action that began before the Respondent was notified by the Union of its organizing activity. Therefore, the City's unilateral action in adopting the performance appraisal system does not constitute interference within the meaning of Sec. 111.70(3)(a)1, Stats. 12/

Attention is now turned to the question of whether the City's announcement two days before the Union election that employes were to be evaluated under the new performance appraisal system interfered with employe rights. In this regard the stipulated facts indicate that on October 5, 1988, two days before the union election, the Mayor of the City issued two pertinent memos; one was directed to department heads asking them to review all non-represented employes under their direction and the other was directed to non-represented employes advising them they would receive a performance evaluation. The latter memo listed the criteria in the newly adopted appraisal system which would be used to evaluate employe performance.

The Examiner finds that neither of the above-noted memos are coercive notwithstanding the fact they were issued two days before the union election. Foremost in reaching this conclusion is that neither memo contains any statements connecting the new job performance appraisal system with the Union's organizing efforts, nor does either memo contain any inferences that employes would be evaluated adversely as reprisal for supporting the Union. Furthermore, neither memo contains a promise of benefits if the Union were defeated in the election nor threats of reprisals if the Union should prevail. Thus, both memos are devoid of any threats or promises related to union activities. Accordingly, it is concluded that the Mayor's October 5, 1988 memos were not coercive and therefore did not interfere, restrain or coerce employes in the exercise of their protected rights.

Discrimination

The Legal Framework

Section 111.70(3)(a)3, Stats., provides that its 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 . . . ."

A violation of Sec. 111.70(3)(a)3 requires that the Complainant prove by a clear and satisfactory preponderance of the evidence that:

> (1)the employes were engaged in protected, concerted activity;
>
> (2)the employer was aware of said activity;
>
> (3)the employer was hostile to such activity;
>
> (4)the employer's action was based, at least in part, upon said hostility. 13/

11/ Such was also the case in Grant County, supra.

12/ Having so found, it is unnecessary to determine if the Employer proved a "legitimate business reason" for the unilateral change involved herein. This is because it was held in Town of Mercer that "no violation is established if the employer can prove a legitimate business reason for the change or a course of action that pre-dates the Union's organizational campaign." Emphasis added. Here, the latter has been found to exist.

13/ 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

Application Of The Legal Framework To The Facts

In this case the employes were engaged in protected, concerted activity (i.e. attempting to organize) at the time the City adopted the performance appraisal program, and the City was aware of that protected activity at the time it adopted same. That being so, points one and two above have been met. Points three and four above require the Union to prove that the City was motivated by hostility towards the employes organizational activity when it adopted the performance appraisal program on August 30, 1988.

The timing of the City's adoption of the performance appraisal program (i.e. just a little over a month before the representation election) is probative, but is not determinative, as to hostility toward the employes' protected activity. Here, the record establishes that the City's consideration of a job performance appraisal system for all non-represented employes predated the employes' efforts to organize. First, the Personnel Committee's discussions regarding same had begun six months before it was advised by the Union of its organizing activity. Second, the City Personnel Committee directed its labor negotiator to proceed with developing an appraisal system in November, 1987, four months before it was advised by the Union of its organizing activity. Given the foregoing then, the Personnel Committee's consideration of a performance evaluation system for all non-represented employes was well underway when the Union filed its election petition on March 28, 1988.

Other than the City's timing in adopting the performance appraisal system on August 30, 1988 (i.e. just a little over a month before to the representation election), there is no evidence of any hostility toward the organizing campaign on the part of the City nor any basis in the stipulated facts for inferring same. That being so, the timing of this action is not sufficient, in the Examiner's view, to sustain the Complainant's burden to prove by a clear and satisfactory preponderance of the evidence that the City was motivated by hostility towards the employes organizational activity when it adopted the performance appraisal system on August 30, 1988. Therefore, no violation of Sec. 111.70(3)(a)3, Stats., has been found herein.

In summary then, it is concluded that the City did not act unlawfully when it unilaterally adopted/implemented a performance appraisal program pending a

---

C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis.2d 540 (1967).

representation election and advised the affected employes they were to be evaluated two days before the election. Consequently, the City did not violate Secs. 111.70(3)(a)1, 3 or 4, Stats., and the complaint has therefore been dismissed.

Dated at Madison, Wisconsin this 21st day of September, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Raleigh Jones, Examiner