

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 428, MILWAUKEE, WISCONSIN	:	
GENERAL CITY CLERICAL EMPLOYEES,	:	
MILWAUKEE DISTRICT COUNCIL 48,	:	
AFSCME, AFL-CIO,	:	
	:	Case 366
Complainant,	:	No. 44601 MP-2396
	:	Decision No. 26728-A
vs.	:	
THE CITY OF MILWAUKEE,	:	
	:	
Respondent.	:	

Appearances:

Perry, Lerner & Quindel, S.C., 823 North Cass Street, Milwaukee, Wisconsin 53202-3908, by Mr. Peter Guyon Earle, Attorney at Law, on behalf of the Complainant.

Ms. Mary M. Rukavina, Assistant City Attorney, City of Milwaukee, Milwaukee City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, on behalf of the Respondent.

FINDINGS OF FACT ,
CONCLUSIONS OF LAW AND ORDER

On September 27, 1990, Local 428, Milwaukee, Wisconsin General City Clerical Employees, Milwaukee District Council 48, AFSCME, AFL-CIO, hereafter the Union or Complainant, filed a complaint with the Wisconsin Employment Relations Commission, in which it alleged that the City of Milwaukee, hereafter the City or Respondent, had engaged in prohibited labor practices contrary to Secs. 111.70(3)(a) 1 and 3, Wis. Stats. On December 27, 1990, after attempts at conciliation were unsuccessful, the Commission appointed Stuart Levitan to serve as hearing examiner on said complaint, and to make and issue Findings of Fact, Conclusions of Law and Order in the matter, as provided for in Secs. 111.70(4)(a) and 111.07, Wis Stats. Hearing in the matter was held on February 8, 1991, in Milwaukee, Wisconsin; a stenographic transcript of said hearing was provided to the parties by March 15, 1991. The Union and City filed written arguments on May 22 and May 30, 1991, respectively; on June 6, 1991, they waived their right to file reply briefs. On July 29, 1991, the Examiner requested that the parties supplement the record with a stipulation on certain specified issues. On September 18, 1991, the City provided certain material in response, which, after further correspondence from the parties to the Examiner, was accepted into the record as evidence on October 29, 1991. At that time, the Examiner also accepted as argument correspondence from the Union dated September 30 and October 9 and from the City dated October 8, all 1991. The having considered the evidence and the arguments of the parties, hereby makes and issues the following Findings of Fact, Conclusions of Law and Order.

1. Local 428, Milwaukee, Wisconsin General City Clerical Employees, Milwaukee District Council 48, AFSCME, AFL-CIO, hereafter the Union or Complainant, is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats., with offices at 3427 West Saint Paul Avenue, Milwaukee, Wisconsin.

2. The City of Milwaukee, hereafter the City or Respondent, is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats., with offices at 200 East Wells Street, Milwaukee, Wisconsin. Certain City computer

programming and related services are performed by the Information Services Division (ISD) in the Department of Administration, successor to the former Central Electronic Data Services Department (CEDSD). 5/ Holly Loveland is the Director of the ISD, which position she had held for approximately four years at the time of hearing. Sharon Struble and Don Martin are both ISD Lead Systems Analysts (supervisory) with effective authority to recommend hiring. Other supervisory personnel at times material hereto are William Huxhold, William Friar, Gary Cashmore and David Dwyer.

3. William N. Broaddrick joined city service as a Programmer 1 in April, 1984, and in March, 1986 was promoted to the position of Programmer 2. His duties involve writing new computer programs, maintaining existing programs and other duties as assigned. On his Report on Probationary Service, dated July 1, 1986, Broaddrick was considered to meet the job requirements of a Programmer II in all four categories (quality of work, quantity of work, attendance and ability to work with others), and certified for regular (non-probationary) appointment. On his Employee Performance Review, covering the period March 11, 1988 - June 15, 1989, Broaddrick was considered to be below job requirements in one area (ability to work under stress), at job requirements in five areas (productivity, quality of work, knowledge of work, adaptability and drive), and exceeding job requirements in four areas (sense of responsibility, attendance, punctuality and relations with others). He was not scored outstanding or unsatisfactory in any area. On his Employee Performance Review, covering calendar year 1990, Broaddrick was rated as meeting job requirements in all categories noted in the 1988-1989 review, except "sense of responsibility" and "ability to work with others," where he was rated as exceeding job requirements. According to his supervisor, Broaddrick's programming skills had "improved tremendously" since he joined the Public Service Group. Since 1986, Broaddrick has served as Vice-President of the Union.

4. Nazir Khan joined city service as a Programmer I in July, 1984, and was promoted to Programmer II in March, 1986; his duties are essentially the same as Broaddrick's. On Khan's Employee Performance Review/Programmer I, for the period July 16, 1985 - March 10, 1986, 6/ Director of Data Services Gary Cashmore ranked Khan as below job requirements in knowledge of work, adaptability and drive, and at job requirements in the seven other categories as listed in Finding of Fact 3. As amplification, Cashmore added that Khan, "either doesn't understand or accept the duties" of programmer, that Khan "has tried to refuse work assignments, once with attempted support from the Union, once with Lead Programmer", and that it is "often difficult to understand his speech or read his writing." Cashmore added further that "analysts complain of inadequate testing, also doesn't figure things out for himself, needs to be told how to do things," and that Khan's "residency in doubt."

On June 23, 1986, Khan submitted a written comment on this evaluation as follows:

The items 3, 7, 10, 11 and 15 have not been rated fairly.

This is retaliation against my following legal activities.

1. Protesting transfer case of Mr. Rokicki before the City Service Commission;

1/ Nomenclature used herein reflects that in place at the time of the events discussed.

2/ Cashmore neglected to date this document, identified in the Complainant's index of exhibits as being submitted on June 20, 1986.

2. Bringing problems of programming section to the notice of higher authorities;
3. Discussing and grieving genuine problems, as a chief steward of the Union;

In order to victimize me, the authority of "Performance Evaluation" has been exercised arbitrarily with intention.

Hence, I disagree with all allegations specified under above-stated items.

It is requested that brief history of each individual event, on which aforesaid items were rated, may be provided to me, so that I should explain my position in writing.

On his Employee Performance Review, covering the period March 10, 1986 - March 10, 1987, Khan was rated by Cashmore at being below job requirements in five areas (productivity, quality of work, knowledge of work, sense of responsibility and relations with others), at job requirement in five areas (attendance, punctuality, ability to work under stress, adaptability and drive), and at unsatisfactory, exceeds job requirements and outstanding in no areas. In addition, Cashmore added the following comments:

1. Tied for the lowest number of completed assignments in 1986. Is the lowest in 1987 as of 3/9/87. Other person is improving, Mr. Khan is getting worse.
2. Many instances of recent changes not working. Analysts request that he not be assigned their projects.
3. Still attempts to refuse assignments. Needs very detailed instructions otherwise blames errors on analysts. Often accuses me of union harassment whenever I discuss his work.
4. Does not follow through. Says that is not his job.

In response to this evaluation, Khan filed a grievance, stating as follows:

The grievant has been hurt grievously by the enclosed Employer Performance Review given to the grievant by Mr. Gary Cashmore the grievant's immediate supervisor. The items 1, 2, 3, 4, 7 and all the comments of item 12 of the performance review are false, fabricated, twisted and baseless. This is a result of Mr. Gary Cashmore's personal anger and retaliation against my legal activities as an employee and chief steward.

On May 5, 1987, CEDS Director Holly Loveland issued her disposition of the above-noted grievance, in which she held, in part, as follows:

The ratings and remarks should remain and the grievance denied. Performance evaluation for the purpose of recognition and improvement is a management right and duty. The grievance process is not appropriate response. Comments and responses are requested on the form. The rating, rather than resulting from

Mr. Cashmore's "personal anger and retaliation" is substantiated through quantifiable project tracking and validating testimony from Systems Analysts.

At all times since January 20, 1986, Khan has served as Union Chief Steward; as such, he is a member of the Union Executive Board and responsible for investigation, evaluation and processing of grievances. During his tenure, Khan has processed approximately 100 separate grievances past the first step (that is, reduced to writing and filed with the grievant's immediate supervisor). These grievances, filed on behalf of unit members both within and outside CEDS/ISD, were about such issues as promotions, work assignments, leaves, evaluations, hours, wages and other conditions of employment. In addition, Khan filed numerous grievances on his own behalf as noted below. In 1986-1987 Khan participated in a unit restructuring and clarification proceeding, by which District 48 sought an amendment to the unit composition, affecting approximately 18 city subdivisions; the proceeding was resolved on June 24, 1987, with a stipulation by which certain positions were brought into the unit, and certain positions were continued outside. One of the positions which Khan sought unsuccessfully to bring into the unit was that of Project Analyst, held by Sharon Struble. The stipulation provided for the inclusion of 12 CEDS positions into the professional or technical units, and the dismissal of the petition for representation of 11 other CEDS positions, including three (3) Project Analyst positions, one of which was held by Struble.

5. On September 11, 1986, Khan filed the following grievance:

Gary Cashmore, supervisor of programming, snatched my steward manual and jammed it into my pocket in the presence of my co-workers. This happened in the programming section at my desk, where I use my terminal.

This act upon the part of Gary Cashmore is a physical assault, injuring the dignity of a C.E.D.S. employee and a chief steward of the union. It undermines the CBA union and contributes to the deterioration of management/labor relations.

As remedy, Khan sought a directive to Cashmore that he "cease and desist above-stated illegal activities", that he issue a written apology, and "any other suitable action required under the law."

In denying the grievance of September 12, 1986, Cashmore defined the issue as "employee was holding Union meeting on City time," which "type of activity must be stopped unless proper arrangements are made." As the basis for his decision, Cashmore stated that Article 10.2 of the collective bargaining agreement "specifically limits union meetings on city time."

Subsequently, CEDS management agreed that Khan could set aside an hour each day to conduct union business, and provided him with a work station and phone. Thereafter, when the level of employment within CEDS became such that there were no vacant work stations available for Khan's use, management provided Khan an area in its basement storage area.

On May 13, 1988, Business Manager Paul Kronberger sent the following letter, written and sent with the knowledge and approval of Loveland, to Khan:

This is to recap our meetings of May 5, 1988 and May 13, 1988 regarding your activities as steward for Local 428 of District Council 48. You will be permitted one hour per day 11:00 AM - 12:00 Noon Monday through

Friday to spend on union matters. This one hour is to include travel time. The department will provide an area for you in our basement store room. This area has a table, chair and telephone. No union business is to be conducted during working hours outside of this one hour time period. Nor is any union business to be conducted in any area on the fourth floor of 809 N. Broadway. If you are observed conducting union business during working hours outside of this one hour or on the fourth floor, this privilege will be revoked. In addition, this one hour privilege and basement facility accommodation should not be considered permanent as future department needs may require their termination.

c Mr. Robert Klaus
District Council 48

On May 18, 1988, Khan replied as follows:

RE: Your letter of May 13, 1988.

The following facts were also stated by me in our meetings of May 5th and 13th of 1988.

1. My activities as a chief steward within office hours cover only grievance matters not union matters.
2. I have a severe sinus allergy and I am under continuous treatment since 198* 7/. In addition to other things, I am extremely allergic to dust.
3. The basement area, offered by you to perform my duties as a chief steward, is full of dust, which could be very detrimental to my health.
4. For the safety of my health, I asked you to get this area cleaned and arrange to keep it clean. But you flatly denied my genuine request.
5. The time I spend on grievance matters during working hours is a compliance of state statutes and not a privilege given by the management.

In the past the CEDS management had arbitrarily stopped me from handling grievances during working hours. I had raised a labor dispute. In a meeting to resolve that dispute, it was agreed by the parties that I would have one hour daily during working hours. Instead of case to case basis without specified time of the day I was to be provided a separate desk and telephone line in the office. I was to coordinate and do all possible

3/ Date illegible in original.

grievance work within that hour. If any grievance matter could not possibly be handled within specified time, I was to notify my supervisor and deviate from the specified time to finish my grievance business. I also had the choice to pick the time of the day which was suitable for me. Since then I have been working accordingly to above stated settlement.

It is astonishing for me that in your above referred letter you have addressed me as a computer programmer instead of chief steward, labelled my grievance related work as general union business and completely banned my activities on the 4th floor where many employees work, who have the right to be represented by me.

In my opinion, your letter by itself shows an anti union attitude and an attempt to suppress the grievance related activities. Your current action is not only impulsive, inhumane and subversive of good labor-management relations, but also tantamounts to unfair labor practice. In view of the above, I request you to please step forward for resolving and settling this dispute for the sake of maintaining peace and harmonious labor-management relations. Otherwise it will drag the parties into a lengthy and very costly legal battle.

cc

Mrs. Veronica Kress President Local 428
and

Mr. Robert Klaus Staff Representative
District Council 48

with a request to please intervene
immediately.

Encl:

Copy of above-referred letter.

6. On September 17, 1986, Khan filed the following grievance against Cashmore, concerning an encounter the day prior:

Mr. Gary Cashmore, supervisor of programming, came to my desk, where I use my terminal, with sheets of paper. He waved those sheets in my face, in a very insulting way.

I took those sheets from him and asked him what they were. He did not say anything and left. After a few minutes, he called me into his office and closed the door of his office. He stood by the door so that I could not get out. He shouted at me and used abusive language for no reasonable cause. He provoked me and I had to control myself and my temper. He seemed ready to punch me in the face. I feel that he illegally confined me in his office, intimidated me and had the intention of assaulting me criminally.

Such actions, Khan alleged, constituted a violation of "union and management agreement, city service rules and chapter 111 of the State Statutes. Misuses of management rights and violation of United States Penal Code."

7. On October 3, 1986, Khan filed a grievance which Cashmore denied on October 6. On October 10, Cashmore filed a grievance appeal, stating that David Dwyer, Supervisor of Systems and Design, had refused to follow the second

step of the grievance procedure, and had, by his attitude, "undermined CBA union and deprived the union of its right of negotiation for the grievance whereas he is the supervisor of the person who violated the labor contract. . ." Khan stated as the reason for his appeal that "the decision conveyed to the union is dissatisfactory and the reason given in the grievance disposition dated October 10, 1986 is quite irrelevant to the unique nature of grievance."

8. On February 3, 1987, Khan sent to management the following letter:

1. With reference to the meeting Mr. Gary Cashmore had with me to-day at about 9:00 a.m. "regarding complaint from the Systems Analyst Mr. Donald Claesges in writing, supported by an example of my performance"; I submit as follows:
2. It is a practice at CEDS that Systems Analysts complain in writing against programmers and CEDS management ratifies their complaints without providing any opportunity of written explanations to the programmers, against whom the complaints are made. The performance of the programmers is evaluated keeping in view those complaints.
3. In my opinion, it is unfair, unjust, against the spirit of the relevant rules and regulations and a source of victimization, harassment and intimidation.
4. As a chief steward of the union, I will process this matter separately, but as an employe of the CEDS dept., I protest through proper channels against this unfair practice and request the administration of the CEDS dept. for a complete investigation of the facts, hold an independent inquiry for the matter stated above in para. 1, for responsibility and take suitable disciplinary action.

9. On February 26, 1987, Khan and Cashmore had a confrontation about a program Khan had written which Cashmore felt was incorrect and needing immediate attention to be fixed. When Khan said he might not be able to finish the project because he would presently have to attend to pressing Union business, Cashmore replied, "I don't give a damn about your Union shit. I want this done right now." Khan filed two separate grievances, relating to Cashmore's allegedly abusive language and Cashmore's insistence that Khan complete the programming task before attending to his union activities, as follows:

Mr. Gary Cashmore, my immediate supervisor, called me in his office at about 10:15 AM. Mrs. Betty Strong was already in his office. Both of them blamed me for the change I made in the Program C230030, as per change request by Mrs. Strong. I said, 'The change made by me is exactly as per change request,' Mr. Gary Cashmore became furious and threatened me by using abusive language and stopped me from doing my grievance related work between 11:00AM and 12:00N. The above stated act upon the part of Gary Cashmore tantamount to irrationality, harassment, retaliation, unfair labor practice and professional misconduct.

On that same date, Khan filed a separate grievance, which he labelled "a union grievance," over the same incident, as follows:

Mr. Gary Cashmore at about 10:15 AM used abusive language against the union and stopped me from doing my grievance related work during the previously negotiated period of time (11:00 Am to 12:00N), without any reasonable cause. The stated act of Mr. Cashmore shows that he is anti-union and creates unrest amongst the employee. He has committed an offence of unfair labor practice.

On March 5, 1987, Cashmore responded as follows:

I acted correctly in my position as Programming Manager in directing him to determine the problem and fix it immediately.

Program 230.030 did not balance since a recent change made by Khan. The change request called for the removal of the printing of an error message. He did this, but also removed a portion of the control balancing routine which was not called for. This caused the program to be in error. The problem was causing a delay in the running of payroll system. I told him that this matter had priority over other assignments but, since it was 10:30 a.m., one half hour before his scheduled union time, he objected to this. He also contended that the program had not worked before it was assigned to him, that it was the analyst's fault and that the analyst had approved his change. Although he agreed on the lines of code in error, he didn't immediately fix the problem. Finally, shortly before 12:00, the analyst went to his terminal and again showed him exactly what to do. He accused me of union harassment because I directed him to fix the mistake in a timely manner.

Examination of the previous run before his change showed it to be correct. Examination of the program coding before the change showed it to be correct. Examination of the test results that the Systems Analyst approved revealed that he had not shown her the part of the report which was in error. At the step 1 level of the grievance procedure even the union president agreed that it was an emergency situation in regards to payroll, also that he had done more to the program than was called for in the change result. It is not irrational, harassment, intimidating, retaliatory, unfair or unprofessional to expect a City employe to perform in an accurate and timely manner.

On March 9, 1987, Khan appealed this disposition of the grievances, contending that Cashmore's response was "dissatisfactory and does not relate to the grievance appropriately." On March 24, 1987, Loveland responded as follows:

1. Several staff members heard Mr. Cashmore's response toward the end of the confrontation as "abusive." Mr. Cashmore will receive a reprimand. Obscenities and shouting were overheard by colleagues. Mr. Cashmore's behavior was inappropriate.
2. As the programmer most familiar with the program changes, Mr. Khan was the appropriate choice and all

activities are subordinate to the urgency of a production payroll program fix. Mr. Cashmore was correct to insist that the fix happen immediately. There is some dispute over whether Mr. Khan or the analyst was responsible for the error that created the production stoppage. Some support exists for each viewpoint. Even if Mr. Khan made no error, however, he was the programmer who made the change and was familiar with the situation and code. Production stoppage is always the highest priority and the urgency requires the most familiar programmer.

10. On July 20, 1987, Khan filed a grievance over an encounter with Cashmore on July 14, 1987, in which he alleged as follows:

Mr. Gary Cashmore called me in his office. He was abnormally angry. He shouted at me "You don't do your work. You don't know how to do it. If you don't know how to do it or you don't understand what I mean, I can get it done by a trainee." I responded I will do it. He again shouted at me and said with full volume of his voice in extreme rage "You can't leave your office until this work is done. No matter if you have to stay all night here." (emphasis in original)

The above-stated underlined words, tone and attitude of Mr. Cashmore were pre-planned and deliberated (sic), with a motive to harass, intimidate, shake my confidence, hurt my feelings, ruin my career and force me to leave this organization due to constant humiliation, degradation and discrimination. This improper behaviour of Mr. Cashmore is against the city service rules, state and federal laws and violation of the labor contract.

As for relief, Khan sought, "a suitable disciplinary action, as required under law, because Mr. Cashmore has behaved and treated repeatedly this way not only me but also several other employees, in the past." On July 22, 1987, Cashmore denied the grievance, stating that Khan was properly reprimanded for unsatisfactory performance on an assignment which "was late and not done correctly." Cashmore stated "it is management's right to reprimand an employe for unsatisfactory performance." On that same date, Khan appealed Cashmore's denial, stating, "the contents of the grievance disposition are dissatisfactory."

11. On April 25, 1989, Khan filed a grievance, stating that he had been "extremely agrieved" (sic) from the fabricated and malicious complaint made by Mr. Dan Huberty on April 12, 1989," which he said constituted an "arbitrary exercise" of the City's management rights. Khan stated his desired relief as follows:

1. Written apology by Mr. Huberty from the grievant.
2. A written report by Mr. Dwyer for the investigation of related facts be placed in Mr. Huberty's personnel file and copy of the same may be sent to the City Service Commission.
3. A written warning to Mr. Huberty may be issued by the management to cease and desist from such acts of victimization.

On April 26, 1989, stating that the issue involved a dispute between Khan

and his team leader on whether Khan had properly processed a program change, Systems Analysis Manager David Dwyer denied the grievance.

12. Loveland, Director of the Information Services Division in the City's Department of Administration, believes that Struble and Martin have concerns over the quality of Khan's work product, particularly his productivity; his ability to understand certain specifications; his initiative, and his ability to complete projects. Loveland believes that Struble feels that Broaddrick works slow but hard.

On at least one occasion, Loveland had an argument with Khan over his actions as a union official. At a meeting of the City's Commission on Community Relations, called to review agency affirmative action plans, Khan, speaking as a union representative, told the Commission that the agency had done little to advance affirmative action. Khan's presentation angered Loveland because, (a) she felt he should have been courteous enough to inform her of his intentions to appear and speak prior to the meeting, and (b), she felt his comments were without factual basis.

On January 30, 1987, Loveland wrote to Tom Williams, Supervisor, Technical Services Division, Consumer Protection and Environmental Health, as follows:

Per our discussion, January 30, 1987, the union representatives for our CEDS employees have indicated that the noise levels in our computer rooms may pose some threat to hearing for employees who work in the area.

To better ensure the safety of the employees, we would appreciate a noise survey to determine whether there is a potential hearing problem for our staff.

I appreciate your prompt response on this request and look forward to meeting with your representative next week.

On October 30, 1989, Loveland wrote to Khan as follows:

You were scheduled to return from your vacation at 8 a.m., October 30, 1989.

At 11:55 a.m. you called Pakistan and, when I was not available, you left this message: "To resume November 1, 1989--having connecting flight problems."

In 1985 you extended your overseas vacation with a telegram claiming illness.

In 1987 you extended your overseas vacation two weeks. You later supplied a receipt for a telegram and a letter from an airline stating that your original ticket was for two weeks round trip. No telegram was ever received in Information Systems.

Now, for your 1989 overseas vacation I have received a phone call claiming "connecting flight problems". Since you have experienced complications so often, you must establish lead times and contingent plans to ensure fulfillment of your employment commitments.

Your pattern of extending overseas vacations leads me to conclude that you are Absent Without Leave. Please report to my office at 3 p.m., Wednesday, November 1, 1989.

Very truly yours,

Holly S. Loveland
Information Systems Director

c Mr. Jeff Hansen
Mr. William Huxhold
Ms. Sharon Struble
Mr. David Riemer
Mr. Nazir Khan--office
--home

On November 2, 1989, Loveland wrote to Khan as follows:

Action items resulting from our 3 p.m. meeting November 1, 1989 are enumerated below:

- 1.You will provide a ticket or photo copy of a plane ticket showing your original flight reservation from Multan 10 a.m., Saturday October 28 to Kurachi
- 2.You will show some published schedule, confirmation, or ticket to confirm that that flight time was changed to depart at 11 p.m., also on October 28 from Multan.
- 3.You will provide some confirmation from Pakistan International Airlines that the 11 p.m. flight from Multan to Kurachi on October 28 was cancelled
- 4.It would be helpful if you would supply any published flight schedule showing that flights from Kurachi to New York were available on the 29th and the 31st of October, but not on the 30th.

We discussed at the meeting that these items were important to confirm explanation about delays in your departure from Pakistan which resulted in the extension of your vacation past 8 a.m. Monday, October 30 when you were to return to work. We also discussed that this was being requested due to the fact that your Pakistan vacations in 1985 and in 1987 were both extended due to unforeseen circumstances.

We will consider the above listed confirmations of the information you shared with us on Wednesday, November 1 as indications that your intention was to return at the scheduled time.

Pending the receipt of these materials, we will not consider Monday and Tuesday as Absence Without Leave and you have enough hours in your Comp. Time accumulation to cover both days. Therefore, you will be paid and we will assume that your flight schedule will be substantiated.

It is required that your next long vacation (greater than one week) should be scheduled with your supervisor to include additional days in anticipation of "unforeseen circumstances". If you schedule three or four days longer than you believe you will require then these problems and delays that arise will not impact your work commitments negatively. If you return from your vacation early you will simply have credit for the unused days to be scheduled at other times. Based on your vacation scheduling history, I believe that you need to anticipate the many variables that may impede your scheduled return and have contingency plans for handling those matters.

If you have any questions or concerns, please let me know. Thank you.

Very truly yours,

Holly S. Loveland
Information Systems Director

c Jeffrey Hansen
William Huxhold
Sharon Struble
David Riemer

On July 16, 1990, Loveland, addressing Khan as Chief Steward, Local 428, wrote to him as follows:

Thank you for your communication of Friday, July 13, 1990, in which you expressed concern over a notification procedure. A probationary employee, Mr. Teddie Jones', employment was terminated on that date and we discussed proper notification procedures for future terminations. Although you stated no further actions are necessary for Mr. Jones' case, and that you now considered the union to be notified, I want to assure you that this kind of delayed notification will not happen again. Thank you.

13. Rule VII of the Milwaukee City Service Commission, in force at all times material to this proceeding, provides as follows:

RULE VII.

Eligible Lists - Original Entrance Examinations.

Section 1. Eligible lists. Eligible lists shall be in force from and after their approval by the Commission. The names of those applicants who have attained at least the minimum average rating required shall be placed in the order of their relative standing on the proper list of eligibles.

. . .

Section 3. Consideration of eligible lists. When there are names of persons on an eligible list for a position for which a new list is approved, both lists shall be consolidated and all persons placed on the consolidated list. Those names on the first list may be removed from the consolidated list on the cancellation of such earlier list.

. . .

Section 5. Life of eligible lists. Except as otherwise hereinafter provided, eligible lists shall expire three years from the date of the holding of the examinations creating them. However, if in the opinion of the Commission better qualified applicants might be secured in a new examination for reasons such as a significant increase in the salary or salary range for the posting an existing list may be cancelled at any time by action of the Commission. The Commission may extend an eligible list for one year from the date of its expiration. A list which has been abolished or which has expired may be revived for special reasons to be stated in full in the minutes but such revival may be made only within the period of five years from the date of the examination creating it and in any such case such a list shall expire not later than the date it would have expired had the action been originally one of extension instead of revival. A list which has been abolished or which has expired may still be used to complete a certification which has been made before the abolition or expiration of the list in case any eligible or eligibles on said certification refuse appointment or are otherwise found to be unavailable or are removed from said list by the Commission for any reason authorized under these rules. Consolidated lists shall continue in effect with time being reckoned from the date of the last examination entering into such consolidated list but names resulting from earlier examinations shall be dropped from such consolidated lists in accordance with the plan above set forth. An eligible list for a position in the special expert class shall be subject to abolition as provided in Paragraph 4 of Section 63.40 of the Statutes.

Nothing herein shall be construed to prohibit the extension of eligibility for promotion of employees or appointment of persons who have qualified in any examination and whose names have been reached for certification during their absence while serving in the armed forces of the United States during the war. The Commission in its discretion may extend the eligibility of any such person beyond the limit of five years above specified; provided, however, that final separation from such war service or transfer to an inactive or reserve status shall be under honorable conditions. The length of said extension shall not exceed the period of time actively served in the armed forces subsequent to May 1, 1940, and prior to the termination of hostilities. Application for extension of such eligibility must be made within ninety days after termination of military or naval duty, or discharge from hospitalization for a disability incurred in

military or naval service, and appropriate evidence of honorable discharge or release from active duty must be submitted.

Section 6. Appointment to be recorded on eligible list. When an applicant has been appointed to a position in the classified service, such appointment shall be entered upon the eligible list from which he was certified.

Section 7. Removal from the eligible list on account of non-appointment. The Commission may remove from the list the name of an eligible who fails of appointment three times; provided, that after the third certification without appointment, the appointing officer(s) may be asked for information concerning the applicant for the purpose of administering this rule. Certification for temporary appointment and certification on which waiver is requested and approved shall not count as one of such certifications.

City Service Commission rules provide that appointment for a management position must be made from among the five (5) top-ranked candidates; appointment for a non-management position must be from among the top three (3) candidates. After DER determines, and provides to the affected department the list of eligibles', it notifies the eligible candidates, directing them to call a particular interviewer for appointment and return a confirming notice to DER. As noted above, CSC Rule VII provides for the creation, maintenance and abolition of eligible lists, and for the removal therefrom on account of non-appointment. Initiative to abolish an existing list of eligible candidates can come either from the affected department (when it concludes that the candidates remaining are not satisfactory) or from the Department of Employment Relations (when it concludes that the list's effectiveness has been exhausted). The Commission does not maintain records to determine who initiated the request for abolition of an eligibility list. As a general rule, where the list is primarily to be used for only one or two departments, those departments will be consulted prior to the list's abolition. The City Service Commission abolishes a small number of lists at each bi-weekly meeting. As noted in Section 7, Rule VII, the Commission may remove from the eligibility list a candidate who fails of appointment three times; in practice, however, the Commission usually gives an applicant more than three opportunities, unless it appears the candidate will not be appointed, in which case CSC staff will initiate a request for the candidate to be stricken. It is rare, however, for the Commission to strike a candidate after only three times being passed-over, especially when the unsuccessful candidate is the highest-ranked. A request to strike a candidate may come either from the affected department or DER staff. When abolishing the list for a specific position applicable to only one or two departments, when the nature or salary range of the position had not changed, the CSC would generally not act without consulting the affected department. In exercising its discretionary power to strike an applicant, it is apparently immaterial to the CSC whether the individual had been by-passed three or more times on one list or one time on three or more lists. Thus, when the City created a new eligibility list for Programmer Analyst in the Spring of 1989 -- but agreed to allow Khan and Broadrick to use their prior-established scores for their new rankings -- the City continued to count against Khan the previous instances in which he was by-passed (i.e., the March 30, 1988 vacancy).

14. On August 17, 1987, following the promotion of Wayne Rokicki to the position of Programmer II, Khan sent the following letter to the Milwaukee City Service Commission:

The City Service Commission
City Hall - 7th Floor

SUBJECT: MR. WAYNE ROKICKI - LEAD PROGRAMMER

I, on behalf of the Senior Programmers and Local 428, submit hereto the following for consideration.

Mr. Rokicki was hired as a Clerk in July, 1985. Within one month, he was reclassified as a Computer Operator I and placed in the programming section.

Mr. Rokicki was on probation as a Computer Operator I, he was actually working as a Programmer I. In the meantime CEDS Management sought to promote him as a Systems-Programmer, even if, he was not reclassified as a Programmer I. At that time Mr. Rokicki had about total experience of six months in data processing, whereas other competent programmers were available.

On our written and personal request, the City Service Commission had turned down the CEDS Management recommendations to promote Mr. Rokicki as a "Systems-Programmer Trainee," a management position involving considerable salary increase, experience and education. This happened last year. (Please see our letter of September 15, 1986, and its attachments, which is enclosed herewith for ready reference.

Mr. Rokicki was reclassified as a Programmer I and he had successfully completed his training period at the same time.

Mr. Rokicki was allowed to take the Programmer II test after one year, whereas other programmers are allowed to take the test having the title of Programmer I for 1-1/2 years.

Now, Mr. Rokicki is being underfilled for the position of a Lead Programmer. The job description approved by the city service commission is enclosed herewith for your perusal please. Mr. Rokicki does not fulfill these requirements at all. But CEDS Management wants to underfill this Lead Programmer position by passing the Senior Programmers II who fulfill the job requirements.

The above special treatment with Mr. Rokicki shows that an invisible hand within the management has been trying hard to move Mr. Rokicki up on top as soon as possible, whether he lives up to the job requirements or not.

I feel it necessary to invite the attention of the commission to the point that Mr. Gary Cashmore has convinced the CEDS Management to fill the vacancies of a Systems-Programmer and two Programmer Analysts from the outside by an open examination for these positions, because according to his evaluation, none of the programmers of his team, except Mr. Rokicki, was capable/eligible for aforesaid positions.

Eventually these vacancies were advertised and examinations

were held by the City Service Commission. Mr. Roger Willson of our staff was at the top of the certified list for the Systems Programmers and Mr. Willson got that position.

Similarly, Ms. Marianne Shultz of our staff placed herself at the top of the certified list for Programmer/Analysts, and got the position of a Programmer/Analyst.

The City Service Commission is requested to scrutinize the recommendations of the CEDS Department, because Mr. Gary Cashmore maliciously convinced the CEDS Department to bypass the Senior Programmers. He states that they did not train themselves by reading the manuals, but Mr. Rokicki did.

On one hand Mr. Cashmore deliberately discriminated in providing training opportunity and time to Mr. Rokicki for a few new packages and on the other side, he deliberately kept the Senior Programmers busy all the time with maintenance and other programming work.

The motive of Mr. Gary Cashmore was to victimize the senior programmers, because of his retaliation against their legal activities and protests detailed in the attachments of the letter dated September 15, 1986, from the programmers to the City Service Commission. The copies of the attachment stated above are enclosed herewith for ready reference.

It is also brought to the attention of the commission that training and reading the manuals is not only the requirement for the position of a Lead Programmer. Please see the additional requirements in the attached job description of a Lead Programmer approved by the City of Milwaukee, City Service Commission.

Sincerely,

Nazir A. Khan
Programmer II/Chief Steward

On September 10, 1987, CEDS Department Director Holly Loveland wrote to the City Service Commission, with copy to Khan, as follows:

Mr. James Springer, Secretary
City Service Commission
City Hall, Room 706

Dear Mr. Springer:

The CEDS Department has requested permission to promote Mr. Wayne Rokicki from Programmer II to Lead Programmer. This follows an underfill request which was subsequently withdrawn. Another Programmer II, Nazir Khan, submitted a letter to question Wayne Rokicki's qualifications for the Lead Programmer position. The major point in that letter appears to be that CEDS Management is "passing the Senior Programmers II who fulfill the job requirements" to promote Mr. Rokicki who does not fulfill the position

requirements.

There are currently six Senior Programmers (Programmers II) in CEDS. The attached grid lists various date, experience, and performance data for your review. Mr. Mattila is not interested in the Lead Programmer position and a promotion request was submitted to the Commission for him to fill a Programmer Analyst position. Messrs. Yorton and Ganas who were recently promoted to Sr. Programmer positions, have less than two years programming experience and are, therefore, ineligible for the Lead Programmer position at this time, although both are very capable professionals.

That leaves only three eligible applicants; Neal Broadrick, Nazir Khan, and Wayne Rokicki.

According to the Examination Division, this position requires two years of experience and knowledge/experience in CICS, DOS/VSE, BAL, ADABAS, and training computer programs. It falls between the more flexible Programmer Analyst position which requires three years of programming and analysis, and the Programmer II position which requires one and one-half years of programming experience.

Mr. Wayne Rokicki is, in fact, qualified for this position by knowledge, education, experience and performance, and is uniquely qualified through his demonstrated ability to teach himself new languages and skills and effectively apply both. I urge the City Service Commission to approve this promotion to a position which has been vacant for two months. An examination which would take additional months to administer would yield a list of three top applicants. Effectively, we have that list in our three qualified departmental applicants.

In addition, some response should be made to Nazir Khan's August 17, 1987 letter to the Commission. While I believe the above information should clarify relevant issues of position requirements and Mr. Rokicki's qualifications, Nazir carries into the remainder of his letter some strong personal feelings about his supervisor, Gary Cashmore, with whom he has an historic adversarial relationship. In this case, although Mr. Cashmore provided a skeleton memo for my original underfill request to the Commission, most of the comments on training and on Mr. Rokicki's qualities were added by and substantiated by the Data Base Administrator and me with little input from Mr. Cashmore. While I would be very willing to provide answers and/or clarifications on various "charges" in the letter, I very much resent Nazir Khan's use of a colleague's promotion request to present information that is often unfounded, not researched, or misinterpreted.

Thank you for your review of the promotion request and if there is any further information that I should provide, please let me know.

c. c. Nazir Khan

15. On or about May 1, 1989, at a time when the salary and scope of the programmer analyst position was remaining constant, Loveland asked the City Service Commission to authorize an examination to compile a new position eligibility list, to replace the first which was approximately one year old. On May 1, 1989, Khan filed the following grievance, with an identical grievance being filed the same date on behalf of Broadrick:

ISD Management requested City Personnel Dept. to hold another examination for the position of programmer analyst, whereas the current eligibility list for this position is only one year old.

The grievant is an officer of the CBA Union Local 428 and is on the said eligibility list.

The motive of the ISD Management is to deprive off the grievant once again from getting this position.

This act of management coerces and intimidates the membership and the officers of the union, which constitutes unfair labor practice on the part of management.

As remedy, Khan sought the following:

1. Stop this examination process.
2. Select the grievant from current eligibility list.
3. Cease and desist from such acts of unfair labor practice.

On May 16, 1989, Loveland denied the grievance, defining the issues as

Grievant protests Information Systems Management's request for an open competitive Programmer Analyst examination. He is on the current list and is a union officer and feels that the request is to coerce and intimidate the membership and officers of the union.

Loveland held that:

All Information Systems positions in recent months have been filled through open examinations as prompted by the Affirmative Action and Examination Units of Personnel. The Programmer Analyst examination has been held each year since the creation of the position and is dependent on the market rather than individuals.

On May 24, 1989, Khan appealed Loveland's decision. On June 1, 1989, Khan wrote to Michael Morgan, Deputy Director of Administration, as follows:

Dear Mr. Morgan:

RE: Grievance appeal meeting on May 30th, 1989 at
2:30 p.m.

I missed to mention the following fact, which I feel is important and will facilitate your decision.

On one hand the ISD management held Programmer Analyst

examination open to public, which I had taken last year.

On the other ISD management given the position of Programmer Analyst to Mr. Robert Polikowski at the same time when I was taking the said examination.

Mr. Polikowski was a Programmer II like me at that time. He did not take any Programmer Analyst examination and was not on eligibility list of Programmer Analyst. I also believe he did not have any verifiable analysis experience. The position was given to him on fabricated recommendations.

On June 13, 1989, Director David Riemer and Deputy Director Michael Morgan of the Department of Administration denied the appeal, stating in part as follows:

Nature of Grievance

On or about May 1, 1989, Ms. Holly Loveland, Director, Information Systems Division, requested that the City Personnel Department hold an examination for the purpose of compiling an eligibility list for the position of Programmer Analyst. The then current eligibility list was approximately one (1) year old. Mr. Khan who had taken the examination for Programmer Analyst a year earlier objected to Ms. Loveland's decision. Mr. Khan argued in his grievance dated May 1, 1989, that Ms. Loveland's decision to compile a new eligibility list was an attempt to deprive him of the position because of his union affiliation.

On May 16, 1989, Mr. Khan's grievance was denied. Ms. Loveland noted that she requested the examination to increase the pool of eligible applicants for the Programmer Analyst position. She denied any discriminatory motives or intent in requesting a new list for the job. On May 24, 1989, pursuant to Wisconsin Statute Section 111.84, Mr. Khan filed this appeal.

Grievance Appeal

Mr. Khan contends that when he took the examination for Programmer Analyst one year ago, he placed second on the eligibility list. When the position became available the first candidate on the eligibility list was offered the job; however, that person refused. He noted that instead of offering the position to him, Ms. Loveland offered the job to a Hispanic female. Approximately one year later the position was again vacant, instead of filling it with a person from the then current eligibility list, Ms. Loveland opted to compile a new list. Based on these facts, Mr. Khan argued that he was discriminated against because of his affiliation with Union Local 428. Mr. Khan is Chief Steward of the local. He also stated that the examination request was intended to coerce and intimidate members and officers of the union.

Decision

First, it is not clear whether Mr. Khan can rely on any State Statute in pursuing this appeal. Grievance procedure is governed by agreement between labor and management, which in this case is the City of Milwaukee and Milwaukee District Council 48.

The applicable grievance procedure in this case is contained in the Memorandum of Agreement between the City of Milwaukee and District Council 48 dated September 28, 1988. Under that agreement "only matters involving the interpretation, application and enforcement of the terms of the agreement constitute a grievance." Insofar as Mr. Khan's reliance in pursuing this appeal is based on State law, this appeal probably is improperly before this department and should be denied. However, because we have heard this matter, equity dictates that a decision be made.

Although not explicitly cited, it appears that Mr. Khan's appeal is taken under Wisconsin Statute Section 111.84(1)(c). Section 111.84(1)(c) reads as follows:

111.84 Unfair labor practices

- (1) It is an unfair labor practice for an employer individually or in concert with others:
- (c) To encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment.

Under Sec. 111.84(1)(c), there must be some showing that Ms. Loveland intentionally engaged in activity which encouraged or discouraged Mr. Khan's association with Union Local 428. The most liberal reading of the facts in this grievance appeal demonstrates clearly that Ms. Loveland did not engage in unfair labor practices, nor did she discriminate against Mr. Khan because of his union affiliation. Ms. Loveland exercised her managerial prerogative to open up the Programmer Analyst position for other potential candidates by requesting the exam. As she stated in her initial review of this grievance:

"All Information Systems positions in recent months have been filled through open examinations as prompted by the Affirmative Action and Examination Units of Personnel. The Programmer Analyst examination has been held each year since the creation of the position and is dependent on the market rather than individuals.

Mr. Khan has simply not shown evidence by any standard that Ms. Loveland's motives were anti-union or discriminatory.

Further, Ms. Loveland's decision does not preclude Mr. Khan from applying for the Programmer Analyst position.

In fact, he may be at an advantage in that he may use either his first or second exam score, depending on which is higher, for purposes of applying for the position. There is simply no evidence to show that Ms. Loveland requested an examination with hopes that some other candidate would score higher than Mr. Khan. Stated differently, Mr. Khan has failed to demonstrate that the actions of Ms. Loveland in this matter constitute unfair labor practices within the meaning of Wisconsin State Statute Section 111.84(1)(c).

For all the reasons stated above, this grievance appeal is denied.

Subsequent to the decision by Riemer and Morgan, the City (presumably Loveland) proposed a modified resolution of the dispute, whereby the City would give its test anew, allow the grievants to take the test again, and leave to the grievants the determination of whether to use the new scores or preserve their old scores. Implementation of this proposal resulted in Khan and Broadrick falling from first and second place on the eligibility list to fourth and fifth place, respectively.

16. On March 30, 1988, the City announced a hiring for two programmer analysts in the Department of Information Services (Requisition No. 434853). The top three eligible candidates, and their respective civil service examination scores were Terry Bostetter (90.67), Neil Young (90.00) and Nazir Khan (85.67); the top female eligibles were Nilsa Santiago (85.67) and Rose Tsang (79.67); the top black eligible was Phil Hutchins (78.67). Of this group, only Khan was active in union affairs. When Young informed the City he was not interested in the position, Santiago became the number three candidate, behind Bostetter and Khan, and thus eligible for hire without use of an expanded selective certification list for affirmative action purposes. On May 2, 1988, the City hired Santiago; on May 23, 1988, the City hired Bostetter.

17. On August 22, 1989, the City announced a hiring for a programmer analyst in the Library (Requisition No. 436140), and a hiring for two programmer analysts in the Department of Information Services (Requisition No. 436142). No appointment was made for the Library position, which was not under the control of personnel in the ISD/CEDS. On September 11, 1989, William Heberlein, ranked number three with a score of 89.67, was appointed to one of the DIS positions. On November 20, 1989, Patricia Becker, who became the third-ranked candidate (test score: 85.67) when Heberlein was hired and another candidate expressed disinterest, was appointed off this eligibility list for a Systems Specialist I position which had been announced October 5, 1989. On February 5, 1990, Neil Young, the top-ranked candidate with a score of 90.00, was appointed to the final vacancy in this series. At all times after Heberlein's hire on September 11, 1989, Khan, with a test score of 85.67, was eligible for appointment to the remaining programmer analyst vacancy and to the Systems Specialist position. At all times Broadrick, with a score of 85.00, was eligible for appointment to the Systems Specialist I vacancy. Of the eight persons eligible for appointment, either through normal or expanded certification, for the three positions discussed in this paragraph, Khan and Broadrick were the only employees active in union affairs; all employees other than Khan and Broadrick who expressed an interest in the positions discussed herein were given the appointments sought. The effective recommendation to select Becker was made by Struble.

18. By letter dated January 9, 1990, the City announced a hiring for three programmer analysts. Upon Young's appointment as noted above (which may have been agreed to prior to its effective date of February 5, 1990), the order and respective scores for eligible candidates were as follows: Khan (85.67); Broadrick, (85.00); Walter Schuck, (85.00, including five bonus points for

military service); Wayne Rokicki, (84.00); Robert Steng, (83.75); William Bopf, (83.00); Mark Ganas, (81.33); Jeffrey Walter, (79.50); Joseph Cerabone, (77.25).

Pursuant to the delegation of authority noted in Finding of Fact 2, Struble and Cashmore conducted interviews of Broaddrick, Schuk and Rockiki. Khan was not on the list of eligibles' to be interviewed because he did not respond to the vacancy announcement in a manner the Department of Employment Relations understood to constitute an expression of interest on his part. Khan did, however, have a conversation with William Huxhold, which Khan felt to be an interview.

On or before February 5, 1990, Struble appointed Rockiki and Cashmore appointed Schuk, with effective starting dates for each of March 19, 1990. The third position remained vacant, and was the subject of another announcement on that date. On or before March 5, 1990, after Steng did not respond and Bopf declined appointment, Struble appointed Ganas.

On March 7 and April 25, 1990, Khan and Broaddrick respectively, were stricken from the list of eligibles', pursuant to City Service Commission Rule VII, Section 7, as cited in Finding of Fact 13. The record does not reflect who initiated the request for this action.

On March 19, 1990, Schuk failed to appear, thus recreating a vacancy in the Programmer Analyst ranks. Cashmore indicated to Loveland that he was not satisfied with the candidates then on the eligibles' list, which, pursuant to an examination held on March 28, 1990 and approved by staff on April 10, consisted of Dennis Haralson (91.00), Jerome McCarty (86.33) and Teddie Jones (81.67). All three men indicated interest in the appointment. There is no evidence that any of these three men had a leadership role, or were otherwise active, in union affairs. Loveland suggested Cashmore "underfill" the vacancy, whereby a candidate would be appointed to a lower position and then, after additional experience, would be elevated to the higher position. Cashmore accepted this suggestion, and appointed Teddie Jones as a Computer Programmer II, intending to raise him up to the position of Programmer Analyst. Jones, however, did not perform in a satisfactory manner, and was terminated a few weeks into his tenure.

19. On February 14, 1990, Khan sent the following letter to John Parr, Executive Director of Milwaukee District Council 48:

It is brought to your attention that a majority of the Systems and Programming staff that were placed in Local 428 in compliance with the WERC award, have been moved into management positions. The management of the ISD has moved these persons into Senior Systems Analyst positions, which were maliciously created by management to bring their favorites back into management.

As a result of the above action, I feel that the following positions should be in our union as per their present duties and responsibilities: Senior Systems Analyst (approximately 11 positions), Technical Systems Analyst (5 positions), and Senior Microcomputer Specialist (1 position).

I would appreciate if you would arrange to file a petition to WERC requesting that the above positions be changed from management positions to bargaining unit positions.

In addition, I would like to repeat a previous request to incorporate the appropriate Records Center staff members into Local 428. Previously, the Records Center

was an independent entity staffed by nonmanagement/nonrepresented employees. Since the Records Center is now part of ISD, these positions should become bargaining unit positions.

The records of the WERC indicate no petitions for unit clarification affecting Local 428 being filed between February 14, 1990 and the date of hearing.

On February 22, 1990, Khan sent Parr the following letter:

The management of Information Systems Division of the City of Milwaukee has repeatedly victimized me, being a Chief Steward of Local 428. They have deprived me of the several opportunities for promotion, which occurred during the past few years, on the basis of false and fabricated grounds. Our Vice-President Neal Broadrick has also been treated the same way.

I have been on the certified list for Programmer Analyst for a considerable period of time. They interviewed me several times heavily for the positions of Programmer Analyst. But they offered those positions to others, even if some of them were ranked lower than I was.

The motive of the management on one hand is to take revenge on me. On the other, it is to intimidate the union members by victimizing their union officers. The members would stay away from their leaders with a fear and thought that if union officers cannot protect themselves from management's retaliation, how they can protect their members. Eventually, the union will be ineffective or defunct.

In order to promote junior person over a union officer they fabricate performance record, discriminate in job assignments and training, apply City Service Rules and exercise management rights arbitrarily. If the union officer complains for the unfair means used by them, they get angry and propagate that the union is going against their own members and create hatred between the union and the members.

For your perusal, I enclose herewith Exhibits (A to F), which the copies of some complaints and grievances I filed against the management for their unfair treatment after I accepted the position of Chief Steward in the union on January 20, 1986. They are self-explanatory and also are the basis of management's retaliation.

The present cause of action is that recently one person, lower in rank on the present eligibility list of Programmer Analyst has been promoted over me and an attempt for another person to be promoted over me is being made. This is also a result of personal anger for historic adversary relations they have with the

union and with me. But they cover up their personal feelings with the name of so-called inefficiency and below average performance that they have attributed to me.

In view of the above, I seek your help as required under the law to intervene and protect me from another victimization and repeated unfair labor practice on the part of management through an appropriate legal action.

Your early action will be highly appreciated.

Sincerely,

NAZIR A. KHAN
Chief Steward
Local 426

cc:For information and necessary action:

- 1.Chief Negotiator City of Milwaukee
- 2.City Service Commission
- 3.All Presidents of Local Unions for the City of Milwaukee.
- 4.President International AFSCME

By letter of March 15, 1990, Parr indicated that Khan would have to obtain sworn statements supporting his contentions. On April 12, 1990, Khan wrote Parr as follows:

Unfortunately, I am unable to get the affidavits from our co-workers for negative remarks against me and Mr. Broaddrick, because they are afraid that the management would treat them the same way as Mr. Broaddrick and I have been treated.

I therefore request your action only on the basis of the facts and documents already decided to you - Note my letter dated 3/1/90.

On May 2, 1990, Parr reiterated that, "affidavits must be provided before any possible action may occur."

20. On June 14, 1990, Loveland sent to all ISD staff a memorandum on the status of various positions, as follows:

- 1.Programmer Analyst/Systems Specialist I: (1--Public Services--1990) (1--General Services) Lisa Wilson from DCD will underfill the Public Services position as a Microcomputer Analyst. Teddie Jones will start with the City underfilling the other position as a Programmer II.
- 2.Systems Analyst -- Senior (General Services -- 1990) Nilsa Santiago will be promoted in pay period 14.
- 3.GIS Analyst (1): Recruiting continues for the position.
- 4.Systems Specialist II (2 -- Public Safety) Interviews are being conducted.

5. Project Assistant: Personnel has graded part of the test. The rest should be graded next week.
6. Lead Programmer: Personnel has posted an announcement. Applications will be taken throughout June.
7. Programmer Trainee (1--General Services) The aptitude test should be graded and scores available to us next week.
8. Microfilm Clerk (Records Center). An exam has been requested.

If you have questions or comments on any of the above actions, please call or stop by. Thanks.

On June 18, 1990, Khan responded to Loveland's memo as follows:

The following items in your above referred letter have created unrest and disappointment among ISD programmers and have embarrassed the collective bargaining union:

- Item 1. Underfilling of Programmer/Analyst and Systems Specialist I positions by non-ISD personnel.
- Item 6. Lead programmer position being filled through an open exam.

Your above actions inhibit existing programmers in their quest for advancement and they violate past practice and principles of fairness.

In view of the above, I request that you please review your decision and provide these opportunities to current ISD Programmers. I believe they are better qualified and deserve these opportunities.

21. The complainant has not demonstrated by a clear and satisfactory preponderance of the evidence that the respondent City, by its failure to appoint Nazir Khan and/or William Broaddrick to the position of programmer analyst when vacancies in such positions occurred on March 30, 1988, August 22, 1989 and January 9, 1990, discriminated against either Khan or Broaddrick for exercising rights guaranteed under Sec. 111.70(2), Wis. Stats.

22. The complainant has not demonstrated by a clear and satisfactory preponderance of the evidence that the respondent City, by its removal of Nazir Khan and William Broaddrick from the eligibles' list, on March 7 and April 25, 1990, respectively, discriminated against either Khan or Broaddrick for exercising their rights guaranteed under Sec. 111.70(2), Wis. Stats.

23. The complainant has not demonstrated by a clear and satisfactory preponderance of the evidence that the respondent City, by its appointment decisions noted in Finding of Fact 21, interfered with either Khan or Broaddrick in the exercise of their rights guaranteed under Sec. 111.70(2), Wis. Stats.

24. The complainant has demonstrated by a clear and satisfactory preponderance of the evidence that the respondent City, by its removal of Khan and Broaddrick from the eligibles' list on March 7 and April 25, 1991, respectively, has interfered with Khan and Broaddrick in the exercise of their rights guaranteed under Sec. 111.70(2), Wis. Stats.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the City did not violate Sec. 111.70(3)(a)1 or 111.70(3)(a)3., Wis. Stats., by its failure to hire Nazir Khan and/or William Broaddrick for any programmer analyst vacancy which arose on March 30, 1988, August 22, 1989 or January 9, 1990.

2. That the City did not violate Sec. 111.70(3)(a)3., Wis. Stats., by its removal of Nazir Khan and/or William Broaddrick from the eligibles' list on March 7 and April 25, 1990, respectively.

3. That the City did violate Sec. 111.70(3)(a)1., Wis. Stats., by its removal of Nazir Khan and William Broaddrick from the eligibles' list on March 7 and April 25, 1990, respectively.

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

ORDER 4/

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

1. Cease and desist from violating Sec. 111.70(3)(a)1, Wis. Stats., by interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Sec. 111.70(2), Wis. Stats.

(Footnote 4/ appears on page 32.)

2. Place Nazir Khan and William Broaddrick on any and all current eligibles' list for programmer analysts, at scores of 81.67 and 85.00, respectively, unless they are currently credited with higher scores, which scores shall then be utilized. If either man is currently on an eligibles' list, he shall be maintained thereon for consideration of a total of no fewer than four appointments; if either man is not on an eligibles' list, he shall be placed thereon for consideration of no fewer than two appointments.

3. Take the following additional affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

(a) Notify all employees in the bargaining unit represented by the Union by posting in conspicuous places on the IDS premises where notices to employees are usually posted, copies of the notice attached hereto and marked Appendix "A", which shall remain posted for sixty (60) days. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by other materials.

(b) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days of the date of service of this Order, as to what steps it has taken to comply herewith.

IT IS FURTHER ORDERED that, with the exception of the violations of Sec. 111.70(3)(a)1., Wis. Stats., as found in Conclusion of Law 4, the complaint is hereby dismissed in its entirety.

Dated at Madison, Wisconsin this 13th day of November, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stuart Levitan /s/
Stuart Levitan, Examiner

4/ 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 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

(Footnote 4/ continues on page 33.)

(Footnote 4/ continues from page 32.)

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.

THE CITY OF MILWAUKEE

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

In support of its position that the complaint be upheld, the Union asserts and avers as follows:

The City's failure to promote Messrs. Khan and Broaddrick to the position of programmer analyst, plus its decision to strike them from the eligibility list, constituted multiple violations of Sec. 111.70(3)(a) 1, Wis. Stats., in that such actions reasonably tended to interfere with the employes' right to engage in protected activity.

It is undisputed that Khan and Broaddrick were both union officers, and that the City was aware of their activity in this regard. Based on their civil service examinations and their evaluations, it is also clear that Khan and Broaddrick were, and are, qualified for the position of programmer analyst. It is further undisputed that none of the persons appointed to the programmer analyst positions announced on March 30, 1988, August 22, 1989 and January 9, 1990, held elected or appointed positions with the Union. Further, as evidenced by the June 26, 1990 letter from the respondent's Department of Employment Relations, Khan and Broaddrick were the only candidates struck from the eligibility list for this position, which strikings took place at a time that each was ranked as the number one candidate. Finally, each and every available candidate eligible for the August, 1989 and January, 1990 vacancies -- nine other candidates -- were offered appointment, while Khan and Broaddrick -- the only union activists, and the only other persons on the eligible list -- were not offered appointment. Accordingly, the respondent committed acts which had a reasonable tendency to interfere with the complainants right to engage in protected activity, and thus constituted a violation of Sec. 111.70(3)(a)1, Wis. Stats.

The act of singling out all qualified and eligible union activists on the eligibility list and denying only them promotions, while promoting all other available and eligible candidates constituted a violation of Sec. 111.70(3)(a)3, Wis. Stats.

Each individual involved in making decisions about appointment from the eligibility list knew of Khan's and Broaddrick's protected activity as elected union chief steward and elected union vice president, respectively. Further, two ranking departmental officials, Holly Loveland and Gary Cashmore, were hostile towards the complainant's protected activity. Loveland acknowledged that she had a confrontation with Khan over his union-based actions regarding the department's affirmative action program, and she admitted that Cashmore felt animosity toward Khan for

his union activity as well. Further, another department official, Dave Dwyer, told Broaddrick he was being passed over for promotion due to his union activity. In sum, the evidence clearly satisfies the complainants burden of proof regarding the presence of hostility based on anti-union animus.

The decisions to bypass Khan and Broaddrick for promotion were motivated by hostility on the part of Loveland and Cashmore on the basis of the complainants protected activity. In particular, the record evidence establishes, by clear and convincing evidence, that: Khan and Broaddrick were eligible and qualified for the position of programmer analyst; that Khan ranked as one of the top three eligible candidates for one of the two vacancies announced August 22, 1989; that Broaddrick ranked as one of the top three eligible candidates for the vacancy for systems specialist; that both Khan and Broaddrick were ranked as one of the top three eligible candidates for each of the three vacancies announced January 9, 1990; that neither Khan nor Broaddrick were appointed to any of these vacancies; that Khan and Broaddrick were the only union activists on the eligibility list; that all other available candidates ranked in the top three on the eligibility list were offered appointment; that Khan and Broaddrick were the only candidates struck from the eligibility list; that at the time Khan and Broaddrick were struck from the eligibility list, each was ranked number one; that at the time Broaddrick was struck from the list a vacancy existed for the position of programmer analyst; that the last vacancy for analyst was underfilled by a new hiree with no prior experience; that Gary Cashmore was responsible for the decision on who to hire for at least one of the January 9, 1990 vacancies, and that all hiring decisions were to be approved by Holly Loveland, and that the respondent has an extensive record of anti-union animus, as evidenced by Loveland's testimony about herself and Cashmore.

In support of its position that the complaint should be dismissed, the City asserts and avers as follows:

To prevail on its complaint alleging a violation of Sec. 111.70(3)(a)3, Wis. Stats., the union must establish by a clear and satisfactory preponderance of the evidence that Khan and Broaddrick were active in union affairs and that the City had knowledge of such activities; that the City bore animus against the employes for such activities; that the City's stated reasons for its actions were pretextual, and that one of the reasons for the City's actions was employe activity in union affairs. As an allegation involving Sec. 111.70(3)(a)3, Wis. Stats., implicates anti-union animus, it is the employer's motives that are to be scrutinized.

Because the principle focus is the employer's motivation, the mere coincidence of adverse employment decisions and protected activity is an insufficient basis for finding a violation. As the WERC considers the totality of the record, legitimate reasons for an

employer's action can rebut an inference of pretext or animus.

Looking at each personnel transaction and each piece of evidence, the record fails to establish anything close to anti-union animus. The grand conspiracy alleged by the complainants is simply not supported by the evidence.

The May 13, 1988 letter in which Paul Kronberger resolved the matter of where and when union business was to be conducted contains no startling revelations, and is not the smoking-gun as claimed by complainant. The barrage of grievances filed by Khan against Gary Cashmore are also of little import: many were outside the applicable time frame, and none were filed on behalf of Broaddrick, thus leaving him outside any evidence of a discriminatory conspiracy. Further, to the extent that the grievances represent any anti-union animus on the part of Cashmore toward Khan, Cashmore was never in a position to influence a promotion decision with respect to Khan, particularly the promotion decisions cited in the complaint.

Further, ranking members of the City's management team, including Holly Loveland, corroborated at least one of Khan's grievances against Cashmore, and reprimanded Cashmore, an action incompatible with a conspiracy to discriminate against Khan.

The record fails to establish that the assignment of Khan to the storeroom for conducting union business evidenced anti-union animus.

In reviewing the issues as to eligibility lists and promotion opportunities, the record fails to establish anti-union animus. With respect to Requisition No. 434853, DIS Programmer Analyst, noticed on March 30, 1988, the testimony of the appointing authorities was that the candidate ultimately selected was far better qualified, with a more impressive resume and exceptional references. While the witnesses were candid in their testimony of their low impression of Khan's work performance, nowhere was there any suggestion of anti-union animus. Broaddrick, meanwhile, was not on the eligible list for this appointment.

With respect to Requisition No. 436140, the Programmer/Analyst for the Library, the record evidence establishes that it was the Library Department, not the DIS, which did the interviewing.

With respect to Requisition No. 436142, two Programmer/Analyst vacancies in the DIS noticed on August 22, 1989, the record establishes that Khan was eligible for only one of these positions; that the appointing authority, Sharon Struble, chose another candidate based on respective job performances, and that Struble had never had any discussions or confrontations with Khan over his union activities. Broaddrick, meanwhile, was not eligible for either

vacancy under this number based on his standing -- no higher than fourth -- on the eligibility list..

Requisition No. 436142 also referenced three Programmer/Analyst vacancies announced on January 9, 1990. While Khan was not considered for the vacancies because he had not responded to the notice for scheduling an interview, Struble also testified that she selected two other candidates, Rockiki and Ganas, based on their superior qualifications. Broaddrick was eligible and was interviewed, but not selected; however, there is no evidence concerning anti-union animus by Struble toward Broaddrick, nor any evidence indicating Struble subject to undue influence to make her hiring decisions on anything other than merit.

As to the striking of Khan and Broaddrick from the eligibility list in March and April, 1990, there is ample record evidence as to the operation of the Civil Service rules, and no evidence at all that these actions were motivated by ill-will or anti-union animus. While separate actions of separate City agencies may show a lack of coordination, a finding of anti-union animus in this regard would require the examiner to find that two witnesses, Bellin and Loveland, committed perjury under oath.

Because the complainant has failed to meet its burden of proof in establishing that any of the City's actions amounted to a conspiracy to discriminate based on anti-union animus, and because the evidence establishes that the City's motivation for the promotion decisions was solely qualifications and merit, the complaint should be summarily dismissed.

DISCUSSION

The complainants allege multiple violations of Secs. 111.70(3)(a)1 and 3, Stats., arising out of a series of personnel transactions and other official actions between 1988 and 1990. The respondent denies all allegations.

Jurisdiction

Complainants filed their complaint with the Commission on September 27, 1990. Pursuant to Secs. 111.70(4)(a) and 111.07(14), Stats., "the right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or prohibited practice alleged." Thus, although the City did not raise timeliness as a specific affirmative defense either in its answer or in its brief, I am without jurisdiction to base an award on events occurring prior to September 27, 1989. As the Commission has stated as a conclusion of law, when the alleged prohibited practices occurred on a date more than one year preceding the date on which the complaint was filed, the statutory limitations "preclude the...Commission from exercising its jurisdiction over the merits of said complaint." 8/ To the extent that certain of the events alleged by the complainants did occur prior to that time, then, the complainants are time-barred from receiving any relief pertaining to those events.

I may, however, take into consideration certain events which allegedly

5/ City of Madison, Decision No. 15725-B (WERC, 6/79).

occurred prior to September 27, 1989, if doing so would illuminate subsequent events. In a case which the Commission has followed, the United States Supreme Court posited two situations which raise the considerations relevant here:

The first is one where occurrences within the . . . limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose Sec. 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely 'evidentiary,' since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is timebarred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice. 9/

Here, the complainants have clearly alleged occurrences within the limitations period which, in and of themselves, might constitute prohibited practices, namely the hiring decisions made on November 20, 1989 and for the positions announced on January 9, 1990, and the City Service Commission action to strike Khan and Broaddrick from the eligibility list in early 1990. To the extent that anterior events -- the May, 1988 selection of a candidate lower-ranked than Khan for a position as programmer analyst; the assignment of Mr. Khan in May, 1988 to a basement work area wherein to conduct union business; the repeated confrontations between Khan and supervisor Gary Cashmore, and the City's decision to compile a new eligibility list in May, 1989, -- may shed light on the true character of the subsequent events, they may be utilized for such purpose.

Two of the prior events are easily dispensed with. As noted in Finding of Fact 12, the City announced two (2) vacancies for programmer analyst on March 30, 1988; on May 2, 1988, the City hired Nilsa Santiago, and on May 23, 1988 it hired Terry Bostetter. Bostetter, with a score of 90.67, was the top-ranked candidate; the second-ranked candidate, Neil Young (score: 90.00) was not available; Khan was the third-ranked candidate with a score of 85.67; Santiago also scored 85.67. 10/ The appointing authority, Lead Systems Analyst Donald Martin, testified that he considered Khan's job performance as a

6/ Local Lodge No. 1424 v. National Labor Relations Board (Bryan Mfg. Co.), 362 US 411 (1960), 45 LRRM 3212, 3214-3215; Moraine Park Technical College, Dec. Nos. 25747-B, C (McLaughlin 3/89, 9/89).

7/ Testimony from the City's witnesses was in conflict as to whether or not Santiago was a "selective certification candidate," that is from a list expanded for affirmative action purposes. According to the ISD supervisor who oversaw the process, Santiago, a hispanic female, was a selective certification candidate. But according to Michael Bellin, supervisor of the Certification Unit in the Department of Employment Relations, Santiago became the number-three candidate (behind Bostetter and Khan) when Young became unavailable, and thus was eligible for hire without the selective certification from the City Service Commission. In any event, Santiago's precise status does not affect my conclusion as to the propriety of her hire, vis-a-vis Khan.

programmer to be "quite inferior," while Santiago had "a lot more experience" plus "a magnificent recommendation" from her prior employer. 11/ There simply is no credible evidence that the decision to pass over Khan was based, even in part, on anti-union animus on the part of Martin. Nor is there the evidence necessary to establish that this action constituted interference on the part of the employer.

I reach the same conclusion about the next occurrence, the May 13, 1988 assignment of Khan to the basement area for the purpose of performing tasks related to contract administration, particularly the processing of grievances. While there may be some occasional inconveniences for Khan in having to reserve his contract administration to a set time and place, the reverse may also be true -- Khan, as of the May 13, 1988 letter, would henceforth have an hour reserved each day, in an area apart from the immediate work-site and thus more suitable for confidential discussions. In sum, there is insufficient evidence to establish that this action by the employer was either the result of animus, or had the result of interference.

The City's decision to abolish its programmer analyst position in May, 1989, however, is more troublesome.

As noted in Finding of Fact 13, City Service Commission Rule VII, Section 5, states clearly that, except as otherwise provided for by rule, eligible lists "shall expire three years from the date of the examinations creating them." An exception for shortening that time is provided, however, by which the Commission may cancel a list at any time if, in its opinion, better-qualified applicants "might be secured for reasons such as a significant increase in the salary or salary range" for the position. The Commission may also extend the life of a list by a year, without any published qualifying criteria.

Clearly, the status of the programmer analyst position as of May 1, 1989, did not meet the rationale given in CSC Rule VII, Section 5 for abolishing a list prior to the normal three-year period. That is, it had not experienced a significant increase in its salary or salary range. Nor had it undergone any meaningful change in any aspect of its scope or duties.

The testimony of Michael Bellin, supervisor of the certification unit for the City's Department of Employment Relations, further highlights the unusual nature of this action. According to Bellin, only "a very small percentage" of lists are cancelled prematurely; such cancellations generally involve a change in qualifications or pay; and such action, when affecting a list for a limited number of departments, would not be undertaken without consultation with the affected department(s). 12/ IDS Director Loveland's written explanation of her request for a new list stated that the open examination process was "prompted by the Affirmative Action and Examination Units of Personnel", and reflected dependence "on the market rather than individuals".

The record before me does not reflect how the Programmer Analyst examination process functioned at other times; nor does the record reflect how the process worked for other positions, either within or outside IDS. What the record does establish is that, at a time when Khan and Broadrick were the two top-ranked candidates, IDS management sought, and received, permission to abolish the eligibles' list in a manner inconsistent with the published terms of the City Service Commission rules, and that such action resulted in substantial harm to the complainants, namely the lowering of the respective standings.

8/ Tr. 147-148.

9/ Tr. 115, 133.

I reach no conclusion as to whether, had this event transpired within the one-year time frame, it could have constituted a prohibited practice. However, in the words of Bryan, I do find that this earlier event is one which "may be utilized to shed light on the true character" of subsequent matters, particularly other events concerning City Service Commission Rule VII.

The Khan-Cashmore relationship is addressed below.

Standards and Burdens

The legal standards for complaint cases alleging interference and discrimination are well-settled. Section 111.70(3)(a)1, Stats, provides that it is a prohibited practice for a municipal employer, individually or in concert with others, to interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed by Sec. 111.70(2), Stats., relating to the formation or administration of a labor or employee organization. The complainant must establish that the employer's conduct contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain or coerce its employees in the exercise of their section (2) rights. 13/ It is not necessary to demonstrate that the employer intended its conduct to have such effect, or even that there was actual interference; instead, interference may be proven by showing that the conduct has a reasonable tendency to interfere with the exercise of protected rights. 14/ However, employer conduct which may well have a reasonable tendency to interfere with employee exercise of Sec. 111.70(2) rights will generally not be found violative of Sec. 111.70(3)(a)1 if the employer had valid business reasons for its actions. 15/

Section 111.70(3)(a)3, Stats., provides that it is a prohibited practice for a municipal employer to encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment. In order to prevail on this count, the complainant must prove establish that:

1. The employee was engaged in lawful and concerted activities protected by MERA; and
2. The employer had knowledge of those activities; and
3. The employee was hostile towards those activities; and
4. The employer's action was based, at least in part, on hostility towards those activities.

In both (3)(a)1 and (3)(a)3 cases, as in all complaint cases, the complainant is required to sustain its burden of proof by "a clear and satisfactory preponderance of the evidence," Sec. 111.07(3), Stats, which standard I am thus "bound. . . to apply." 16/

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

11/ City of Brookfield, Dec. No. 20691-A (WERC, 2/84).

12/ Cedar Grove-Belgium Area School District, Dec. No. 25849-B (WERC, 5/91).

13/ Milwaukee County (Sheriff's Department), Dec. No. 24498-B (WERC, 7/88); Layton School of Art & Design v. WERC, 82 Wis. 2d 324, 361, 262 N.W. 2d 218 (1978).

By its explicit reference to "other terms of employment," (3)(a)3 clearly includes promotional opportunities. 17/ Conditions of employment are also the subject of collective bargaining, as protected by (3)(a)1 and 2; thus, the wrongful denial of promotional opportunities may be a separate violation of (3)(a)1 as well.

Regarding the fourth aspect, it is important to note that it is "irrelevant that the employer has legitimate grounds" for the action taken "if one of the motivating factors for the employer's action is the employe's protected concerted activity." 18/ As our Supreme Court said in setting forth the "in-part" test, an employer may not subject an employe to adverse consequences "when one of the motivating factors is his union activities, no matter how many other valid reasons exist" for the employer's action. 19/ Although the legitimate bases for an employer's actions may properly be considered in fashioning an appropriate remedy, discrimination against an employe due to concerted activity "will not be encouraged or tolerated." 20/

Not all acts are equal, however; and when hostile acts are remote in time from the instances of alleged interference and/or discrimination, or are counter-balanced by other evidence inconsistent with anti-union animus, it is appropriate to so note and take into consideration. 21/

Merits -- (3)(a)3

Here, the only direct evidence of hostility on the part of Loveland against Khan or Broaddrick which could be related to union activity was Loveland's own testimony that she had been angry at Khan for criticism of the CEDS affirmative action program at a meeting of the Community Resources Commission. However, feeling hostility towards a union activist for acts done under color of union activity is not necessarily the same as anti-union animus.

I believe that Loveland became hostile towards Khan based on the style and substance of his presentation -- that is, that he took her by surprise at a public meeting, and made comments she felt were false -- not just because Khan disagreed with her on affirmative action.

Counterbalancing this uncertain (and not entirely persuasive) evidence of anti-union animus is evidence inconsistent with such an attitude. That is, on at least two occasions, Loveland reprimanded Cashmore -- Khan's prime nemesis -- for abusive behavior and language. Not only were such reprimands part of Loveland's disposition of grievances in which Khan alleged anti-union animus by Cashmore, but the reprimands were even officially communicated to Khan as part

14/ Milwaukee County (Sheriff's Department), Dec. No. 24498-A (Jones, 1/88); State of Wisconsin Department of Administration (Professional-Social Services), Dec. No. 15699-B (WERC, 11/81).

15/ LaCrosse County (Hillview Nursing Home), Dec. No. 14704-B (WERC, 7/78).

16/ Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis. 2d 540, 562 (1967); see also the earlier Kenosha Board of Education, Dec. No. 6986-C (WERC, 2/66), in which the Commission was "cognizant of the motivating factor of Muskego-Norway". Kenosha Teachers Union v. Wisconsin Employment Relations Commission, 39 Wis. 2d 196, 202-203 (1968). See also Union High School District, City of Lake Geneva, et al, Dec. No. 17939-A (Houlihan, 4/82) for cases applying Muskego-Norway.

17/ Employment Relations Dept. v. WERC, 122 Wis. 2d 132, 141 (1985).

18/ Price County, Dec. No. 24504-A (Gratz, 4/88).

of Loveland's handling of the matter. As a final note in this regard, the record shows that Loveland took seriously enough union concerns about workplace safety and health issues to convey them to the proper city officials for their expert study and review.

In summary, the record does not contain a clear and satisfactory preponderance of evidence that Loveland's personnel actions regarding Khan or Broadrick were motivated, even in part, by anti-union animus.

Nor do I find sufficient evidence to support a conclusion that Struble's actions were based, even in part, on anti-union animus. The only evidence which complainants presented on this critical point was Khan's own testimony that "I could feel it," 22/ presumably premised on Khan's prior effort to bring the position Struble held into the unit. Under relevant precedent, I believe that "I could feel it" does not, absent further corroboration, satisfy the standard of "clear and satisfactory preponderance of the evidence".

The record is, however, replete with evidence of hostility between Cashmore and Khan. Unchallenged testimony has Cashmore making abusive comments in foul language about Khan's union activities. By Loveland's own admission, Khan's union activity, "among other things," did contribute to the negative feelings which Cashmore held. 23/ This is precisely the sort of mixed-motive that the "in-part" test of Muskego-Norway seeks to address. As pertains to Khan, then, any employment decision which Cashmore made on the matters here under review would have been improperly and unlawfully tainted by anti-union animus.

This foundation for illegal discrimination, however, does not extend to Broadrick. The record evidence establishes that Cashmore's hostility towards Khan's union activity was precisely that -- hostility towards the union activity performed by Khan, rather than hostility towards union activity in general. Moreover, the record suggests that Cashmore's initial hostility was based primarily on his perceptions of Khan's performance and personality, and apparently preceded Khan's union activity. 24/

As to Cashmore's purported anti-union animus in a context other than his dealings with Khan, the record is silent. There simply is insufficient evidence -- certainly, not the clear and satisfactory preponderance -- that Cashmore was hostile to the union or even to union activity in general; only that he was hostile to the activities of Chief Steward Khan. In particular, there is insufficient evidence that Cashmore's actions regarding Broadrick were motivated, even in part, by anti-union animus.

Finally, the record lacks a clear and satisfactory preponderance of the evidence to establish any anti-union animus on the part of William Friar, William Huxhold, or David Dwyer.

Cashmore, then, is the only supervisory member of the ISD Management team

19/ Tr. p. 108.

20/ Tr. p. 199.

21/ Cashmore was highly critical of Khan as early as the Employee Performance Review of July 16, 1985 - March 10, 1986. Khan became Chief Steward January 20, 1986, and did not file his first grievance until September, 1986. That is, even if Cashmore did not complete the Review until mid-June, and even accepting that he may have improperly allowed some post-March 10 perceptions to affect his evaluation, the record establishes that this negative evaluation was prior to Khan's first documented grievance activity.

who meets the Muskego-Norway "in-part" test of anti-union animus, and only as pertains to Khan. Accordingly, as the Cashmore/Khan relationship is the only one which satisfies the third aspect of the four-part test noted above, it is the only one necessary to consider further in the context of the (3)(a)3 complaint.

Central to this question is whether Khan expressed an interest in the positions announced on January 9, 1990. Unfortunately, the record here is somewhat cloudy.

Loveland testified without challenge that line supervisors had the authority to conduct interviews with eligible candidates, and to make an effective recommendation for hire/promotion. The testimony of Struble, one of the supervisors so authorized, confirmed this understanding.

For the three programmer analyst vacancies announced on January 9, 1990, Struble and Cashmore had this authority for two and one positions, respectively. According to Struble, she did not interview Khan because "he didn't respond." 25/ Struble also testified that she and Cashmore "both interviewed the same slate of candidates" for these positions. 26/ Thus, absent evidence that would establish otherwise, the record seems to support the City's assertion that Khan did not express interest in these positions in the manner necessary to be considered by the City as still in the selection process. Of course, if Khan took himself out of the selection process, he cannot prevail on his claim of discrimination against the City for its failure to select him.

Khan testified that he was interviewed for these positions by William Huxhold, at the time, the de facto deputy to Loveland. Loveland testified she would not be aware whether Huxhold had interviewed Khan, and was not aware whether he had done so. According to Loveland, Struble reported to Huxhold on the results of her interviews. According to Khan, Huxhold not only interviewed him, but told him that a hiring had already been made. 27/ Other than Khan's testimony, however, there is no independent corroboration that such an interview took place. This does not mean Khan testified untruthfully; indeed, I believe that Khan and Huxhold did have a conversation about the programmer analyst positions. However, in this context, "an interview" is a particular and precise event, far more important and meaningful than a conversation or discussion. Even if Khan did have an interview with Huxhold, there is nothing in the record to establish that Huxhold has the effective authority to fill these vacancies; moreover, there is affirmative testimony that the individuals who did have such authority (Struble and Cashmore) were not given Khan's name on the list of eligibles'.

Finally, there was this colloquy between complainant's attorney and Michael Bellin, senior personnel analyst:

Q: Can a person be interviewed for a position
without your department being aware?

22/ Tr. - 173.

23/ Tr. - 171.

24/ Khan's recounting of his colloquy is open to interpretation as to the time-frame of the decision-making process. Assuming the accuracy of Khan's account, it is unclear whether Huxhold was telling Khan that someone else had been offered the position, or that he, Huxhold, knew that someone else would be offered the position. Huxhold did not testify at the hearing.

A: I would say that it probably happens all the time. They shouldn't be appointed without our knowledge because they have -- we have to certify that they are, you know, within -- you know, they are reachable within the rules.

Q: But on your letter it states that Mr. Khan did not respond to the January 9th, 1990 --

A: Right.

Q: -- requisition. And yet, if he were interviewed for the position, would that be inconsistent with that indication there?

A: A lot -- there are -- it frequently occurs when somebody receives an interview notice, calls for an interview but never sends it back to us.

Q: So it would be simply that your department didn't get it but he processed the interview for him?

A: It's possible that he may have called and gotten an interview.

Q: Under those circumstances, a person in that situation would in fact be eligible; is that correct?

A: Sure. 28/

I do not find this testimony to be inconsistent with my discussion above. In particular, I note that it reflects conditions and hypotheticals that the record does not persuasively establish are present here; namely, that an applicant who neglected to return the confirming notice had called for an interview, was placed on the interview list of a supervisor with effective authority to fill the position, and was so interviewed. I understand Bellin's testimony to be that in such situation -- where the only failing by the applicant was not returning the confirming notice -- the applicant would be treated as eligible. Here, however, there is no evidence -- other than conclusory statements couched as questions by counsel, both to this witness and others -- that Khan called for an interview, was placed on the interview list of a supervisor with effective authority to fill the position, and was so interviewed.

Cashmore, then, did not make any employment decisions affecting Khan. As the chronology shows, the only position Cashmore was empowered to fill was one of the January, 1990 programmer analyst vacancies. But, as noted above, the record does not establish that Khan was on the list of eligible candidates provided to Cashmore for interview and consideration. Indeed, there is affirmative testimony by Struble that the list of eligibles' which she and Cashmore both interviewed included Broaddrick, Shuck and Rokicki. If Cashmore did not know he had the option of hiring Khan, it could not have been discrimination for him not to do so.

Notwithstanding my conclusion, stated above, that the Huxhold-Khan exchange was more akin to a conversation than a formal job interview,

25/ Tr. - 141, 142.

Loveland's testimony does allow for some confusion on that point. Asked by Complainant's counsel whether Huxhold had told Loveland that he had interviewed Khan, Loveland responded:

A: I don't recall him ever saying that. I'm sure that he talked to Nazir at some point, but I never heard Bill say that he had interviewed him for a position. And he could have; that was his choice. It wasn't the convention. 29/

Thus, despite other testimony giving primary responsibility for hiring for the January 9, 1990 positions, Loveland here appears to be testifying that Huxhold also had authority to act in this regard.

Finding that Huxhold did have such authority, however, does not change my conclusion. Nothing in the record suggests anti-union animus on the part of Huxhold; thus, his failure to promote Khan, even if he did have the authority, cannot be found to have been tainted by unlawful discrimination. And even if Huxhold did "interview" Khan in the sense of the term that the complainants propound, there is still no evidence that such an interview resulted in restoring Khan to the list of eligibles' to be interviewed by Cashmore.

Cashmore did, of course, have the option of promoting Broaddrick, which option he twice declined -- first in favor of Schuck, and then, when Schuck failed to report, by underfilling the position with Jones. As noted above, I have concluded that while any action which Cashmore might have taken regarding Khan would have been unlawfully tainted by anti-union animus, this illegal discrimination did not extend to Broaddrick as well. Neither the background of the Cashmore-Broaddrick relationship, nor the selection of Schuk, satisfies the test of a "clear and satisfactory preponderance of the evidence" to find illegal anti-union animus.

Finally, as Khan and Broaddrick had been stricken from the eligibles' list on March 7 and April 25, 1990, respectively, the decision to underfill the Schuk vacancy with Teddie Jones cannot be a discriminatory act in and of itself. Again, if Cashmore did not know that Khan and Broaddrick were eligible for appointment -- and, because of the CSC action, neither man was eligible -- his failure to appoint them cannot be discrimination. 30/

As to the January 9, 1990 vacancies, then, I find that neither Loveland nor Struble bore Khan or Broaddrick anti-union animus; that Cashmore did bear anti-union animus against Khan, but not against Broaddrick; that the list of eligibles' given to Struble and Cashmore for interview and consideration did not include Khan; and that neither Khan nor Broaddrick were on the list of eligible candidates for the vacancy created when Schuk failed to report. Accordingly, I have concluded that there was no 3(a)3 violation as regards the vacancies announced on January 9, 1990, either affecting Khan or Broaddrick.

Merits -- (3)(a)1

I now consider the complaints of violations of Sec. 111.70(3)(a)1, under the standards discussed above. The specific acts within the applicable time period of which the union complains were as follows: the November 20, 1989 decision to promote a lower-ranked candidate, Becker, rather than Khan, to fill the position announced on August 22, 1989 31/; the bypassing of both Khan and

26/ Tr. 218.

27/ Milwaukee County, Dec. No. 12153-A (Schurke, 11/74).

28/ Khan and the other candidate, Patricia Becker, both had a score of 85.67; Khan, however, was considered the higher-ranked candidate based on other

Broaddrick for lower-ranked candidates to fill the vacancies announced on January 9, 1990; and the striking of Khan and Broaddrick from the eligibility list on March 7 and April 25, both 1990, respectively.

The effective authority to recommend hiring Becker for the August, 1989 position was held by Struble, who began supervising Khan that month. By the time of the decision to hire Becker, Struble had formed an opinion of Khan's ability; based on her own observations, and her discussions with her peers, Struble believed that Khan's work "(wa)sn't as good of a product" as that of other IDS personnel, and was "not at the level that I would consider appropriate for a Programmer Analyst." 32/ Struble believed that Becker, based on other analytic experience, "seemed to be a better match." 33/

Given Struble's rational and credible testimony, and the respective identical civil service examination scores, I conclude that the union has not established by a clear preponderance of the evidence that the decision to hire/promote Becker rather than Khan would have a reasonable tendency to interfere with protected rights of the union and/or its members.

I have previously discussed Khan's problem with proving a violation related to the January 9, 1990 vacancies, namely his failure to reply in such a manner so that the city Department of Employment Relations would understand his interest in the positions.

While I express no conclusion on whether granting a union leader special favors or waivers in the application process would itself be a prohibited practice, I can, and do, conclude that not granting such special dispensation was, in this instance - assuming no practice of generally doing so - not a violation of Sec. 111.70(3)(a)1.

Broaddrick, of course, needed no special consideration; ranked second on the list, he expressed his interest in a timely and effective manner.

In filing the three vacancies announced January 9, 1990, the city made four hiring decisions: first, the selection of Walter Schuk and Wayne Rokicki; then the selection of Mark Ganas, and finally, when Schuk did not report for duty, the selection of Teddie Jones in an "underfill" capacity. 34/

The union contends this history shows that every lower-ranked applicant who was interested received appointment, while Broaddrick, the veteran union leader, was by-passed; this, the union asserts, establishes a reasonable tendency to interfere with protected rights.

To be sure, there is something suspicious -- on the surface, at least -- about this pattern of pass-overs. But suspicion is not the same as a "clear and satisfactory preponderance of the evidence." And because of one further factor in the Jones underfilling, I cannot find that standard has been met.

That factor is that the City passed over two higher-ranked candidates -- neither of them active in the Union -- before it appointed Jones. Indeed, both of these candidates (Haralson and McCarty) also scored higher than Broaddrick (as well as higher than Khan, for that matter). Thus, it is neither unique nor unprecedented for the city to appoint someone other than the highest-scoring

City Service Commission procedures.

29/ Tr. - p. 162

30/ Tr. - p. 156

31/ Unless indicated otherwise, all future date references are to 1990.

candidate; indeed, it is to allow the appointing authority some flexibility that the City Service Commission procedures provide for a list of eligibles' rather than a single name.

Of course, this flexibility must never be used as a mask for decisions to, or which, interfere or discriminate. But again, while Broaddrick's string of strike-outs raise serious questions, the evidence does not support an answer as the union has alleged.

Finally, I turn to the process itself, and find it wanting. Specifically, I find the City committed a prohibited practice when it struck Khan and Broaddrick from the eligibles' list at the City Service Commission meetings of March 7 and April 25, 1990, respectively. The record does not establish whether it was IDS or DER which took the initiative to strike the complainants. But as both are agencies of the respondent City, and as motive is not an issue in a (3)(a)1 case, that this aspect is open does not bar the conclusion I have reached. 35/

As noted in the jurisdictional paragraph, I have had some trouble understanding aspects of the City's personnel practices; indeed, my need for clarification of the record as to the filling of the January 9 vacancies caused me to reopen the record and request supplemental evidence. My questions largely dealt with the City's apparent practice of defining the date of appointment not as the date an appointment decision was made, but rather as the starting date of the appointee. That is the only possible explanation for the evidence that shows Schuk and Rokicki being "appointed" on March 19, while a letter dated February 5 announces the one remaining vacancy (which in turn was filed by Ganas one month later).

The procedures concerning the vacancies is further clouded by reference in the City's supplemental submission to Neil Young. In its original evidence, the City listed Young as being appointed on February 5, to one of the two vacancies announced on August 22, 1989. That documentation also stated clearly that William Heberlein was appointed on September 11, 1989 to the other vacancy, and implied that Patricia Becker was appointed on November 20, 1989, to a Systems Specialist I position announced October 5, 1989. 36/

This documentation is inconsistent with the testimony at hearing of Sharon Struble, who recalled that she interviewed Becker for, and appointed her to, the Programmer Analyst position. 37/ However, if Young and Heberlein were appointed to the two Programmer Analyst vacancies, there would be no remaining vacancies for Becker to fill.

In its supplemental submission, the City now states that Young was not hired for the August, 1989 position, but rather for the January 9, 1990 vacancy -- a statement which thus throws the Schuk - Rokicki - Ganas - Jones arrangement into doubt. 38/ To frustrate further efforts at understanding, I note that the August, 1989 and January, 1990 vacancies all used the same requisition number, and that there is no requisition number listed for the October, 1989 vacancy at all.

In seeking the most objective and reliable facts I can, I keep returning

32/ Tr. - p. 119.

33/ Ex. 44

34/ Tr. - p. 156

35/ Ex. 58

to the striking of Khan and Broaddrick from the various list of eligibles'. Taken in context -- a context that includes Bryan considerations, and City Service Commission Rule VII -- I conclude that here there has been interference with protected concerted activity.

Khan and Broaddrick were cited as eligible on a list certified March 21, 1988, and were also included (at a lower score) on a list approved by City staff August 9, 1989. They were stricken from both lists by action of the City Service Commission on March 7, 1990 and April 25, 1990, respectively.

City Service Commission Rule VII provides that the Commission "may remove from the list the name of an eligible who fails of appointment three times" According to Personnel Analyst - Senior D. Michael Bellin, however, it is unusual, even rare, for a candidate to be stricken after only three failures. 39/ It is no more usual for a candidate ranked number one to be dispatched so promptly.

Khan failed of appointment for nine (9) separate vacancies: the two (2) vacancies announced March 30, 1988, and filed on May 2 and May 23; the library vacancy announced August 22, 1989, and never filed; the other two (2) vacancies announced August 22, 1989; the vacancy announced October 5, 1989, and probably filed November 20, and the three (3) vacancies announced January 9, 1990. Broaddrick ostensibly failed of appointment to five (5) separate vacancies: the library position, the systems specialist, and the January, 1990 series of three. 40/

Neither Broaddrick nor Khan, however, were included on the February 5, 1990 list used to complete the hirings for the last-cited series. 41/ Although one can presume that Khan was omitted because he failed to respond properly to the initial letter, there is no explanation of why Broaddrick was omitted. As all three of the appointments to the January, 1990 series were subsequent to February 5, 1990, the City simply cannot count against Broaddrick those "failures" which occurred after he was inexplicably omitted from the list. I am fully aware that the hiring decisions relating to Schuk and Rokicki were made on or before February 5, 1990. However, the City Service Commission rules refer to an eligible who "fails of appointment." In its material submitted herein, the City has chosen to define "appointment" in such a way that the "appointment" of Schuk and Rokicki did not occur until March 19, 1990. Thus, Broaddrick had not failed of these appointments at the time his name was omitted from the list prepared for the February 5 hiring, because these appointments -- by the City's own terms -- had not yet occurred, leaving him with just two such instances. Given Broaddrick's service of more than five (5) years as a union officer, the City's action to strike him from the eligibles' list before he had failed of appointment even three times -- and thus in a manner inconsistent with its published rules -- necessarily would have a reasonable tendency to interfere with the guaranteed rights to engage in protected concerted activity.

This consideration is inapplicable to Khan because of his failure to

36/ Tr. - p. 117, 134.

37/ Senior personnel analyst Bellin testified that Khan failed of appointment five, not nine times; this seems to indicate that multiple positions listed in the same announcement (e.g., the two vacancies announced March 30, 1988 or the three vacancies announced January, 1990) are counted once in the "fails of appointment" test. Because my analysis does not turn on this point, I leave unresolved the question of exactly how the City counts such incidents.

38/ Tr. - p. 130; p. 224; Ex. 45

return proper confirmation of interest in the January, 1990 vacancies. However, another factor does apply -- Khan's standing on dual eligibility lists.

Khan scored an 85.67 on the list certified on March 21, 1988, and an 81.67 on the list certified August 9, 1989. There is nothing in the official documentation submitted to indicate that the lists were consolidated as provided by in CSC Rule VII, Section 3; indeed, the two lists had separate examination numbers, and expired on different dates. The City's documents further indicate that the placement of Khan on the lists for consideration of each vacancy was in regard to his 1988 score, not his 1989 ranking. However, when he was stricken on the CSC meeting of March 7, 1990, Khan was stricken from both lists. But if the two lists of eligibles' were separate and distinct, and Khan failed of appointment only in relation to his 1988 score, I do not see how his 1989 score can be stricken as well. Or, to be more precise, given Khan's union activities, -- activities of an extremely high profile, which provoked anti-union animus from at least one supervisor -- I cannot see such action, itself not in apparent conformity with the City's published rules, without also seeing a reasonable tendency to interfere with the exercise of protected rights.

Accordingly, I have found violations of Sec. 111.70(3)(a)1, in the City's striking of Khan and Broaddrick from the list of eligibles' at the CSC meetings of March 7 and April 25, 1990, respectively, and have dismissed all other aspects of the complaint.

REMEDY

The Union has sought, as remedy, orders that the City cease and desist from continuing violations; that it promote Khan and Broaddrick to the position of programmer analyst; that it provide back pay, and such other and further relief as may be appropriate to effectuate the provisions and policies of MERA.

Because I have not found any violations of MERA arising out of the City's decisions not to appoint Khan and/or Broaddrick as programmer analysts, I have not made such appointment part of my remedy. Obviously, as I have not provided for appointment as programmer analyst, I have not provided for the related back pay.

I have instead sought to provide a remedy which relates directly to the violations I have found, namely the improper deletion of Khan and Broaddrick from the eligibles' list. If Khan and/or Broaddrick are not currently on a list, the remedy provides that they be so placed, and maintained, for no fewer than at least the next two appointments. If Khan and/or Broaddrick are currently on a list, the remedy provides that they be maintained thereon for a total of at least four appointments. That is, if Khan is not on an eligibles' list, and Broaddrick is on a list but has failed of appointment once, they are to be placed on the eligibles' list for the next two appointments and three appointments, respectively. Under either procedure, Khan and Broaddrick are to be credited with scores of 81.67 and 85.00, respectively, unless they are currently credited with higher scores, in which case such higher scores shall be used.

Dated at Madison, Wisconsin this 13th day of November, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stuart Levitan /s/
Stuart Levitan, Examiner

APPENDIX "A"

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

1. WE WILL NOT interfere with the employes of the Information Services Division in the exercise of their protected rights under Sec. 111.70(2) of the Municipal Employment Relations Act by making statements, or taking actions, which contain or constitute a threat of reprisal to employes who engage in protected, concerted activity.
2. WE WILL NOT in any other or related matter violate Sec. 111.70(3)(a)1 of the Municipal Employment Relations Act.
3. WE WILL place Nazir Khan and William Broaddrick on the appropriate eligibles' list, as required by the Examiner's Order in Local 428 v. City of Milwaukee, Case 366, No. 44601, Dec. No. 26728-A.

Dated this 13th day of November, 1991.

By _____

Director,
Informational Services Division

THIS NOTICE MUST BE POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

