STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Appearances:

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

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

ORDER

On November 13, 1991, Examiner Stuart Levitan issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled proceeding wherein the Examiner dismissed certain complaint allegations but wherein the above-named Respondent was found to have committed prohibited practices within the meaning of Sec. 111.70(3)(a)1, Stats., and was ordered to cease and desist therefrom. No petition for review was timely filed and by operation of Sec. 111.07(5), Stats., Examiner Levitan's Findings of Fact, Conclusions of Law and Order became the Commission's Findings of Fact, Conclusions of Law and Order on December 3, 1991.

On December 17, 1991, Complainant filed a petition for rehearing pursuant to Sec. 227.49, Stats., asserting that the decision of the Examiner and the Commission contained material errors of fact and law and that new evidence existed of sufficient strength to reverse or modify the Commission's Order, which evidence could not have previously been discovered by due diligence. On January 16, 1992, the Commission granted the petition for rehearing to determine whether there was merit to the Complainant's assertions. The parties thereafter filed written positions with the Commission, the last of which was received January 31, 1992.

Having considered the record, and being fully advised in the premises the Commission makes and issues the following

ORDER 1/

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

227.53 Parties and proceedings for review. (1) Except as otherwise

1. Decision No. 26728-B does not contain any material error of law or fact.

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specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

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2. The evidence Complainant wishes to present is not sufficient to reverse or modify the Order in Dec. No. 26728-B.

3. Decision No. 26728-B is not modified in any way.

Given under our hands and seal at the City of Madison, Wisconsin this 16th day of September, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

1/ Continued

> (b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.
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> (c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MEMORANDUM ACCOMPANYING
ORDER

In its petition for rehearing and supporting argument, Complainant asserts that the Commission erred when concluding that Respondent City of Milwaukee did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)3, Stats., by failing to promote Nazir Kahn. Complainant asserts that there is undisputed evidence in the record that Kahn's supervisor, Cashmore, was hostile towards Kahn's union activity and that Cashmore played a role in Kahn's failure to obtain a promotion. Complainant acknowledges that the Examiner determined that Kahn did not seek an interview for the promotion in question and thus determined that no improper denial of the promotion occurred. However, Complainant contends that Kahn did indeed interview for the promotion with Cashmore's immediate supervisor. Complainant argues the record clearly indicates that Cashmore must have had some input into the immediate supervisor's determination not to promote Kahn. In this regard, Complainant contends that the newly discovered evidence it wishes the Commission to consider demonstrates that Cashmore's supervisor was not only a normal participant in the promotion process but also served as an initial interviewer for one of the January 9, 1990 promotions. Given all the foregoing, Complainant alleges that the record establishes that hostility towards Kahn's union activity played some role in his failure to receive any of the promotions announced January 9, 1990.

Respondent contends that Complainant is merely restating earlier arguments which were properly heard, considered, and dismissed. Respondent asserts the record establishes that Cashmore never interviewed Kahn and thus any antagonism he felt toward Kahn could not have manifested itself in the promotion decision. Respondent asserts that the evidence sought to be presented by Complainant on rehearing is neither new nor material and thus does not warrant any change in the Commission's decision.

Respondent notes that the evidence sought to be presented goes to the issue of whether Cashmore's supervisor interviewed Kahn for the promotion. However, Respondent asserts that the Examiner and the Commission have already analyzed the alleged violation assuming that Complainant's argument in this regard is correct. Thus, even if Cashmore's supervisor interviewed Kahn, Respondent argues there is no evidence that Cashmore's supervisor harbored animus toward Kahn or that Cashmore influenced his supervisor in any way not to hire Kahn. Because there is no evidence in the record that Cashmore ever had a conversation with his supervisor in which he urged his supervisor not to hire Kahn because of his union activity, Respondent contends that the record continues to warrant dismissal of this allegation.

In his decision, as adopted by the Commission, the Examiner discussed the issue presented on rehearing in the following manner:

> Cashmore, then, is the only supervisory member of the ISD Management team 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 recommend-ation for hire/promotion. The testimony of Struble, one of the supervisors so authorized, confirmed this under-standing.

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." 22/ Struble also testified that she and Cashmore "both interviewed the same slate of candidates" for these positions. 23/ 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

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22/Tr. - 173.

23/Tr. - 171.

been made. 24/ 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?

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.

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.

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 inter-view 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. 25/

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

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25/Tr. - 141, 142.

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 convers-ation than a formal job interview, 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. 26/

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. (Emphasis added)
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> Cashmore did, of course, have the option of pro-moting 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

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26/Tr. 218.

> 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 Schuck, satisfies the test of a "clear and satisfactory preponderance of the evidence" to find illegal anti-union animus.
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> 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 Schuck 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 discrimin-ation. 27/
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> 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 Schuck 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.

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

We are satisfied that the above quoted portion of the Examiner's Memorandum correctly responds to the argument made by Complainant on rehearing.

As found by the Examiner, the record as a whole supports the conclusion that Kahn was not interviewed by either Cashmore or Cashmore's immediate supervisor (Huxhold) for the position. However, as noted by the Examiner, even if one were to assume that Kahn was interviewed by Cashmore's supervisor, there is

no persuasive evidence in the record that Cashmore's supervisor bore animus toward Kahn. Further, contrary to Complainant's arguments on rehearing, even assuming again that Cashmore's supervisor did interview Kahn, there is no persuasive evidence in the record that Cashmore and his supervisor ever discussed Kahn's promotion or that, as a result of any such discussion, Cashmore's supervisor was influenced by the animus Cashmore had toward Kahn. Complainant's assertion on rehearing that the existing record generally establishes interaction between the two supervisory levels when positions are filled is simply not sufficient to meet Complainant's burden of proof even if Complainant were correct that Kahn was interviewed for the position in question.

The evidence which Complainants wish us to consider for the first time on rehearing would establish that Cashmore's supervisor has directly interviewed applicants as part of the promotional process in dispute. Such evidence does not establish that he interviewed Kahn as to any of the January 1990 vacancies. Nor does it establish any communication between Cashmore and the supervisor as to whether Kahn should receive a position. Thus, even assuming that the evidence in question is new evidence which could not previously have been presented with due diligence, the evidence is clearly not of sufficient strength to overturn the existing dismissal of the discrimination allegation.

Given all the foregoing, we are satisfied that no error of fact or law has been committed and that our decision should stand.

Dated at Madison, Wisconsin this 16th day of September, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner