

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 2537, AFSCME, AFL-CIO,	:	
	:	
Complainant,	:	
	:	
vs.	:	Case 110
	:	No. 48911 MP-2704
	:	Decision No. 27779-A
CITY OF БЕЛОIT,	:	
	:	
Respondent.	:	
	:	

CITY OF БЕЛОIT,	:	
	:	
Complainant,	:	
	:	
vs.	:	Case 111
	:	No. 49116 MP-2721
	:	Decision No. 27780-A
LOCAL 2537, AFSCME, AFL-CIO,	:	
	:	
Respondent.	:	
	:	

Appearances:

Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1734 Arrowhead Drive, Beloit, Wisconsin 53511-3808, appearing on behalf of the Union.
Mr. Bruce K. Patterson, Employee Relations Consultant, P.O. Box 0048, New Berlin, Wisconsin 53151-0048, appearing on behalf of the City.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On March 11, 1993, Local 2537, AFSCME, AFL-CIO filed a complaint alleging that the City of Beloit had violated various provisions of the Municipal Employment Relations Act by retaliating against bargaining unit employees engaging in protected concerted activity. Thereafter, on April 16, 1993, the City of Beloit filed a complaint alleging that Local 2537, AFSCME, AFL-CIO had also violated certain provisions of the Municipal Employment Relations Act by failing to comply with the grievance/arbitration procedure in the parties' collective bargaining agreement and by filing the aforesaid complaint interfering with the City's right to exercise certain "powers and responsibilities for the government in the good order of the municipality." Subsequently, the undersigned was appointed Examiner in the cases and hearing was scheduled for November 17 and 18, 1993, in the Beloit City Hall, Beloit, Wisconsin. Both parties filed an Answer in the above cited matters and denied committing any prohibited practices by

their actions herein. A hearing was conducted by the undersigned on November 17 and 18, 1993, in the Beloit City Hall as noted above. The aforesaid two complaints were consolidated for hearing, argument and decision without objection from the parties. At the beginning of the hearing the Union withdrew its complaint regarding Linda Charbonneau without objection from the City. The hearing was transcribed, and the parties completed their briefing schedule on January 28, 1994.

The Examiner, having considered the evidence and argument of the parties and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Local 2537, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization within the meaning of Section 111.70(1)(h), Stats., and has its principal place of business at 1734 Arrowhead Drive, Beloit, Wisconsin 53511-3808.

2. City of Beloit, hereinafter referred to as the City, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and has its principal place of business at 100 State Street, Beloit, Wisconsin 53511.

3. At all times material hereto, the Union has been the exclusive bargaining representative of certain employees of the City defined as follows:

All regular full-time and regular part-time employees of the City of Beloit, including all regular full-time and regular part-time craft employees (Building, Housing, Plumbing, Electrical Officials), employed at the Beloit City Hall, Engineering Department, Library, Health Department, Fire Department, Police Department, Housing Authority, and Department of Public Works; but excluding law enforcement personnel, fire fighters, supervisory, confidential, professional and casual employees, and all employees of the Department of Public Works presently represented by Local #643, AFSCME, AFL-CIO.

4. At all times material to this proceeding, the Union and City were parties to a collective bargaining agreement that governed the wages, hours and conditions of employment of certain employees of the City as noted above. Said agreement was in effect from January 1, 1991 through December 31, 1992, and contained among its provisions a grievance procedure culminating in final and binding arbitration. Said agreement also contained, inter alia, the following provision:

ARTICLE XVII

LAY-OFF AND RECALL

- 17.01 If the employer eliminates the number of positions in any classification and/or departments or reduces the regularly scheduled hours of an employee, the following procedure shall apply:
- a) Employees whose jobs have been eliminated shall first have the right to bump any junior employee in their classification, provided they are qualified and can demonstrate their ability to do the junior employee's job.
 - b) Employees unable to bump a junior employee in their classification shall be able to bump a junior employee in classification in pay ranges below, provided they are qualified and can demonstrate their ability to do the junior employee's job.
 - c) Employees who exercise their right to bump a junior employee in their pay range, but in a different classification, shall be required to serve a trial period of ten (10) working days in the junior employee's classification.
 - d) Such junior employees who have lost their positions as a result of a bump, shall have the right to exercise their seniority in the same manner as if their job had been eliminated.
 - e) Employees who are without jobs as a result of a bump or a reduction in the number of positions, shall be notified in writing two (2) weeks prior to the lay-off and shall be placed on a re-employment list.
 - f) Employees who do not choose to exercise their bumping rights, shall also be placed on a re-employment list.
 - g) Probationary employees do not have recall rights.

5. On or about June 2, 1992 the Union and the City received an award in the matter of an interest arbitration between the parties in Case 103, No. 45306, INT/ARB-5946 from Arbitrator Frank P. Zeidler, dated June 1, 1992. The Award provided as follows:

The 1991-1992 Collective Bargaining Agreement between the City of Beloit and the Union should contain the Final Offer of the Union.

6. The final offer of the Union included in part the following items:

* a proposal that would limit the City's ability to unilaterally alter the hours of work of employees, including those employees working in the Animal Control Department;

* a proposal that provided for the reclassification of Betty Motacek from a Clerk Typist II to a Secretary in the Housing Authority Department;

* a proposal that provided for the reclassification of Theresa Ryan from Animal Control Warden to Humane Officer in the Animal Control Department;

* a proposal that provided that employees working a 5/2-5/3 schedule in the Police Department (Public Safety Technicians) would receive double-time for all holidays worked as well as receive a minimum of eight (8) holidays per year, previously those employees only received double time for six out of the ten listed holidays, for the other they only received time and one-half;

* a proposal to provide that employees required to carry a paging device during off-duties hours would receive fifty cents (50 cents) per hour for each off-duty hour that the employee is on-call, previously employees required to carry paging devices received twenty-five cents (25 cents) only for each hour worked, this proposal primarily effected employees working in the Animal Control Department and the Housing Authority.

7. The final offer of the City included in part the following items:

* that a new working shift be established for the Animal Control Warden (Theresa Ryan) of 12:30 p.m. to 9:00 p.m. Monday through Friday during daylight savings time and 9:30 a.m. to 6:00 p.m. during non-daylight savings time;

* that the Custodian Supervisor (Floyd Voss) at the Beloit Housing Authority be reduced to Custodian.

8. On or about August 26, 1992, the Community Development Authority of the City of Beloit adopted Budget Revision 2 to its 1992 budget in which it eliminated the position of custodian supervisor at the Beloit Housing Authority held at the time by Floyd Voss, and the position of Secretary at the Authority occupied at the time by Betty Conklin (Motacek).

9. On or about November 23, 1992, the Beloit City Council acted to adopt a 1993 budget which provided for the elimination of two positions relative to animal control services (Humane Officers) held at that time by Theresa Ryan and Val Jean LaFavor and further provided for the contracting out of said services. Planning for this change began on or before October of 1991, when Captain Gregory I. Ferguson of the Beloit City Police Department began exploring the possibility of animal control activities being contracted out. After investigating the matter, the City Council adopted a resolution on January 4, 1993 authorizing the City to contract with the Rock County Humane Society for animal control services. Thereafter, on or about January 18, 1993 the City entered into an agreement with the Rock County Humane Society to

perform said services. Although the City would still perform some residual animal control duties, and the Humane Society would not/could not perform all of the duties performed by the Humane Officers, the City estimated a savings of \$50,833 for 1993 as a result of the change. As part of the aforesaid process, the City notified the Union on November 24, 1992 of its intent to begin subcontracting animal control work on January 24, 1993. Also as part of this process the City notified Ryan and LaFavor on November 30, 1992 that their positions would be eliminated as a result of the aforesaid subcontract between the City and the Rock County Humane Society.

10. In acting to adopt a 1993 budget on or about November 23, 1992, the Beloit City Council also eliminated two public safety technician positions occupied by Polly Richards and Bonnie Cosgrove. On or about November 30, 1992, the City served notice of said elimination on the employes and the Union. In said notice, the City informed the employes that they might "wish to consult Article XVII of the collective bargaining agreement regarding lay-off and recall to see what bumping rights may be available to you," and asked said employes to let the City know "at your earliest convenience" if they chose to exercise those rights.

11. On or about December 15, 1992, following an interview process, the City notified Polly Richards and Bonnie Cosgrove that they would not be allowed to exercise bumping rights into positions of housing specialist at the Beloit Housing Authority. The City informed Richards and Cosgrove that the "finding of the Housing Authority is that you do not meet the ' . . . provided they are qualified . . .' standard" found in Section 17.01 of the agreement. In particular, they did not have experience in real estate contracts. The City informed the employes that they could "still exercise your bumping rights to bump another junior employe under the terms of Article XVII." Thereafter, by exercising said bumping rights, Richards bumped into a clerk typist II position in the Community Development Department and Cosgrove bumped into a cashier clerk position in the Finance Department from which she posted into a collections clerk position in the same department.

12. On or about December 18, 1992, following an interview process, the City advised Theresa Ryan, who was displaced as a Humane Officer under the action described in Finding of Fact No. 9 above, that she would not be allowed to bump into the position of custodian at the Beloit Housing Authority. The City informed Ryan that she did not meet the aforesaid "provided they are qualified" standard found in Section 17.01 and informed her that she might still exercise her bumping rights to bump another junior employee. More specifically, the Beloit Housing Authority found that Ryan was unqualified for the position because she lacked relevant experience and "understanding of real property maintenance/repair procedures; nor is she experienced with most of the power tools typically used at the Authority." The Authority had informed Ryan during the interview that the position wasn't really a custodial position, but more of a maintenance position. Ryan had admitted during the interview that what knowledge she had in property maintenance/repair procedures and the use of power tools was gained through watching or assisting her husband around their home, not as a result of "hands on" experience.

13. On or about January 8, 1993, following an interview process, the City advised Theresa Ryan that she would not be allowed to bump into the position of Inspection Official 1 in the Housing Services Department. Again, the City found that Ryan did not meet the necessary qualifications, and informed her of her right to bump junior employes. The City based its decision on the following: Ryan had no experience or training working with codes and ordinances necessary for the position; she had no experience or training in making property inspections to enforce same; and there was no correlation in the principal duties and responsibilities between Ryan's former position as Humane Officer and the position she was applying for. Ryan's prior work

experience did include participation as an animal control officer in "cert" team inspections where the City would go into a property that had many potential code violations, including animals, with an inspection team including humane officer, nursing staff and various code enforcement officials. However, Ryan had no direct prior experience performing duties required of an Inspection Official.

14. Theresa Ryan is presently employed as a custodian in the Maintenance Department.

15. Val Jean LaFavor, the other Humane Officer affected by the City's action described in Finding of Fact No. 9, also sought to bump into a custodian position at the Beloit Housing Authority. She voluntarily withdrew from consideration for that position following an interview because she did not believe the interview questions "had a lot to do with the custodian job as it was described in the job description." Like Theresa Ryan, LaFavor at the time of the hearing in this matter was employed as a custodian in the Maintenance Department.

16. On or about January 21, 1993, following an interview process, the City advised Karen Range that she would not be allowed to bump into a housing specialist position at the Beloit Housing Authority. The Authority determined that Range was not qualified for the position and advised her that she could exercise her bumping rights to bump another junior employe. Range interviewed for the position because she was going to be bumped from her office coordinator position at the Water Pollution Control Facility. When the person who bumped her decided they did not want the position and chose to withdraw from the position, Range went back to her old position but not before interviewing for and accepting another position, library technician. Range had prior experience working as a secretary for Neighborhood Housing Services of Beloit, a not-for-profit organization which revitalized housing in Beloit in "run down" areas.

17. The Union filed grievances over Theresa Ryan, Karen Range, Polly Richards and Bonnie Cosgrove's inability to exercise contractual rights to "bump" into other positions due to staff reductions as described in Findings of Fact Nos. 11 - 13 and 16. The Union also filed grievances over the elimination of certain positions as described in Findings of Fact Nos. 8 - 10. The Union has not processed these grievances to arbitration at any time material herein.

18. The action taken by the Community Development Authority to eliminate a position of custodian supervisor and a position of secretary was done to accommodate a budget shortfall. As noted in Finding of Fact No. 8 the action was taken by the Authority at a meeting on August 26, 1992. The Authority took said action because the wage increases granted by the aforesaid arbitration award were in excess of those amounts granted the Authority by the Federal Government necessitating, therefore, budget revisions. The Authority also acted because of reduced workload expectations and the likelihood of diminishing revenues. The budget revisions were not carried out in retaliation due to the aforesaid arbitration award.

19. The City Council, by adopting the 1993 operating budget, eliminated two positions relative to animal control services as noted in Finding of Fact No. 9 above. The Council action followed an extensive examination of the question of how to provide animal control services to the citizens of Beloit conducted by Police Captain Gregory I. Ferguson. The Police Department decisions surrounding animal control were motivated by a demand from the community for increased police services in terms of the number of patrol officers on the street. The Department sought to find additional funds to put more police officers on the street and did not enter into the contract with the Rock County Humane Society for animal control services in retaliation for the

issuance of the aforesaid arbitration award.

20. The elimination of the two public safety positions was directly related to the City joining in with a centralized emergency dispatch function (9-1-1) with Rock County. The positions were eliminated and funds reallocated as part of an effort by Police Chief Terry Fell to put more police officers on the street and to pay for 9-1-1 costs to the County through the adoption of the City's 1993 operating budget. The action was taken as a result of a public policy determination by the City Council and was not taken in retaliation due to the arbitration award noted above.

21. The City, in its preparations for the 1993 budget, had severe fiscal constraints, had a necessity for increased police services and attempted to provide the maximum amount of service for the dollar to the citizens of Beloit. There was no effort to retaliate against the Union or any of the bargaining unit employees as a result of bargaining or the aforesaid arbitration decision.

22. During bargaining for the 1991-92 collective bargaining agreement between the City and the Union, the City's representative, Bruce Patterson, made a statement to the effect that if the Union persisted in the course of action it was taking to arbitration that the City had no choice but to look into the reduction of the animal control hours. Teresa Ryan, a Humane Officer as well as an alternate on the Union's bargaining team who was participating in her first bargain, was "concerned" about the implications of this comment. Prior to the arbitration, the Union rejected a proposal whereby the City agreed to drop the animal control issue if Ryan would drop her reclass. The proposal was rejected even though Ryan and the Union knew the issue could "jeopardize maybe losing hours."

23. Also during bargaining for the aforesaid collective bargaining agreement, the Beloit Housing Authority questioned the need for an additional secretary position if Betty Conklin prevailed in negotiations/arbitration regarding her reclassification request from clerk typist II to secretary. In response to concerns expressed by Conklin over this matter, Don Johnson and Barb Stark, manager and housing programs coordinator for the Authority respectively, met with her to try to alleviate her concerns. During the course of said meeting, they informed Conklin that there was not enough money in her budget for a second secretary position, but tried to alleviate concerns that if the Union prevailed in its reclassification request for Conklin she would "be out the door." Conklin then called Union President Betty Villalobos to express her concerns over what was said in the meeting. Villalobos, in turn, took the Authority representatives' comments as a threat to eliminate Conklin's position if the Union pursued the reclass in arbitration and complained to Allen Tullefson, City Personnel Manager, regarding same who after looking into it called the Union back and said "it would not happen again."

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

CONCLUSIONS OF LAW

1. Because City of Beloit did not discontinue certain positions described in Findings of Fact Nos. 8, 9, and 10 or not allow certain employees to exercise their contractual bumping rights as described in Findings of Fact Nos. 11 - 13, 15 and 16 in whole or in part in retaliation for the Union raising certain issues regarding these employees as described in Finding of Fact No. 6 during collective bargaining for a 1991-1992 collective bargaining agreement, City of Beloit did not thereby commit prohibited practices within the meaning of Sec. 111.70(3)(a)3, Stats.

2. City of Beloit's actions described above did not have a reasonable tendency to interfere with the exercise of rights guaranteed by Sec. 111.70(2),

Stats., and thus the City did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)1, Stats.

3. City of Beloit did not refuse to bargain collectively with the Union by its actions noted above, and thus the City did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)4, Stats.

4. Because City of Beloit did not violate any collective bargaining agreement between the parties or refuse or fail to implement the arbitration award issued by Arbitrator Frank P. Zeidler on June 1, 1992, the City did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)5 or Sec. 111.70(3)(a)7, Stats.

5. Because the Union, Local 2537, AFSCME, AFL-CIO, acted within its rights under the Municipal Employment Relations Act by including Paragraphs 10, 11, 12 and 14 in its Complaint alleging retaliation by the City for not allowing certain employees to exercise their contractual bumping rights, Local 2537, AFSCME, AFL-CIO did not thereby commit a prohibited practice within the meaning of Sec. 111.70(3)(b)4 or Sec. 111.70(1)(a), Stats.

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

ORDER 1/

IT IS ORDERED that the Complaints filed herein be, and the same hereby are, dismissed in their entirety.

Dated at Madison Wisconsin this 25th day of March, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Examiner

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

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or

(Continued on following page)

(Footnote 1/ continued)

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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The background facts, procedural development and basic positions taken by the parties in this case are as stated in the preface and Findings of Fact.

POSITIONS OF THE PARTIES

The Union basically argues that the City retaliated against specific individuals and the Union in general as a result of having lost an Interest Arbitration case concerning the instant bargaining unit. The Union adds that the City has engaged in a pattern of conduct which discriminated toward employees who sought to exercise their rights to engage in protected concerted activity to improve their wages, hours and conditions of employment. The Union argues that "it is more than a coincidence that the only bargaining unit employees to face the elimination of their position were also employees who were beneficiaries of provisions of the Interest Arbitration over and above those received by the membership in general." The Union included the following table in its brief summarizing "the benefit each affected employee received and the adverse action taken against them by the City":

Theresa Ryan	Increased Pager Pay Reclassification Maintained Work Hours	Position Eliminated, Not allowed to bump (twice)
Floyd Voss	Increased Pager Pay, Maintain Cust. Supv. position	Position Eliminated
Betty (Motacek) Conklin	Reclassification	Position Eliminated
Val Jean LaFavor	Increased Pager Pay	Position Eliminated
Polly Richards	Increased Holiday Compensation	Position Eliminated Not allowed to bump
Bonnie Cosgrove	Increased Holiday Compensation	Position Eliminated Not allowed to bump

For a remedy, the Union requests that the Commission find that the actions of the City and its representatives in retaliating against bargaining unit employees violated certain sections of the Municipal Employment Relations Act.

The City, on the other hand, rejects the Union's argument that its decisions to eliminate certain positions, along with subsequent actions relative to employee layoff and bumping rights, were carried out in such a manner as to retaliate because of the Union prevailing in an interest arbitration dispute. The City adds that the record does not support the Union's claim of threats and retaliation by the City Council and the Community Development Authority. To the contrary, the City asserts it acted properly herein based on fiscal constraints of either the property tax or grant funds provided by the Federal Government and changing service demands and denies committing any prohibited practices. In addition, the City feels that the Union has committed a prohibited practice by including allegations of contract violations in its complaint without utilizing the grievance/arbitration procedure provided in the parties' collective bargaining agreement. For a remedy, the City requests that the complaint of the Union be dismissed, and the complaint filed by the City be

upheld.

LOCAL 2537, AFSCME, AFL-CIO COMPLAINT

The crux of the Union's complaint is that the City retaliated against bargaining unit employes for engaging in protected concerted activity. Secs. 111.70(3)(a)3 and 1, Stats., are the appropriate MERA provisions under which to examine the Union's allegation of retaliation.

To prevail on its allegation of retaliation under Sec. 111.70(3)(a)3, Stats., the Union must establish by a clear and satisfactory preponderance of the evidence that:

1. Bargaining unit employes engaged in protected lawful concerted activity
2. The City was aware of their protected lawful concerted activity;
3. The City was hostile to their protected lawful concerted activity; and
4. The City eliminated certain positions and did not allow certain employes to exercise contractual bumping rights, at least in part, because of said hostility. 2/

The Union's engaging in collective bargaining with the City over the terms of a 1991-1992 collective bargaining agreement wherein the Union raised issues regarding the matters which are covered by the instant complaint is lawful concerted activity protected by Sec. 111.70(3)(a)1, Stats. The record is undisputed that the City, through its agents and representatives, was aware of this lawful concerted activity at all times material herein. Thus, the Union has established the first two elements of its proof.

The Union cited only two examples in the record of the City's alleged hostility to its protected lawful concerted activity: some comments made at the bargaining table by the City's representative, Bruce K. Patterson and some comments, also during bargaining, made by representatives of the Beloit Housing Authority to Betty Conklin over the fate of her position if the Union should prevail in arbitration over her reclassification request. For the reasons discussed below, the Examiner finds that the record does not support a finding that the City was hostile to the protected lawful concerted activity of the Union.

While it is true that during bargaining for the 1991-92 collective bargaining agreement, City representative Patterson made a comment to the effect that if the Union persisted in the course of action it was taking and went to arbitration the City would have to look into the possibility of reducing the animal control hours, it appears the comment was made as a normal part of regular bargaining table talk and amidst the usual "give and take" of negotiations. There is nothing persuasive in the record indicating that the comment was made in hostility toward the Union's exercise of protected concerted activity. To the contrary, it simply reflected the City's general concern for fiscal restraint and for the financial impact of negotiations.

Likewise, the Examiner rejects the Union's reliance on certain comments made by Housing Authority representatives to Betty Conklin as evidence of hostility toward the Union's activities. The Examiner can understand how Conklin and the Union viewed those statements as a possible threat. However,

2/ Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis.2d 540 (1967); Employment Relations Dept. v. WERC, 122 Wis.2d 132 (1985).

the record contains more persuasive evidence that the Housing Authority representatives were simply "trying to deal with Betty's frustrations," respond to her concerns, and "at least delay her fears that she would . . . be out the door if this occurred." 3/ Obviously it "didn't come across that way," 4/ but, in the Examiner's opinion, the City's agents were not acting toward Conklin out of hostility toward the Union's exercise of any protected concerted activity. It should be pointed out that the City's Personnel Director, when informed of these comments, put an immediate stop to them.

The Union also cites the fact that "it is more than a coincidence that the only bargaining unit employes to face the elimination of their position were also employees who were beneficiaries of provisions of the Interest Arbitration over and above those received by the membership in general." The Union adds that the City compounded this transgression by failing to allow certain of these employes to bump into positions at the Housing Authority. This evidence creates an inference that hostility toward the Union's lawful concerted activity played some role in the City's actions. However, on balance, the Examiner is persuaded that this inference is overcome by the inference to be drawn from evidence that the City took the actions complained of herein merely as a result of fiscal constraints and policy decisions not related to any hostility toward the Union. In particular, the record is very clear that the City eliminated the Animal Control workers because of a desire by the Police Department to save money (the Rock County Humane Society would perform roughly the same service at a cost savings to the City of an estimated approximately \$51,000.00) and reallocate dollars to put more police officers on the street. 5/ The recommendation to eliminate the positions came only after a lengthy study by the Department, 6/ and the officer responsible for its preparation testified un rebutted that the motivation for contracting out animal control services was not retaliation but simply economics. 7/

Similarly, the record is also clear that the City's elimination of the two dispatchers was because of the City's switch to a 9-1-1 system and for no other reason. The Union admits in its brief that the affected employes "were the two least senior of eleven Public Safety Technicians (Dispatchers)." And while it is true that the City would not be eliminating the dispatch functions until later in the year as alleged by the Union, the Police Department acted in January, 1992 to eliminate the two positions because it was going to lose these positions anyway, and it hoped instead to use some of the money in the budget for dispatch to instead put more officers on the street. 8/

The issue involving the Housing Authority is a little closer. The Examiner can understand how the Union and Betty Conklin interpreted the Authority's representatives' comments as a threat if the Union continued to pursue Conklin's reclassification during bargaining/arbitration. However, as noted above, the Examiner feels that said representatives' comments were more a clumsy effort to respond to Conklin's fears and concerns than anything else. In addition, the record indicates the motivation for eliminating Conklin's

3/ Tr. 11/18/93 at p. 219.

4/ Id.

5/ Tr. 11/18/93 at p. 161.

6/ Tr. 11/17/93 pp 27 - 51.

7/ Tr. 11/17/93 at p. 38.

8/ Tr. 11/18/93 pp. 159-161.

secretary position was budgetary and stemmed from reduced federal funding. 9/ Finally, after Union representative Betty Villalobos complained to City Personnel Manager Alen Tollefson about the Authority's actions she was told "it would not happen again." 10/ Based on the foregoing, the Examiner finds that the record does not support a finding that the Beloit Housing Authority eliminated Betty Conklin's secretary position in retaliation for the Union's pursuit of a reclassification of her position during bargaining for a new collective bargaining agreement.

A question remains over whether the City retaliated by not allowing certain employees to exercise their contractual bumping rights. The thrust of the Union's argument in this area is directed at the Beloit Housing Authority. However, the Authority had legitimate business reasons for denying the requested bumps. 11/ In addition, the Union failed to prove the Authority acted out of any hostility toward the unsuccessful applicants. Finally several unsuccessful applicants felt their interviews were fair 12/ while others did not complete the interview process. 13/ Finally, all of the unsuccessful applicants eventually bumped into other positions with the City. For these reasons, the Examiner rejects the Union's claim that the City denied the bumps in question out of hostility toward protected lawful concerted activity.

Based on all of the above, the Examiner finds that the Union failed to establish a relationship between its protected lawful concerted activity and the City's actions and that the City committed no Section 111.70(3)(a)3, Stats. violations as a result of the actions complained of.

To establish a violation of Sec. 111.70(3)(a)1, Stats., the Union must prove that the City's actions had a reasonable tendency to interfere with the exercise of rights guaranteed by Sec. 111.70(2), Stats. 14/ Looking only at the fact that the City's actions fell disproportionately on a number of bargaining unit members who received benefits from the Union's bargaining and winning of the interest arbitration case over and above those received by the membership in general, it can be argued that the City's action had a reasonable tendency to interfere with the exercise of rights guaranteed by the aforesaid statute. However, when those actions are viewed in the context of facts establishing that the City acted for sound budgetary and public policy reasons, the Examiner finds it reasonable to conclude that the City's actions did not have a reasonable tendency to interfere with Sec. 111.70(2) rights. Therefore, it is appropriate to dismiss the Union's Sec. 111.70(3)(a)1 allegations.

The Union also argues that the City violated Secs. 111.70(3)(a)4, 5 and 7 Stats., by its conduct. However, the Union offered no additional evidence or argument, except as discussed above, in support of these claims. Therefore, based on same, and the record as a whole, the Examiner dismisses these allegations as well.

9/ Tr. 11/18/93 pp. 215 and 227.

10/ Tr. 11/17/93 at p. 105.

11/ City Ex. No. 1, Section 5, pp. 8-11, Section 6, pp. 2-7, Section 7, pp. 2-4, Section 8, pp. 5-6, and Section 12. See also the testimony of Don Johnson Tr. 11/18/93 pp. 229, 232-235, 238-240, 245-248.

12/ Tr. 11/17/93 87-88, 96-97.

13/ Tr. 11/17/93 pp. 61-62.

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

City of Beloit Complaint

The City filed a complaint alleging that the Union was engaging in prohibited practices within the meaning of Sec. 111.70 Stats. by failing to use the parties' contractual grievance/arbitration procedure to resolve the disputes over bumping.

It is well established that the Commission has jurisdiction to adjudicate cases which allege prohibited practices, even though the facts might also support a breach of contract claim which is resolvable through arbitration. Here, the Union does not allege contract violations except in the context of its complaint that the City allegedly committed certain prohibited practices by acting in a retaliatory and discriminatory way toward certain bargaining unit members. The Examiner finds no basis in the record, the City's argument or Sec. 111.70 Stats. for denying the Union this right. Therefore, the Examiner finds that the Union did not violate Sec. 111.70(3)(b)4 or Sec. 111.70(1)(a) (which is merely definitional) by the Union's filing of a prohibited practice complaint herein.

Based on all of the foregoing, and the record as a whole, the Examiner finds that the allegations of prohibited practices by the Union and City are without merit, and the Examiner has dismissed both complaints in their entirety.

Dated at Madison, Wisconsin this 25th day of March, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Examiner