STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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.

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

On March 25, 1994, Examiner Dennis P. McGilligan issued Findings of Fact, Conclusions of Law and Order wherein he concluded that the City of Beloit had not committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3, 4, 5, or 7, Stats. He therefore dismissed the complaint.

Complainant timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. Complainant and Respondent thereafter filed written argument in support and in opposition to the petition, the last of which was received June 7, 1994.

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

ORDER 1/

The Examiner's Findings of Fact, Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 26th day of September, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/

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

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 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

(footnote 1 continued on page 3)
(footnote 1 continued from page 2)

or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit

court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

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

CITY OF BELOIT

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

The Pleadings

The complaint alleges that the City of Beloit and its representatives retaliated against employes represented by Complainant because those employes exercised their right to collectively bargain and proceed to interest arbitration under the Municipal Employment Relations Act.

In its answer, Respondent City denies that it took any action against employes represented by Complainant which was in retaliation for the employes' exercise of their rights under the Municipal Employment Relations Act.

The Examiner's Decision

The Examiner dismissed the complaint reasoning as follows:

> 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.
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> 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:
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> 1. Bargaining unit employes engaged in protected lawful concerted activity;
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> 2. The City was aware of their protected lawful concerted activity;
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> 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.

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).

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, 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/

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

4/ Id.

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

The recommendation to eliminate the positions came only after a lengthy study by the Department, 6/ and the officer responsible for its preparation testified unrebutted 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 loose 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 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/

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

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

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

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

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

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 employes 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

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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).

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.

Positions of the Parties

The Complainant

Complainant urges the Commission to reverse the Examiner's decision and to conclude that the Respondent City retaliated against employes following the interest arbitration proceeding in which the Complainant was successful. Complainant contends that when viewed in their totality, the City's actions clearly punished those employes who successfully sought to improve their wages, hours and conditions of employment.

Complainant argues that the City's intent to retaliate is established by remarks made to employes and Complainant during the bargaining process as well as by the fact that only those employes who individually benefited from the Interest Arbitration Award were singled out for adverse employment consequences. Complainant urges the Commission to reject the City's attempt to veil its illegal conduct with public policy justifications.

Complainant asserts that the only way employes will regain trust that their rights are protected is for the Commission to conclude that Respondent City committed prohibited practices by its conduct and to order that the employes be made whole. Given the foregoing, Complainant urges the Commission to reverse the Examiner.

The Respondent

Respondent City urges the Commission to affirm the Examiner. Respondent contends that its actions were not taken in retaliation to employes' exercise of their rights to collectively bargain and proceed to interest arbitration. Rather, the City alleges that its conduct reflected the exercise of its contractual rights and the result of legitimate public policy determinations as to how best to provide service to the community. The City argues that the comments made at the bargaining table and to an individual employe do not provide evidence of retaliation, but rather were attempts to convince Complainant of the seriousness of the consequences which could flow from the positions taken by the Complainant at the bargaining table.

Given the foregoing, the Respondent City asks the Commission to affirm the Examiner's dismissal of the complaint.

Discussion

We have affirmed the Examiner because we conclude that he correctly determined the conduct of the City and its agents cited by the Complainant was not motivated by an intent to retaliate against the exercise of employe rights under the Municipal Employment Relations Act and did not have a reasonable tendency to interfere with the employes' exercise of those rights.

Because we find the above quoted portions of the Examiner's analysis to be responsive to the arguments of Complainant on review, we will not repeat that analysis here. However, it is important to acknowledge certain realities of the collective bargaining process which the facts of this case demonstrate. In our view, it is generally appropriate for one party to advise the other during the collective bargaining process of the potential negative consequences if a proposal or position ultimately is included in the collective bargaining agreement. Thus, for instance, if an employer advises a union that acceptance of the union's wage demands might or would require the layoff of employes and the totality of the circumstances surrounding the employer's statement establish that the employer is not motivated by a desire to threaten employes for the exercise of their right to collectively bargain, that employer is acting in a legal manner consistent with the collective bargaining process. The employer in such circumstances is not seeking to deter employes from exercising rights but rather seeking to persuade employes to change the position they are taking at the collective bargaining table when exercising their rights. Simply put, parties are generally free to take whatever positions they wish at the collective bargaining table, but cannot expect to be insulated from any consequences if they are successful in having those proposals become part of the collective bargaining agreement.

Complainant's position in this litigation generally acknowledges the foregoing realities of the collective bargaining process. Complainant contends that this conduct by the City differs from the general reality of collective bargaining because the City singled out specific employes who personally benefited from the Interest Arbitration Award. If we were satisfied the City was motivated by hostility toward employes for resisting City proposals and successfully improving their wages and hours and conditions of employment, we would find the Sec. 111.70(3)(a)3, Stats., violation alleged by Complainant. However, when we review the City's justifications for its conduct, we are persuaded that the Examiner correctly concluded that the City was not motivated by hostility but rather by legitimate management decisions and public policy choices regarding service levels and financial constraints.

As to the legitimacy of the elimination of positions, we generally note that the City had argued its limited fiscal capability to the Interest Arbitrator and has persuaded us that it faced significant fiscal constraints for calendar year 1993. More specifically, the record establishes that: (1) the elimination of the two public safety positions was directly linked to creation of a centralized Rock County dispatch system and the City's interest in increasing direct "street" law enforcement service; (2) the elimination of the two Humane Officers resulted from the decision of the City to subcontract certain animal control services which action had been under consideration since October, 1991, and (3) elimination of the two Community Development Authority positions was a response to a projected budget shortfall produced by the Interest Arbitration Award, reduced workload and diminishing revenue.

As to the City's conduct during the contractual bumping process which followed the elimination of the psoitions, the record contains plausible justifications for the City's actions, and no persuasive evidence of retaliatory hostility.

Given all of the foregoing, we have affirmed the Examiner.

Dated at Madison, Wisconsin this 26th day of September, 1994

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