

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE INTERNATIONAL ASSOCIATION  
OF FIREFIGHTERS, AFL-CIO,  
LOCAL 311 and DANIEL WENBORNE,

Complainants,

vs.

CITY OF MADISON,

Respondent.

Case 168  
No. 49240 MP-2734  
Decision No. 28020-A

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. John Talis, 214 West Mifflin Street, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of the Complainants.

Mr. Larry O'Brien, Assistant City Attorney, City of Madison, City-County Building, Room 401, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53710, appearing on behalf of the Respondent.

FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER

The International Association of Firefighters, AFL-CIO, Local 311 and Daniel Wenborne filed a complaint on May 14, 1993 with the Wisconsin Employment Relations Commission which alleged that the City of Madison had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 3, Stats., when it failed to promote firefighter Wenborne to the position of lieutenant or division chief because of his past union activities. Thereafter, hearing on the complaint was held in abeyance pending efforts to settle the dispute. On May 2, 1994, the Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. Thereafter, hearing on the matter was scheduled and postponed four times. On June 27, 1996, the Complainants filed an amended complaint. On October 9, 1996, the City filed an answer to the complaint as amended. A hearing was held in Madison, Wisconsin on October 10 and October 29, 1996, at which time the parties were given full opportunity to present their evidence and arguments. Both parties filed briefs and reply briefs.

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whereupon the record was closed on February 18, 1997. The Examiner, having considered the evidence and arguments of counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

### FINDINGS OF FACT

1. International Association of Firefighters, Local 311, hereinafter referred to as the Union, is a labor organization with its offices located at 821 Williamson Street, Madison, Wisconsin. The Union is the exclusive bargaining representative for the following positions in the Madison Fire Department: firefighter, chief's aide, fire lieutenant, fire investigator, fire inspector, director of community education, firefighter/paramedic, community educator and fire captain.

2. The City of Madison, hereinafter referred to as the City, is a municipal employer with its offices located at the City-County Building, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin. Among its many governmental functions, the City operates a fire department. The ranks in the fire department from lowest to highest are as follows: firefighter/paramedic, apparatus engineer, lieutenant, captain, division chief, assistant chief and chief. The positions of captain and below are included in the bargaining unit; the positions of division chief and above are excluded from the bargaining unit.

3. Daniel Wenborne is a firefighter/paramedic with the Madison Fire Department. He has been employed by the City in that capacity since 1982. Prior to that, he worked for nine years as a firefighter with the London, England Fire Brigade. In his employment with the City of Madison he has filed one grievance which was subsequently withdrawn. He has never been on the Union's negotiating committee nor has he ever been an elected Union officer. He served on the Union's executive board as a station representative from 1985 to 1987 and again from 1989 to 1994.

4. In the early 1990's, several contentious and divisive policy issues arose between the Department's management and the Union. One such matter was the Quint vehicle issue, another was the accountability issue, and still another was the cross staffing issue. Wenborne was not involved to any significant degree in either the Quint vehicle issue or the accountability issue, whereas other union members were. Wenborne's involvement in the cross-staffing issue is set forth below.

5. The cross staffing issue involved the placement of firefighters at various stations in the City at various times. Stated simply, Department management proposed a change in same which the Union opposed. The Union formed a special cross staffing committee to build public opposition against cross staffing. Wenborne was one of the union members appointed to this committee and was named its facilitator. Some members of this committee, most notably Jack Deering, Jan Jefferson and Gary Westbrook, had high public profiles on the matter because they spoke publicly against cross staffing. Wenborne did not have as high a profile as the employees just referenced because he (Wenborne) never spoke publicly on the cross staffing matter nor was he

ever quoted in the media or referenced in same. The cross staffing committee engaged in public picketing and leafleting which was designed to educate the public about cross staffing. Wenborne participated in this public picketing and leafleting at three locations along with other unnamed union members. Wenborne helped make the leaflets which were distributed to the public during this picketing and leafleting. Sometime in 1992, the Union's cross staffing committee and the Department's management met with some members of the City's Common Council to address the matter. Wenborne was at that meeting, but did not make the Union's presentation; that was done by another member of the Union's committee. During the course of this meeting overhead transparencies which Wenborne prepared were shown as part of the Union's presentation. Sometime during the course of the meeting Wenborne tried unsuccessfully to make eye contact with Assistant Chief Philip Vorlander who was also at the meeting. Since Vorlander did not make eye contact with him during the meeting, Wenborne felt that Vorlander intentionally snubbed him.

6. Among other responsibilities, the Madison Police and Fire Commission (PFC) approves promotions in the Madison Fire Department. This occurs as follows. The Fire Department Chief compiles a promotion list which is submitted to the PFC. The PFC then says yes or no to the promotions recommended by the Chief. The PFC does not decide who is on the promotion list; the Chief does. In December, 1992, the PFC and Chief Earl Roberts discussed anticipated division chief vacancies which would be filled in 1993. In the course of this discussion, a colloquy occurred between PFC member Michael Christopher and Chief Roberts concerning the qualities Roberts looked for in making promotions. During this colloquy, Roberts indicated that he felt a sense of loyalty was very important and therefore he wanted to promote loyal people. Roberts did not define what he meant by the term "loyal", so Christopher supplied his own interpretation. Christopher interpreted the term "loyalty" to mean that Roberts wanted to surround himself with people who reflected his opinion about how to run the fire department. Christopher then told Roberts that it sounded to him like Roberts only wanted to promote "yes men". Roberts reacted defensively to Christopher's comment.

7. In January, 1993, all bargaining unit employees were notified via a memo that they could compete for promotion to the rank of lieutenant and division chief. This notice specified that the "minimum qualifications" to compete for promotion to both positions were as follows:

1. Journeyperson status and three and one-half years experience as a commissioned member of the Madison Fire Department.
2. Current licensure as an Emergency Medical Technician.
3. Certification as a Hazardous Materials Technician.
4. Three or more credits in the Supervisory Management program.

The notice went on to provide that in addition to having the "minimum qualifications" referenced above, "candidates selected for the Lieutenant eligibility list must have":

1. Working knowledge of the Incident Command System at the Company Officer Level.
2. Demonstrated ability to function as a team leader.
3. Thorough knowledge of the procedures and requirements of Administrative Procedure Memorandum 3-29, Harassment-Free Work Environment.
4. The ability to effectively communicate both verbally and in writing.
5. Demonstrated listening skills.
6. Demonstrated ability to follow directions.

The notice also provided that in addition to having the qualifications just referenced, the "candidate selected for the Division Fire Chief eligibility list must have":

1. Thorough knowledge of the Incident Command System including Integrated Emergency Response at the command level.
2. Thorough knowledge of the principles and responsibilities of management and organizational development.
3. Thorough knowledge of the City Affirmative Action Policies and Principles.
4. Thorough knowledge of the Madison Fire Department disciplinary process.

The notice specified that those individuals who wished to compete for the rank of lieutenant needed to submit a resume and a written response to the following set of questions which were designated as Achievement History Questions (AHQs):

1. List your education, training and job experience. Include dates and/or the number of hours in attendance and certificates or degrees earned.

2. Describe any community involvement that you feel has assisted you in preparing for this position.
3. Describe in your own words harassment as indicated in Administrative Procedures Memorandum No. 3-29 and its objectives. Also include the obligations of every supervisor.
4. What do you think are the qualities of a good leader/supervisor?
5. Describe the incident command system and its objectives.
6. What is your vision of the fire service ten years from now? This response should generally cover the fire service nationally and be more specific regarding the Madison Fire Department.

The notice also provided that those individuals who wished to compete for the rank of division chief needed to submit a resume and a written response to the following set of questions:

1. Describe your experience in designing or implementing a system, major project or program. Provide details on the process used to complete your task and the role you played. Was the outcome successful?
2. As a District Manager, it is your responsibility to supervise all personnel at your assigned fire stations. There is an officer at Fire Station A who has a crew of 3 firefighters and 2 firefighter/paramedics. Lt. J. French is the officer for this crew.

You have in the past counseled Lt. French on performance problems involving incomplete inspections, fire incident reports not being accurately and timely completed, company training assignments and on the maintenance of the fire station. You have also been involved in resolving problems which crew members could not get Lt. French to resolve. You had a meeting with Lt. French who did not appear too concerned when you discussed the needs of the crew.

You are noticing that the situation is continuing to deteriorate

at Station A and the crew appears to be making less of an effort when you have observed them at training exercises and that the overall condition of the fire station has not improved. It also does not appear that fire inspections for the period will be completed by the deadline as there are only two weeks left.

In addition, you have received a call from business owner James Lee that Lt. French was very rude when inspecting his business last Thursday. Mr. Lee, who owns a gift shop, said that Lt. French told him that his business had so many code violations that it should be closed down. This statement was made in front of at least ten customers in the store.

As you are pondering this situation, you receive a call from a Mayoral Aide that Lt. French has informed the election workers that the station personnel are too busy to assist in setting up the polling place for tomorrow's election.

What are you going to do about the complaints from Mr. Lee and the Mayoral Aide and the election workers? What will you do about Lt. French? How will you get the crew to be motivated and do a good job? How will you evaluate any crew members who apply for the Lieutenant promotional process scheduled to begin next month?

3. As the District Manager for Station B, you have been contacted by Lt. Daniel Linhart regarding some problems with his assigned crew. Lt. Linhart overheard comments on the apparatus floor regarding women and the lowering of physical standards to hire them as firefighters and how a woman firefighter may replace Firefighter John Visgar upon his retirement. Comments were that females are not able to do the job. Currently a class of ten firefighters are in training and 3 are white women, 2 are minority males and 5 are white males. These recruits will graduate in four weeks and it is extremely likely that a woman or minority firefighter will be assigned to this station.

What is your responsibility and how will you proceed?

4. A management team is a group of very diverse individuals.

Every individual has talents, insecurities, diverse opinions and faults. No one person can meet all the needs of the organization. It is through group dynamics and consensus decision making that the needs of the organization are best met.

As the management team goes through the process of consensus decision making there are many comments, opinions and debates that occur.

What are the obligations of every team member in this process?

What would you do as a member of this team if the decision arrived at by consensus is going to be unpopular to implement?

What information would you provide to personnel you supervise?

5. The Fire Service is constantly evolving due to the advancements of technology and the service requirements of a growing and increasingly complex community. These challenges often must be met within declining resources. You, as part of the management team, will be involved in planning for immediate change and for the needs of the future.

What do you believe to be the major challenges that the department will face in the next ten years?

How can personnel be prepared to face and adjust to change?

What do you believe you can contribute in this area?

6. You are the OIC on Thursday, March 4, 1993. The temperature is 41 degrees Fahrenheit, the sky is clear and the wind is from the Northeast at 11 M.P.H.

At 1820 you are dispatched along with Ladder 8, Engine 8, Engine 10 with Rescue 10 and Squad 6 to the Wisconsin Department of Transportation complex at Pierstorff and



Highway 51 for a report of an explosion and fire.

You report on location along with Ladder 8 and Engine 8 and observe heavy odd-colored smoke and substantial fire in a loading dock area. Also fully involved is a semi-trailer backed into the loading dock. The trailer is placarded "Dangerous."

You are told by a D.O.T. Supervisor that several workers are unaccounted for at the incident location and the Dane County Communications Center notifies you that they have been contacted by the Madison Area Technical College Administration who report heavy smoke in the area and several people down. The Comm Center has dispatched Engine 3 and Rescue 3 to M.A.T.C.

Develop a plan for managing this incident, explaining in detail the rationale for your actions.

The notice further provided that the resumes, AHQs and responses to questions would be reviewed by a screening board. The screening board for the position of lieutenant was composed of the following three people: Administrative Services Manager Rita Johnson, Madison Area Technical College Chair of Public Safety Services James Hood, and Assistant Chief Phillip Vorlander. The screening board for the position of division chief was the three people just referenced plus Assistant Chief Wayne Wolf. The notice provided that the lieutenant screening board would select candidates to continue in the promotion process. It provided that those selected to continue in the lieutenant promotion process would then be evaluated by Acting Assistant Chiefs Kinney and Shillinglaw and Division Chief Schmelzer, and then would be interviewed by an oral examination board consisting of Assistant Chief Wolf and Division Chiefs Spohn and Trachte. Finally, the notice provided that Chief Roberts would create the lieutenant eligibility list after reviewing the resumes, achievement histories, evaluations and "oral" scores. The notice also provided that the division chief screening board would select candidates to be interviewed by Fire Chief Roberts, who would subsequently create the division chief eligibility list.

8. On January 20, 1993, Wenborne applied for both the positions of lieutenant and division chief. He met the minimum qualifications for each position specified in Finding of Fact 7. In applying for the position of lieutenant, he submitted a cover letter, his resume, and his responses to the AHQs. In applying for the position of division chief, he submitted a cover letter, his resume and his responses to the five questions. He did not include any letters of reference along with the foregoing materials. 15 employees applied for the position of lieutenant. The record does not indicate how many employees applied for the position of division chief. The two screening boards referenced in Finding of Fact 7 subsequently reviewed Wenborne's submitted materials, along with

those of the other applicants. After doing so, the screening boards decided that Wenborne would not continue further in the selection process for either lieutenant or division chief. On February 4, 1993, Wenborne was notified in writing as follows:

Dear Firefighter Wenborne:

The quality of the achievement histories and resumes made the decisions of the screening team very difficult; however, I am sorry to inform you that you were not selected to receive an interview for promotion.

Thank you for your interest in becoming a Fire Lieutenant. On behalf of Chief Roberts and the other members of the Management Team, I hope you remain positive and urge you to compete in future promotionals.

Sincerely,

Phillip C. Vorlander /s/  
Phillip C. Vorlander  
Assistant Chief

Wenborne received a similar letter from Vorlander informing him that he had not been selected to receive an interview for the position of division chief. Thus, Wenborne was not interviewed for either the position of lieutenant or division chief.

9. On March 4, 1993, Chief Roberts posted a promotion list for the position of division chief. The memo provided as follows:

The following personnel have been selected for promotion to Division Chief. Their names are listed in the order in which the promotions will be made. The list will remain in effect until exhausted.

Kenneth L. Bavery  
Terry W. Turnquist  
Carl B. Saxe  
William P. Olson  
Arthur J. Dinkins III

10. Arthur Dinkins III was one of the individuals who was on the above-referenced

division chief promotion list. Dinkins joined the Madison Fire Department in 1982. He had no fire service experience prior to joining the Madison Fire Department. Dinkins and Wenborne worked together for several months in 1984 and 1985 in the Department's Community Education Division. Wenborne viewed himself as Dinkins' mentor.

11. On March 5, 1993, Chief Roberts posted a promotion list for the position of lieutenant. The memo provided as follows:

The following personnel have been selected for promotion to Lieutenant. Their names are listed by seniority and promotions will be made in this order. The list will remain in effect until exhausted.

Harold A. Hurley  
Walter B. Cox  
Rodney M. Olson  
Bradley Campbell  
William J. Tobias  
Ernesto Martinez  
John M. Suter  
Robert L. Hansbro  
Craig Yapp  
Arthur J. Dinkins III  
Joseph M. Conway, Jr.  
Laura Agostini

12. Robert Hansbro was one of the individuals who was on the above-referenced lieutenant promotion list. Hansbro joined the Madison Fire Department in 1987.

13. Shortly after the promotions referenced in Findings of Fact 9 and 11 were announced, Wenborne told the other firefighters at his station (Station 8) that he was going to file a lawsuit against the City concerning the promotions. Upon hearing this, some firefighters including then-lieutenant Joseph Aldworth told him not to waste the Union's money and attempted to dissuade him from filing such a lawsuit. Wenborne later told Aldworth and the other firefighters at Station 8 that if he did file a lawsuit against the City, he would pay for it himself.

14. On May 14, 1993, the Union and Wenborne filed a complaint with the Wisconsin Employment Relations Commission (WERC) which alleged that the City failed to promote Wenborne to the position of lieutenant or division chief in 1993 because of his past union activities. At the time this complaint was filed, Lieutenant Paul Payas was on the Union's Executive Board. Because of his position on the Board, Payas knew that the complaint had been filed.

15. In 1993, Wenborne worked part-time at Madison Area Technical College as a fire

service instructor. In the summer of 1993, the Madison Fire Department contracted with MATC to teach a class to the department's new firefighter recruits. MATC Fire Service Coordinator Kent Anderson planned to have Wenborne be one of three teachers for this class. Before the class started, Assistant Chief Vorlander called Anderson on the phone and told him that he (Vorlander) did not want Wenborne to teach that class to the department's new recruits because in his (Vorlander's) view, Wenborne did not have the competencies that the department wanted to teach new recruits. Anderson complied with Vorlander's request and did not have Wenborne teach that particular class. Wenborne is still a part-time fire service instructor at MATC. Anderson considers Wenborne to be an excellent instructor.

16. In 1994, firefighters were notified they could compete for promotion to the rank of apparatus engineer. This was a newly-created position which was a step above the position of firefighter and a step below the position of lieutenant. The position of apparatus engineer is not a prerequisite to becoming a lieutenant, but is considered a stepping stone for same because an apparatus engineer can become an acting lieutenant and take command at a fire scene. Wenborne applied for the position of apparatus engineer along with 77 other internal candidates and took a written apparatus engineer exam. The examination for this position was developed through a cooperative effort between the department's management and the union. Wenborne was one of 13 candidates who failed the written apparatus engineer exam. Wenborne attributed his failure to pass the written test to his suffering from depression related solely to this prohibited practice complaint and his being on medication for depression which caused a physical reaction. In 1996, Wenborne applied again for the position of apparatus engineer. This time, he took and passed the written test and proceeded to take the remaining portions of the exam. He did not get a passing grade in one of the remaining portions. As a result, he failed the exam again. Wenborne attributed his failure to pass the apparatus engineer exam the second time to his concentrating his studies on graduate courses he was taking at the time.

17. In early 1996, the Fire Department announced that employees could compete for promotion to the rank of lieutenant. The lieutenant promotional process had three separate parts: an evaluation by a three-person panel, a written exam, and an assessment center evaluation wherein candidates were assessed on the topics of incident command and tactics, training and supervision. The evaluation by the three-person panel was ten percent of the candidate's total composite score, the written exam was 45 percent of the candidate's total composite score, and the assessment center was also 45 percent of the candidate's total composite score. The union and the department had jointly decided there would be two district managers and one station officer on each evaluation panel. The two district managers who were designated to serve on each evaluation panel were Division Chief Joseph Aldworth and Division Chief Kenneth Bavery. The station officer representative on the evaluation panel varied, but was always the supervisor of the candidate being evaluated. Before any evaluations were done, Division Chief Bavery met with a representative of the City's Department of Human Resources to discuss the forthcoming evaluation process. During

this discussion Bavary was informed that the evaluators were to complete the following evaluation form for all of the candidates they evaluated:

FIRE LIEUTENANT

	<b>ALMOST ALWAYS</b> 9	<b>USUALLY</b> 3	<b>SELDOM</b> 1	<b>NEVER</b> 0
<b>WORK HABITS</b>				
Identifies tasks to be performed and follows through independently				
Recognizes the importance of timely reporting and response				
Sets high quality standards and meets them				
Meets and/or exceeds quality standards in accomplishing tasks				
Prioritizes tasks appropriately				
Helps where/when needed without direction				
<b>INTERPERSONAL</b>				
Works effectively in team efforts				
Gets along effectively with co-workers				
Contributes to positive work environment				
Interacts with citizens, customers, patients, co-workers appropriately				

<b>LEADERSHIP</b>				
Ability to organize work to be accomplished				
Independently assumes informal leadership role				
Appreciates big picture				
Demonstrates acceptance of responsibility				
<b>JUDGMENT</b>				
Analyzes situations and makes appropriate decision				
Thinks clearly under duress				
Develops innovative solutions				
Appropriately applies standards and guidelines				
Acts appropriately in the absence of clear standards and guidelines				
<b>JOB KNOWLEDGE</b>				
Demonstrates knowledge of suppression tactics and practices				
Demonstrates knowledge of emergency medical procedures				
Demonstrates knowledge of hazardous materials practices and procedures				
Exercises initiative in gaining job knowledge and skills				

Demonstrates knowledge of incident command				
<b>COMMUNITY INTERVENTION</b>				
Demonstrates competence in code compliance				
Proficiency in community education activities				
Proactive approach to fire protection				

This form was prepared by the City's Human Resources Department for the lieutenant evaluations. When Bavery and the individual from the Human Resources Department reviewed this form, Bavery was not told that the evaluators could not use pluses or minuses when they rated a candidate.

18. Wenborne was one of 28 candidates who applied for promotion to lieutenant in 1996. All the candidates were evaluated in absentia. Wenborne was evaluated on May 6, 1996 by Division Chiefs Aldworth and Bavery and Lieutenant Paul Payas. Payas was Wenborne's supervisor at Station 10 and had been for four months. Other than working with Wenborne during this four-month period, Payas had no other experience with Wenborne's job performance. Before the evaluation started, all three evaluators reviewed the above-referenced evaluation document and discussed the various categories which were to be graded. Next, the evaluators discussed the grading process. Bavery told the other two evaluators that after they picked the rating they thought applied to the applicant, they were to fill in the numerical score that corresponded to the rating they picked, to wit: if they picked the "almost always" rating, they were to fill in a score of 9 in that category; if they picked the "usually" rating, they were to fill in a score of 3 in that category; if they picked the "seldom" rating, they were to fill in a score of 1 in that category, and if they picked the "never" rating, they were to fill in a score of 0 in that category. Bavery described these four ratings to the other evaluators in the following fashion: a score of 9 was to be given when the candidate was "godlike" and "walked on water"; a score of 3 was to be given when the candidate was above average or deserved a numerical score between 99.9 and 85; a score of 1 was to be given when the candidate was average; and a score of 0 was to be given when the candidate was below average. After discussing these ratings, the evaluators agreed they would give the candidate an initial score in each category; afterwards, they would discuss all the initial scores, explain why they were given and ultimately agree on a final score. They also agreed that if one of them graded an applicant low in a category, that was the candidate's score by default. Thus, if one evaluator graded an applicant low in a certain area, the low score stayed unless all three evaluators agreed to a higher score in the discussion afterwards. The three evaluators then proceeded to grade Wenborne in each of the



above areas based on their knowledge of him. It took Payas 15 to 20 seconds to fill out the entire evaluation form, whereupon he announced "I'm done." Aldworth and Bavary were still rating Wenborne in the first category when Payas announced that he was done. It took Aldworth and Bavary about 10 to 12 minutes to fill out the entire evaluation form. The record indicates that the three evaluators gave Wenborne the following initial scores: Payas gave Wenborne a rating of 9 in 20 categories and 3 in seven categories. Payas gave Wenborne no scores of 1 or 0 in any category. Bavary gave Wenborne a rating of 3 in 17 categories, a 3- in four categories, a 1+ in two categories, and a 1 in four categories. Bavary did not give Wenborne a score of 9 or 0 in any category. Aldworth gave Wenborne a rating of 9 in one category, a 3+ in nine categories, a 3 in seven categories, a 3- in four categories, and a 1+ in seven categories. In one category, Aldworth gave Wenborne two separate scores. Aldworth did not give Wenborne a score of 0 in any category. After the three evaluators finished making their initial ratings, they discussed them in detail. If an evaluator had a score which differed from the score of the other evaluators, the evaluator with the different score explained why they gave the score they did. For the most part, Payas' scores differed from the other two evaluators because his scores were higher than theirs. After listening to Payas' comments, Aldworth and Bavary raised their scores in some categories. During the course of this discussion, Aldworth or Bavary did not say anything to Payas about Wenborne's involvement in the cross staffing matter or his pending unfair labor practice charge. Also, at no point during the discussion did Aldworth or Bavary tell Payas that Wenborne was not sufficiently cooperative to justify promotion to lieutenant. After the evaluators finished their discussion, they tabulated a revised score which incorporated all the changes they had discussed and agreed upon. This new score was considered Wenborne's final evaluation score. It was as follows:

#### FIRE LIEUTENANT

**Name:** Dan Wenborne

	<b>ALMOST ALWAYS 9</b>	<b>USUALLY 3</b>	<b>SELDOM 1</b>	<b>NEVER 0</b>
<b>WORK HABITS</b>				
Identifies tasks to be performed and follows through independently		3		
Recognizes the importance of timely reporting and response			1	
Sets high quality standards and				

meets them		3		
Meets and/or exceeds quality standards in accomplishing tasks		3		
Prioritizes tasks appropriately		3		
Helps where/when needed without direction		3		
<b>INTERPERSONAL</b>				
Works effectively in team efforts	9			
Gets along effectively with co-workers		3		
Contributes to positive work environment		3		
Interacts with citizens, customers, patients, co-workers appropriately		3		
<b>LEADERSHIP</b>				
Ability to organize work to be accomplished		3		
Independently assumes informal leadership role		3		
Appreciates big picture		3		
Demonstrates acceptance of responsibility		3		
<b>JUDGMENT</b>				
Analyzes situations and makes appropriate decision		3		

Thinks clearly under duress		3		
Develops innovative solutions		3		
Appropriately applies standards and guidelines		3		
Acts appropriately in the absence of clear standards and guidelines		3		
<b>JOB KNOWLEDGE</b>				
Demonstrates knowledge of suppression tactics and practices		3		
Demonstrates knowledge of emergency medical procedures		3		
Demonstrates knowledge of hazardous materials practices and procedures			1	
Exercises initiative in gaining job knowledge and skills	9			
Demonstrates knowledge of incident command		3		
<b>COMMUNITY INTERVENTION</b>				
Demonstrates competence in code compliance		3		
Proficiency in community education activities		3		
Proactive approach to fire protection		3		

**Initials:**

KB /s/ PAP /s/

JWA /s/

**Date:** 5/6/96

When this final score was tabulated, Payas did not complain to either Aldworth or Bavery that the scoring process for Wenborne was unfair. Additionally, Payas did not tell Aldworth and Bavery that his (Payas') opinion should be weighted more than those of the other two graders. Had he

wanted to, Payas could have refused to sign the final score sheet or dissent from the scores given to Wenborne. He did not do either. Instead, Payas initialled this form along with both Aldworth and Bavery. When the evaluation scores of all 28 applicants were subsequently compiled from high score to low score, Wenborne was ranked 14 out of 28.

19. The evaluation referenced above was the first time Payas ever evaluated a candidate seeking promotion to lieutenant. In addition to evaluating Wenborne, Payas also evaluated two other candidates as part of the 1996 lieutenant promotional process. Thus, he graded a total of three candidates. He was the immediate supervisor for all three. The scores which Payas gave to the three candidates he evaluated were the highest scores given by any evaluator to any of the candidates. Thus, Payas' scores were higher than those given by the other evaluators.

20. After his evaluation was finished, Wenborne heard via the grapevine that candidates were finding out about their grades on the evaluation, so he approached Payas and asked him what was going on. Payas responded to Wenborne's inquiry by telling him that he (Payas) had graded him (Wenborne) high on the evaluation, while Aldworth and Bavery had graded him low. Payas also told Wenborne that during the evaluation, Aldworth and Bavery "mentioned the unfair labor practice" charge which Payas knew was still pending with the WERC.

21. On May 9, 1996, Wenborne took and passed the written lieutenant exam. When the written exam scores of all 28 applicants were subsequently compiled from high score to low score, Wenborne was ranked 25 out of 28.

22. On May 28, 1996, Wenborne participated in the assessment center evaluation. When the assessment center scores of all 28 applicants were subsequently compiled from high score to low score, Wenborne was ranked 17 out of 28.

23. After all three parts of the lieutenant examination process were finished, a final composite score was tabulated for all of the candidates. Wenborne was ranked 21 out of 28 in this final composite score. Wenborne was not one of the 12 individuals promoted to lieutenant in 1996.

24. The record does not establish by a clear and satisfactory preponderance of the evidence that the City's failure to promote Wenborne to any of the sought after positions of lieutenant or division chief in either 1993 or 1996 was motivated even in part by anti-union considerations and/or the exercise of Wenborne's right to engage in protected (union) activity.

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

#### CONCLUSION OF LAW

The City's failure to promote Daniel Wenborne to the position of lieutenant or division chief in either 1993 or 1996 was not due to animus toward Wenborne's past union activities. Consequently, the City's non-selection of Wenborne for those positions did not violate Sec. 111.70(3)(a)3, Stats., or derivatively Sec. 111.70(3)(a)1, Stats.

Based on the foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER 1/

The complaint of prohibited practices is dismissed.

Dated at Madison, Wisconsin, this 21st day of May, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones /s/  
Raleigh Jones, Examiner

(Footnote 1/ appears on the next page.)

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

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

**This decision was placed in the mail on the date of issuance (i.e. the date**

**appearing immediately above the Examiner's signature).**

## CITY OF MADISON

### MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

#### The Pleadings

In its original complaint, the Complainants alleged that the City violated Secs. 111.70(3)(a)1 and 3, Stats., when it failed to place Wenborne on the 1993 promotional lists for lieutenant and division chief because of his past union activities. In its amended complaint, the Complainants alleged that department officials made comments about this pending complaint and gave Wenborne a negative evaluation which resulted in his not being placed on the 1996 lieutenant promotional list because of his past union activities. The City's answer denied it committed any prohibited practices by not promoting Wenborne to either lieutenant or division chief.

#### POSITIONS OF THE PARTIES

##### Complainants

It is the Complainants' position that the City violated (3)(a)3 and derivatively (3)(a)1 when it failed to promote Wenborne to either the position of lieutenant in 1993, the position of division chief in 1993, or the position of lieutenant in 1996. According to the Complainants, it established all four elements required for a finding that the City violated Section 111.70(3)(a)3 when it failed to promote Wenborne. Specifically, it asserts that the record establishes that Wenborne engaged in lawful, concerted activity; that the City was aware of that activity; that the City was hostile to that activity; and that the City's failure to promote Wenborne to any of the sought-after positions was based, at least in part, on that hostility.

The Complainants contend that the first element for finding a (3)(a)3 violation is established by the following evidence. First, it notes that Wenborne was on the Union's executive board from 1985 to 1987 and again from 1989 until 1994. Second, it cites Wenborne's involvement in the cross-staffing issue in 1992. The Complainants call specific attention to the fact that he was the facilitator of that committee, the fact that he engaged in public picketing and leafleting concerning the issue, and that he made the overhead graphics that were used at the meeting with members of the city council to educate them on the issue. Third, it notes that Wenborne filed the instant prohibited practice charge in May, 1993. Fourth, it notes that Union president Conway testified that Wenborne was vocal at union meetings. Based on the foregoing, the Complainants characterize Wenborne as a union activist.

Next, the Complainants assert that the second element for finding a (3)(a)3 violation is established by the following evidence. First, the Complainants note that Wenborne, Chief Roberts and Assistant Chief Vorlander were present at the meeting with the city council members on the



cross-staffing matter. Wenborne felt that Vorlander snubbed him at the meeting because Vorlander did not make eye contact with him. In the Complainants opinion, this establishes that the Employer was aware of Wenborne's involvement in the cross-staffing matter. Second, the Complainants cite Lieutenant Payas' testimony that when division chiefs Aldworth and Bavery evaluated Wenborne as part of the 1996 lieutenant promotion process, they told him they knew about Wenborne's pending prohibited practice charge and Wenborne's work on the cross-staffing matter. The Complainants believe this also proves that the Employer was aware of Wenborne's union activity.

The Complainants contend that the third element for finding a (3)(a)3 violation is established by the following evidence. First, they cite PFC Commissioner Michael Christopher's testimony that at a 1992 PFC meeting, Chief Roberts said "that he wanted to promote only those persons who would reflect his opinion about how to run the fire department." The Complainants aver that since Roberts reacted defensively to Christopher's statement that Roberts wanted to be surrounded by "yes men", he must have in fact wanted to promote only those "yes men" who would reflect his opinion about how to run the fire department. The Complainants then make the assertion that Wenborne was not a "yes man". Joining these two points together, the Complainants assert this proves that Roberts was hostile to Wenborne's union activities. Second, the Complainants cite Kent Anderson's testimony that in 1993 after he selected Wenborne to co-teach a class at MATC for the department's new recruits, Vorlander called him and asked him to not have Wenborne teach the class. According to the Complainants, this event shows Vorlander's hostility toward Wenborne. Finally, the Complainants contend division chiefs Aldworth and Bavery were also hostile toward Wenborne's union activities, specifically filing the instant prohibited practice complaint in 1993 and serving on the union's special cross-staffing committee in 1992. As the Complainants see it, the hostility these management officials had for Wenborne showed itself when the instant promotional opportunities came along and Wenborne was not selected for any of them.

The Complainants contend there is both direct and inferential evidence that the City's failure to promote Wenborne to any of these positions was based on anti-union animus (the fourth element in a (3)(a)3 claim). With regard to the former (i.e., direct evidence) the Complainants cite Lieutenant Payas' testimony that when he and division chiefs Aldworth and Bavery evaluated Wenborne in 1996 as part of the lieutenant promotional process, Aldworth and Bavery told him that Wenborne was not sufficiently cooperative to warrant promotion because of the pendency of the instant prohibited practice complaint and his prior cross-staffing activities. The Complainants then note that Aldworth and Bavery rated Wenborne much lower than Payas did. According to the Complainants, this establishes that Aldworth and Bavery had animus toward Wenborne because of his past union activities and adversely evaluated his performance as part of the 1996 lieutenant promotional process. With regard to inferential evidence, the Complainants cite the following: 1) a lack of content validity in the City's promotional questions and rating system; 2) a lack of agreement among the three evaluators on the meaning of terms and the ratings; and 3) the use of pluses and minuses in the rating system by Aldworth and Bavery. The Complainants contend these flaws allowed bias to be injected into the promotional process. Responding to the City's argument concerning Payas' "disgust and frustration" with the City's promotional practices, the Complainants

believe the promotional process is indeed worthy of "disgust and frustration" because it (i.e. the process) was motivated by factors other than merit. According to the Complainants, management representatives repeatedly manipulated the promotional process against Wenborne.

Next, the Complainants argue that the City failed to articulate convincing reasons for failing to promote Wenborne. In their view, Wenborne has an "outstanding" work record and was "fully qualified" to be a lieutenant or division chief. To support this premise, the Complainants cite Wenborne's reference letters, teaching experience, and responses to the Achievement History Questions (AHQs). According to the Complainants, Wenborne's credentials and qualifications were comparable to or superior to those candidates who were promoted. The Complainants also argue that Wenborne should have been promoted because he had more experience and seniority than those people who were promoted, specifically Dinkins and Hansbro. In the Complainants' view, there is no logical explanation for the City's failure to promote Wenborne except for his past union activities. The Complainants draw the inference that Wenborne's past union activities cost him the promotions in question.

Finally, responding to the City's contention that Wenborne would not have been selected even if illegal animus did not exist, the Complainants contend that the City is attempting to modify the applicable legal standard on the issue of motive. For purposes of background, the Complainants note that under Wisconsin's "in part" test, it does not matter whether the City can show that Wenborne could have been denied the promotions for another permissible reason. The Complainants contend the City should lose this case because Wenborne was denied a promotion, at least in part, due to anti-union animus.

In order to remedy the alleged promotion discrimination suffered by Wenborne, the Complainants seek an order promoting him to the first lieutenant or division chief position which becomes available in the department. Thus, the Complainants are not seeking to have Wenborne displace an existing lieutenant or division chief. As part of this remedy, Complainants seek an award of back pay for Wenborne.

### Respondent

It is the Respondent City's position that its conduct herein did not constitute a prohibited practice. It argues that Wenborne's failure to be selected for any of the sought-after promotions was due solely to his own inability to make the grade in comparison to the other candidates. It asks that the Complainants' innuendo and misrepresentations of evidence not be substituted for the lack of evidence. According to the City, the Complainants failed to prove that the City's promotion decisions were motivated in any way by hostility toward Wenborne's past union activities. The City therefore argues the Complainants have not met their requisite burden of proof.

With regard to the first element in a (3)(a)3 case, the City characterizes Wenborne's union activities in general as "so minimal and inconspicuous as to have been virtually unnoticed,

particularly in comparison to those of other union members." As the City sees it, Wenborne's union activities were "significant in his mind only." It makes the following arguments to support this contention. First, it notes that other than Wenborne aggrandizing his union activities, not one other person testified that he (Wenborne) was a union activist, principal player with the Union or that he stood out as being involved on any given issue. Consequently, the City characterizes Wenborne as "nothing more than a minor player in the union." Second, it notes that Wenborne has never been on the Union's negotiating committee, has never been an elected union officer, has filed just one grievance in his entire tenure (which was subsequently withdrawn), and filed just one unfair labor practice charge (the instant case). That said, the City acknowledges that Wenborne did serve on the Union's executive board as a station representative. The City notes, however, that the votes of the executive board or positions taken privately by executive board members are not made available to management, so it logically follows that the City could not have known how Wenborne voted on various matters which the executive board addressed. The City submits that given the foregoing, it could not possibly have been prejudiced against Wenborne by any of his executive board votes. Third, the City notes that Wenborne was, by his own admission, only minimally involved in two hot topics which arose in the department during the applicable time frame, namely the accountability issue and the Quint vehicle issue. Fourth, with regard to the cross-staffing matter, the City acknowledges that Wenborne was involved in same in that he made some picket signs, leaflets and graphics. However, the City asserts that the Department's management did not know he made any of the materials just referenced because his name was not on same. Additionally, the City notes that Wenborne never spoke publicly on the cross-staffing matter to either the Public Safety Review Board (PSRB), the Police and Fire Commission (PFC), or the meeting held with common council members, nor was he ever quoted in media stories on the issue. That being so, the City avers that Wenborne "made no name for himself" on the cross-staffing issue.

Next, the City reviews the various incidents relied upon by the Complainants to prove the second element of a (3)(a)3 claim, namely that City representatives were aware of Wenborne's union activities. However, after reviewing them, the City avers that department officials were not aware of Wenborne's union activities. First, with regard to the cross-staffing matter, it cites the testimony of division chiefs Aldworth and Bavery that neither was aware that Wenborne was involved in same. Second, with regard to the assertion that Aldworth and Bavery were aware of Wenborne's unfair labor practice charge when they evaluated him in 1996, the City cites their testimony that neither was aware that Wenborne had filed a complaint with the WERC in 1993. According to the City, they did not know of the complaint's existence until they were notified they were to testify in this case. Finally, the City cites Vorlander's testimony that he saw nothing in Wenborne's activity that identified him (Wenborne) as a union activist or "heavy hitter" on either the cross-staffing matter or any other issue.

Next, the City reviews the various incidents relied upon by the Complainants for the proposition that management officials were hostile towards union activities in general or Wenborne's cross-staffing activity in particular. However, after reviewing them, the City concludes those events do not show hostility by management officials against union activities in general or

cross-staffing activity in particular. First, responding to the Complainants' contention that Chief Roberts supposedly wanted to be surrounded by "yes men", the City asserts this contention misrepresents the record evidence. In the City's opinion, the record evidence only contains Christopher's interpretation of what Chief Roberts said to the PFC; not what the Chief actually said. The City asserts that what the Complainants did in their brief was to take Christopher's interpretation of what Chief Roberts said to the PFC and incorrectly directly ascribe it to Roberts. The City then goes on to cite the testimony of Vorlander to the effect that Roberts had no time for "yes men" on his staff. Second, with regard to Wenborne's testimony that Vorlander "snubbed" him at the cross-staffing meeting held with members of the Common Council because he (Vorlander) did not make eye contact with him (Wenborne), the City notes that Wenborne later changed his characterization of Vorlander's conduct to simply being "reluctant to acknowledge me". The City also calls attention to Wenborne's subsequent acknowledgement that Vorlander might not have made eye contact with him (Wenborne) that night because of Vorlander's possible preoccupation with the matter being discussed. Third, the City asserts that the comment attributed to Aldworth and Bavery by Payas (namely that Wenborne had a unfair labor practice charge pending) simply did not occur. In support thereof, it cites Aldworth's and Bavery's testimony that Payas' assertion was not true. According to the City, Payas is not credible because of "his obvious anti-management prejudice." The City argues that any determination of credibility should be made in favor of Aldworth and Bavery. Finally, the City contends that union activity has no adverse impact in the department's selection practices. The City asserts that it promotes qualified people whether or not they have been active in espousing the Union's positions. To support this premise, it notes that Union President Conway has been in management's face (so to speak) on a variety of issues and has also spoken vigorously before the Common Council and the Public Safety Review Board on safety, staffing standards and accountability standards, yet he was promoted to lieutenant in 1994. The City also calls attention to the fact that Jack Deering, Jan Jefferson and Gary Westbrook were all more active in cross-staffing issues than Wenborne was, and all three of them were promoted. As the City sees it, Wenborne's union activity was de minimis in comparison with the strident actions of those just noted who were promoted.

The City also argues that the Complainants did not show the fourth factor needed to prove a (3)(a)3 violation, namely that the City's failure to promote Wenborne was based in part, on management's hostility toward Wenborne's past union activities. The City contends that the sole reason Wenborne was not promoted to lieutenant or division chief in 1993 was because he did not meet the promotional standards. According to the City, the 1993 lieutenant and division chief examinations were fairly created, administered and evaluated. To support this premise, it cites Union President Conway's testimony that the 1993 promotional process was consistently applied. The City avers that the only reason Wenborne did not make it past the AHQ portion of either examination was because he did not score well enough. The City asserts that the sole reason Wenborne was not promoted to lieutenant in 1996 was also because his scores on the three-part examination process were not high enough. The City submits that the 1996 lieutenant examination process (like the 1993 examination process) was also fair and objective.

Next, the City responds at length to the Complainants' assertion that Wenborne had an "outstanding" work record and was "fully qualified" to be a lieutenant and/or a division chief. With regard to Wenborne having an allegedly "outstanding" work record, the City begins by noting that the only record evidence of same came from Payas who said it was "excellent" and offered no elucidation. The City then reviews what it characterizes as "the basis for his (Payas') statement". The City notes that in 1996, Payas was temporarily assigned to Wenborne's station where he had his first experience with Wenborne's job performance. After Payas worked with Wenborne for just four months, he was part of the three-person team that evaluated Wenborne as part of the 1996 lieutenant promotion process. The City notes that Payas testified that after he was temporarily assigned to that station, he wanted to have "cooperation" with his diverse crew. The City opines that "what would be better than to rate his people highly" (in the lieutenant promotion process), which it notes is what Payas did. With regard to Payas' statement that he was "disgusted" with the grading process, the City avers that whatever "disgust" he had with the process arose after it became clear that one of the three people he evaluated (namely Wenborne) did not make the lieutenant promotion list. Next, with regard to Wenborne allegedly being "fully qualified" to hold the position of lieutenant or division chief in 1993 or 1996, the City makes the following arguments. The City notes that when Wenborne applied for promotion in 1993, his AHQ responses were screened and scored by an assessment panel and Wenborne did not score well enough to proceed. The City calls attention to the fact that three of the four raters are not even accused by the Complainants of having anti-union feelings (i.e., Johnson, Hood and Chief Wolf). The City also notes that the Complainants are not raising a conspiracy theory that Vorlander somehow controlled these other three raters when they scored Wenborne's AHQ responses. The City also objects to the Complainants' attempt to compare Wenborne's AHQ responses with those of the other candidates. In the City's view, such is outside the scope of the pleadings and the Commission's jurisdiction. In the alternative, the City contends that the purported comparisons of Wenborne's AHQ responses with other applicants is meaningless. Turning attention to the 1996 lieutenant promotion process, the City believes that Wenborne's scores on same speak for themselves. As for the letters of reference which were offered to establish Wenborne's credentials, the City notes that these references were not part of his application for any of the promotions, but rather were generated for this litigation. Given all of the foregoing, the City argues that contrary to the Complainants' claim, Wenborne does not have an "outstanding" work record, nor was he "fully qualified" to hold the lieutenant or division chief position in 1993 or 1996.

Finally, the City notes that while the Complainant's brief challenges the content validity of the questions asked of applicants as part of the 1993 lieutenant and division chief promotion process, that matter (i.e., content validity) was never pled. The City contends that since the subject of content validity was not pled, it follows that the content validity of any of the questions asked of applicants as part of the 1993 promotion process is not properly before the Commission. However, if the Examiner does address this matter, the City submits that the only record evidence concerning same is that consultant Charles Hale checked the job-relatedness of the exam questions. The City argues that given this unchallenged testimony, the test questions pass muster. The City asserts that the statement in the Complainant's brief that City witnesses "conceded" that the various questions

on the exam "lack any content validity" is simply not true.

In conclusion then, the City argues that Wenborne's failure to be selected for any of the promotions in question was due solely to his own lack of skill and inadequate performance on the examinations, notwithstanding his self-aggrandizement in placing the blame on others. The City therefore requests that the complaint and amended complaint be dismissed.

## DISCUSSION

### The Legal Framework

The Complainants allege the City discriminated against Wenborne (specifically, did not promote him) because of his past union activities. The legal standards for complaint cases alleging this type of discrimination are well-settled. Section 111.70(3)(a)3, Stats., makes it 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." By its explicit reference to "other terms or conditions of employment", Section 3(a)3 has been held to include promotional opportunities. 2/ Not promoting an employee because of his/her union activity falls within this proscription. Thus, an employer cannot take an employee's union activity into account when making a promotion. In order to establish a violation of this section, a complainant must show all of the following elements:

1. The employee engaged in protected activities; and
2. The employer was aware of those activities; and
3. The employer was hostile to those activities; and
4. The employer's conduct was motivated, in whole or in part, by hostility toward the protected activities. 3/

It is well-settled under Wisconsin's "in-part" test that anti-union animus need not be the employer's primary motive in order for an act to contravene this statute. 4/ If animus forms any part

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2/ Milwaukee County (Sheriff's Department), Dec. No. 24498-A (Jones, 1/88); *aff'd*, Dec. No. 24498-B (WERC, 7/88).

3/ Milwaukee Board of School Directors, Dec. No. 23232-A (McLaughlin, 4/87), *aff'd by operation of law*, Dec. No. 23232-B (WERC, 4/87); Kewaunee County, Dec. No. 21624-B (WERC, 5/85); City of Shullsburg, Dec. No. 19586-B (WERC, 6/83); Fennimore Community Schools, Dec. No. 18811-B (WERC, 1/83).

4/ Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis.2d 540 (1967); Employment

of the decision to deny a benefit or impose a sanction, it does not matter that the employer may have had other legitimate grounds for its action. 5/ An employer may not subject an employee 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. 6/ Thus, an otherwise valid action may still be found violative of MERA if it is motivated by anti-union animus. If it is established that an adverse (personnel) consequence was in any part motivated by the employee's union activity, then the Examiner is obligated to grant relief in the form of remedial and affirmative orders. A municipal employer who violates Sec. 111.70(3)(a)3, Stats., also derivatively interferes with the Sec. 111.70(2) Stats., rights of bargaining unit employees in violation of Sec. 111.70(3)(a)1, Stats.

#### Application of the Legal Framework to the Facts

Applied to the facts involved here, the above-noted Section (3)(a)3 test requires that the Complainants demonstrate that Wenborne engaged in protected union activities; that the City had knowledge of his union activities; that the City was hostile to it; and that the City's decision not to promote Wenborne to any of the sought after positions was based, at least in part, upon said hostility.

In this case, each of the four elements just noted are at issue. To begin with, the City disputes that Wenborne engaged in protected activities and, even if he did, the City asserts it had no knowledge of same. The City also denies hostility toward union activities. Finally, the City denies that Wenborne's union activities played any part in his not being promoted to any of the sought after positions. Each of these elements will be addressed below.

#### Protected Activity

In most (3)(a)3 cases, the first element (i.e., involvement in protected activity) is not disputed because the individual involved is known to be a major player in the union, or has a high profile in union matters, or is a known union activist. Wenborne certainly sees himself as such. However, none of the other witnesses at the hearing did. Specifically, no one else from either side characterized Wenborne as being a major player in the union, or having a high profile in union matters, or as a union activist. Additionally, the record evidence demonstrates that Wenborne's union activity has been relatively minimal. For example, he has never been a union officer or served on the union's bargaining team. In his entire employment with the department, he has filed just one grievance and it was subsequently withdrawn. The only prohibited practice complaint he has ever filed or been involved with is the present case. Furthermore, by his own admission, he was

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Relations Department v. WERC, 122 Wis.2d 132 (1985).

5/ Ibid.

6/ Muskego-Norway, supra, at p. 562.

only minimally involved in two of the hot departmental topics which arose in the 1990's, namely the Quint vehicle matter and the accountability matter.

That said, it is not imperative that an individual be a major player in the union, or have a high profile in union matters, or be a known union activist in order to satisfy the first element of a (3)(a)3 claim. Nor is there any requirement that the individual engage in a certain number of union matters. Finally, there is no requirement that the individual be considered more active or more strident than other union members. Instead, all that is required to satisfy the first element of a (3)(a)3 claim is that the individual simply "engage in protected activity". In the opinion of this Examiner, this element can be satisfied if the individual engaged in any protected (union) activity whatsoever. I find that Wenborne meets this minimal qualification for the following reasons. First, he served on the Union's executive board as a station representative for six years. Second, he was involved to the following extent in the cross-staffing matter which was a hot departmental issue in 1992. Specifically, he was facilitator of the Union's special cross staffing committee; he helped prepare picket signs and leaflets opposing cross staffing; he participated with other committee members in public picketing on three occasions opposing cross staffing; he attended a public meeting that dealt with cross staffing; and at said meeting, the Union's presentation on cross-staffing included diagrams and graphics which he (Wenborne) prepared. Wenborne's participation in the activity just referenced involved protected (union) activity and is sufficient to satisfy the first element of a (3)(a)3 claim.

#### Employer Knowledge

In most (3)(a)3 cases, the second element (i.e., employer knowledge of the individual's union activity) is not disputed either because the individual has usually dealt with management officials in negotiations or processing grievances. Here, though, that is not the case because Wenborne has never served on the Union's bargaining team nor does the record identify specific grievances that he processed when he served on the Union's executive board as a station representative. Given Wenborne's lack of involvement in negotiations and processing grievances, the Complainants rely instead on Wenborne's involvement in the cross-staffing matter to satisfy the second (3)(a)3 element. The Complainants assert that four department officials were aware of Wenborne's involvement in the cross staffing matter, to wit: Division Chief Aldworth, Division Chief Bavery, Chief Roberts and Assistant Chief Vorlander. Each is addressed below.

Both Aldworth and Bavery testified they were unaware that Wenborne was involved in the cross staffing matter. The Complainants' assertion to the contrary (i.e., that Aldworth and Bavery did in fact know of Wenborne's involvement in the cross staffing matter) is premised on the contention that when Aldworth and Bavery evaluated Wenborne during the 1996 lieutenant promotion process, they supposedly asked Lieutenant Payas if he was aware of Wenborne's "problems at Station 8". Assuming for the sake of discussion that Aldworth and Bavery made such a statement, it is not clear from the context what "problems" were being referenced. Was it, for example, a code reference to cross staffing, or was it a reference to other unspecified problems? If



it was the former (i.e., a code reference to cross staffing), it is logical to assume that Payas would have cracked the code so to speak, interpret it in that fashion, and testify accordingly. He did not. Specifically, he did not elaborate as to the intended meaning of the phrase. Since the Complainants' own witness did not connect the phrase "problems at Station 8" with the cross staffing matter, the Examiner has no basis for doing so either. Accordingly, it is held that the Complainants have not shown that Aldworth and Bavary were aware of Wenborne's involvement in the cross staffing matter when they evaluated him as part of the 1996 lieutenant promotion process.

Next, the Complainants assert that Chief Roberts was also aware of Wenborne's cross staffing activity. To support this premise, it cites Roberts' attendance at the meeting "when Wenborne spoke to the Madison City Council on the issue." 7/ The problem with this contention is that while Roberts was at that meeting, Wenborne did not speak at the meeting as the Complainants allege. By Wenborne's own admission, it was someone else from the Union who publicly presented the case against cross staffing. Since Wenborne did not speak publicly at the meeting, the Complainants have not shown that Roberts was aware that Wenborne was at that meeting or involved in the cross staffing matter.

Finally, the Complainants assert that Assistant Chief Vorlander was aware of Wenborne's cross staffing activity. This situation differs from those just referenced because Vorlander acknowledged that he was aware of Wenborne's involvement in the cross staffing matter. Vorlander specifically recalled that Wenborne was present at the public meeting which was held with the common council members on the cross staffing matter, and that Wenborne showed overhead graphics he had prepared at that meeting. Given that acknowledgement, it follows that at least one department official (namely Vorlander) was aware that Wenborne was a participant in the Union's cross staffing committee. Since the Union's cross staffing committee was involved with protected (union) activity, it is held that the Complainants have satisfied the second element of a (3)(a)3 claim. In so finding, it does not matter that other members of the Union's cross staffing committee had a higher profile on the issue than Wenborne did.

### Hostility

The focus now turns to the third element necessary to prove a (3)(a)3 claim, namely hostility toward union activities. Evidence of hostility and illegal motive (factors three and four above) may be direct (such as with overt statements of hostility) or, as is usually the case, inferred from the circumstances. 8/ Here, the record will be reviewed for evidence of both types. If direct

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7/ Complainants' initial brief, p. 10.

8/ Thus, in Town of Mercer, Dec. No. 14783-A (Greco, 3/77), the Examiner stated that:

"it is well established that the search for motive at times is very difficult, since oftentimes, direct evidence is not

evidence of hostility or illegal motive is found lacking, the Examiner will then look to the total circumstances of the case. In order to uphold an allegation of a violation, these circumstances must be such as to give rise to an inference of pretext which is reasonably based upon established facts that can logically support such an inference. 9/

The Complainants contend that Chief Roberts, Assistant Chief Vorlander, and Division Chiefs Aldworth and Bavery were all hostile against Wenborne's union activities. The record evidence pertaining to each of these management officials is reviewed below.

There is no direct evidence in the record that Roberts was hostile to union activities in general or Wenborne's union activities in particular. With regard to the former, the record does not document a single instance where Roberts exhibited outright anger or hostility toward grievance activity itself. With regard to the latter, the record does not document that Roberts ever had a one-on-one meeting with Wenborne which involved union activity. That being the case, no direct evidence exists that Roberts was hostile against union activity.

The Complainants contend it can nevertheless be inferred that Roberts was hostile against union activity in general and Wenborne's union activity in particular. To support this premise, the Complainants point to a verbal exchange which occurred at a 1992 PFC meeting between Roberts and PFC member Christopher. According to the Complainants, Roberts said during this verbal exchange that "he wanted to promote only those persons who would reflect his opinion about how to run the fire department", whereupon Christopher responded that Roberts only wanted to be surrounded by "yes men". The Complainants assert that since Wenborne was on the Union's cross-staffing committee, this proves he was not a "yes man", and therefore Roberts must have been hostile against him for this reason. The Examiner believes there are several problems with this

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available. For, as noted in a leading case on this subject, Shattuck Denn Mining Corp. v. N.L.R.B. 362 F 2d, 466, 470 (9 Cir., 1966):

"Actual motive, a state of mind being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise, no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book."

9/ Cooperative Educational Service Agency #4, et al., Dec. No. 13100-E (Yaffe, 12/77), aff'd, Dec. No. 13100-G (WERC, 5/79).

argument. To begin with, a close reading of the record indicates that Roberts did not make the statement just ascribed to him. Instead, the record indicates that the statement referenced in quotes above was Christopher's interpretation of what Roberts said; not Roberts' own words. However, even if Roberts made such a statement, it (i.e., the statement) was not directed at any named individual. That being so, Roberts' alleged statement has not been tied to Wenborne. Consequently, it is held that it cannot be inferred from either this incident or the record evidence as a whole that Roberts was hostile to Wenborne for his union activity.

The Complainants contention that Vorlander was hostile to Wenborne's union activity is based on the following two incidents: 1) Vorlander's alleged snubbing of Wenborne at the 1992 cross staffing meeting, and 2) Vorlander's calling the MATC fire service coordinator and telling him that Wenborne should not teach the upcoming class for the department's new recruits. Each is reviewed below.

During the 1992 cross staffing meeting with some Common Council members, Wenborne tried unsuccessfully to make eye contact with Vorlander. Wenborne felt that since Vorlander did not make eye contact with him, Vorlander intentionally snubbed him. It may be that Vorlander intentionally did not make eye contact with Wenborne at that meeting, and that Wenborne correctly read the situation as an intentional slight. However, it is also possible that Vorlander did not make eye contact with Wenborne during the meeting because he was preoccupied with the matter being discussed and that Wenborne simply misread the situation. Because of this uncertainty, the Examiner concludes that the fact that Vorlander did not make eye contact with Wenborne at the 1992 cross staffing meeting proves nothing.

It is undisputed that in 1993, Vorlander called MATC Fire Service Coordinator Anderson and told him that he (Vorlander) did not want Wenborne to teach an upcoming class for the Fire Department's new recruits because Vorlander felt Wenborne did not have the competencies needed to teach new recruits. As the Complainants see it, this phone call shows that Vorlander was hostile toward Wenborne. What is proscribed by (3)(a)3 though is not antagonism, animosity or ill will in general; instead, what is proscribed is only hostility against grievance activity itself. While Vorlander's comment to Anderson certainly indicates what Vorlander's opinion is about Wenborne's work competencies, that is all it shows. Vorlander's comment to Anderson does not reference union or grievance activity either on its face or when reading between the proverbial lines. That being so, it is held that Vorlander's comment to Anderson does not show hostility by Vorlander against union activity. Given the foregoing findings, it follows that the Complainants have not established that Vorlander was hostile to Wenborne for his union activity.

Finally, the Complainants contend that Aldworth and Bavery were hostile to Wenborne for his union activity because they raised it (i.e., Wenborne's union activity) to Payas while they were evaluating Wenborne for the 1996 lieutenant promotional process. According to the Complainants, Aldworth and Bavery raised two separate aspects of Wenborne's union activity: his 1992 cross staffing activities and his filing the instant prohibited practice complaint.

The matter of what Aldworth and Bavery said during the evaluation about cross staffing has already been addressed. Specifically, it was held that even if Aldworth and Bavery did refer during the evaluation to Wenborne's "problems at Station 8", that statement did not refer to cross staffing on its face, nor did the Complainant's own witness (Payas) connect that phrase to cross staffing. Consequently, the record evidence does not establish that Aldworth and Bavery raised Wenborne's cross staffing activities during the 1996 evaluation.

Attention is now turned to the question of whether Aldworth and Bavery raised the subject matter of the instant prohibited practice complaint during the 1996 evaluation process. Payas testified that during the course of their discussion, either Aldworth or Bavery "mentioned" the pending complaint case, while both Aldworth and Bavery forcefully denied the allegation. After considering the conflicting testimony, the Examiner finds Aldworth's and Bavery's denial more credible than Payas' accusation. In so finding, it is noted that Aldworth's and Bavery's testimony on this point is consistent with their other testimony that they were not aware that a complaint had been filed with the WERC over the 1993 promotional process until they were notified in July or August, 1996 that they were going to be called as a witness in this case. Additionally, Aldworth recounted that in 1993, Wenborne told him and other members of his station that he (Wenborne) was going to file a lawsuit over the promotions; not that he had filed a lawsuit over same.

Assuming for the purpose of discussion that Payas' version is credited, and either Aldworth or Bavery did "mention" the pending complaint case during the course of the evaluation, that still does not establish hostility. This is because there is nothing more in Payas' account than an accurate statement of fact (i.e., namely that Wenborne had filed a complaint with the WERC in 1993). It would be one thing if it was alleged that when Aldworth or Bavery "mentioned" a complaint, they exhibited outright anger or rage in conjunction with same. If they had, that would have constituted evidence of hostility against union activity. However, Payas made no such assertion that anything along those lines happened. That being so, it is held that the Complainants have not established that either Aldworth or Bavery was hostile to Wenborne for his union activity.

After considering the foregoing matters individually and collectively, the Examiner finds they are insufficient to directly or indirectly establish that management officials were hostile to union activities in general or Wenborne's union activities in particular.

### Motive

The previous finding that the Complainants have not proved the third element of their

(3)(a)3 claim technically ends this case. However, for purposes of completing the record, the Examiner has decided to review the Complainants' contentions regarding the fourth element necessary to prove a (3)(a)3 claim, namely illegal motive. As previously noted, this element involves the question of whether the City's non-selection of Wenborne for any of the sought-after positions was motivated, in part, by hostility towards Wenborne's union activities.

Attention is focused first on whether any direct evidence exists which establishes that Wenborne was not promoted because of his past union activities. The Complainants contend that there is, citing Payas' testimony about Wenborne's evaluation during the 1996 lieutenant promotional process. According to the Complainants, Aldworth and Bavery told Payas during that evaluation that Wenborne was not "sufficiently 'cooperative' to justify promotion to lieutenant." The problem with this contention however is that not a single witness, including Payas, testified that such a statement was made during the evaluation. A close reading of the record indicates that the statement referenced in quotes is contained only in the complaint. That being the case, it is held that no direct evidence exists that Wenborne was not promoted because of his past union activities.

Given the foregoing finding, the focus now turns to whether any inferential evidence exists which establishes that Wenborne was not promoted because of his past union activities. As support for same, the Complainants cite the following alleged flaws in the City's promotional process: 1) a lack of validity in the City's promotional questions and rating system; 2) a lack of agreement by the City's evaluators on the meaning of terms and the ratings; and 3) Aldworth's and Bavery's use of pluses and minuses when they initially rated Wenborne.

The Examiner concludes that the Complainants have not substantiated any of the alleged flaws with the City's promotional process. First, with regard to the alleged lack of content validity to the questions which were asked as part of the division chief and lieutenant promotional process, it is initially noted that contrary to the Complainants' assertion, City witnesses never "conceded" that the various questions on the division chief and lieutenant exam lacked content validity. This means that the Complainants had to prove that the questions on the division chief and lieutenant exams lacked content validity. All the Complainants did though was make the bald assertion that the exam questions lacked validity. That does not suffice. The Complainants did not identify any suspect questions or unlawful inquiries and none have been found to exist. It is therefore held that the Complainants did not prove that the promotional questions and/or rating system lacked content validity. Second, with regard to the alleged lack of agreement by the three evaluators on the meaning of terms and the rating system, again all the Complainants did was make the bald assertion that no agreement existed on same. It offered no evidence to support this contention. There is nothing in the record which indicates that the three evaluators, and specifically Payas, were not in agreement on the terms used in the evaluation, or did not understand the rating system. Consequently, it is held that the Complainants have not substantiated this contention either. Third, with regard to the "pluses and minuses" which Aldworth and Bavery used during their initial

scoring of Wenborne, suffice it to say that the Complainants did not establish that the Human Resources Department had to authorize the use of such pluses and minuses or that the evaluators were prohibited from using same during their initial scoring of the candidate. As a result, the Examiner finds nothing improper with Aldworth's and Bavery's use of "pluses and minuses" during their initial scoring of Wenborne.

Finally, the Examiner finds that the explanations offered by the City for Wenborne's non-selection for promotion for any of the lieutenant or division chief positions in question cannot reasonably be found to be pretextual. As noted in the Findings of Fact, Wenborne did not make the cut for promotion to lieutenant or division chief in 1993 after two screening boards reviewed his credentials, qualifications and responses to the AHQs. After doing so, the screening boards decided that Wenborne would not continue further in the promotion process. Thus, he did not even get to interview for either position. The screening boards obviously determined that other candidates had better credentials, qualifications and responses to the AHQs than Wenborne did. Nothing in the record indicates that the screening boards' decision in this regard was not objective or was tainted by Wenborne's past union activities. While the Complainants contend that one screening board member (namely Vorlander) was hostile to Wenborne, the Complainants do not contend Vorlander somehow controlled the other screening board members and their decision, nor is there any basis for the Examiner to so find. Turning attention to the 1996 lieutenant promotional process, the Findings of Fact establish that Wenborne was not even close to the top of the three separate parts of that promotional process. Specifically, he was rated 14 out of 28 on the evaluation portion, 25 out of 28 on the written portion, and 17 out of 28 on the assessment center portion. When these scores were tabulated and averaged, Wenborne had a final composite score of 21 out of 28. The Complainants focus all their attention on the evaluation portion of the 1996 lieutenant promotional process. As they see it, Aldworth and Bavery manipulated the evaluation of Wenborne and gave him a negative evaluation. There is no question that Aldworth and Bavery rated Wenborne much lower than Payas did. That was not hard to do though because Payas rated him so high. Specifically, Payas rated Wenborne as "godlike" and "walks on water" in 20 out of 27 categories. However, the fact that Aldworth and Bavery did not give Wenborne the same unusually high ratings as Payas did does not somehow taint the evaluation or turn it from a legitimate process into an illegitimate one. Most importantly, the Complainants have not shown that Aldworth and Bavery gave Wenborne the ratings they did because of his (Wenborne's) past union activities. Given the foregoing, there simply is not sufficient evidence in the record to infer anti-union animus. Overall, the Examiner cannot find any reasonable basis to infer that Wenborne was not promoted in 1993 or 1996, even in part, due to hostility to his past union activity.

In summary then, the Examiner has found that although Wenborne engaged in protected (union) activity of which at least one management representative was aware, the evidence does not support a conclusion that the department's management was hostile to said activity (in the sense connoted by Sec. 111.70(3)(a)3, Stats.) or that Wenborne was not promoted, even in part, due to

hostility towards his past union activity. Consequently, it is held that the City's action in not promoting Wenborne to any of the lieutenant or division chief positions he sought in 1993 and 1996 did not violate Sec. 111.70(3)(a)3.

Although the Complainants also raised a (3)(a)1 claim, that claim was simply a derivative of the (3)(a)3 claim. As such, it has been subsumed into the analysis above. Thus, no (3)(a)1 violation has been shown either. The complaint has therefore been dismissed. 10/

Dated at Madison, Wisconsin, this 21st day of May, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones /s/  
Raleigh Jones, Examiner

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10/ Any matter not addressed in this decision has been deemed to lack sufficient merit to warrant individual attention.