STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 953, Complainant, vs. MEDFORD ELECTRIC UTILITY, Respondent.	Case 26 No. 52399 MP-3013 Decision No. 28440-D

Appearances:

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, by Ms. Marianne Goldstein Robbins, for the Union.

Ruder, Ware & Michler, S.C., Attorneys at Law, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, by Mr. Jeffrey T. Jones and by Ms. Cari L. Hoida, for the City Utility and the City.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel J. Nielsen, Examiner: On March 15, 1995 the International Brotherhood of Electrical Workers, Local 953 (the Union or the Complainant) filed a complaint of prohibited practices against Medford Electric Utility, City of Medford (the Utility or the Respondent) alleging that the Respondent had violated Section 111.70, Stats., the Municipal Employment Relations Act, by refusing to bargain in good faith over a proposal to transfer bookkeeping work from the bargaining unit, in that it refused to provide requested information, refused to meet with the Complainant, and unilaterally implemented the transfer, resulting in the partial layoff of a unit member, and also that the Respondent discriminated against employees because of their protected concerted activity and, through these acts, interfered with the protected rights of unit employees. The Respondent generally denied any statutory violations. A request for grievance arbitration was also submitted to the Commission, arising from the same series of events.

Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission, on June 19, 1995 appointed James W. Engmann, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the collective bargaining agreement. Arbitrator Engmann was simultaneously appointed Examiner to hear and decide the complaint. Due to the resignation of Arbitrator Engmann, the Commission, by September 1, 1995, appointed Jane B. Buffett, another member of its staff, to serve as Arbitrator in the above noted matter and also as Hearing Examiner in the complaint . The parties agreed to consolidate evidentiary hearing on the arbitration and the complaint. The consolidated evidentiary hearing was held before Examiner Buffett in Medford, Wisconsin on September 13 and 14, 1995, then completed in Madison, Wisconsin on October 2, 1995. A transcript of each day of hearing was received by November 14, 1995. The parties filed briefs and reply briefs, the last of which was received February 1, 1996. On October 8, 1996, the parties stipulated certain additional facts to be considered part of the evidentiary record.

On December 5, 1996, Arbitrator Buffett issued her Award, concluding that there was no violation of the contract. Subsequently, owing to the unavailability due to illness of Examiner Buffett, the Commission on January 7, 1997, appointed Daniel Nielsen, an Examiner on its staff to make and issue appropriate Findings of Fact, Conclusions of Law and Orders.

Now, having considered the evidence, the arguments of the parties, the applicable provisions of the statute, and the record as a whole, the Examiner makes the following

FINDINGS OF FACT

1. The City of Medford operates the Medford Electric Utility (hereinafter referred to as either the Utility or the Respondent) which is a municipal employer providing electrical power generation services to the people of Medford, Wisconsin. The Utility's business address is 330 South Whelen Avenue, Medford, Wisconsin 54451. At all relevant times, the Utility's Manager has been Michael Frey.

2. The International Brotherhood of Electrical Engineers, Local 953, is a labor organization which represent certain employees of the Utility. The Union's business address is 2206 Highland Avenue, Eau Claire, Wisconsin 54701. At all relevant times, the Union's Business Manager has been Richard D. Haley, and the Assistant Business Managers have been William Lewis and Bruce Michalke.

3. The Union and the Utility have been parties to a series of collective bargaining agreements dating from the original certification of the Union in 1964. At the time that the instant dispute arose, the collective bargaining agreement contained, inter alia, the following provisions:

ARTICLE I - RECOGNITION AND COVERAGE

A. Pursuant to and in conformity with Section 111.70,

Wisconsin Statutes, the Utility recognizes the Union as the bargaining agency for all regular employees (exclusive of clerical employees and superintendent) of the Medford Electric Utility covered by Wisconsin Employment Relations Board Certification No. 6734, and amended by Decision No. 6734A to include the classification of office clerical employees to whom this Agreement applies.

B. The Utility and the Local Union agree to negotiate and deal with each other through the duly accredited officers and committee representing the parties hereto, exclusively, for the employees of the Utility covered hereunder on matters relating to hours, wages and other definite conditions of employment, included within the application and interpretation of this Agreement affecting said employees.

. . .

ARTICLE IV - MANAGEMENT PREROGATIVES

A. The management and operation of the Employer's facilities and the direction of its workforce shall be vested exclusively in management except as modified by this Agreement and including, without limitations, as follows:

1. The right to plan, direct and control operations;

2. Establish new jobs, abolish or change existing jobs;

3. Increase or decrease the number of jobs, specify and select materials, supplies and equipment, or change or vary materials, processes, products, equipment or operations;

4. To determine the methods, means and personnel by which the Employer's operations are to be conducted;

5. To introduce new or improved methods or facilities and to change existing methods or facilities . . .

7. The right to schedule and assign work, hire, rehire, promote, transfer, layoff and recall employees . . .

10. The Utility will not contract out maintenance and conversion work normally performed by the employees covered by this agreement which would result in unemployment of regular employees, or if any regular employee is unemployed.

ARTICLE V - GRIEVANCE PROCEDURE-ARBITRATION

A. Grievance - Definition and Procedure: A grievance is defined as a dispute between the Utility and an employee (or employees), or the Local Union concerning the interpretation or application of this Agreement.

1. A grievance shall not be in existence until a request by an employee to the City's Personnel Committee Chair or Utility Manager on a matter constituting a grievance has been denied, or ignored for one (1) week after it is presented.

2. First Step: The Steward (who shall be an employee of the Utility) may attempt to settle the grievance of any employee directly with the Manager.

3. Second Step: If the grievance is not adjusted by the Manager to the employee's satisfaction within the one (1) week after it is presented in the First Step, the Union Business Agent may present the grievance in the Second Step by reducing the grievance to writing and mailing it to the Personnel Committee within ten (10) working days after the decision of the Manager . . .

7. If the grievance is not called to the Utility's attention at the Second Step of the grievance procedure within thirty (30) calendar days after the cause for such grievance develops, it shall be deemed not to exist.

B. Arbitration:

. . .

2. . . . Upon one party notifying the other in writing of an election to refer a matter to arbitration, the parties shall meet within ten (10) days to select an Arbitrator from said panel. Each party shall strike two names alternately, with the party requesting arbitration striking first and the remaining person shall be the Arbitrator . . .

. . .

ARTICLE VI - CLASSIFICATION AND WAGES

A. . . . Nothing herein contained shall prevent the Utility from changing operating and production methods or adopting new methods or creating new occupational classifications or new or changed methods . . .

. . .

ARTICLE VII - SCHEDULE OF HOURS

A. Eight (8) hours shall constitute a regular days work and five (5) days, beginning Monday morning and terminating Friday evening, shall constitute a weeks work, except as mutually agreed otherwise.

. . .

ARTICLE VIII - SENIORITY

A. The seniority of an employee is defined as the length of the employee's employment starting with the employee's date of hire, or rehire after loss of seniority, and shall be given due consideration in connection with layoffs, re-employment, promotions and demotions.

. . .

F. An employee shall cease to have any seniority if the employee:

. . .

3.Following a layoff due to lack of work, the employee does not acknowledge within five (5) days the Utility's request that the employee return to work. . .

4.After a layoff, is physically fit and does not return to work within fifteen (15) days after requested to do so . . .

H. When the Utility decreases the work force, employees with the least seniority in classification amongst the employees who are qualified for the work available shall be laid off first on fifteen (15) days written notice. Recall shall be in reverse order provided that employees recalled shall be physically fit and qualified to perform the available work . . .

ARTICLE IX - VACATION, SICK LEAVE,

LEAVE OF ABSENCE

A. All regular employees covered by this Agreement shall be entitled to vacations with regular pay each calendar year in accordance with the following rules and schedules:

. . .

Part-time employees will receive vacation pro-rated as per time worked.

. . .

ARTICLE X - SAFETY AND WORKING RULES

A. When doing maintenance work on live equipment of 750 volts or over, it shall be the general practice to have at least two qualified employees working on such equipment.

. . .

ARTICLE XI - HOLIDAY CLAUSE

. . . Part time employees will receive holiday pay prorated as per hours worked the three months immediately preceding the holiday.

. . .

ARTICLE XIII - HOSPITALIZATION/SURGICAL PROGRAM

A. . . . Premium payments will be prorated for regular part-time employees

. . .

4. Since 1964, the contract has contained the provision now set forth in Article IV, Subsection A(10): "The Utility will not contract out maintenance and conversion work normally performed by the employees covered by this agreement which would result in unemployment of regular employees, or if any regular employee is unemployed." In 1980, the City proposed to reorganize portions of the collective bargaining agreement, including the establishment of a separate Management Rights clause, with a broader provision reserving to management the right to "Contract out for goods and services." The Union opposed this proposal, and the parties ultimately settled the 1980-81 contract by establishing the separate Management Prerogatives clause, but without the broader language on contracting out.

5. The Union was originally certified as the exclusive bargaining representative for "all regular employees (exclusive of clerical employees and superintendent) of the Medford Electric Utility" in 1964 (Dec. No. 6734). Two years later, the parties stipulated to an amendment of the certification to include office clerical employees (Dec. No. 6734A). During the periods relevant to this dispute, the office clerical employees of the Utility were Cashier Cynthia Jackson, and Computer Operators Cynthia Pernsteiner and Debra Pernsteiner.

6. In January of 1991, the Wisconsin Taxpayers Alliance issued a study entitled "Classification, Compensation and Job Descriptions of Nonrepresented Employe Positions in the City of Medford". The report recommended abolishing the separate utility commission and bringing the utility under the direct control of the Common Council, as well as merging the clerical and financial operations of the Utility with those of City Hall.

7. Sometime early in 1992, the City contacted the accounting firm of Anderson, Tackman & Company (AT) to study combining clerical and financial operations of the City and its Utility. In April of 1992, AT started to accumulate data on these operations. Included in the data collected by AT were job descriptions for City Hall and Utility employes, a copy of the WTA study and a four week time utilization study. For the period from April 15 through May 15 of 1992, City Hall and Utility employes completed forms documenting the tasks performed during the work day. The then incumbent City Administrator/Clerk/Treasurer, William Mattson, submitted the completed time utilization forms to AT in a letter dated May 18, 1992. In that letter, Mattson criticized the content of the forms:

> The Electric Utility forms, with the exception of Manager Frey's, do not seem to breakdown their work adequately. Please let me know if you will need new surveys from these E.U. employees that are broken down more comprehensively.

8. In a letter to Michael Frey, the City Utility's Manager, dated June 10, 1992, Mattson stated that AT wished to produce "an amended time study for a period of two weeks." Mattson stated the basis for the amended study thus:

> The reason for the auditors request for additional time study documentation from said employees is due to their previous time study documentation having been too non-specific in nature with more similarities to a general job description than to specific documentation of how actual time is being spent each day . . .

9. Frey received an unsigned memo objecting to this amended time study. That memo provoked, on June 17, 1992, a written response from Mattson to City Utility employes which mandated a prompt response to the amended time utilization study, and concluded:

> There will be no negotiation on this matter as the requested task is neither hazardous, unethical nor illegal and is required in order to receive a valid benefit from this study which resulted from a specific recommendation of the Wisconsin Taxpayer's Alliance approved by the Common Council.

10. On June 22, 1992, Mattson sent the amended time utilization survey forms to AT. After receiving these forms, AT conducted an on-site audit of eight positions involved in the bookkeeping and financial operations, four at the City Utility and four at the City Hall. The four Utility positions were those occupied by Frey, Jackson and the Pernsteiners. The four City Hall positions were occupied by Mattson, Executive Secretary Virginia Brost, Deputy City Clerk Donna Goodman and Staff Accountant Samy Abadeer.

11. The AT employe with primary responsibility for the on-site audit was Duane Zaborowski. His field notes made during the on-site audit process indicate that among the options he considered for making the City and Utility accounting functions more efficient were merging "payroll to one department head, either City or utility," and hiring "additional staff to ease workloads." At one point in the on-site audit process, Zaborowski's review of the accounting cycle convinced him that combining City Hall and City Utility staff would not cut overall costs. Sometime in September or October Zaborowski completed the on-site observation process.

12. Sometime after completing his on-site audit, probably in September or October of 1992, Zaborowski discussed the audit process with Frey and with Cynthia Pernsteiner. Zaborowski indicated to them that he thought certain accounting work might flow from the City Hall to the City Utility because employes at the City Utility were performing certain functions well with which other departments were having difficulty. Part of the reason for Zaborowski's opinion was that the City had installed a new computer system at both the City Hall and the City Utility. The City Utility had, however, installed the new system before City Hall, and the City Utility in the fall of 1992, was more adept at handling the new system than the City Hall was.

Difficulties within City Hall also came to impact on the ability of City Hall employes to assume additional work. In September of 1992, the City terminated Mattson's employment, and the resulting vacancy complicated the performance of City Hall accounting functions. To cover for Mattson's absence, Goodman continued to cover her own duties and those Clerk/Treasurer duties formerly assumed by Mattson. The City did not fill the position vacated by Mattson.

13. On January 15, 1993, AT submitted its completed study to the City. Its study includes the following provisions:

CITY OF MEDFORD
APPROACH TO MERGING THE ELECTRIC UTILITY AND CITY OFFICES

> We have been engaged by the City of Medford to study the clerical and financial operations of the Clerk/Treasurer's and Electric Utility's offices for the purpose of recommending the best way to merge the two offices totally or in part. The issue developed out of a study of the organization and administration of the Medford City Government by the Wisconsin Taxpayer's Alliance in September 1990 . . .

OPTIONS AVAILABLE

> As information was gathered related to the various job positions and the organizational structure of other city electric utilities, the following three alternatives to the merger process were identified:

- No merger attempted - continue operations as in the past.
- Perform a partial merger of selected activities.

- Completely merge all accounting work into one location.

. . .

OTHER CONSIDERATIONS

STAFFING: Staffing needs may change based upon the action taken by the City's common council. At the present time, the Utility is very adequately staffed, having excess staffing of approximately a half-time position. In addition, implementation of automated remote meter reading should substantially reduce the time requirements of the Cashiers during the billing process. This could easily amount to a half-time position. On the other hand, City Hall is currently understaffed with the administrator position being vacant. We anticipate that it will be necessary to hire another individual at City Hall. This could be another administrator, but more likely it should be a data entry person, or an entry level secretary/receptionist. Adoption of either merger options two or three would require that a reorganization of staff positions be performed. The reorganized staffing needs of City Hall could be met through the use of the existing staff of both City Hall and the Electric Utility . . .

FINAL RECOMMENDATIONS BASED ON OUR STUDY

1. We recommend that the City initially implement option two, a partial merger of City Hall and Electric Utility. The merger should include the following processes: payroll, vendor accounts payable disbursements, general ledger, bank reconciliation and financial statement preparation.

The payroll responsibilities should be shifted from the Electric Utility Bookkeeper to City Hall staff, with the Electric Utility payroll becoming a part of the City payroll instead of being a separate payroll . . .

The transfer of the vendor accounts payable disbursements, general ledger, bank reconciliation and financial statement preparation would require transferring the Electric Utility operating account to the City's records. The next step would be to create the Electric Utility's chart of accounts on the City's computerized financial

system. The purchasing, receiving, invoice processing would be handled in the same fashion as for other City Departments.

. . .

The actual transfer of general ledger processing is relatively simple after the payroll and disbursement processing has been completed by the City Hall staff. The only portion of the cash activities of the utility not transferred under the partial merger is actual collection of utility billings and subsequent deposit into the bank accounts . .

We recommend that the Electric Utility fixed asset detail records and related work order and retirement processing continue to be maintained by the Electric Utility Manager, Mike Frey. These records are very detailed and very accurate. We feel that current City Hall staff does not have sufficient time or the expertise necessary to handle these aspects of the Electric Utility plant and work order accounting process . . .

2. We recommend that the City not hire a replacement administrator. The benefits to the City outweigh the costs . . .

3. A review of the Electric Utility billing process should be performed. Although our time study results indicated minimal slack periods in the Electric Utility Cashier positions, this information is not consistent with the anticipated reductions in staff hours projected if the remote reading system is implemented. The projected reduction is only thirty hours per month, or a ten percent reduction in the Cashier's time. We anticipate that the reduction in staff hours will be substantially greater based on the results of the time sheet analysis. Implementation of the remote meter reading process and the resulting reduction in both the data inputting and verification process should reduce the need for two Cashiers. In addition, many of the utilities we contacted and those we have audited in the past had a smaller staff even without automated reading. This would require a reallocation or reduction of one of the Cashier's positions. . .

4. We recommend that ultimately, the City should totally merge the Electric Utility accounting staff into the City's finance department. The overall goal would be to save time and money and improve financial reporting. We believe that a complete merger should require a total staff of six individuals in the combined City Clerk's and Finance department compared to the current seven

positions in the separate departments. The utilization of remote meter reading, including electronic transfer of readings from the meter reader to the computer system, a process that requires no physical input time and no input errors, could reduce staff requirements by another one-half position.

Under the full merger the Electric Utility's remaining bookkeeping, billing and cashier functions will be moved under the control of the Finance department. The utility billing and collection function should be in the same location as the City's Finance department and City Clerk's office. The Finance department would be responsible for the manual data entry/automated remote entry of meter readings, calculation of bills and reports and mailing of the bills. A common cashier function would be provided for both City and Utility cash collections. The cashier function would be staffed by the City Clerk's office. Actual posting of Utility cash collections to customer accounts would be performed by the Finance department.

. . .

CONCLUSION

We feel the implementation of the above merger and other recommendations, partially or fully, will benefit the entire City through time and cost savings, elimination of duplication and inconsistency among City policies, more effective administration and improved financial reporting. Some of the recommendations will be easy to implement, whereas, some recommendations will require additional analysis by the City and may take two to three years to implement. Our experience and study has shown that the City Hall and Utility department administrative and accounting operations are most effective when they are one unit.

14. AT's report and recommendations became a subject of some controversy. The study was addressed in local newspaper articles and at common council meetings. On February 5, 1993, Frey sent a letter to Dolores Meyer, Medford's then-incumbent Mayor, addressing the controversy over the study. Frey included in this letter the following:

> 1. Why weren't the employees who contributed to the study allowed to review a draft of the study before the final draft was presented to the City? Duane had emphasized to me that this was important . . .

> 2. Why does the study differ substantially from what Duane had expressed to me and others? In discussions with Duane he indicated he would be recommending that, other than payroll, which would be transferred to the City, most operations would remain basically the same and staffing at the Electric Utility would probably be increased along with transferring some work to the Utility from the City. The final report is a complete turnaround from this.
>
> 3. Why does the study suggest that current staff at the City is qualified to fill the positions recommended in the study, namely that of Finance Director? In my discussions with Duane the competency of city staff to fill such a position was questioned . . .
>
> > While changes can be expected in the final draft of a study such as this, one questions the complete turnaround on these issues. What outside influences caused these changes or was I intentionally mislead (sic) while the study was being prepared?
> >
> > . . .
> >
> > The existing atmosphere of suspicion and mistrust needs to change.
>
> . . .

15. While the controversy over the merger study was developing, the parties were engaged in bargaining over a successor to their 1990-92 collective bargaining agreement. The Union had initiated the bargaining for that agreement with a letter dated August 28, 1992. On February 17, 1993, the Union and the City reached tentative agreement on a contract for the period November 1, 1992 through October 31, 1994. The February 17, 1993 tentative agreement was not executed as a complete collective bargaining agreement until August 31, 1993. In their bargaining for the 1992-94 labor agreement, the issue of work transfer between the City Utility and the City Hall was not addressed.

16. In March of 1993 the Common Council approved the transfer of City Utility payroll to the City Hall effective the following April 1. The actual transfer was not implemented until August 1, 1993. Throughout the remainder of 1993, the City undertook efforts to move general ledger work from the Utility to City Hall in the hope of implementing the transfer in January of 1994. Sometime in the Spring of 1993, the City hired Rita Tischendorf to serve as a City Hall Receptionist. Sometime in August of 1993, the City hired Debbie Schaefer to serve as Abadeer's assistant.

17. The issue of potential overstaffing at the Utility was considered by the Common Council throughout 1993. The Union learned of these deliberations, and communicated its concern

to the City. William R. Lewis, the Union's Assistant Business Manager, in a letter to City Mayor Dolores Meyer dated July 15, 1993, voiced the Union's concerns thus:

> It has come to the Union's attention that it may be the City's intention to transfer some of the present duties normally performed by the IBEW Union Office Employees at the City Electric Utility to some other City Department.
>
> Please either verify these rumors or deny them . . .

The City's labor counsel, Jeffrey T. Jones, responded to this letter in a letter dated July 19, 1993. Jones stated:

> The City is considering transferring the payment of Utility bills to the City Office. Such action would be in accord with a recommendation from the City's accountants to increase efficiency. Such action would also be in accord with ... Article IV, Management Prerogatives ... (and) Article VI, Classifications and Wages ...

Lewis, in a letter to Jones dated August 13, 1993, stated: "The Union would like to remind the City that anything involving the Terms and Conditions of employment are negotiable issues . . ." Jones responded to Lewis in a letter dated August 16, 1993, and stated: "(T)he Wisconsin Employment Relations Commission has recognized that the duty to bargain on mandatory subjects does not extend to matters already addressed in a Labor Agreement . . ." Lewis responded with a letter to Meyer, dated September 27, 1993, which stated:

> It is the Union's position that any transfer of work from the Medford Electric Utility Office employees to other City Departments is a violation of our present Labor agreement.
>
> Therefore, we request the City to stop any transfer of work. If the City does transfer work, the Union will file a grievance.

18. On October 13, 1993, the City called a meeting to address certain issues arising from the ongoing partial merger process, including the impact of the recommendations on current staff. Jones, Meyer, various Common Council members, Frey, Richard Haley, the Union's Business Manager, and certain Utility employes attended this meeting. Common Council minutes from that meeting state:

> Mayor Meyer then asked Jeff Jones of Ruder, Ware & Michler, S.C. to speak to the issue of possible jobs lost. Mr. Jones stated that the IBEW has stated they will file a grievance if the City proceed with

> the transfer. He stated that we have the right under the management rights clause of the union contract to transfer duties to effect the most efficient operation of the City. There is no prohibition in the contract. It would be a different situation if the City were contemplating subcontracting the work out to another firm.
>
> Mr. Haley of the IBEW said the problem is that the City would be taking bargaining unit work away from union employees. He feels this would be a violation of the contract. Mr. Jones asked him under what provision this would be a violation, and Mr. Haley replied because of past history (who did the work in the past). Mr. Jones then replied that just because the City have (sic) not exercised our management rights in the past does not mean that the City has waived them. Mr. Haley then stated that the union's position and the City's position differ greatly. The union employees have done this work in the past and will continue to do it until it is negotiated differently.
>
> Mr. Haley then asked if the work goes to City Hall, would any of the Utility workers be transferred. Mr. Jones stated that issue has not been addressed. Mr. Zaborowski stated that if the remote meter reading had done what it was supposed to do, some time would have been eliminated from the staff time at the Utility. He further stated that if all the duties were transferred to City Hall (including billing and collections), then it might be prudent to offer the jobs to the Utility staff. However, that is not what is being proposed.
>
> Ms. Pernsteiner stated that what she found upsetting about the merger study is that she feels no one knows exactly what the Utility staff does and how hard they work. The Utility is now moving to Demand Side Management, and that will take even more time. There followed some discussion on how the original study was handled, ending in Ms. Pernsteiner stating that she wanted it known that she and her staff are cooperative and do all the work that is assigned them . . .

19. Effective January 1, 1994, general ledger duties, and certain billing and bookkeeping functions formerly performed at the Utility were moved to the City Hall. During January problems surfaced regarding Abadeer's job performance. By February of 1994, Abadeer's and Schaefer's employment with the City had been terminated.

20. On January 12, 1994, the Union filed the following grievance (the January grievance):

> In accordance with the present Labor Agreement the Union presents the following grievance into the 2nd Step of the grievance procedure:
>
> > a) Cynthia S. Pernsteiner, Debbie A. Pernsteiner, Catherine J. Jackson positions of Computer Operator, and Cashiers.
> > b) Transfer of Bargaining Unit work to non-bargaining employees.
> > c) Transfers of bookkeeping and billing duties.
> > d) January 1, 1994.
> > e) Article I, Article IV, and any other articles which may be applicable
> >
> > We stand ready to meet on the above matter at a mutually agreeable time and date.

21. On February 17, 1994, the Personnel Committee denied the grievance. Jones advised Lewis of this denial in a letter dated February 22, 1994. He also advised Lewis that the City Utility saw "an issue as to the timeliness of the grievance," and that the City Utility would agree to proceed directly to arbitration of the grievance. Haley wrote to Jones on March 2nd, proposing a voluntary resolution:

> In an effort to settle the above referenced grievance prior to continuing on to arbitration, the Union, without precedence or prejudice to its position, would consider the matter resolved if the City of Medford would reassure the Union that the transfer of work from the Medford Electric Utility will not result in the loss of employment or a change in the condition of employment of any of the current employees.
>
> If the above resolution is not agreeable to the City, then the Union and the City would ask for an agreeable member of the Wisconsin Employment Relations Commission to be selected to preside over the arbitration. If the City cannot agree to the aforementioned selection process, then the Union will ask for a panel of arbitrators, as per the present Labor Agreement.

Jones advised Haley, in a letter dated March 11, 1994, that the "Personnel Committee voted to reject the proposed settlement . . ."

22. In a letter dated March 23, 1994, the Union filed a request for grievance arbitration with the WERC, and requested "a panel of seven WERC Staff Members for the parties to choose from." Marshall L. Gratz, an Attorney/Team Leader for the WERC, stated, in a letter to Haley and to Jones dated March 29, 1994, the following:

> . . . I explained to Mr. Haley when I called him yesterday, that the Commission provides only panels of outside ad hoc arbitrators, but not of WERC staff members. Mr. Haley stated (and the parties' correspondence confirmed) that Local 953 and the Utility have agreed to utilize a WERC staff arbitrator. I told him that the Commission attempts where possible to honor joint requests of the parties for assignment of a particular staff arbitrator and that I could provide a list of the entire staff of the Commission to facilitate joint request discussions between the parties. He asked that I provide such a list and that the case be held in abeyance pending the results of the parties' efforts to develop a joint request concerning the staff arbitrator . . .
>
> As requested we will hold this case in abeyance in order to allow the parties to determine whether they can mutually agree to make a joint request concerning the staff arbitrator to be assigned in this case. If the parties are unable to reach an agreement in that regard, our agency will designate the arbitrator from among its staff members . . .

23. Haley did not contact Jones to set up a procedure to select a WERC staff arbitrator. Haley testified that he phoned Jones sometime in April of 1994, and asked Jones if the City Utility was contemplating laying off any employes during the remaining term of the 1992-94 labor agreement. He testified that Jones responded in the negative, and that the two of them discussed holding the grievance in abeyance so the matter could be addressed in collective bargaining for a successor to the 1992-94 labor agreement. Jones denies ever receiving such a phone call.

24. On July 25, 1994, the Common Council's Personnel/Finance committee met. At that meeting a number of items regarding the ongoing merger of City Hall and City Utility bookkeeping functions were discussed. At this meeting, the committee voted on a number of proposals relating to the ongoing merger. The Committee voted unanimously to make the following recommendations to the Council at its meeting the following evening:

- to have AT provide additional data entry and supervisory services in order to complete the changeover to the new computer system;
- to continue on-site processing of vendor disbursements and posting of receipts by the City, but under AT supervision for a period of up to six months; and
- to engage AT to assist with monthly ledger activities for up to six months.

The Committee also voted, with alderman Fred Gelhaus the sole dissenting vote, to make the following recommendations to the Council:

- to engage AT to provide payroll processing services from October 1, 1994 through December 31, 1995; and
- to engage AT to perform a cost analysis to determine the most cost-effective method to do utility billings.

During the discussion of these items the possibility of layoffs at the City Utility was addressed. Either during that discussion, or possibly during discussion of these items at the following evening's Council meeting, Alderperson Arlynne Parent asked if a layoff of two of the three clerical employes would break the Union. Chairperson May Bix responded that the Union included both clerical and electrical employes, so that a layoff of two clerical employes would not destroy the Union.

25. The Common Council met on July 26, 1994. Utility clericals Catherine Jackson and Debra Pernsteiner attended this meeting. After completion of the discussion on the recommendations of the Personnel/Finance Committee, Jackson was permitted to speak. She stated she understood the recommendation to send work to AT turned at least in part on the inability of City Hall personnel to complete those duties. She then suggested to the Council that if the City Hall needed assistance, payroll work should be sent back to the Utility, where Cynthia Pernsteiner had once performed it. Bix reacted in anger, asserting that Pernsteiner drew overtime for doing payroll work. Jackson denied this. The exchange between Bix and Jackson became sufficiently animated that the Mayor had to intervene to call the meeting back to order. The Common Council voted to accept the recommendations of the Personnel/Finance Committee.

26. In August of 1994, the Union notified the City Utility of its intent to amend the terms of the 1992-94 labor agreement. Included among the Union's initial proposals was the following:

> 2. <u>Article IV, (A) 10.</u>
>
> The Utility will not contract out any work normally performed by the employees covered by this agreement which would result in unemployment of regular employees, or if any regular employee is unemployed.

27. The parties' initial collective bargaining session took place on October 5, 1994. The City Utility's initial proposal did not contain any provision concerning the issue of subcontracting. The Union stated at that session that Proposal 2 was designed to clarify its reading of Subsection A, 10. The City Utility responded that subcontracting was within its management rights, and the parties agreed that this issue could itself cause an impasse. The City Utility suggested that the parties seek arbitration, but the Union suggested that mediation would be appropriate, and the City

agreed.

28. On December 8, 1994, the parties participated in mediation with a WERC staff member serving as Mediator. At the start of the December 8 mediation, the City Utility made the following proposal concerning subcontracting:

> K. To subcontract for goods or services. However, in the event subcontracting would directly result in the layoff of bargaining unit employees and is work regularly performed by bargaining unit employees, the City will notify the Union and bargain with the Union regarding the decision to implement such subcontracting, if requested.

The City drew this proposal from its labor agreement covering Department of Public Works employes. Neither party would agree to the other's subcontracting proposal as the mediation progressed. At one point in the mediation, the Union asked the Mediator to ask the City Utility representatives if they contemplated laying off or reducing the hours of any Utility employes. Jones informed the Mediator that no layoffs were currently being considered, but that there could be no guarantees made for the entire duration of the agreement. The Mediator communicated the Utility's response to the Union. The Union understood the mediator to say that the City Utility had no present intent to layoff, and it withdrew its subcontracting proposal. When the City learned the Union's subcontracting proposal had been withdrawn, it dropped its subcontracting proposal. With this issue off the table, the parties were able to reach a tentative agreement.

29. The Mediator conducted a joint session between the parties to confirm the terms of the tentative agreement. Neither party raised any question regarding the subcontracting proposals or regarding the layoff of any Utility employe. The Union neither sought nor received a guarantee against a layoff or a reduction in hours. Neither party sought any written statement from the other on this issue. The Union ratified the tentative agreement that evening.

30. On February 13, 1995, AT issued its report regarding the most cost effective method to perform Utility billing. Its report states, among other points, the following:

> AVAILABLE METHODS TO ACCOMPLISH THE BILLING
>
> The first step involved determining the potential methods available to accomplish the utility billing process. The available alternatives are:
>
> - Maintain the current status quo
> - Make the utility billing function a part of the City Hall

finance function

- Have the utility bills generated via a service bureau approach utilizing the same software currently utilized by the utility . . .
- Have the utility bills generated via a service bureau approach utilizing a different utility billing software package.

Each above option has its strengths and weaknesses . . .

The second option will not be covered in detail since current union contract provisions may prohibit this type of work transfer. In addition, the current physical layout of the City Hall facility is not conducive to this alternative . . .

THE CITY'S NEXT STEP

Based on the information provided by our analysis, the City must decide how it chooses to restructure the utility billing process within the City. The choices are:

- Modify the current status quo method to consider and implement our observations. Significant potential exists for reduction of needed staff time and reallocation of that time for other City purposes. We conservatively estimate at least 660 hours. A potential goal would be the reallocation of an entire staff position. We do not know if this would be possible though. Ultimately, we feel that the City would be best served if the utility office and city hall offices could be in the same building. This would allow easier reallocation of staff time made available by making better use of the utility billing software . . .

31. In February of 1995, the City published a "Notice of Public Meeting" of the Public Utilities Committee to be held on February 20, 1995. Included on the notice was the following:

> 4. DISCUSSION: Electric Utility Cost-Effective Report prepared by Anderson, Tackman & Company

The three Utility clerical employes learned of this meeting and attended it. The Committee voted to go into closed session before discussing Item 4.

32. In a letter to Bix dated February 23, 1995, Haley advised her that the Union was aware of the contemplated changes in the Utility's operation, and believed that the City was both bound to bargain before making any changes and subject to a grievance if it proceeded. Haley also requested the production of information related to the pending arrangements with Anderson Tackman, and asked for a meeting to discuss the matter:

> It has come to our attention that the City of Medford may be contemplating changes in the work hours of clerical employees represented by IBEW, Local 953 or other changes in the terms and conditions of their employment. It is further our understanding that the City has consulted with Anderson Tackman & Company concerning these contemplated changes. These contemplated changes in employment may violate the terms and conditions of the collective bargaining agreement now in effect between IBEW, Local 953 and the City of Medford.
>
> In order to carry out our obligation as bargaining representative of City of Medford Electrical Utility employees and to investigate possible violations of the Union's contract with the City of Medford, we hereby request a copy of the report prepared by Anderson Tackman & Company referred to in the Notice of Public Meeting for February 20, 1995. We also request any correspondence, proposals, reports or other documents between the City of Medford and Anderson Tackman & Company which concern changes in the terms and conditions of employment of employees whom we represent at the Electric Utility or concerning charges which may impact on their terms and conditions of employment.
>
> Please provide the information within the next week, that is on or before March 2, 1995.
>
> We would further like to set up a meeting with the City to discuss the proposed changes after we have had an opportunity to review the Anderson Tackman Report. I am available March 6, 7, or 10, 1995. Please let me know which of these dates and times are best for you.

33. The Public Utilities Committee met on February 28, 1995. Haley and the three Utility clerical employes appeared at this meeting. Shortly after opening the meeting, however, the Committee voted to go into closed session to consider AT's February 13, 1995 report on City Utility billing. Haley asked the committee if he could attend the closed session. He was informed he could not. Haley and the clerical employees then left. Committee minutes from this closed session state that the Committee unanimously agreed to recommend that the Council accept and implement

the AT report of February 13, 1995. The minutes further detail the following:

> Parent moved, Thielke seconded a motion to recommend to Council to lay-off one half-time cashier effective April 1, 1995 (the effect of the motion is to reduce one full-time cashier to half-time status effective April 1, 1995); and on or before May 15, 1995, the Public Utilities Committee and the Electric Utility Manager will re-evaluate the situation with a view to possibly laying-off the entire cashier. Roll Call Vote: Unanimously Aye. MOTION CARRIED.

These recommendations were to be placed before the Council at a meeting on March 7, 1995.

34. In a letter to Haley dated February 28, 1995, Jones stated:

> We are responding on behalf of the City . . . to your February 23, 1995 letter...
> We are presently reviewing your request and will shortly be responding to that request. We are unaware, however, of any charges which may impact upon the employees' terms and conditions of employment.
>
> You had also requested to meet with City officials to discuss the proposed changes after you have had an opportunity to review the Anderson Tackman report. You had proposed the dates of March 6, 7 or 10, 1995. The undersigned has a conflict with the March 6 and March 10 dates and the March 7th date is the Common Council meeting date. We would propose March 9, 22, 23, or 29, 1995 . . .

35. On March 1, 1995, the City mailed the following items to Jones: (1) the January 15, 1993 AT report; (2) the February 13, 1995 AT report; (3) the minutes of the February 20, 1995 closed session of the Public Utilities Committee; and (4) the minutes of the open and closed portions of the February 28, 1995 Public Utilities Committee meeting.

36. On March 2, 1995, the Union's labor counsel, Marianne Goldstein Robbins, responded to Jones' letter of February 28, 1995. That letter states:

> Given the developments of Tuesday, February 28, 1995, we find your response, on behalf of the City of Medford, totally inadequate . . . Your response . . . did not provide a copy of the report and stated "we are unaware . . . of any charges (sic) which may impact on employees terms and conditions of employment."
> On the very same date, the City met in closed session and thereafter announced adoption of the Anderson Tackman report and, on that basis, announced that an employee within the bargaining unit . . . would be place on part-time status effective April 1, 1995. It further appears this employee may lose all employment in the future. Given

> the foregoing, a claim that the City is unaware of any changes which may impact on employees terms and conditions of employment appears disingenuous at best.
>
> In your letter, you declined to meet with the Union . . . before the next meeting of the Common Council. This is particularly unfortunate where the Union has appeared at two recent meetings of the Utility Committee . . . (and the) Union's requests to (be) heard at these meetings have been flatly refused . . .
>
> Given the foregoing, the Union requests that the City of Medford provide the Anderson Tackman report and all correspondence or other documents between Anderson Tackman and the City which, in any way, refer to the potential layoff or reduction in hours of employees within the bargaining unit or any changes in operations which could lead to such action, no later than Monday, March 6, 1995. Additionally, the Union demands to meet with City representatives on March 7, 1995, before the Common Council meeting . . . Lastly, the Union requires reassurance from the City that it will not implement any change in job status of employees represented by the Union until the Union has had an opportunity to review the documents requested and then explore with the City whether a mutually agreeable resolution of the issues concerning any possible change in job status can be reached by the parties . . .

Jones responded in a letter dated March 3, 1995, stating that his letter "was apparently misread," and stating:

> In our letter of February 28, 1995, we advised Mr. Haley that we were reviewing his request and would be shortly responding to that request. That statement was in response to Mr. Haley's first two requests. As noted in your March 2, 1995 letter, we also advised Mr. Haley that we were unaware of any charges which may impact on the employees' terms and conditions of employment. That statement was in direct response to Mr. Haley's third request. The statement was not in response, as stated in your letter, to Mr. Haley's request for the Anderson Tackman report, or a claim that the City was unaware of any changes which may impact on the employees' terms and conditions of employment.

Jones' letter also challenged the Union's view that its representatives had been "flatly refused" access to the Public Utilities Committee, and noted the impossibility of arranging a meeting of the

City with the Union on March 7, 1995. The letter continued:

> The action with respect to the reduction of the employee's work hours is not to take effect until April 1, 1995. Thus, there is ample time for City officials to meet with Union representatives to discuss the matter. We would propose the following dates for a meeting: March 9, 20, 22 or 23 . . .
>
> In response to Mr. Haley's request, enclosed please find the Anderson Tackman report of February 13, 1995, and a second report from the same firm dated January 15, 1993. These are the only written documents between Anderson, Tackman and the City of Medford that we are aware of which fall under Mr. Haley's request . . .

Goldstein Robbins responded in a letter dated March 6, 1995. That letter confirmed the March 20 meeting date and stated:

> . . . (W)e believe it is the Common Council's obligation to take no action on the Anderson Tackman report nor to take any action which will alter the terms and conditions of employees represented by the Union at the March 7, 1995 meeting . . . We further request that the Common Council take no action to implement the Anderson Tackman report . . . until after the parties meet on March 20, 1995 and have an opportunity to fully explore the matter.

In a letter to Goldstein Robbins and to Haley dated March 7, 1995, Jones noted that the Common Council would be "reviewing and possibly acting" upon the reduction in Jackson's hours, and that Haley had been granted fifteen minutes of time "to speak to the Council prior to the Council rendering a decision on the matter." The letter also stated:

> In speaking with Mr. Haley with regard to this matter, we understand that he will not be raising any legal or contractual issues with the Council at tonight's meeting with respect to the proposed reduction in work hours. Rather, he will be asking the Council to consider alternatives to a reduction in hours. Any legal and/or contractual issues are to be discussed at the March 20, 1995 meeting . . .

37. The Common Council met on March 7, 1995. The minutes of that meeting summarize the deliberations on the reduction in hours issue:

> Chairman Parent moved to accept the Committee on Public Utilities'

> unanimous recommendation (therefore no second necessary) to reduce one full-time cashier to half-time status effective April 1, 1995; and on or before May 15, 1995, the Public Utilities Committee and the Electric Utility Manager will re-evaluate the situation with a view to possibly laying off this cashier.
>
> Mayor Meyer recognized Bruce Michalke, the Assistant Business Manager for Local #953 of the International Brotherhood of Electrical Workers representing the clerical employees through the WRC. Mr. Michalke was respectfully requesting that the City not
>
> take action on this item at this time. He went on to state that his office had tried to schedule meetings with the Personnel Committee. He noted that a meeting has now been scheduled for March 20, 1995 and thus is requesting that no action be taken until said meeting has been held. He is hopeful the Personnel Committee and Union can come to a mutually agreeable solution to the problem at that time.
>
> Mayor Meyer responded that the City would like to implement this by April 1, 1995 and that 15 days' notice needs to be given prior to the lay-off. She noted that the original Anderson Tackman & Company report has been discussed for two years. Although not recently, the City has met with the employees regarding this issue. She added that the Public Utilities Committee has looked at this long and hard and has now made a recommendation to the Council.
>
> Alderperson Gelhaus stated that he would like to hear all the facts and points of view before voting on this important issue.
>
> With that explanation, Gelhaus moved to table.

Gelhaus' motion failed, and the Council voted to accept the recommendation of the Public Utilities Committee.

38. On March 8th, a letter from the Personnel Committee to Catherine Jackson advised her of a reduction in her work hours:

> The Common Council of the City of Medford has directed that the hours of one clerical employee at the City of Medford Electric Utility be reduced to half-time. The Council's directive was in accord with

a recommendation received from an outside consulting agency.

> Of the Utility's clerical employees, you possess the least seniority. By this memorandum, your are advised that your work hours will be reduced to half-time effective April 1, 1995 . . .

39. Also on March 8th, Robbins submitted an additional request for information, demanding the production of any contracts and invoices between the City and Anderson Tackman for AT's work on the Utility payroll. Jones responded on March 14th, providing Haley with the proposal submitted by AT to provide payroll service to the entire City.

40. The Union filed a grievance challenging Jackson's loss of hours. Richard Haley, submitted the written grievance in a letter dated March 13, 1995 (the March grievance):

> This letter shall serve as the Step 2 written grievance concerning the reduction of work hours for Cathi Jackson . . . effective April 1, 1995 and the transfer of work outside the bargaining unit which is responsible for that work hour reduction. The grievance has been previously presented at the first step to the Utility Manager, March 1, 1995, and denied on March 1, 1995.
>
> On March 9, 1995, the Union was informed for the first time that Cathi Jackson's hours of work would be reduced from fulltime to part-time work. It now appears that this reduction in hours is the delayed result of the City's transfer of work previously performed by the Utility clerical staff to other city positions and the subcontracting of payroll work to Anderson Tackman. The transfer of bargaining unit work outside the bargaining unit to other city employees and to a subcontractor violated the parties' collective bargaining agreement, including Article I, Recognition And Coverage; Article IV, Management Prerogatives Subsection 10; Article VI, Classification and Wages; Article VII, Schedule of Hours; Article VII, Seniority and all other relevant contract provisions.
>
> The Union demands that Cathi Jackson be retained in fulltime status, that all work transferred out of the bargaining unit to City employees and to any subcontractor be returned to the unit and that Cathi Jackson be made whole for all losses as a result of the City's contract violation.

The parties were unable, during or after the March 20, 1995 meeting, to resolve the grievance. The payroll work authorized by the Common Council to be contracted to AT during the July 26, 1994 meeting is still being performed by AT, which ultimately was authorized to perform such work through January 1, 1997. The grievance was processed through to arbitration, and the Wisconsin Employment Relations Commission was requested to assign an arbitrator.

41. On March 15, 1995, the Union filed the instant complaint, alleging that the Respondent Utility had violated Sections 111.70(3)(a) 1, 3, and 4. Both the request for arbitration and the complaint of prohibited practices were assigned to Commission staff member James W. Engmann. Examiner Engmann subsequently resigned from the Commission's staff, and Examiner Jane B. Buffett was assigned as both Examiner and Arbitrator. The matters were consolidated for hearing and argument. After the close of the hearing, the parties submitted additional stipulated facts:

a. In November of 1995, the City of Medford extended its contract with the accounting firm of Anderson-Tackman & Company to perform the City's payroll work, including the Utility's payroll which had previously been performed by a bargaining unit member.

b. IBEW 953 was not given any specific notice that the City would be extending the Anderson-Tackman contract.

c. A written notice of the City Committee meeting, at which the extension of the Anderson-Tackman contract was discussed, listed the extension of the Anderson-Tackman contract as an agenda item to be discussed in open session. The notice was posted in the usual City public locations and a copy of the notice was also provided to the Electrical Utility where bargaining unit employees could have access to it.

d. The City maintains that the Anderson-Tackman contract was extended because the City Treasurer was not yet prepared to perform the work.

e. The City further maintains that the work will be transferred back to City Hall for completion by the City Treasurer on or about January 1, 1997.

f. IBEW maintains that the above information is relevant to the Examiner's decision since City witnesses testified at the prohibited practice hearing(s) that the work would be transferred back to City Hall for completion by the City Treasurer on or about January 1, 1996.

g. The City maintains that the information is not relevant to the Examiner's decision with respect to any substantive issues in this case.

42. On December 5, 1996, Arbitrator Buffett issued her Award, in which she denied the grievance. The initial portion of Arbitrator Buffett's discussion dealt with the timeliness of the January 1994 and March 1995 grievances. She concluded that the January 1994 grievance was clearly not timely, but that March grievance was timely. She then turned to the question of whether the Utility had the right to transfer bargaining unit work to the City, thus effecting the reduction in Catherine Jackson's hours, and concluded that it did. Arbitrator Buffett first addressed whether

Article IV, §A(10), limiting the Employer's right to subcontract "maintenance and conversion work" served to protect the bookkeeping work previously performed by Jackson:

> The issue on the merits of the grievance turns on the contractual propriety of Grievant's layoff. The parties' arguments pull a considerable portion of the agreement into dispute. The issue for decision turns, however, on Grievant's layoff. An examination of the grievance must start there. Subsections 2 and 7 of Article IV coupled with Article VIII, Section H govern the City Utility's authority to select employes for layoff. Article VIII, Section H requires that the employe with the "least seniority in classification amongst the employees who are qualified for the work available" shall be the employe selected for layoff. There is no dispute that Grievant is that employe, if the layoff itself can be considered appropriate.
>
> The Union challenges the propriety of the layoff primarily through the application of Subsection A, 10. Beyond this, the Union contends that agreement provisions read as a whole limit the City Utility's authority to reduce employe hours to avoid payment of contractually set wages and benefits.
>
> As noted above, Subsection A, 10 proscribes subcontracting which results in either of two contingencies. Both contingencies are, however, triggered by the contracting out of "maintenance and conversion work normally performed by the employees covered by this agreement." The parties do not dispute that the reference to "employees" is broad enough to cover clerical employees who have, since the 1966 labor agreement, been included within the scope of Article I. The parties dispute turns on whether the reference to "maintenance and conversion work" can be read to include clerical employees.
>
> The disputed reference cannot be considered unambiguous. There is no evidence of past practice to guide an interpretation of these terms. Resolution of the contractual ambiguity must turn on other indicia of the bargaining parties' intent.
>
> Relevant bargaining history viewed in light of other agreement provisions makes the City Utility's reading of Subsection A, 10 more persuasive than the Union's. The unit certified by the Commission in Dec. No. 6734 excluded clerical employes. Article I of the parties'

1964 and 1965 labor agreements reflected this exclusion. The parties first included clerical employes in their 1966 labor agreement. Subsection A, 10 appeared as Article III, Section 6 of each of these agreements. Its placement in the contract changed in the 1982 agreement, but its terms have never been altered. At its inception, and through one other agreement, what has become Subsection A, 10 did not apply to clerical employes. The City's attempt to broaden the scope of this provision in the 1982 agreement failed. The parties' mutual attempts to alter the terms of this provision in the bargaining for a 1995-97 agreement also failed. There has been, then, no express agreement to expand Subsection A, 10 to clerical employes.

The absence of express agreement on this point cannot be ignored on the facts posed by the grievance. As noted above, the references to "regular employee," "regular employees," and to "employees covered by this agreement" are broad enough to include clerical employes through the amendment of Article I in the 1966 agreement. These references, however, govern the scope of the contingencies Subsection A, 10 applies to, but do not broaden the reference to "maintenance and conversion work." This reference cannot be persuasively expanded to include clerical employes in the absence of the parties' express agreement to do so.

What evidence there is on the point indicates "maintenance and conversion work" has a meaning in utility contracts limited to employes who work with the transmission of electricity. More significantly, other terms of the parties' 1995-97 labor agreement support this view. Article VIII, Section B refers to "maintenance crews" in a context applying to line work and not to clerical work. Article X, Section A also refers to "maintenance work on live equipment" in a context applicable only to electrical work. Significantly, each of these provisions traces its roots to the 1964 labor agreement. Against this background, the absence of mutual agreement to expand Subsection A, 10 to clerical employes cannot be ignored. To ignore the history of Subsection A, 10 would create through arbitration a provision never achieved through negotiation. Subsection A, 10 must, then, be read to limit the City Utility's authority to subcontract regarding "maintenance and conversion work" only. This type of work is not covered by the work transfer or subcontract posed here, and Subsection A, 10 does not afford Grievant the protection the Union asserts.

> While the persuasive force of the Union's contentions cannot be ignored, the record will not support a conclusion that the City Utility violated the labor agreement by reducing Grievant's hours. The Union argues that the reference to "maintenance and conversion work" can "be viewed as all work which maintains present operations or is involved in converting . . . the means by which existing work is performed." This view stretches the terms broadly enough to cover the bookkeeping work at issue here, but is not well grounded in Subsection A, 10. The Union's view effectively covers duties typically performed by clerical employes, but makes the reference to "work normally performed" in Subsection A, 10 superfluous, since the "maintenance and conversion" reference would be broad enough to cover virtually all clerical work. As read by the City Utility, each word of Subsection A, 10 has meaning, since the "normally performed" reference states the specific type of work governed by Subsection A, 10.

43. Having concluded that Article IV, §A(10) did not include bookkeeping work within the term "maintenance and conversion work", Arbitrator Buffett considered the Union's argument that there was no general right to subcontract other work. She concluded that the contract did contain such a general right:

> The Union contends that even if Subsection A, 10 is read to limit the City Utility's right to subcontract certain electrical maintenance and conversion work, it cannot be persuasively read as a general grant of the right to subcontract. If, however, the City Utility has no such right, it is unclear what meaning is to be given Subsection A, 10. This aspect of the Union's arguments cannot, however, be meaningfully addressed in isolation from the remainder of its arguments, which question whether other contract provisions limit the City Utility's authority to transfer work to City Hall or to contract work with AT.
>
> The Union contends that a myriad of contract provisions, including Articles I, VIII, and any other provision establishing the wage and benefit package, preclude the undermining of the unit manifested by Grievant's reduction in hours. Underscoring this line of argument is, according to the Union, an implied covenant of good faith which underlies these agreement provisions. This argument has persuasive force. As a matter of contract interpretation, however, the argument points out the fundamental interpretive dilemma posed by the

> grievance, which is that the contract must be interpreted to give meaning to all of its provisions. The City Utility has, under Article IV, authority to control its operations and to alter the means by which work is performed. It also has, as noted above, the authority to layoff. The Union's arguments afford no guidance on how these provisions are to be given effect. As read by the Union, the wage and benefit package precludes
>
> Grievant's reduction in hours and serves effectively as a total ban on subcontracting. It is not apparent how this can be squared with the authority granted the City Utility under Articles IV and VIII, or with relevant bargaining history.

44. Having found that the collective bargaining agreement allowed the Utility to transfer bargaining unit work to the City, Arbitrator Buffett turned to what she termed "the most troublesome point raised by the Union", the assertion that the City had engaged in a bad faith effort to undermine and circumvent the wage and benefit provisions of the contract:

> This argument serves, however, as the preface to the most troublesome point raised by the Union. That argument focuses on whether the City Utility's actions manifest a bad faith attempt to circumvent the wage and benefit provisions of the labor agreement. As the Union aptly points out, indicia of bad faith can be found in the record. The City's concerns with the efficiency of the City Utility notwithstanding, the evidence offers no persuasive indication City Utility clerical staff were inefficient. To the contrary, Zaborowski's on-site audit led him to consider the transfer of work from the City Hall to the City Utility. How this consideration fell from AT's final report is not apparent, and affords a basis to question the City's good faith in reducing the role of the Utility in its accounting functions. To underscore this, the evidence is less than convincing that the City's attempts to centralize its accounting function have yielded any efficiency enhancement. The parties' October 8, 1996 stipulation indicates that City Hall is not yet capable of absorbing the Utility payroll.
>
> Beyond this, the Union forcefully points to evidence which appears to manifest ill will between City authorities and City Utility staff. Frey's February 5, 1993 letter eloquently states this problem. The problem underlies subsequent events, as manifested by the absence of communication between City officials and the Utility as the

merger process proceeded. The meetings leading to Grievant's layoff were closed, and Union attempts to secure information on that process met with something less than an open response. Jones' February 28, 1995 letter highlighted a typo from Haley's information request. Whatever is said of this technical response to the request, it manifests the less than open relationship between the parties. Beyond this, active ill will between City officials and Utility staff can be seen in Gelhaus' testimony and in the events of July 25 and 26, 1994.

The Union views this type of evidence to establish a type of bad faith which warrants a conclusion that the City Utility has deliberately undermined the collective bargaining agreement. While the evidence of ill will cannot be ignored, it is not of a type on which a contract violation can be based. Parent questioned, in July of 1994, whether Utility layoffs could break the Union. This comment stands alone as a question on the impact of the then-contemplated layoffs rather than as a manifestation of an anti-Union campaign. The acerbic confrontation between Bix and Grievant at the July 26, 1994 Council meeting manifests a depth of feeling, but that feeling has not been shown to be anything beyond a long-simmering distrust between certain City officials and the Utility staff.

The centralization of accounting functions at City Hall was a long-studied point, and affords a more reliable account of the City's actions than does the bad faith sketched by the Union. The Union asserts that the City deliberately sought to undermine unit employes' wages and benefits. The City's focus appears broader than that. That the City declined to replace Mattson's position underscores that its concern with wages was not limited to Union represented positions. The WTA study which initially posed the efficiencies of centralizing the City's accounting functions also highlighted that certain nonrepresented City employes earned more than comparable positions in comparable municipalities. While the Union accurately points out that the possibility of transferring work to the Utility did not find its way into the final AT report, it is no less true that the report left certain accounting functions at the Utility. The continuing contracting of Utility payroll work to AT is troublesome, but the personnel turn-over and reorganization of City Hall appear both unanticipated and disruptive to the merger process. On balance, the evidence supports the assertion that the City sought, throughout the partial merger process, to gain the efficiencies WTA and AT asserted

centralization would bring.

> The emphasis WTA and AT placed on the efficiency to be gained by centralizing accounting functions at the City Hall appears to have found a receptive audience among elected officials. That the City would be interested in consolidating central authority over City functions is not, standing alone, remarkable. That the Utility staff would fear such a consolidation of authority is also not, standing alone, remarkable. The evidence of personal ill will is as readily explained by the opposition City officials perceived from the Utility as by the assertion those officials deliberately set out to gut the Union's contract. The ill will came to the surface in the events preceding and following the initiation of the amended on-site audit. It is apparent Mattson and Bix perceived and resented active resistance from the Utility at this time. There is, however, no persuasive basis in the evidence to conclude this resentment was anything more than a reflection of their desire to pursue the reorganization initially suggested by WTA. Whether the partial merger implemented by the City violates the labor agreement must turn on whether the City's focus was not the purported efficiency of the centralization, but the evisceration of the collective bargaining agreement. The evidence on this point is troublesome, but indicates the City's desire to centralize its functions motivated its actions toward the Utility.

45. Based upon the foregoing analysis, Arbitrator Buffett denied the grievance in its entirety.

46. That the collective bargaining agreement authorized the City to transfer bookkeeping work from the City Utility to the City Hall.

47. That the collective bargaining agreement authorized the City to subcontract bookkeeping work to Anderson Tackman.

48. That the collective bargaining agreement authorized the City Utility to layoff employees and reduce employee hours.

49. That the collective bargaining agreement sets forth the criteria for selecting employees for full and partial layoff, and the procedures for recalling such employees.

50. That the collective bargaining agreement sets forth the benefits to be received by employees who are reduced in hours from full-time to part-time.

51. That the collective bargaining agreement fully addresses the impact of the decision to partially layoff Catherine Jackson.

52. That the parties negotiated over the issue of subcontracting unit work in their 1994 negotiations and reached agreement on that topic.

53. That the City did not have a duty to bargain over the issue of subcontracting bargaining unit work in February and March of 1995.

54. That the City did not have a duty to bargain over the impact of reducing an employee to less than full-time status in February and March of 1995.

55. That the scheduling of a meeting on March 20, 1995 to discuss the subcontracting of bargaining unit work and the partial layoff of Catherine Jackson was reasonable under all of the circumstances.

56. That the City did not unreasonably delay the production of information relevant to grievance processing and collective bargaining when it provided information relative to the decision to subcontract bargaining unit work and the partial layoff of Catherine Jackson on March 3, 1995 and copies of Anderson Tackman's proposal for performing services for the City on March 14, 1995;

57. That the partial layoff of Catherine Jackson was motivated by a desire to implement the restructuring proposed by the Wisconsin Taxpayers Alliance and Anderson Tackman studies.

58. That the partial layoff of Catherine Jackson was not motivated by hostility to protected concerted activity by either Jackson or the Union, nor by a desire to increase or decrease membership in the Union.

59. That the partial layoff of Catherine Jackson did not have a reasonable tendency to interfere with the exercise of protected rights by employees of the City Utility.

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

CONCLUSIONS OF LAW

1. That the Respondent, City of Medford Electric Utility, is a municipal employer, within the meaning of Section 111.70 (1)(j), MERA.

2. That the Complainant, International Brotherhood of Electrical Workers, Local 953 is a labor organization within the meaning of Section 111.70(1)(h), MERA.

3. That by the conduct described in the above Findings of Fact, the Respondent did not commit prohibited practices within the meaning of Sections 111.70(3)(a) 1, 3 or 4, MERA.

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

ORDER 1/

IT IS ORDERED that the instant complaint of prohibited practices be, and the same hereby is, dismissed in its entirety

Dated at Racine, Wisconsin this 29th day of May, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Daniel J. Nielsen, Examiner

1/ Footnote found on page 34.

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).

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Background

The factual background is set out in detail in the Findings of Fact. Briefly summarized, for over thirty years the Union has represented a bargaining unit including the field employees and the office clericals of the City's Electric Utility. In 1991, the City received an analysis it had requested from the Wisconsin Taxpayers Alliance. The WTA report suggested that the Utility be brought under the direct control of the Common Council, and that the financial and bookkeeping operations of the Utility be merged with those of the City.

As a follow-up to the WTA report, the City had an accounting firm, Anderson Tackman (AT) do a study of the utility and City Hall operations. In January of 1993, AT recommended that payroll, vendor accounts payable, general ledger, bank reconciliation and financial statement preparation all be transferred to City Hall, with an eye to ultimately transferring all financial and bookkeeping work. Payroll was transferred in August of 1993. General ledger, some billing and bookkeeping were transferred to City Hall in January of 1994.

The Union filed a grievance challenging the shift of work, and the grievance was denied. It was not pursued to arbitration. The Union claims that this was because the City's labor counsel said no jobs would be lost, while the City denies this. The AT proposals and restructuring of the financial operations continued to be a source of controversy throughout 1994. In the midst of the controversy, the parties negotiated over a 1994-96 collective bargaining agreement. The Union proposed limits on subcontracting, and the City offered a counter-proposal offering to bargain over any subcontracting that would lead to a loss of jobs. In a mediation session in December of 1994, the Union had the mediator inquire about whether any job losses were anticipated. According to the City, its bargainers told the mediator that none were being actively considered, but it could make no promises for the duration of the contract. According to the Union's negotiators, the mediator told them that the City was not presently contemplating any layoffs. The Union then dropped its proposal, and in response the City dropped its proposal. A tentative agreement was reached with no change in the contract's subcontracting language.

On February 13, 1995, AT issued another report on restructuring the Utility's billing operation. It projected that moving billing operations from the Utility could save at least 660 hours per year. The report was put on the agenda for the Public Utilities Committee's February 20th meeting. The Union became aware of the report and the Utility clerical employees attended the meeting. The AT report was discussed in closed session and the employees were not allowed to attend.

On February 23rd, Business Manager Richard Haley sent a letter citing the Union's status as bargaining agent and its desire to investigate a possible grievance. The letter requested a copy of the AT report, as well as "any correspondence, reports or other documents" between the City and AT which might relate to changes in conditions of employment or changes which might impact on conditions of employment. The letter contained a typographical error, in that the word "charges" was used instead of "changes" in referring to impact items. Haley also asked for a meeting to discuss any proposed changes. He said he was available to meet on March 6, 7 or 10th.

Five days after Haley's letter, the Utilities Committee met again to discuss the report. Haley and the clerical employees attended the meeting, but again the Committee held its discussion in closed session and did not allow participation by any representative of the Union. The Committee voted to recommend to the Common Council that a half-time cashier position be laid off. That same day, City labor counsel Jeffrey Jones sent a letter responding to Haley's February 23rd request. He told Haley that the City was reviewing the request and would be responding in the near future. He noted that he was unaware of any "charges" which might impact on working conditions. He advised Haley that he was unavailable to meet on March 6th or 10th, and that the 7th was a Common Council meeting date, and suggested that the parties meet on March 9th, 22nd, 23rd or 29th.

The Union's attorney, Marianne Robbins, sent a letter excoriating Jones for claiming that he was unaware of changes impacting employee terms and conditions of employment when the Utility Committee was proposing to reduce one employee to half-time. She demanded that the City produce all documents referring in any way to the possible reduction in hours. She further sought a meeting before the March 7th Council meeting to discuss the matter, and assurances that the City would not act to implement any changes before a meeting was held. Jones replied that he had never claimed there would be no impact from the changes, but noted that Haley's letter asked about the impact of any "charges", not the impact of any "changes". He noted that there would be no actual change before April 1st so there was ample time to meet, and he proposed some alternate dates. He enclosed a copy of the January 1993 and February 1995 AT reports with the letter. Robbins wrote back protesting any attempt to implement the layoff proposal before the parties could meet, and Jones wrote back noting that the Common council had allocated 15 minutes for Haley to speak on the merits of the proposal at the March 7th meeting, and that legal and contractual issues would be discussed on March 20th.

The Council met on March 7th and voted to reduce one cashier to half-time status, with the Utilities Committee to review the matter later to determine whether the position should be completely eliminated. The next day, Catherine Jackson was given notice of layoff, effective April 1st. That same day, Union counsel Robbins demanded that the City produce copies of any contracts it had with AT for the performance of bargaining unit work, along with invoices for those

services and any related correspondence. On March 14th, the City provided a copy of the AT proposal adopted by the City Council.

A grievance was submitted on Jackson's behalf protesting the transfer of work from the IBEW's bargaining unit to other City employees and to outside contractors. The instant complaint was also filed. None of the issues was resolved at the March 20th meeting, and the parties proceeded to litigation before Arbitrator Jane Buffett, who heard both the grievance and the complaint in a consolidated proceeding. Arbitrator Buffett issued her Award in December of 1996, finding that the City had the contractual right to remove work from the bargaining unit, and had not acted in bad faith to undermine the contract. She denied the grievance.

Contentions of the Parties

A. The Complainant

The Complainant asserts that the Utility engaged in prohibited practices by refusing to meet at reasonable times to discuss the decision and/or the impact of the decision to transfer the bargaining unit work to the City Hall staff, and by laying off Catherine Jackson for reasons of union animus. The Union notes that economically motivated decisions to subcontract are mandatory topics of bargaining. Here the Utility proceeded with the decision unilaterally, despite repeated and urgent demands for bargaining and the Common Council refused to even allow attendance by Union representatives at the various closed sessions it held on this subject.

The City's bad faith is highlighted by its dilatory conduct in response to the Union's effort to secure necessary information and schedule bargaining sessions. Even though the Union offered a variety of dates for meetings before the Common Council was scheduled to take action, the City claimed a need for the presence of its labor counsel, who was conveniently unavailable until after the vote on transferring the work was held. The Union notes that timely participation in meetings is a fundamental element of the duty to bargain. Another basic part of the duty to bargain is the obligation to provide requested information. In this case, the City refused to make any meaningful response to the Union's requests for information until after the decision was made. The Union requested information on February 23rd, yet the City made only partial responses, even after the March 7th vote to layoff Cathi Jackson. The City's attitude is most starkly illustrated by its counsel's disingenuous claim that his incomplete responses to the request for information were partially due to a typographical error in the union's letter, wherein the word "charges" was inadvertently used instead of "changes":

> We also request any correspondence, proposals, reports or other documents between the City of Medford and Anderson Tackman & Company which concern changes in the terms and conditions of employment of employees whom we represent at the Electric Utility or concerning charges which may impact on their terms and

conditions of employment.

In the context of the letter, no one could have misunderstood what Haley was requesting. Yet the City contemptuously dismissed the Union's sincere effort to represent its members. As a penalty for this pervasive bad faith, the City should be required to restore the status quo ante pending its participation in good faith bargaining.

The Union also avers that the true reason for the decision to layoff Catherine Jackson was hostility to the Union's success at the bargaining table, in that the Common Council targeted Jackson because it believed her wages were too high. This went beyond economics. Instead it became an emotional issue for the Common Council, to the point that Mary Bix engaged in a shouting match with Jackson at a public meeting in July of 1994. That economic efficiency was merely a pretext for the decision is demonstrated by the fact that the City stood by its decision even though at the time, and even through October of 1996, the City Hall employees could not perform the work, and the subcontracting of the work to Anderson Tackman cost more than the cost of having Jackson perform the work. If the City wished to address its concerns over wages in the bargaining unit, the appropriate vehicle was bargaining and/or interest arbitration. Instead, it laid off Jackson as an act of retaliation against the Complainant. This violates Section 111.70(3)(a)3, and requires that she be made whole as a remedy for this violation.

B. The Respondent

The Respondent denies that any prohibited practices were committed. The transfer of the Utility payroll to City Hall was completed in April of 1993, and the bookkeeping work followed in January of 1994. The work was then contracted to Anderson Tackman in October of 1994. The prohibited practice complaint was not filed until March 14, 1995. The work was removed from the bargaining unit well over one year before the complaint was filed, any challenge to this decision is therefore barred by the statute of limitations. As for the claim that the City discriminated against Jackson, there is no evidence of such discrimination, much less a clear and satisfactory preponderance as required by the statute.

The claim that the City bargained in bad faith is not borne out by the facts. The City promptly responded to all requests for information, including the one in which Union representative Haley mistakenly asked for information about "charges". The City also met promptly with the Union to discuss the layoff. While the session was after the Council meeting when the layoff was authorized, it was ten days before the layoff was to be implemented, enough time to rescind the action with no loss to the employee. The City notes that the Union's own suggested array of dates proposed meeting after the Common Council was scheduled to act. Thus the urgency of a meeting is clearly an after the fact concern of the Union, solely asserted for purposes of this litigation.

Turning to the Union's claim that the City acted unilaterally, the City notes that the contract authorizes the actions it took, and thus no bargaining is required. The City also notes that the root causes of the reduction in hours -- the transfer of work from the Utility -- were effected before the parties bargained their 1995 contract. The Union knew of these transfers, made proposals about

them, and dropped the proposals. It then signed a contract with a blanket waiver of bargaining clause. There cannot be any credible argument that the City failed to bargain. The City in fact bargained before the decision to reduce hours, and made itself available to bargain after the decision although the Union failed to make any proposals at the March 20th meeting and thus no actual bargaining took place.

Interference and discrimination are not found where the motive for a layoff was valid concern with economic efficiency, and the action was authorized by the contract. Here the layoff resulted from a careful study, stretching over several years, of the financial operations of the utility and the City. Moreover, the contract reserves the right to subcontract to the City, and also provides for the layoff of employees. While City officials did discuss the high wages paid to unit employees, all of those discussions took place in the context of contract negotiations. One Alderman asked whether the transfer of work and the layoff of clerical employees would break the Union, but she explained that she knew little of the Union's composition and assumed that the layoffs being discussed would leave the unit too small for bargaining.

As there was no timely complaint, and inasmuch as the evidence establishes no violation of Section 111.70, MERA, the complaints should be dismissed.

Discussion

The instant complaint raises issues of whether the City had a duty to bargain with the Union over the decision to transfer work out of the bargaining unit and/or the decision to reduce Catherine Jackson to half-time, or to bargain the impact of those decisions, as well as whether the City violated its duty to bargain in good faith by refusing to meet at reasonable intervals for bargaining and by refusing to provide requested information. The complaints also presents a claim that the City's decision to transfer work and partially layoff a member of the bargaining unit was motivated by anti-union animus. Each of these issues is discussed in turn.

A. Section 3(a)4, MERA - Duty to Bargain

With respect to those aspects of the complaint which raise an issue of a refusal to bargain over the decision to partially layoff Jackson or the effects of the layoff, the decision of Arbitrator Buffett is dispositive. 2/ The arbitrator determined that the Utility had the contractual right to transfer work, which was the underlying cause of the layoff. The contract itself contains a layoff provision, as well as sections devoted to the status of and benefits enjoyed by part-time employees. 3/ Moreover, the parties specifically addressed the possibility of layoffs resulting from work transfer in their negotiation four months before the layoff of Jackson, and the Union dropped its

2/ City of Wisconsin Rapids, Dec. No. 27466-A (Shaw, 5/11/93).

3/ Madison Metropolitan School District, Dec. No. 15629-A (Davis, 5/1/78).

proposal. Thus the parties had already satisfied their duty to bargain over transfers of work and reductions in force at the time of this layoff. 4/

4/ School District of Cadott Community, Dec. No. 27775-C (WERC, 6/23/94).

B. Section 3(a)4, MERA - Duty to Meet at Reasonable Times

The other aspects of the 3(a)4 charges are the allegations that the City failed in its duty to provide requested information and to meet at reasonable times for bargaining. The parties have a mutual obligation to meet for bargaining at reasonable intervals, and may not frustrate the bargaining process through their scheduling tactics. 5/ In this case, the City offered to meet within fourteen days of Haley's February 23rd letter requesting a meeting. Haley asked for a meeting on March 6, 7 or 10th. Jones was unavailable on the 6th and 10th, and the 7th was unavailable because it was the date of the Council meeting. He counter-proposed March 9, 22, 23 or 29th. Even assuming for the sake of argument that the duty to meet at reasonable intervals for collective bargaining attaches to a situation where there is no underlying duty to bargain, it cannot be said that an offer to meet on March 9th constitutes an unfair labor practice when the Union itself offered March 10th as a meeting date. Granting that March 9th was two days after the Council was scheduled to vote on the proposal to partially layoff a cashier, the Union was aware of the March 7th date for the Council meeting when it proposed March 10th as an acceptable meeting date.

C. Section 3(a)4, MERA - Duty to Provide Information

The remaining 3(a)4 issue is whether the City complied with its duty to provide relevant information to the Union. It is axiomatic that the duty to bargain extends to providing information necessary to the administration of an existing agreement, as well as to the negotiation of a new or successor agreement, and to do so in a timely fashion:

> This duty exists as to requests or demands for information relevant to the bargaining agent's negotiation with the employer for a collective bargaining agreement as well as that relevant to its policing the administration of an existing agreement. Information relative to wages and fringe benefits is presumptively relevant to carrying out the bargaining agent's duties, there being no need to make a case by case by determination of the relevancy of such requests. However this presumption has not been applied to other information sought, and the burden falls initially upon the bargaining agent to demonstrate the relevancy of said information to its duty to represent unit employees. Milwaukee Board of School Directors, Dec. No. 15825-B (Yaeger, 6/79)

5/ Jerome Filbrandt Plumbing & Heating, Dec. No. 27045-C (WERC, 9/29/92).

The burden of demonstrating relevance is measured against a liberal "discovery type" standard, rather than a "trial type standard". 6/ Additionally, the exclusive representative must make some demonstration of the necessity of the specific pieces of evidence sought if it does not relate to wages or fringe benefits. Even though information may be relevant, the bargaining representative's right to information is not absolute, and the provision of the same information in a form different from that requested will satisfy the duty to bargain. 7/ Furthermore, even relevant information may be withheld in whole or in part if the employer can make a specific and substantial claim that its interest in confidentiality outweighs the union's interest in securing the information. 8/ In this case, there is no claim that the information requested by the Union was irrelevant or privileged. The City concedes that it had the duty to provide the information requested, and in fact did provide the requested information. 9/ The only question is whether the information was provided in a timely fashion.

In his February 23rd letter, Haley requested:

> . . . a copy of the report prepared by Anderson Tackman & Company referred to in the Notice of Public Meeting for February 20, 1995. We also request any correspondence, proposals, reports or other documents between the City of Medford and Anderson Tackman & Company which concern changes in the terms and conditions of employment of employees whom we represent at the Electric Utility or concerning charges which may impact on their terms and conditions of employment...

6/ Moraine Park VTAE, Dec. No. 26859-B (WERC, 8/9/93); La Crosse School District, Dec. No. 26541-A (Crowley, 3/91).

7/ See Milwaukee Board of School Directors, Dec. No. 24729-A (Gratz, 5/88), at page 10, and cases cited therein.

8/ La Crosse School District, Dec. No. 26541-A (Crowley, 3/91); Detroit Edison v. NLRB 440 US 301, 100 LRRM 2728 (1979); Minnesota Mining & Mfg. Co., 261 NLRB 27, 109 LRRM 1345 (1982).

9/ In this regard, the Examiner notes that while the data underlying the 1993 AT report was not provided until the hearing in this matter, this data consisted of notes retained by Anderson Tackman. Those notes were obtained directly from Anderson Tackman through a subpoena and there is no evidence that those notes were in the City's possession at any time prior to the hearing.

On March 2nd, Union counsel Robbins wrote City counsel Jones:

> . . . the Union requests that the City of Medford provide the Anderson Tackman report and all correspondence or other documents between Anderson Tackman and the City which, in any way, refer to the potential layoff or reduction in hours of employees within the bargaining unit or any changes in operations which could lead to such action...

The AT reports and relevant minutes were received by Jones from the City on March 2nd and he forwarded the reports to the Union on March 3rd. On March 8th, the Union's counsel requested a copy of the contract between the City and AT, as well as invoices and other correspondence relative to the subcontracting. While there was no formal contract with Anderson Tackman, there was a proposal to the City for providing payroll services, and this proposal was provided to Haley by letter dated March 14th.

The AT reports were provided to the Union within seven days of the date on which the initial request for information was received by the City. The AT proposal was provided within eighteen days of the receipt of that request. The proposal certainly fell within the scope of the initial request, and should have been included in the City's first response to that request. Even the City does not seriously dispute that point, contending instead that this was merely an error by City officials caused by the fact that the AT proposal was not limited to Utility payroll services.

A refusal to provide relevant information is a per se violation of the duty to bargain. Whether a delay in providing information is unreasonable or inconsistent with the statutory duty is a subjective determination, based upon whether it constitutes bad faith under the totality of the circumstances. 10/ In this case, the Examiner concludes that the passage of one week before responding to the Union's request for information was not unreasonable, given the City's desire to have its legal counsel review the request and the data. The delay of eleven days beyond the original response in providing the information about the proposal is less reasonable, but standing alone it does not rise to the level of a prohibited practice. The existence of the subcontracting arrangement itself was known to the Union, and in the context of a decision to grieve or not, the City would gain little if any advantage by concealing the precise details of its business arrangement with AT, and the Union's view of its contractual rights would not be likely to change as a result of what it learned from the AT proposal. In making this observation, the

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10/ Frank Carmichael, d/b/a/ Old Market Square Theatre 22243-C (WERC 12/86); Mayville School District, Dec. No. 25144-D (WERC, 5/5/92).

Examiner does not mean to suggest that the City had any right to withhold this information. Rather the nature of the information, the absence of tactical advantage to the City through delaying its production and the likely impact of the requested information on the Union's decision to proceed with a grievance all go to the likelihood that the failure to immediately produce the AT proposal was a good faith error, and to the degree of prejudice suffered by the Union as a result of the error. These factors are weighed under the totality of the circumstances test for assessing whether the City's conduct constitutes bad faith.

Finally, as evidence of overall bad faith, the Union cites Jones' letters of February 28th and March 3rd, in which he appears to take advantage of a typographical error in Haley's request for information. In his February 23rd letter to the City, Haley inadvertently requested information related to "charges" which might impact on conditions of employment, rather than "changes". In his February 28th letter, Jones said he was not aware of any "charges" that might impact conditions of employment and, when Union counsel Robbins subsequently challenged this claim, Jones wrote back that he was responding to the specific request, and had not understood Haley to be asking for information about changes impacting on working conditions. The Union's claim that this response was disingenuous is a fair characterization. Given the balance of Haley's letter, it had to have been clear to Jones that the use of the word "charges" was a typographical error and that the Union was in fact addressing the impact of changes in working conditions. Whatever the reason for Jones' decision to act as though he did not understand the request for information, the predictable result was to cause doubts about the City's candor and good faith. Having noted that, however, the Examiner does not find any item of information that would have been provided absent the typographical error that was not provided to the Union. Aside from generating suspicion and annoyance, Jones' decision to take advantage of the obvious typographical error appears to have had no actual impact on the Union's ability to evaluate or process this grievance. This aspect of the City's conduct causes a closer examination of the other allegations of bad faith, but on the record as a whole, the Examiner concludes hat the City's responses to the Union's requests for meetings and information, although not perfect, were not marked by an illegal desire to frustrate the Union's efforts to effectively represent its members, and did not have that effect.

D. Section 3(a)3, MERA - Discrimination

Finally, the Union asserts that the decision to transfer work to the City Hall and to AT was motivated by hostility to the protected activities of the unit employees, in that the City resented their success in bargaining good wage rates and transferred the work as an act of retaliation. Under the Commission's long-standing Muskego-Norway line of cases, 11/ the test of whether an employer's actions constitute discrimination in violation of Section 111.70(3)(a) 3 has four prongs:

11/ Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis.2d 540, 151 N.W.2d 617 (1967).

1. The employee was engaged in protected activity;

2. The employer was aware of the activity;

3. The employer was hostile to the activity;

4. The employer's conduct was motivated, in whole or in part, by hostility to the protected activity.

Here the act of bargaining contracts is obviously protected activity and the City was necessarily aware of the activity, having taken part in the process. The question is whether this created hostility on the City's part and, if so, whether the decision to layoff Jackson was the result of that hostility.

Arbitrator Buffett extensively discussed the City's motives for removing the work from the Utility in the context of the Union's argument that it was a bad faith effort to undermine the unit and the contract. She concluded that, even though the evidence was "troublesome", the motive for the transfer of work was a desire to implement the WTA and AT reports, and realize the efficiencies and cost savings projected by those studies. Unlike the issue of whether there was a duty to bargain over the work transfers or the layoff, the arbitrator's conclusions are not binding on the Examiner where the issue is illegal discrimination. Instead, the Examiner conducts a de novo review of the evidentiary record and draws his own conclusion. On the basis of that review, however, the Examiner finds little to disagree with in Arbitrator Buffett's analysis.

The Union's assertion of discrimination is based on statements attributed to City officials to the effect that high salaries paid to the Utility clericals were the motivation for transferring work out of the unit, as well as a confrontation between Jackson and Alderman Bix at a Common Council meeting and a question by Alderman Parent as to whether reducing the Utility clerical staff would break the Union. Both the confrontation and the question came about in July of 1994. The City denies that wage cost was the motivation, citing instead the efficiencies to be gained by consolidating its payroll. This is a very fine distinction, one that blurs into nothingness under close review. Completing a given function more efficiently connotes achieving it in a manner that saves either time or cost. The saving of time is desirable largely because it means less cost. Either way, increases in efficiency are almost always pursued because of savings in cost, and in a service industry savings in cost are almost always related to savings in wages.

Accepting the Union's argument that a desire to save money by obtaining a service at a lower cost than the cost of wages can be equated with illegal hostility to the negotiation of those wages would mean that virtually any cost cutting effort in the public sector would be a per se violation of Section 111.70 (3)(a)3. The law of municipal labor relations does not exist in isolation from the law of supply and demand. The higher the cost of having a service performed by an employee, the more attractive alternate sources of that service become. This is true no matter

whether the wage was collectively bargained, individually negotiated or unilaterally set. Even where employees are informed across the bargaining table that success in negotiating higher wages will result in layoffs -- a far more direct linkage between the protected activity and the detrimental consequence than exists in this case -- no illegal motive is automatically inferred. 12/ If the employer's motive in transferring work or laying off employees is to save money relative to negotiated wage rates, that motive may trigger a bargaining obligation, but it is not an illegal motive for purposes of Section 111.70(3)(a)3. 13/

12/ Price County, Dec. No. 24504-A (Gratz, 4/88); See also, City of Beloit, Dec. No. 27779-B (WERC, 9/26/94) wherein the Commission found that the City did not violate MERA when it warned a specific employee that if the Union succeeded in reclassifying her position she would be laid off, and then did in fact lay her off after the Union prevailed in an interest arbitration. The Commission commented that "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."

13/ I note that the wage rates the City is alleged to have been hostile to were arrived at through a voluntary agreement reached in mediation in December of 1994, only three months before the March 7th vote leading to this layoff. For all of the alleged hostility, there is nothing in

The Union points to the fact that the reorganization of the billing function did not actually achieve greater efficiency or save money. The record shows that the Utility staff were not inefficient, that the City Hall was not able to perform all of the bookkeeping functions and that the City was compelled to hire AT to do much of the accounting work. Where the justification for an action is shown to be pretextual, the Examiner may infer that hostility to protected concerted activity was the actual motive. 14/ In this case, however, I agree with Arbitrator Buffett's conclusion that the failure to achieve the desired economies is attributable to disruptions caused by personnel turn-over and the reorganization of City Hall, rather than a decision to sacrifice efficiency in favor of revenge. It appears that the City officials were enamored of the concept of centralized bookkeeping and remained committed to it even though it was not nearly as practicable as they had been led to believe. The fact that a policy decision may ultimately prove to have been the wrong decision does not mean that it was illegally motivated.

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the record to indicate that wages were the stumbling block in those negotiations. Rather it was the issue of subcontracting that occupied most of the parties' attention. Certainly the two are related, but if the City was so hostile to the negotiated wage rates that it restructured its entire billing operation as an act of retaliation, one would expect the topic to have received more direct attention at the bargaining table.

14/ Furthermore, contrary to Kalbes' statements, the evidence failed to show that Dorothy Klatt had ever been accommodated to the extent Kalbes claimed -- that she could sit down and rest whenever she pleased while working in her SUP.

The confrontation between Jackson and Bix in July of 1994 is also held out as proof of hostility to the Union, but I agree with Arbitrator Buffett's observation that this appears to be more an expression of the deep mistrust between the Council members and the Utility staff. Hostility for the purposes of Section 111.70(3)(a)3 does not encompass all manner of bad feeling and ill-will. 15/ It appears that Bix was hostile to attempts to prevent the consolidation of payroll and other bookkeeping services, and that it was Jackson's objections to that consolidation that made her the focus of Bix's hostility at the July meeting, rather than her status as a member of the Union. More troubling is the question by Parent about whether the reduction in the clerical staff would "break the Union". She testified that this was naiveté rather than animus, and that she was genuinely confused as to whether the Union could continue to function as a bargaining representative if two of the three clerical employees were laid off. This is a plausible explanation of the question, although the use of the phrase "break the Union" has to raise a red flag for anyone reviewing this case. Notwithstanding Parent's explanation, a statement such as this could easily support a finding of animus in many cases. In this case though, it stands pretty much on its own. It is isolated from the decision to layoff Jackson by seven and a half months, while that decision was the foreseeable culmination of years of study, debate and formal Council action dating back to the original 1990 WTA report recommending consolidation of accounting functions.

The Complainant bears the burden of proving violations of Section 111.70 by the clear and satisfactory preponderance of the evidence. In this case, the sequence of events gave rise to a reasonable suspicion on the Union's part that the City was not, in fact, pursuing efficiency and economy by its transfer of bookkeeping work from the Utility to City Hall and to Anderson Tackman. This suspicion would have been based primarily on the fact that this transfer did not appear to actually improve efficiency, and would have been buttressed by Parent's use of the phrase "break the Union" in discussing possible layoffs and by Jones' insistence that he somehow misunderstood the Union's request for information. In each instance, however, the preponderance of the evidence demonstrates that these were poor decisions, rather than illegal decisions. Accordingly, the Examiner has dismissed the complaint in its entirety.

Dated at Racine, Wisconsin this 29th day of May, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner

15/ La Crosse, et. al., Dec. No. 17084-D (WERC 10/83).