STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CITY OF MAUSTON EMPLOYEES' UNION LOCAL 569-A, AFSCME, AFL-CIO, Complainant, vs. CITY OF MAUSTON, Respondent.	Case 40 No. 52921 MP-3057 Decision No. 28534-B

Appearances:

Mr. Michael J. Wilson, Representative at Large, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, on behalf of the Complainant.

Godfrey & Kahn, S.C., Attorneys at Law, 131 West Wilson St., Suite 202, P.O. Box 1110, Madison, Wisconsin 53701-1110, by Mr. Peter L. Albrecht, on behalf of the Respondent.

ORDER DENYING MOTION TO DISMISS

On July 26, 1995, the City of Mauston Employees' Union, Local 569-A, AFSCME, AFL-CIO, hereinafter Complainant, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission wherein it alleged that the City of Mauston had violated Secs. 111.70(3)(a)1, and 3 of the Municipal Employment Relations Act (MERA) by laying off employe Harlan Bader. On October 10, 1995, the City of Mauston, hereinafter Respondent, filed its answer wherein it denied it had committed any prohibited practices.

The Commission appointed a member of its staff, David E. Shaw, as Examiner to make and issue findings of fact, conclusions of law and orders in the matter. Hearing were held before the Examiner in Mauston, Wisconsin on October 24, 1995, March 7, July 25 and September 18, 1996.

On August 21, 1996, Complainant filed an amended complaint of prohibited practices, wherein, in addition to amending and adding certain factual allegations, it alleged that Respondent had refused to bargain in good faith in violation of Secs. 111.70(3)(a)1 and 4, Stats., by unilaterally adjusting the wage rate of the Deputy City Clerk position and by failing to notify Complainant of said wage adjustment.

At the close of hearing on September 18, 1996, Complainant completed presentation of its case-in-chief and rested, subject to the right to present rebuttal evidence. At that time, Respondent requested leave to file a written motion to dismiss the amended complaint in its entirety. Leave was granted and Respondent filed its motion to dismiss on October 17, 1996, along with argument in support of its motion. On November 1, 1996, Complainant filed its response in opposition to Respondent's motion.

Having considered the parties' pleadings and arguments and concluded that the motion to dismiss is premature, the Examiner makes and issues the following

ORDER

The Respondent's motion to dismiss the instant amended complaint is denied.

Dated at Madison, Wisconsin, this 20th day of December, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner

CITY OF MAUSTON

MEMORANDUM ACCOMPANYING ORDER DENYING
MOTION TO DISMISS

At the conclusion of the Complainant's case-in-chief, the Respondent requested leave to file a motion to dismiss in writing along with argument in support of its motion. Respondent's request was granted and it filed its motion to dismiss on October 17, 1996. The Complainant filed its response in opposition to the motion on November 1, 1996.

Respondent

The Respondent asserts that in order to prevail on its claim that Bader's layoff violated Secs. 111.70(3)(a)1 and 3, Stats., Complainant must prove all of the following elements by a clear and satisfactory preponderance of the evidence:

(1) That Bader was engaged in protected, concerted activity;

(2) That Respondent's agents knew of that activity;

(3) That Respondent was hostile toward such activity; and

(4) That Respondent's motive for laying off Bader was, at least in part, its hostility toward his protected, concerted activity. (Citing, Price County (Highway Department), Dec. No. 24504-A (Gratz, 4/88).

Respondent asserts Complainant presented no evidence Bader was engaged in protected, concerted activity beyond his having filed a grievance more than 19 months before his layoff. There was no evidence of a causal connection between those two events and they are too remote in time to create such connection. Further, Complainant amended its complaint to eliminate its allegation that Respondent's City Administrator had told Bader that his layoff was due to the various suits brought against the Respondent by Complainant. Thus, the allegation that Bader was laid off due to his having engaged in protected, concerted activity must be dismissed.

Respondent also contends that Complainant has failed to prove its allegation that Bader was laid off in retaliation for the general activities of Complainant over the years. There was no showing that the grievances cited by Complainant or the suits brought were considered by the Respondent in making its decision, and all of the incidences cited either occurred at least a year or more before the layoff, or occurred after the layoff. The events occurring prior to the layoff are too remote in time to have any probative value, let alone create a causal connection between those incidents and layoff, and it would be illogical to assume that incidents occurring after the layoff

played any role in the layoff decision. The Respondent also asserts that the evidence presented established that Respondent had legitimate, non-discriminatory reasons for the layoff. Complainant's contention that the economic justification was a pretext, as shown by Respondent having offered different reasons for the layoff, i.e., "economic", versus "lack of work", is splitting hairs. The evidence demonstrates that the layoff was for both reasons. Also, the timing of the layoff was not, as Complainant claims, suspicious. In the course of preparing the 1995 budget, the Department of Public Works realized it could layoff one employe and still get the work done and there was no reason not to immediately realize those savings.

Respondent also contends that the allegations in the amended complaint regarding the alleged refusal to bargain with regard to the Deputy City Clerks' wages must be dismissed as untimely. Pursuant to Sec. 111.07(14), Stats., a complaint must be filed within one year from the date of the alleged violation. Where, as here, an amendment to a complaint raises a new cause of action, the date of the filing of the amended complaint is controlling for statute of limitation purposes. Citing, City of Stevens Point, Dec. No. 26525-A (Jones, 2/92). Also, the statute of limitation begins to run when an individual knows, or reasonably should have known, of the alleged violation. Complainant filed the amended complaint on August 21, 1996, alleging that the Respondent committed a prohibited practice by unilaterally granting a wage increase to the Deputy Clerk position in November of 1994. The only evidence to support a contention that the Complainant only recently gained knowledge of the wage increase was that its representative, White, testified that he did not personally know about the wage increase at the time. Respondent asserts that White's testimony regarding when he communicated a settlement offer to Respondent was inaccurate and was contrary to Complainant's own assertions in its amended complaint. Thus, White's testimony should not be credited. Further, while Complainant's president and vice-president both testified, neither of them addressed the alleged failure to bargain issue. Presumably, if they had just recently learned about the wage increase, they would have testified to that effect. Thus, their silence in that regard must be imputed against them. Respondent also asserts that the issue of the Deputy City Clerk's compensation was a matter of public record. The Complainant's own exhibit establishes that the issue of the Deputy Clerk's compensation was listed on the public notice of Respondent's common council meeting of November 1, 1994, and thus was a matter of public record of which Complainant's local officials reasonably should have been aware. Respondent asserts that even assuming, arguendo, that this allegation is not time-barred, Complainant has failed to establish by a "clear and satisfactory preponderance of the evidence" that Respondent violated its duty to bargain. Complainant provided no evidence whatsoever in that regard other than White's testimony that he believed he did not learn about the wage increase until recently. Thus, this allegation must be dismissed.

Complainant

Complainant does not dispute that it has the initial burden of proving the elements necessary to find discrimination, nor does it dispute the Respondent's recitation of law as to the statute of limitations. Complainant does assert that it has established that Bader's layoff was in retaliation for

Complainant's exercise of its protected activities. Proof of the discrimination in this case is the pretextual explanation offered for the layoff of Bader. A confession is not required, and discrimination may be, and often is, inferred from "finding that the explanation offered by the Employer is pretextual." Citing, City of Evansville, Dec. No. 24246-A (Jones, 3/88) at p. 9. Complainant also asserts that if animus formed any part of the decision to layoff Bader, it does not matter that Respondent may have had other legitimate grounds for its actions. It is well-established that anti-union animus need not be the Employer's primary motive in order for a discriminatory act to contravene the statute. City of Evansville, supra. Complainant asserts that the record sustains a finding that the local union engaged in protected activities, including suits against Respondent, membership affiliation, negotiations and pursuit of recognition; that the Respondent was party to those suits and aware of the affiliations, negotiations and union recognition; that the Respondent was hostile toward those activities and was motivated to layoff or terminate members of the local union in retaliation for the $100,000 settlement offer made in the "Bosgraaf suits"; and that the layoff of Bader was for neither economic reasons, nor due to lack of work. The Complainant asserts that under those circumstances, its explanation is both plausible and supported by the clear and satisfactory preponderance of the evidence.

With regard to the alleged refusal to bargain, Complainant asserts that the refusal to bargain in good faith commences on the date that refusal is communicated to the other party; citing, Menominee County, Dec. No. 22872-A (Honeyman, 9/85). The evidence shows that Respondent went into "closed" session and unilaterally adjusted the wages of a bargaining unit employe, and that Complainant first learned of that adjustment during the course of the instant hearing.

Complainant asserts that on being certified as the bargaining representative of Respondent's employes, Respondent was obligated to maintain the *status quo* until such time as a change was agreed upon by the parties or an impasse resolution completed. Citing Prairie Home Cemetery, Dec. No. 22958-A (Ford, 5/86) at p. 5. Further, the refusal to bargain is of a continuing nature; every day Respondent pays the employe the adjusted rate constitutes a new violation of the *status quo*.

Complainant also asserts that while Respondent pretended to bargain in good faith with the local union, it secretly adjusted employe wages. Respondent attempted to hide the adjustment when Complainant requested the minutes of the closed session of November 8, 1996 (sic) meeting of the common council by obliterating that portion of the closed minutes that recorded the vote regarding the adjusted employe wages. The adjustment was not disclosed to Complainant until the hearing on the instant complaint was commenced and Respondent was confronted concerning the edited portion of the minutes.

Complainant concludes that the motion to dismiss must be denied as the complaint is both timely in all respects and that Complainant has met its burden of proving by a clear and satisfactory preponderance of the evidence that the layoff was in retaliation for the exercise of protected activities.

DISCUSSION

Respondent requested leave to file the instant motion to dismiss at the completion of Complainant's case-in-chief. The Examiner reluctantly granted Respondent's request, over Complainant's objection, with the admonition to keep its arguments brief. Both parties have complied with that admonition, however, the reasons for the Examiner's reluctance to grant the request and Complainant's objection are apparent at this point.

In support of its motion to dismiss, Respondent has essentially argued that the evidence presented by Complainant in its case-in-chief is not sufficient to meet Complainant's burden of proving its prohibited practices allegations. In doing so, Respondent has contended that the examples of protected, concerted activity engaged in by Bader or other members or officers of Complainant are too remote in time from the layoff decision to establish a causal connection; that the evidence does not demonstrate that hostility towards those activities played a part in Respondent's decision or that the reasons offered for Bader's layoff were pretextual. With regard to the timeliness issue of the refusal to bargain allegation, Respondent asks that the Examiner not credit the testimony of Complainant's bargaining representative based upon what it asserts are errors in other areas of his testimony. Respondent also asks that the failure of Complainant's officers to testify as to when they learned of Respondent's action regarding the wages of the Deputy City Clerk be imputed against Complainant.

Deciding these questions would require a number of determinations as to what might reasonably be inferred from the evidence and whether the evidence presented is sufficient to meet the statutory standard. In the judgement of this Examiner, a decision on whether the Complainant has sufficiently proved up the necessary elements of the prohibited practices it alleges, 1/ is best done on the basis of a complete record. While it is true that this could result in Respondent's having to unnecessarily present a case in its defense, that burden must be weighed against the considerable delay that would result if the Examiner granted the motion and subsequently was reversed on appeal and the case was remanded for further hearing. The Respondent may ultimately prevail on its arguments and defenses, but it would be premature to decide the issues at this point with a less than complete record and, in the Examiner's estimation, the interests of all of the parties are best served by completing the hearing in these matters before rendering a decision on the merits of the allegations. 2/ For these reasons, the Examiner has denied Respondent's motion to dismiss as

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1/ It is noted that Respondent does not address the sufficiency of the evidence as regards the violation of Sec. 111.70(3)(a)1, Stats., alleged in the amended complaint.

2/ The instant situation is somewhat similar to that decided by Examiner Schurke in Guthrie v. Council 24, AFSCME, AFL-CIO and State of Wisconsin, Dec. No. 11457-A (Schurke, 1/73), aff'd No. 139-212 (Cir.Ct., Dane Co., 8/73), aff'd State of Wisconsin v. W.E.R.C., 65 Wis. 2d 624 (1974). As was stated by the Circuit Court, in holding that the examiner's denial of a motion to dismiss and a motion for summary judgement as premature was not an

appealable order:

> "The decision of the hearing officer to take all of the evidence before ruling may very well have prolonged the hearing somewhat, but at the same time having a complete record permitted both the Commission and reviewing court to have a complete record if they should find that a dismissal on the issue raised by the motion was improper. This in effect follows the philosophy of *Davis v. Skille* (1961), 12 Wis. 2d 482, 490, 107 N.W. 2d 458, and seems to us to be in accordance with a reasonable discretion to be exercised by the hearing officer in building a record, so that all of the facts are in the record and there is no likelihood that the case might be returned for further hearings after appeal and review. This tends to the more prompt disposition of cases."

(Cited by Supreme Court with approval, at 65 Wis. 2d 632-33).

See also the discussion of Examiner McLaughlin in McClure v. Dairyland Greyhound Park, Inc., Dec. No. 28134-B (McLaughlin, 10/95) in explaining the reasons for denying a motion at the conclusion of complainant's case to postpone further hearing and entertain a motion to dismiss.

premature.

Dated at Madison, Wisconsin, this 20th day of December, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner