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-C

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 Street, Suite 202, P.O. Box 1110, Madison, Wisconsin 53701-1110, by **Mr. Peter L. Albrecht**, on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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 was held before the Examiner in Mauston, Wisconsin on October 24, 1995. On November 20, 1995, the Respondent filed a motion to exclude evidence. By January 3, 1996, the parties completed briefing of the motion and on January 3, 1996, the Examiner issued an Order Granting Motion to Exclude. Thereafter, further hearing was held on 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 individual in the Deputy Clerk/ADA Officer 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. On December 20, 1996, the Examiner issued his Order Denying Motion to Dismiss and further hearing was held before the Examiner on March 4 and June 24, 1997. The parties filed post-hearing briefs in the matter by October 8, 1997.

Having considered the evidence and the arguments of the parties, the Examiner now makes and issues the following

FINDINGS OF FACT

1. The City of Mauston, hereinafter the Respondent or City, is a municipal employer having its principal offices located at 303 Mansion Street, Mauston, Wisconsin. The City is governed by an elected Mayor and Common Council and also employs a City Administrator. Since August of 1994, Devin Willi has been the City Administrator and in that position performs the duties of administrator, clerk, treasurer and comptroller for the Respondent. From January, 1993 to February of 1996, Patrick Geisendorfer was the Director of the City's Public Works Department, which included sewer, water and streets divisions. At all times relevant herein, Richard Noe has been an elected member of the City's Common Council and has been on the City's Public Works Committee and the Chair of its Personnel Committee. At all times material herein, Jon Anderson has been the City's labor attorney.

2. The City of Mauston Employees' Union, Local 569-A, AFSCME, AFL-CIO, hereinafter the Complainant or Union, is a labor organization affiliated with Wisconsin Council 40, AFSCME, AFL-CIO, which has its principal offices located at 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903. At all times relevant herein, David White has been the Staff Representative from Wisconsin Council 40 assigned to represent the Union in its collective bargaining relationships with the City. At all times relevant herein, Chuck Torkelson, David Bosgraaf and Susan Bosgraaf have been the President, Vice-President and Secretary-Treasurer, respectively, of the Union.

3. At all times relevant herein, the City and the Union have had a collective bargaining relationship and the Union is the exclusive collective bargaining representative of all regular full-time and regular part-time employes of the City, excluding managerial, supervisory, confidential and library employes and temporary or casual part-time employes as defined in Article I, Section 4, of the parties' Collective Bargaining Agreement. The City and the Union were parties to a collective bargaining agreement covering the aforementioned employes for the period from January 1, 1993 through December 31, 1995. Said Agreement contained a management rights provision, a provision covering the matter of layoffs of employes, a wage schedule for the various classifications, and also contained a grievance procedure culminating in final and binding arbitration.

4. Harlan Bader was employed full-time by the City as a Laborer in its Public Works Department, Streets Division, from July of 1990 until November 25, 1994, and was a member of the bargaining unit represented by the Union during that time.

5. In 1992, the City reorganized its operations and as part of that reorganization, the City created new positions and eliminated several existing positions. Among the positions created was Deputy Clerk/ADA Officer, which was created as a non-bargaining unit position. Renee Hazelton was hired into the position. Among the positions eliminated was the unit position of Utility Clerk/Secretary, occupied by Susan Bosgraaf, who was off work on Worker's Compensation leave at the time.

On August 14, 1992, the Union filed a unit clarification petition with the Commission requesting that a number of positions, including the Deputy Clerk/ADA Officer position, be included in the bargaining unit it represents. The City opposed the petition and asserted that the Deputy Clerk/ADA Officer is a confidential and managerial employe. On November 29, 1993, the Commission issued its Order Clarifying Bargaining Unit wherein it determined that the position of Deputy Clerk/ADA Officer is to be included in the unit.

6. By way of a letter of May 20, 1994 from David White to Jon Anderson, the Union demanded to bargain with the City regarding the wages, hours and conditions of employment for the Deputy Clerk/ADA Officer position and included proposals in that regard. The parties commenced negotiations in that regard in September of 1994. These negotiations continued and in March of 1995, the Union petitioned for interest-arbitration. The parties submitted final offers in May of 1995 with respect to the remaining issues regarding the wages, hours and conditions of employment of the Deputy/Clerk position. By October of 1995, the parties had agreed on a wage rate for that position and agreed to implement their tentative agreement while litigating the remaining issue of whether the County could be required to post the position.

7. In September of 1994, as part of the City's budget process for developing its 1995 budget, the City had its department heads prepare worksheets showing what they projected spending in their departments in 1995. The department heads' projections then went to the City's Finance Committee for discussion and recommendations. The Finance Committee met twice on the 1995 budget prior to November 1, 1994, and developed a proposed budget, which it recommended at its November 1, 1994, meeting and which was published and a public hearing was subsequently held on it. Following public hearing on the budget, the City's Common Council then acted on the budget, making the changes it deemed necessary and passed the final budget in the latter part of November, 1994.

Although the department heads had been advised by Willi that the Council did not want to see an increase in the City's tax rate as a result of its 1995 budget, at least three departments, including Public Works, referenced in the budget as "Street Department", had requested an increase in their budget in excess of 50%. The initial budget request submitted for the Street Department was for a 58.24% increase over its 1994 budget, a requested total increase of $171,653, of which $58,454 was an increase for "salaries and overtime" and $32,806 an increase for "benefits" over the amounts budgeted for those accounts in 1994. By September 30, 1994, the Street Department had already spent 90% of the amount it had budgeted for "salaries and overtime" for 1994.

8. On September 22, 1994, David Bosgraaf was given a written reprimand by Patrick Geisendorfer for leaving a project site without authorization during which time a pipe was damaged. Bosgraaf grieved the reprimand and the grievance was still pending at the close of hearing in this matter.

9. The Official Notice of the joint meeting of the City Council's Finance Committee and Personnel Committee of November 1, 1994, read, in relevant part, as follows:

OFFICIAL NOTICE OF JOINT MEETING
OF THE
FINANCE COMMITTEE AND THE PERSONNEL COMMITTEE
OF THE MAUSTON COMMON COUNCIL
IMMEDIATELY FOLLOWING SPECIAL COMMON COUNCIL MEETING
TUESDAY, NOVEMBER 1, 1994
MAUSTON CITY HALL ADMINISTRATIVE OFFICES
303 MANSION STREET

I. Call to Order/Roll Call

• • •

III. Closed Session: Pursuant to Wisconsin Statutes 19.85(1)(c) considering employment, promotion, compensation, or performance evaluation data of any public employe over which the governmental body has jurisdiction or exercises responsibility
A. Director of Public Works Contract
B. Deputy Clerk compensation
C. Custodian position
D. Police and Fire Commission

IV. Reconvene In Open Session

V. Additional Discussion of 1995 Budget and establishment of preliminary 1995 Budget for presentation and publications.

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At said joint meeting of the two committees, in closed session, a motion was passed to recommend raising the salary of the employe in the Deputy Clerk position, Hazelton, to $16,800 for 1994, effective retroactive to January 1, 1994.

10. On October 11, 1994, the City's Personnel Committee, the City's labor attorney, Jon Anderson, and the Union's representative, David White, met with a mediator from the Commission's staff, Richard B. McLaughlin, to attempt to resolve a number of grievances and other disputes that were pending at that time.

By letter of October 24, 1994 to Anderson and White, McLaughlin made a "mediator's proposal" to resolve the outstanding grievances of Susan Bosgraaf against the City. Anderson responded to McLaughlin with the following letter of November 1, 1994:

Dear Mr. McLaughlin:

This letter is written as a follow-up to your letter of October 24, 1994 and received in my office on October 25, 1994. I have not received information from Mr. White as concerns a financial settlement of these cases. This will be an important part of the City's review of this matter.

> As a result, the City needs additional time to consider and respond to this proposal. I would suggest that both sides have additional time to respond once all relevant information has been received.
>
> It is my understanding that all parties wish to continue to pursue a voluntary resolution of these matters and as such we have not completed Step 3 of Section 7 of the grievance procedure as of this date. If my understanding is not accurate, please notify me immediately.
>
> Please advise.
>
> Very truly yours,
>
> GODFREY & KAHN, S.C.
> Jon Anderson /s/
> Jon E. Anderson

Anderson copied White and Willi on the letter.

On November 2, 1994, White telephoned Anderson and advised him that Susan Bosgraaf would settle all of her claims against the City without reinstatement in exchange for payment of $100,000. Anderson communicated the offer to the City by letter of November 2, 1994 to Willi.

11. While layoff of personnel was discussed in general terms in the budget discussions as a possible means of reducing costs, it was not until the November 7, 1994, meeting of the Public Works Committee that the topic was directly addressed. At that November 7, 1994, meeting, Patrick Geisendorfer, the Public Works Director, recommended the layoff of one employe in the Laborer classification in the Streets Division as a means of reducing personnel costs in the Department. In November of 1994, the top hourly rate for the Laborer classification was $10.50/hour and would have been $10.71/hour effective January 1, 1995 and $10.92/hour effective July 1, 1995. The Public Works Committee voted at its November 7, 1994 meeting to recommend the layoff of one employe in the Streets Division in order to effectuate a cost savings of $21,308.20 (wages and benefits of $29,238.20, less the cost of 26 weeks of unemployment compensation ($7,930.00).

12. The official notice of the November 8, 1994 meeting of the City's Common Council stated, in relevant part, as follows:

XIII. Closed Session: Pursuant to Wisconsin State Statute 19.85(1)(c) Considering Employment, Promotion, Compensation or Performance Evaluation Data of Any Public Employee Over Which the Governmental Body has Jurisdiction or Exercises Responsibility

A. Deputy Clerk Position
B. Employee Layoff
C. Arbitration Settlement

At the closed session portion of its November 8, 1994, meeting, the Common Council discussed the ramifications of laying off one employe and directed Willi to contact the City's labor counsel, Jon Anderson, as to what was required in that regard. The Council passed a motion to layoff one employe in the Public Works Department effective November 25, 1994. At that time there were two employes in the Public Works Department who were off of work on leaves of absence, Peters and Stolarski, who were expected to return to work, although neither subsequently did so.

Also in closed session at that meeting, the Council passed a motion to authorize an increase in the salary of the person in the Deputy Clerk position, Hazelton, to $16,800 for 1994, retroactive to January 1, 1994. The parties subsequently agreed in 1995 to a rate for the position greater than the amount Hazelton received by that increase and retroactive beyond January 1, 1994. The Council also discussed the settlement offer from Susan Bosgraaf that White had relayed to Anderson on November 2, 1994. The Council had several questions in that regard and directed Willi to arrange a teleconference with Anderson to discuss the matter. The Council met in closed session on November 22, 1994, during which it had a teleconference with Attorney Anderson. Following the teleconference, the Council passed a motion to offer Susan Bosgraaf $19,198.58 to settle her claims and that if she did not accept that offer, to continue to pursue those cases.

13. The afternoon of November 11, 1994, Geisendorfer went to Bader's job site and informed him that he was being laid off and Geisendorfer indicated he wanted Torkelson and David Bosgraaf to be present when he discussed it with Bader. Approximately twenty minutes later, Geisendorfer met with Bader, Torkelson and Bosgraaf at the Water Shop and informed them that Bader was going to be laid off. Torkelson asked Geisendorfer if the layoff was due to there not being enough work and Geisendorfer replied, "No", that it was for "economic reasons". Torkelson also asked if they would be permitted to use compensatory time, and Geisendorfer responded that they would not be able to do so until the touchpads were installed for the water meters. Geisendorfer also indicated that Peters, an Operator in Streets who was on Worker's Compensation leave for a shoulder injury, would be returning to work in the near future.

Also on November 11, 1994, Willi sent Bader a letter informing him that the City's Common Council had voted on November 8, 1994, to layoff one employe in the Public Works Department upon the recommendation of the Public Works Committee, and that pursuant to Article VI of the parties' Collective Bargaining Agreement, he was the employe being laid off, effective November 25, 1994.

14. On November 23, 1994, Bader was given an "exit interview and separation clearance" by Willi, which stated as follows with regard to the "reasons for separation":

"layoff due to lack of work"

On November 25, 1994, Bader was laidoff from his employment with the City and has not been recalled to said employment.

15. In early 1995, Robert Guist was transferred from the Utility Division to the Streets Division in the Public Works Department. That transfer was grieved and ultimately the grievance was sustained in arbitration. Peters' employment was terminated in early 1995 on the basis he could no longer perform the duties in his job. Also in September of 1995, a laborer in the Streets Division, Stolarski, retired. Neither Peters' nor Stolarski's positions were subsequently filled.

16. The official notice of the November 1, 1994, closed session joint meeting of the City's Finance Committee and Personnel Committee, and the official notice of the November 8, 1994 meeting in closed session of the City's Common Council, were insufficient to reasonably place the Union on notice at those times that action to immediately change the payrate of the individual in the Deputy Clerk/ADA Officer position (Hazelton) was being considered or acted upon by the City's elected officials. At no time during the parties' negotiations regarding the wages, hours and conditions of employment of the Deputy Clerk/ADA Officer position did the City make any effort to notify the Union of its Council's actions of November 8, 1994 with respect to Hazelton's wages. The Union first became aware of the City's unilateral change of Hazelton's wage rate on October 24, 1995 (at hearing in this case) when the City first provided the Union with a copy of the minutes of the November 8, 1994, closed session of the City's Common Council that did not have the portions of the minutes referring to "Deputy Clerk Position" and "Arbitration Settlement" effaced.

17. On August 21, 1996, the Union filed an amended complaint in this matter in which it added an allegation that the City, by unilaterally adjusting the 1994 wages of the person in the Deputy Clerk/ADA Officer position, subsequent to the Commission's decision including that position in the bargaining unit, and during the "accretion negotiations" between the Union and the City, and by failing to notify the Union of its actions, violated Secs. 111.70(3)(a)4, and

derivatively, 1, Stats., by refusing to bargain in good faith. Said amended complaint was filed within one year of the Union becoming aware of the City's actions on November 8, 1994.

18. In its reply brief filed in this case on September 24, 1997, the Union raised for the first time in these proceedings the allegation that the unilateral change in Hazelton's wages constituted discrimination in violation of Sec. 111.70(3)(a)3 and 1, Stats.

Based upon the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. The amended complaint alleging that the Respondent City of Mauston refused to bargain in good faith by its actions of November 8, 1994 unilaterally changing the wage rate of the individual in the Deputy Clerk/ADA position, was timely filed under Sec. 111.07(14), Stats.

2. The Respondent, City of Mauston, its officers and agents, by unilaterally adjusting the wages of the individual in the Deputy Clerk/ADA Officer position on November 8, 1994, while it was negotiating with Complainant Local 569-A, AFSCME, AFL-CIO, over the wages, hours and conditions of employment for that position, and by failing to inform the Complainant of its actions, refused to bargain in good faith in violation of Sec. 111.70(3)(a)4, Stats., and derivatively, (3)(a)1, Stats.

3. The issue of whether the Respondent City of Mauston discriminated in violation of Secs. 111.70(3)(a)3 and 1, Stats., by unilaterally adjusting the wages of the person in the Deputy Clerk/ADA position has neither been raised in the pleadings, nor otherwise been made an issue that may properly be adjudicated in this proceeding without violating Respondent's due process rights.

4. The Complainant Local 569-A, AFSCME, AFL-CIO, has not shown by a clear and satisfactory preponderance of the evidence that the decision and action of the Respondent City of Mauston, its officers and agents, to layoff Harlan Bader effective November 25, 1994, was motivated, at least in part, by animus toward the Complainant or any of its members for having engaged in protected, concerted activity. Therefore, the Complainant has failed to establish that the Respondent, City of Mauston, its officers and agents, violated Sec. 111.70(3)(a)3, and derivatively, (3)(a)1, Stats., in that regard.

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

ORDER

1. The allegations in the instant amended complaint that the Respondent City of Mauston committed prohibited practices by its decision and actions with regard to the layoff of Harlan Bader are dismissed.

2. The Respondent City of Mauston, its officers and agents, shall immediately:

a) Cease and desist from refusing to bargain in good faith with Complainant Local 569-A, AFSCME, AFL-CIO, by unilaterally implementing a wage increase with regard to a position over which the Respondent City is obligated to bargain with the Complainant regarding its wages, hours and conditions of employment, and by failing to inform the Complainant of such unilateral action.

b) Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

(1) Post the Notice attached hereto as Appendix "A" in conspicuous places in City buildings where notices to employes are posted. The Notice shall be signed by the representative for the City and shall remain posted for a period of thirty (30) days. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

(2) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this Order as to the action the City has taken to comply with this Order.

Dated at Madison, Wisconsin, this 27th day of March, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

APPENDIX "A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employes that:

WE WILL NOT violate Sections 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act by unilaterally changing the wages of a position over which we are obligated to bargain the wages, hours and conditions of employment for that position and by failing to inform the exclusive collective bargaining representative (Local 569-A, AFSCME, AFL-CIO) of such changes.

WE WILL bargain in good faith with Local 569-A, AFSCME, AFL-CIO, within the meaning of Section 111.70(1)(a) of the Municipal Employment Relations Act.

Dated this _____ day of _____, 1998.

CITY OF MAUSTON

By _____

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL.

CITY OF MAUSTON

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Union filed a complaint of prohibited practices wherein it alleged that the City's actions in laying off an employe, Harlan Bader, in the bargaining unit represented by the Union was motivated, at least in part, by anti-union animus as a result of suits and grievances brought against the City by the Union and one of its officers, Susan Bosgraaf. The Union subsequently amended its complaint to add the allegation that the City committed prohibited practices by unilaterally altering the wage rate of the individual in the Deputy Clerk/ADA Officer position after that position had been included in the bargaining unit by order of the Commission and while the parties were engaged in negotiating the wages, hours and conditions of employment for the position and by failing to notify the Union of said wage adjustment.

The City has responded that the layoff of Bader was for the purpose of saving the City money and because it could still get the work done despite the layoff, and not because of anti-union animus. With regard to the amended complaint, the City has asserted that the new allegations involve actions taken by the City more than one year prior to the filing of the amended complaint and that, therefore, those allegations are untimely under Sec. 111.07(14), Stats., and the Commission does not have jurisdiction over those allegations.

POSITIONS OF THE PARTIES

Union

With regard to the City's motion to dismiss the complaint as untimely, the Union asserts that the City has the burden of proving that the Union knew or should have reasonably known of the alleged violations at the time they occurred. However, as late as October 24, 1995, the City was wilfully concealing information as to the actual wages paid the Deputy Clerk and that it had adjusted said wages during the period of negotiations with the Union. Its actions were taken during closed sessions of the joint meeting between the Finance and the Personnel Committees on November 1, 1994 and of the City's Common Council on November 8, 1994. The notices of those closed sessions were vague and without sufficient detail to forewarn of the prohibited conduct. Based on the content of those notices, a reader could not have concluded that the City was about to commit the prohibited practices alleged. Further, the Union is not required to police the City's closed sessions.

The Union asserts that the City's surreptitious conduct in adjusting the Deputy Clerk's pay, and concealing that adjustment, constituted refusals to bargain in good faith and interference in violation of Section 111.70(3)(a)(4) and derivatively, (1), as well as an independent violation of 111.70(3)(a)(1), Stats. The parties were in the process of negotiating the wages of the Deputy Clerk position at the time in question and the Union had no reason to suspect that the City had unilaterally changed those wages in its closed sessions. An employer who implements a wage increase prior to the exhaustion of its duty to bargain with the employes' exclusive bargaining representative commits a *per se* refusal to bargain in good faith and under the circumstances here, constituted an attempt to undermine the Union.

The Union further asserts that the closed sessions of the City's Common Council and its Public Works Committee with regard to recommending and deciding on the layoff of an employe and the adjustment of a bargaining unit employe's wages violated Wisconsin's Open Meetings Law. While the minutes of those meetings state that those bodies went into closed session pursuant to Sec. 19.85(1)(c), Stats., that statutory provision does not authorize a public body to go into closed session to act on the compensation of members of a collective bargaining unit or to determine staffing levels in general.

As to the layoff of Bader, the Union asserts that a finding of discrimination is not restricted to the traditional analysis for finding discrimination. Citing, WINNEBAGO COUNTY (SOCIAL SERVICES), DEC. NO. 16930-A (Davis, 8/79). An employer will be found to have discriminated in violation of 111.70(3)(a)3, Stats., even though the recipient of the employer's adverse action had not engaged in concerted activity, where it has been shown that the employer's action was motivated by a purpose to chill the exercise of protected rights among the remaining unit employes, and if the employer may reasonably have foreseen that its actions would likely have that effect. In this case, there is ample evidence that the City laid off Bader, a bargaining unit employe, in order to intimidate the remaining employes, even though there is no evidence that the City's action was directed at Bader personally. The Union argues that it has shown that the layoff of Bader was actually a termination, and that it was for neither "economic reasons", nor for "lack of work", as claimed by the City. Establishing that the City's explanation was pretextual is sufficient proof that its decision and action was motivated by unlawful animus. GREEN LAKE COUNTY, DEC. NO. 28792-A (Nielsen, 4/97). It is not necessary that a complainant establish direct evidence of the employer's illicit motive. TOWN OF SPIDER LAKE, DEC. NO. 28038-A (Greco, 12/94). Further, the layoff was contemporaneous with other hostile acts, e.g. restrictions on employe time off, requests for vacation and compensatory time off, and the transfer of Guist from the Utility to the Street Division in violation of the parties' collective bargaining agreement, and the reprimand of the Union's Vice-President, David Bosgraaf. Contrary to the City's assertions, the Director of Public Works at the time, Geisendorfer, denied that there was a lack of work, and testified that he never told anyone that there was and he also did not confirm that he initiated the layoff in November of 1994. Geisendorfer also testified that he had very little to do with Guist's transfer from Utility

to the Streets Division. The Union concludes that the only event which explains the termination of Bader is the Union's having engaged in protected activity.

In its reply brief, the Union asserts that Bader's layoff was a spur of the moment reaction to the Union's general protected activities. The evidence established that the City had not considered the layoff prior to November 2, 1994, and that at no time prior to the City Council's vote to effect the layoff was the subject ever addressed in a public forum as part of the preliminary budget or otherwise. The testimony of the City's Administrator, Willi, established that the City's preliminary budget presented in "mid-October of 1994", included 11 full-time employes, including the positions of Bader, Peters and Stolarski. Further, the City's Finance Committee had met twice prior to November 1, 1994, and dealt with major budget issues in the preliminary budget, and it then met on November 1 for the specific purposes of additional discussion of the 1995 budget and the establishment of a preliminary budget for presentation and publication. That closed session on November 1 did not deal with any matters relating to layoff. However, on November 2, 1994, the Union's representative, David White, contacted the City's representative, Attorney Anderson, and relayed an offer of settlement in the amount of $100,000 regarding pending litigation involving the City and the Union. On November 7, 1994, the Public Works Committee went into closed session for "a discussion and recommendation on layoffs." On November 8, 1994, the Common Council went into closed session to consider "A. Deputy Clerk position" "B. Employe Layoff", and "C. Arbitration Settlement." According to Willi, the layoff discussion by the Council on November 8, 1994, was not employe-specific, and the Council voted in closed session on that date to layoff one employe effective November 25, 1994. It is clear that the Public Works Committee met on November 7, 1994, and the Council, on November 8, 1994, in closed session regarding labor relations matters they did not want disclosed. Those sessions were not preceded by public notice regarding any budgetary matters to be considered, nor do the minutes of either session reflect any discussion of budgetary matters. The Chair of the City's Personnel Committee, Richard Noe, testified that he had no recollection of any discussion regarding the layoff prior to the November 7, 1994 meeting. The layoff of Bader was acted on during the same closed session in which the arbitration settlement regarding Sue Bosgraaf was discussed and the wage adjustment for the Deputy Clerk was secretly passed.

The City's actions on November 7 and 8, 1994 had nothing to do with the proposed 1995 budget or the 1994 budget to date; rather, the sole and exclusive stimulus which intervened to instigate the City's actions was the Union's protected activity. The common thread to the three items -- the arbitration settlement, the Deputy Clerk position, and the employe layoff, was the City's reaction to the Union's $100,000 settlement offer. Nothing other than the communication of that settlement offer occurred between November 1 and November 7-8, 1994. Further, the record establishes the animus between the City and the Union was like that between "the Hatfields and McCoys".

The Union also asserts that the City on or about August 28, 1995, excised portions of its minutes of the November 8 Council meeting in order to conceal its illegal conduct. Willi's August 28, 1995 letter to Torkelson explained that the "City has excised those portions of the minutes. . .because they remain confidential." Willi's testimony that he believed that the Union's representative, White, was aware of the wage increase given to the Deputy Clerk is contradicted by his letter to Torkelson, wherein he explained that the excised portions of the minutes of the November 8 Council closed session were not only confidential, but "do not pertain to your request." However, the six documents that Willi produced in response to the Union's subpoena in this case, by his own admission, did not contain anything pertaining to the layoff involved. Further, at hearing in March of 1997, Willi produced a document he purportedly prepared at Geisendorfer's request on or about November 1, 1994, presumably a document that had it been submitted to City officials at the November 1, 1994, would have been incorporated into the minutes of that meeting. Noe testified that there was no discussion regarding layoffs prior to the November 7, 1994 Public Works Committee meeting. Thus, Willi's testimony in March of 1997 that Geisendorfer on or about November 1, 1994 was planning to approach the Public Works Committee regarding a proposed layoff is not credible.

The Union also asserts in its reply brief that the City not only refused to bargain in good faith regarding the wage adjustment to the Deputy Clerk position, but also discriminated by unilaterally adjusting the wages of that position. The City sought to reward an individual whose self-interest was in direct opposition to the Union's position in litigation. The City's violation in this regard was exposed only because its conduct was intertwined with its decision to layoff a bargaining unit employe in retaliation for the $100,000 settlement offer made to the City by the Union on behalf of Hazelton's predecessor. In that regard, the Union requests that it be permitted to amend its petition to allege a separate violation of 111.70(3)(a)(3) and (1), Stats., based on the City's failure to notify the Union of its unilateral action to adjust the wages of the Deputy City Clerk position.

The Union concludes that it has satisfied its burden of proving discrimination in violation of Section 111.70(3)(a)(3), Stats., by a clear and satisfactory preponderance of the evidence. It has shown that the City, had, as late as November 1, 1994, budgeted for 11 full-time employes in the Public Works Department, that even though Peters and Skolarski were still off work on an extended leave of absence, Bader was laid off, and that the City was already shorthanded even before Bader's layoff. In that same time period, the City had curtailed vacation and compensatory time off of the remaining unit employes and transferred Guist to the Streets Division and subcontracted certain work otherwise performed by the bargaining unit in the past. Thus, the record establishes that the City's only motivation was to exact retribution from the bargaining unit because of protected activities, and not for lack of work or economic reasons. Lastly, the Union asserts that the City's contention that if the Union did not know of the November 8, 1994 wage adjustment, then the effect was *de minimis* and there was no impact

on the bargaining unit, amounts to the assertion that the Union cannot be hurt by what it did not know. The Union requests that the complaint be sustained, and an appropriate remedy ordered.

City

The City first asserts that in order for the Union to prevail on its claim that Bader's layoff violated Section 111.70(3)(a)(3) and derivatively (1), Stats., it must prove all of the following elements by a clear and satisfactory preponderance of the evidence: (1) that Bader was personally engaged in protected, concerted activity; (2) that the City's agents had knowledge of that activity; (3) that the City was hostile toward such activity; and (4) that the City's motivation for laying off Bader was, at least in part, its hostility toward such protected, concerted activity. PRICE COUNTY (HIGHWAY DEPARTMENT), DEC. NO. 24504-A (Gratz, 4/88).

With regard to the first element, the Union presented no evidence that Bader was engaged in protected, concerted activity. Bader's only recent exercise of his rights under 111.70(2), Stats., occurred when he filed a grievance in April of 1993, more than 19 months before his layoff. No evidence was presented of a causal connection between that grievance and his layoff in November of 1994. While the Union alleged in paragraph 17 of its initial complaint that Bader had been told by the City Administrator that he was being laid off due to the various suits the Union had brought against the City, Bader admitted that was not the case, and, as a result, the Union amended its complaint to eliminate those allegations. The City asserts that is telling, as that is the only allegation that could be considered direct evidence of discrimination. Thus, the Union has conceded it has no direct evidence linking Bader's layoff to any protected concerted union activity. Having failed to show by a clear and satisfactory preponderance of the evidence that Bader was laid off for protected concerted activity in which he personally had engaged, the Union's complaint should be dismissed in that regard.

Having recognized that Bader's layoff had nothing to do with his exercise of protected, concerted rights, the Union has attempted to create a "subtle shift" in the focus of the case by asserting that Bader's layoff was in retaliation for the general activities of the Union over the years. Attempting to bolster that argument, the Union added 26 additional paragraphs to its amended complaint. Those allegations obviously represent the Union's strongest allegations in support of its claims. According to that amended complaint, the following incidents allegedly caused Bader to be laid off. The Union alleged that it had filed numerous grievances alleging contract violations by the City prior to November 17, 1994 and that approximately half of those grievances remained unresolved as of November 7, 1994. Those grievances date back as far as 1985 and there is no evidence that any of them, even the most recent, played any role in the layoff that occurred in 1994. The decision to layoff one employe was first proposed by the Director of Public Works on or about October 1, 1994. In the one year prior to that, only five grievances were filed by the Union, of which four were resolved. The Union has not shown how those grievances were connected to the layoff, nor even that the grievances were

"numerous". The Union also alleges that among the many grievances, was one filed by Sue Bosgraaf that was the subject of a hearing on October 29, 1992, and which resulted in an amended award from the Arbitrator on February 12, 1996. The timing alone of those events underscores their irrelevance. The hearing was conducted two years before the layoff and the amended award was issued 15 months after the layoff, and neither could have had anything to do with the layoff. The Union also asserts that it was involved in grievances and litigation that resulted in a preliminary injunction being issued in April of 1993, but presented no evidence that the preliminary injunction issued a year and a half before the layoff played any role in the layoff decision. The Union alleged that the City reorganized its office in 1992, eliminating Sue Bosgraaf's position, and which resulted in a Commission decision issued in November of 1993. Again, the Union presented no evidence that the decision issued a year before the layoff played any role in the layoff decision. The Union also asserts that the layoff is in retaliation for Bosgraaf's settlement demand of $100,000. However, the decision could not have been related to that demand as the recommendation for layoff occurred prior to the City having knowledge of the demand. Further, there is no evidence that the demand resulted in animus or hostile feelings; rather, the evidence shows that the City countered that demand with its offer to settle the claim, demonstrating a good faith attempt to resolve the matter and underscoring the lack of a showing of animus. Also cited by the Union was a February 2, 1995 grievance involving the transfer of Guist, which grievance was denied. The City questions how a grievance filed after the layoff could have played a role in the layoff decision. Regarding the alleged incidents occurring before the layoff, each occurred at least a year or more before and, based on timing alone, are too remote to have any probative value, let alone create a causal connection between those incidents and the layoff. As to those incidents allegedly occurring after the layoff, it is illogical that they could have played a part in the decision. Thus, the Union has presented no evidence that any of the incidents alleged were even considered by the City in making the layoff decision.

The City asserts that it has established that it had legitimate, non-discriminatory reasons for the layoff. The City showed that it was able to save over $21,000 by laying off an employe, while also managing to perform the work. The City demonstrated why it was necessary to reduce costs in light of it having the seventh highest tax rate of all the cities in the State. While the Union attempted to raise the inference that the City's justification for the layoff was a pretext by alleging the City offered different reasons, i.e., economic versus lack of work, the evidence established that the City's decision was based upon both the economic savings and its ability to absorb the layoff from an operational standpoint. The contention that the City changed its explanation is not supported by the facts. Willi's unrefuted testimony was that he spoke with Bader on November 16, 1994, regarding the reasons for the layoff and told him at that time that the layoff was for both financial and workload reasons. That testimony was bolstered by Willi's contemporaneous memorandum he prepared as a summary of that conversation. (Respondent's Exhibit 2). The Union also asserted that the timing of the layoff was suspicious in that it was implemented in November of 1994. The City asserts that in the course of preparing the 1995

budget, the Public Works Department recognized that it could layoff an employe and still get the work done. Thus, there was no reason not to immediately begin to realize those cost savings. Further, the evidence underscored the need the City faced for immediate cost savings. As of September 30, 1994, the Public Works Department had expended 90 percent of its budget for employe salaries, leaving it with 25 percent of the year to go, and only 10 percent of its salary budget left. Willi testified that was also a factor in deciding to effectuate the layoff immediately, and further testified that because the workload is traditionally lower in the fall and winter for that department, they could proceed immediately with the layoff. Thus, the City has presented legitimate, non-discriminatory reasons for the layoff and the Union has presented no evidence that these reasons were pretextual.

Next, the City asserts that the Union's allegations regarding the refusal to bargain must be dismissed as they were not timely filed. Pursuant to Section 111.07(14), Stats., a prohibited practice 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 the amended complaint was filed is controlling for statute of limitations purposes. CITY OF STEVENS POINT, DEC. NO. 26525-A (Jones, 2/92). The time for filing begins to run when an individual knows, or reasonably should have known, of the alleged violation. MILWAUKEE COUNTY, DEC. NO. 27437-A (Burns, 3/93). In this case the amended complaint was filed on August 21, 1996, alleging that the City had committed a prohibited practice by unilaterally granting a wage increase to the Deputy Clerk in November of 1994. The alleged violation having occurred approximately 21 months before the filing of the complaint, is well beyond the one-year statute of limitations. Assuming that the Union contends that it only recently gained knowledge of the wage increase allegedly given to the Deputy Clerk, the Union has produced minimal evidence on that issue. The only evidence adduced was that the Union's representative, White, stated that he personally did not know about the wage increase. It is possible that White misremembers, as he obviously misremembered other portions of his testimony that he adamantly swore were correct. White testified that he was positive he had communicated the $100,000 settlement offer to Anderson in October of 1994; however, the Union conceded in its amended complaint that the offer of settlement was made in November, not October. In addition, Willi testified he believed that White was aware of the wage increase at the time it was given. While the Union also provided testimony by its President and its Vice-President, neither of these Union officials addressed the alleged failure to bargain issue. One would assume that if they had just recently learned about the wage increase, they would have testified to that effect. Their silence in that regard must be imputed against them. Further, it is undisputed that the issue of the Deputy Clerk's compensation was a matter of public record. The issue of the Deputy Clerk's compensation was listed on the public notice of the meeting of the Common Council on November 1, 1994, and thus was a matter of public record of which the local union officials reasonably should have been aware.

The City also asserts that the Deputy Clerk position was accreted into the bargaining unit in 1994. The unrefuted evidence is that the increase she received in 1994 was decided upon by the City prior to the inclusion of the position in the bargaining unit and that even with the wage increase, the Deputy Clerk was receiving less than the contract rate for the position. Thus, the City did little more than give the Deputy Clerk the wage increase she was in line to receive before the position was accreted. The fact that the wage increase did not even bring the position to a contract rate further underscores that the City did not usurp the Union's bargaining authority, and the issue of her wage rate was not resolved by the increase that she received in 1994. At worst, if such a violation is found, the effect was *de minimis*. If the Union is to be believed, no one in the Union was aware of the wage increase given to the Deputy Clerk. Accordingly, there could not have been any impact upon the bargaining unit and, as such, no derivative violation of Sec. 111.70(3)(a)(1), Stats.

In its reply brief, the City reiterates its contention that the unrefuted evidence is that Willi told Bader, prior to the effective date of his layoff, that the layoff was due to both economic reasons and the lack of work. Again, that testimony was bolstered by Willi's contemporaneous memorandum he prepared summarizing his meeting with Bader. Also, the Union's contention that the only event which intervened before November 7 and 8, 1994 which explains the November 25 layoff of Bader, is the Union's protected activity, is not supported by the record. The record shows that things were relatively quiet on the labor/management front at the time of the layoff. Despite the Union's making much ado of the $100,000 settlement demand by Bosgraaf, the evidence shows the demand was made after the decision to layoff an employe. The layoff could not have been motivated by a desire to "chill" Union activity, since during the year prior to the layoff, there was virtually no such activity. As to the Union's allegation that the City violated the State's Open Meetings Act in conjunction with its action in laying off Bader, the City asserts the allegation is a red herring and is brought in bad faith. The Union is fully aware the Commission has no jurisdiction to enforce alleged violations of the Open Meetings Law.

The City concludes that the Union's assertion that the reasons offered for the layoff were pretextual is not supported by the record, and that the Union has therefore not met its burden of proof. Conversely, the City has offered evidence that its reasons for the layoff were real.

DISCUSSION

Timeliness of the Amended Complaint

Section 111.07(14), Stats., made applicable to the filing of complaints under MERA by Sec. 111.70(4)(a), Stats., provides:

> The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged.

The Commission has held that the one year begins to run under Sec. 111.70(14), Stats., "once a complainant has knowledge of the act alleged to violate the statute." STATE OF WISCONSIN, DEC. NO. 26676-B (WERC, 4/91), as well as the cases cited therein. The evidence establishes that although the City took the action of changing the wage rate of the person (Hazelton) in the Deputy Clerk/ADA Officer position on November 8, 1994, the Union did not learn of it until it received a complete copy of the minutes of the City Council's November 8, 1994, closed session at hearing in this case on October 24, 1995. The Union had requested those minutes sometime in the summer of 1995 in preparation for hearing on its initial complaint filed in this case, as it was also at that November 8th closed session that the Council voted to lay off an employe in the Public Works Department. On August 28, 1995, the City sent the Union's President a copy of the minutes of the Council's November 8th closed session, but with the portions pertaining to "Deputy Clerk Position" and "Arbitration Settlement" blacked out. Given the City's initial response to the Union's request for those minutes, it cannot convincingly argue that those minutes were first available for the asking anytime after November 8, 1994, and that the Union therefore could have, and should have, been aware of the City's actions any time after that date. Further, the notices of both the November 1, 1994 closed session of the City's Finance and Personnel Committees and the November 8, 1994 closed session of the City Council were too vague to have put the Union on notice of the City's intended actions. Although the notice for the November 1st closed session referenced "Deputy Clerk Compensation", it must be remembered that the parties were at that time engaged in negotiations regarding the wage rate for that position so that it would not have been unreasonable for the Union to assume that the City was discussing the subject in that context. It also must be remembered that although the City was engaged in those negotiations with the Union well into 1995, the City failed to inform the Union during that time that it had changed Hazelton's wage rate. The City questions White's testimony that he was not aware of the change, since his recall of the date he gave the Susan Bosgraaf settlement offer to Anderson was faulty. There is, however, a difference between recalling a conversation as being in late October, when it was actually November 2nd, and not remembering whether the City had changed the wage rate of a position over which the parties were then bargaining.

There being no evidence that the Union knew, or should have known, of the City's actions of November 8, 1994 changing Hazelton's wages, before it received the minutes of that closed session at hearing on October 24, 1995, and the Union having filed its amended complaint on August 21, 1996, it is concluded that the amended complaint is timely under Sec. 111.07(14), Stats., as to such allegations.

Unilateral Change in Deputy Clerk's Pay

Section 111.70(3)(a)4, Stats., provides, in relevant part, that it is a prohibited practice for a municipal employer:

> "To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit."

Where, as in this case, an existing position has been clarified into a bargaining unit, that position is not automatically covered by the existing collective bargaining agreement and the municipal employer is required to bargain with the union with regard to the wages, hours and conditions of employment for that position. MADISON VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT, DEC. NO. 8382-A (WERC, 1/80). Concomitant with that duty to bargain is the duty to maintain the *status quo* as to the wages, hours and conditions of employment of the position during those negotiations. The City asserts that its action in raising Hazelton's wages in November of 1994 was based upon the increases that had been anticipated for the City's non-union positions for 1994 when it was developing its 1994 budget in the fall of 1993 (when the Deputy Clerk position had not yet been placed in the bargaining unit.) That assertion is based solely upon Willi's "understanding" of what had gone on; as he was not employed by the City until August of 1994, and the City offered no documentary evidence in that regard. Moreover, the Commission issued its decision including the Deputy Clerk/ADA Officer position in the bargaining unit on November 29, 1993, and presumably if the City felt it was implementing a prior commitment to raise the position's rate effective January 1, 1994, it would have done so at that time. The fact that the City did not raise the position's rate on January 1, 1994, but waited until November of that year, shortly after it had begun negotiations with the Union over the position, belies its assertion.

The City's claim that since the raise it granted was less than the rate the parties eventually agreed to for the position, there was no violation, amounts to a "no harm, no foul" defense. The Examiner is not aware that such a defense has been recognized by the Commission with regard to a municipal employer's duty to bargain in good faith.

It is concluded that by unilaterally changing the wage rate of the individual in the Deputy Clerk position at the time it was obligated to bargain with the Union regarding the wages, hours and conditions of employment of that position, and by failing to inform the Union at that time of its action, the City violated its duty to bargain in good faith with the Union in violation of Sec. 111.70(3)(a)4, and derivatively, (3)(a)1, Stats. The fact that the raise the City granted turned out to be less than the rate the parties subsequently agreed to does not excuse the violation; however, it does impact on the remedy, as it eliminates the need for a backpay order as part of the relief granted.

The Union asserted for the first time in its reply brief that the unilateral wage increase the City granted to Hazelton also constitutes "discrimination" in violation of Sec. 111.70(3)(a)3, Stats., and moved to amend its complaint in that regard as well. That issue was neither litigated nor raised at hearing, nor was it addressed by the parties in their initial briefs. The Examiner has therefore concluded that it would be improper and would violate due process and the principles of fair play to adjudicate the issue at this point. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 20941-B (WERC, 1/85); CITY OF PRAIRIE DU CHIEN, DEC. NO. 21619-A (Schiavoni, 7/84) aff'd by operation of law, DEC. NO. 21619-B (WERC, 8/84).

Bader Layoff

The Union asserts that the City's decision to lay off Bader, and the implementation of that decision violated Sec. 111.70(3)(a)3, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

Section 111.70(3)(a)3, Stats., provides, in relevant part, that it is a prohibited practice for a municipal employer

> 3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment.
>
> . . .

In order to establish a violation of Sec. 111.70(3)(a)3, Stats., Complainant must prove by a clear and satisfactory preponderance of the evidence that a municipal employe was engaged in protected, concerted activity; that the municipal employer's agent's were aware of that activity; that the municipal employer, or its agents, were hostile towards that activity; and that the municipal employer's actions toward the municipal employe were motivated, at least in part, by its hostility toward the municipal employe's protected, concerted activity. MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 Wis. 2d 540 (1967); EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122 Wis. 2d 132 (1985); GREEN LAKE COUNTY, DEC. NO. 28972-B (WERC, 12/97). It is not necessary that the municipal employe against whom the adverse action was taken personally engaged in the protected, concerted activity; it is sufficient that the employe's exclusive collective bargaining representative or its officers have engaged in such activity and the employer's actions are motivated, at least in part, by hostility towards that activity. GREEN LAKE COUNTY, supra. It is safe to say that in this case although Bader had not recently engaged in protected, concerted activity before his layoff in November of 1994, the Union had been active in filing grievances and a unit clarification. It is also safe to say that the City and its agents were aware of the Union's activity in that regard.

To establish animus on the part of the City, the Union relies in part upon the amount of litigation in which the parties were involved, the timing of the City's decision to lay off Bader, and of the implementation of its decision, and asserts that, together with establishing that the reasons given by the City for its actions are pretextual, animus may be inferred.

The Examiner does not find the amount of litigation in which the City and the Union were involved at the time sufficient to establish hostility toward the Union. A review of the list of grievances and other litigation the Union had filed (Complainant Exhibit No. 40), indicates that seventeen grievances and one law suit had been filed in 1993 and that in 1994 five grievances had been filed prior to the decision to lay off an employe in Streets. That would seem to indicate some improvement in the parties' relationship, assuming that numbers alone are indicative of anything in that regard. Further, Willi's unrebutted testimony was that the parties had resolved four out of the five grievances filed between October of 1993 and October 1 of 1994. The evidence also indicates that the parties were engaged in efforts to resolve the litigation involving Susan Bosgraaf in October and November of 1994. It is noted in this regard that the City made a not insubstantial counter-offer to the November 2, 1994 offer White had made to the City on Bosgraaf's behalf.

With regard to the timing of the City's decision to layoff and its implementation of the decision, the Union asserts that such action was first considered only after the City received the settlement offer from White regarding Susan Bosgraaf and notes that the City Council's decision to lay off was made in the same closed session at which it considered the Bosgraaf offer and at which it voted to improperly grant Hazelton a wage increase. In asserting that the City did not discuss or consider laying off an employe prior to receiving the Bosgraaf offer of November 2, 1994, the Union relies on the testimony of Richard Noe and Geisendorfer. Noe was on the Public Works Committee in 1994, and his testimony was that he did not recall when the subject was first raised, although he did state that if it did not appear in the minutes of meetings prior to the November 7, 1994 Public Works Committee meeting, he would say it was not discussed at those prior meetings. As the Union notes, there are no specific references to discussion of a layoff in the minutes of prior meetings that are in the record. However, it is also noted that while the minutes of the October 17, 1994 meeting of the City's Finance Committee are not detailed in that regard, they do reference under "Budget Preparation", discussions with Geisendorfer regarding his 1995 departmental budget requests. (Complainant Exhibit No. 8). Geisendorfer's testimony on this point is even less clear. Geisendorfer testified that he did not recall if his budget worksheet for the 1995 budget included the layoff or whether it was his idea to layoff an employe. Willi, however, testified that Geisendorfer had raised that possibility on his 1995 budget worksheet that he submitted around the first of October, 1994, and that Willi had prepared a calculation on November 1, 1994 of the possible cost savings of laying off a Laborer in the Streets Division, at Geisendorfer's request, for presentation to the Public Works Committee (Respondent Exhibit No. 1). 1/ Willi had testified earlier when called adversely by the Union, that he had been present at all of the meetings where the possibility of layoffs were

discussed, except the November 7, 1994 meeting of the Public Works Committee, and that the subject had been discussed at prior budget meetings in a general way as a possible means of reducing the budget, but not with any specificity until the actual budget process began. (October 24, 1995 Tr., p. 109).

It is not clear from the above evidence when the possibility of a layoff as a means to reduce costs was first discussed by the City, however, there is evidence that such discussions predated the November 2, 1994, offer White communicated to Anderson. Albeit the specific recommendation and decision were made after the offer was received, the timing of those actions is not, by itself, determinative, but is part of the totality of the circumstances to be considered in determining whether the reasons offered for those actions are pretextual.

The Union asserts that in addition to the suspicious timing of the City's decision to layoff an employe, there are other indicia that the reasons offered by the City for its decision are a pretext to hide its real motive. The Union asserts that the City has given different reasons for laying off Bader; stating it was for economic reasons, and then stating it was for a "lack of work". In that regard, Geisendorfer testified that the layoff was for economic reasons, but agreed that he would not have laid off an employe if he did not feel he still could get the work done. (September 18, 1996, Tr. p. 29). Noe, a member of the Public Works Committee that recommended the layoff, testified that the Committee was basing its recommendation on Geisendorfer's determination that he could save some money in his budget and still get the work done with one less employe. (March 7, 1996, Tr. p. 76, 78-9). Willi also testified that Geisendorfer appeared before the committee and was asked if he could maintain the same level of services with the remaining work force and that Geisendorfer stated that he could. (March 4, 1997, Tr. p. 9). As the City argues, a layoff decision by necessity entails both economic considerations and staffing/workload considerations. The Examiner finds no inherent incongruity in the reasons given by the City for the decision to layoff one employe.

The Union also argues that the decision to layoff for an alleged "lack of work" is a facade, since it occurred at the same time that Geisendorfer had imposed new restrictions on the employes' use of compensatory time and vacation time, ostensibly because of the workload, and when the Streets Division was already short-handed with Peters off of work. On their face, those actions would appear to conflict with the City's decision to layoff an employe in the Streets Division. It is not totally clear why Geisendorfer imposed the restrictions on using compensatory time and vacation time in the fall of 1994, however, as David Bosgraaf explained, it appears that there was a considerable effort beginning sometime in October of 1994 to complete work on the water meters, with as many as two or three employes from the Streets Division being assigned to assist Guist in that regard. (September 18, 1996, Tr. p. 49). Bosgraaf also testified that the restriction on taking vacation was imposed about the same time that Bader was laid off, or about the time deer-hunting season started, at which time everyone wanted to take time off from work, and while Peters was still off work. (September 18, 1996, Tr. p. 59).

The timing of the layoff of Bader effective November 25, 1994, i.e., almost as soon as possible after the decision to layoff was made, was adequately explained by Willi. Willi testified, and the evidence (Complainant Exhibit 33) shows, that by September 30, 1994, the Public Works Department had already spent 90% of the amount it had budgeted for salaries and overtime in 1994, with 25% of the year still to go. Willi also testified that there is usually less work in the later part of the year. (March 4, 1997, Tr. pp. 18-20). The testimony also indicates that at the time Geisendorfer expected Peters to return to work in the near future from Worker's Compensation leave. The evidence provides valid business reasons as to why the City needed to effect a cost savings in the Department almost immediately, while at the same time Geisendorfer was taking steps to complete the water meter project and still get the rest of the work done with the remaining workforce.

As to the involuntary transfer of Guist to the Streets Division on February 1, 1995, in the arbitration of the grievance filed in that regard, the Union claimed, and to some degree the Arbitrator concluded, that a true transfer did not take place, since Guist continued to work most of his time in the Utility Division. (Complainant Exhibit 65). Whatever the City's reasons for transferring Guist, it does not appear that too much work for the remaining staff in the Streets Division was that reason. 2/ It is also noted that Peters, whose employment was terminated early in 1995 on the basis he was unable to perform his job, and Stolarski, who retired in September of 1995, were not replaced. Willi also testified that the amount spent by the Public Works Department for overtime did not increase from 1994 to 1995. (March 4, 1997, Tr. p. 18).

The Union also alleges that further evidence the City's reasons for its decision to layoff Bader were pretextual was the subsequent subcontracting of work previously performed by unit employes. The evidence establishes that the contracting out of such work occurred on two occasions in the summer of 1996, almost two years after Bader's layoff, and did not result in any layoffs at that time. (September 18, 1996, Tr. p. 61). Such events are too remote in time to provide any guidance as to the City's motive for its actions in November of 1994.

The Union asserts that the City's claim it was laying off Bader for "economic reasons" was a facade as well. That assertion ignores the fact that the Public Works Department had already spent 90% of its budgeted amount for salaries and overtime by September 30, 1994. (Complainant Exhibit 33). The Union's claim that there were no other cost savings measures taken by the City, other than laying off Bader, is also not supported by the evidence. As noted above, the City also decided not to fill the vacancies left by Peters' termination early in 1995 and Stolarski's retirement later in 1995, which presumably resulted in further savings.

In conclusion, the City has been able to establish that it had valid business reasons for its decision to layoff one employe in its Public Works Department in November of 1994. Beyond having established that the City's final decision and action were coincident with the Union's offer to settle the Susan Bosgraaf litigation and certain personnel actions by the Public

Works Director that the employes perceived in a negative light, the Union has not been able to establish, by a clear and satisfactory preponderance of the evidence, animus on the City's part towards the Union's concerted activity, nor has it established a nexus between the Union's concerted activity and the City's decision to layoff Bader. Therefore, the allegations in the amended complaint regarding the layoff of Harlan Bader have been dismissed.

Dated at Madison, Wisconsin, this 27th day of March, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

ENDNOTES

1/ The Union objected to the introduction of this exhibit at hearing on March 4, 1997, on the basis that it fell within the description of documents the Union had previously subpoenaed and had not been produced at that time. The Union's objection was overruled, however, the Union was permitted to request a continuance in order to give it the opportunity to respond to the document in rebuttal. The Union's request was granted, and the hearing was continued on June 24, 1997, at which time no rebuttal evidence was offered regarding Respondent Exhibit No. 1 or Willi's testimony in that regard.

2/ In summarizing the background facts in her award in the transfer grievance, the Arbitrator noted that Bosgraaf testified that the City Crew Foreman told him that if he grieved Guist being called in ahead of him for snowplowing, Guist would be transferred to Streets so that he could be called in ahead of Bosgraaf. (Complainant Exhibit 65).

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