

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

OCONTO FIRE FIGHTERS ASSOCIATION  
LOCAL 2739,

Complainant,

vs.

CITY OF OCONTO,

Respondent.

Case 41

No. 53275 MP-3098

Decision No. 28650-A

Appearances:

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, Attorneys at Law, by Mr. John B. Kiel, 700 West Michigan, Suite 500, P. O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of Oconto Fire Fighters Association, Local 2739.

Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Robert W. Burns, 333 Main Street, P. O. Box 13067, Green Bay, Wisconsin 54307-3067, appearing on behalf of the City of Oconto.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Oconto Fire Fighters Association, Local 2739 filed a complaint with the Wisconsin Employment Relations Commission on October 11, 1995, alleging that the City of Oconto had committed prohibited practices in violation of Secs. 111.70(3)(a)1, 3 and 4, Stats., by the Fire Chief's alleged statement that bargaining unit members' lives would be made "miserable" if they didn't get rid of Union President Brabant, by denying a shift exchange to President Brabant to attend a Union convention and by refusing to negotiate over a proposed change to restrict Union members from leaving the City during their free time without permission. On February 9, 1996, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held on March 28, 1996, in Oconto, Wisconsin. The parties filed post-hearing briefs and reply briefs, the last of which were received on July 12, 1996. The

No. 28650-A

Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

### FINDINGS OF FACT

1. Oconto Fire Fighters Association, Local 2739, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and its offices are located at 225 Michigan Avenue, Oconto, Wisconsin 54153. Terry F. Brabant has been the Union's President at all times material herein and has acted on its behalf.

2. The City of Oconto, hereinafter referred to as the City, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its offices are located at 1210 Main Street, Oconto, Wisconsin 54153. Michael F. Hoppe is the City's Fire Chief and has acted on its behalf.

3. The Union and the City have been parties to a series of collective bargaining agreements, the most recent covering the period January 1, 1995 through December 31, 1997. The collective bargaining agreement has provisions over wages, hours and conditions of employment as well as a grievance procedure culminating in final and binding arbitration.

4. On November 4, 1994, Chief Hoppe suspended a member of the bargaining unit for one day without pay. On or about November 10 or 11, 1994, Union President Brabant filed a grievance on behalf of the employe. On November 18, 1994, the grievance was resolved by the Police and Fire Commission in favor of the Union.

5. Article IV of the parties' collective bargaining agreement provides that fire fighters will be given 12 hours off each 28 day work cycle to average a 53 hour work week. On or about April 12, 1995, Chief Hoppe told Union President Brabant that he intended to use vacation, sick leave and leave time to offset the 12 hours of leave provided in Article IV. Brabant prepared a grievance but never filed it because the City's negotiator met and discussed this with Brabant and they resolved the matter.

6. On or about July 6, 1995, Brabant made a request to change shifts with Roger Reed so Brabant could attend the Union Convention. Reed presented it to Chief Hoppe who asked if it was so Brabant could attend the Union Convention and Reed said yes. The Chief said he did not think he could okay it and denied the request. On July 7, 1995, a grievance was filed over the denial and it was agreed that another fire fighter would come off vacation and trade with Brabant and Brabant was allowed the time off. During the grievance discussion it came out that the Chief was going to a Police and Fire Commission seminar at the same time and the denial was due to a lack of staffing.

7. Sometime during the period of June to August, 1995, Chief Hoppe had a conversation at the fire station with fire fighters John Reed and Roger Reed. During the course of

the conversation, Chief Hoppe told them that as long as Brabant was Union President, he (Chief Hoppe) would make life miserable for them. John Reed said there was nothing he could do about Brabant and everyone should not be punished. Chief Hoppe told him that they voted Brabant in and could vote him out.

8. On August 7, 1995, Chief Hoppe asked the Police and Fire Commission at its regular meeting to adopt a rule requiring a number of fire fighters to remain in the City during off duty time, subject to call. Fire fighters John Reed and Richard Anderson expressed opposition to the Chief's proposal. A member of the Police and Fire Commission suggested that the fire fighters meet and possibly sit down with the Chief and bring suggestions back to the next regular meeting. On August 14, 1995, Brabant asked Hoppe for a meeting to discuss the matters of the August 7, 1995 Commission meeting. On August 17, 1995, a meeting was held with the Chief and all Union members except Roger Reed. Brabant told Hoppe that the Union would be willing to make some compromises in the Fair Labor Standards hours to save the City money. Chief Hoppe told them they wanted the 12 hours off and that's what they're going to get and as far as he was concerned that was it. Brabant assumed the meeting was over and left along with fire fighter Anderson. Chief Hoppe then stated that part of the employees' problem was having Brabant as President of the Union.

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

#### CONCLUSIONS OF LAW

1. The City, by the statements made by Chief Michael J. Hoppe to fire fighters John Reed and Roger Reed during the summer of 1995 and to the fire fighters on August 17, 1995, did interfere with, restrain and coerce employes in the exercise of their rights under Sec. 111.70(2), Stats., and therefore, the City of Oconto has committed prohibited practices within the meaning of Sec. 111.70(3)(a)1, Stats.

2. The City, by Chief Hoppe's denial of the shift exchange between Roger Reed and Terry Brabant, was not motivated in whole or in part by hostility toward the exercise of the employe's protected rights, and therefore, the City has not committed any prohibited practice within the meaning of Sec. 111.70(3)(a)3, Stats.

3. Neither the City nor Chief Hoppe was obligated to bargain with the Union during the term of the parties' agreement on restrictions on off-duty hours as there has been no change in the status quo but merely a suggestion by the Police and Fire Commission to the Chief and the Union to meet, and inasmuch as there is no obligation to bargain, there can be no refusal to bargain and the City has not committed any prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the

Examiner makes the following

ORDER 1/

IT IS ORDERED that

1. The alleged violations of Secs. 111.70(3)(a)3 and 4, Stats., are dismissed in their entirety.
2. The City of Oconto, its officers and agents, shall immediately:
  - a. Cease and desist from interfering with, restraining or coercing any of its employees in the exercise of their rights guaranteed in Sec. 111.70(2), Stats.

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

Section 111.07(5), Stats.

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

**This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).**

- b. Take the following affirmative action with the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:
1. Notify all of its employes in the City of Oconto's Fire Department by posting in conspicuous places where employes are employed in that Department copies of the Notice attached hereto and marked "Appendix A." The Notice shall be signed by Chief Hoppe and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for forty-five (45) days thereafter. Reasonable steps shall be taken by the City to insure that said 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 steps that have been taken to comply herewith.

Dated at Madison, Wisconsin, this 14th day of October, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/  
Lionel L. Crowley, Examiner

"APPENDIX A"

NOTICE TO ALL EMPLOYEES OF THE OCONTO FIRE DEPARTMENT

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

1. WE WILL NOT interfere with, restrain or coerce our employees in the exercise of their rights guaranteed them under Sec. 111.70(2), Stats.

By \_\_\_\_\_  
Chief Michael F. Hoppe

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 1996.

THIS NOTICE MUST REMAIN POSTED FOR 45 DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.



CITY OF OCONTO

MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint initiating these proceedings, the Union alleged that the City violated Secs. 111.70(3)(a)1, 3 and 4, Stats., by Chief Hoppe's statements to fire fighters, Hoppe's attempt to change hours, denial of Brabant's request for a shift exchange with Reed, Hoppe's attempt to restrict fire fighters' free time and by refusing to negotiate over a mandatory subject of bargaining. The City denied that Chief Hoppe made any statements to fire fighters that constituted a prohibited practice, the City claimed that it did not change the status quo with respect to hours or restrict fire fighters' free time and the shift exchange sought by Brabant was denied because of a staffing shortage and it sought dismissal of the complaint.

UNION'S POSITION

The Union contends that Chief Hoppe interfered with the rights of Union members when he repeatedly threatened to make their lives miserable as long as Brabant was the Union President. It argues that the bulk of the threats were directed to John Reed and began with the one-day suspension grievance and were continuing and ongoing on the change of hours and the shift exchange grievance. It alleges that these threats were also made to Roger Reed and Dennis Ladwig. It submits that these comments have a reasonable tendency to interfere with the unit's selection of their president and thus violated Sec. 111.70(3)(a)1, Stats. The Union insists that Chief Hoppe's denial that he tried to influence the Union's internal affairs is unpersuasive. It observes that he admitted explaining that the Union would have problems as long as Brabant was President and he hoped that Union members would get him straightened out and change his attitude. It argues that the evidence established that the Chief pressured the unit to remove Brabant from the presidency and thus interfered with the protected right of members to select their own representative.

The Union claims that the Chief threatened to retaliate against members for pursuing the suspension grievance and the scheduling issue. It relies on John Reed's testimony to support its position. It also argues that the Chief acted on his threat to restrict off-duty time by bringing that matter before the Police and Fire Commission. It takes the position that considered in light of all the circumstances, Chief Hoppe interfered with the employees' protected rights.

The Union maintains that the chief's denial of Brabant's shift exchange request constituted interference. It observes that these requests had been routinely approved in the past and the Chief offered no reason for the denial at the time of the denial. It asserts that it was reasonable for members to conclude that the denial was based on hostility to Brabant and his Union activity. It

argues that the Chief's belated reason of a staff shortage is pretextual because the Chief implied the denial was because Brabant wanted to attend the Union convention, he had approved trades in the past without regard to staffing and the Chief could have asked Reed if he would be in the City that day. It alleges that the denial discouraged participation in collective bargaining and enforcement and violated Sec. 111.70(3)(a)1, Stats. It also contends that the denial of the shift exchange violated Sec. 111.70(3)(a)3, Stats. It submits that the Chief was well aware of Brabant's protected activities and the Chief was hostile to these and the denial of the shift exchange request was motivated by the hostility of the Chief to Brabant's protected activity. It concludes that all the elements to establish a violation of Sec. 111.70(3)(a)3, Stats., have been proved.

The Union argues that the Chief's attempt to unilaterally restrict the free time of fire fighters to the City limits and his subsequent refusal to bargain with the Union constitutes a violation of Sec. 111.70(3)(a)4, Stats. The Union states that the decision or impact of the decision to require off-duty fire fighters to remain within the City limits is a mandatory subject of bargaining that is not addressed by the parties' collective bargaining agreement and the Union has not waived any bargaining rights with respect to the issue. It notes that Chief Hoppe at the August 7, 1995 Police and Fire Commission meeting asked to approve his proposal to restrict off-duty fire fighters and fire fighters present at the meeting objected and the Commission directed the Chief to meet with the Union. It points out that the Union sent the Chief a letter calling for a meeting. It observes that a meeting was held on August 17, 1995, and the Chief was unwilling to discuss the issues and that was the end of it. It suggests that the Chief's refusal to discuss the matter is tantamount to a refusal to bargain and the Chief's actions are inconsistent with good faith bargaining. It suggests that the Chief's conduct was based on hostility toward the Union and was a violation of Sec. 111.70(3)(a)4 and a derivative violation of Sec. 111.70(3)(a)1, Stats. It concludes that the Chief committed prohibited practices and it seeks appropriate remedies including reasonable attorneys' fees.

#### CITY'S POSITION

The City denies that it has interfered with Union rights. It contends that the record fails to establish any interference on the City's part with the Union's ability to conduct its affairs. It suggests that the Chief's comments about Union President Brabant are insufficient to constitute interference and were about Brabant's abrasive and agitating style of dealing with people. The City submits that the comments were more in the way of a prediction or opinion. The City further alleges that the Union members solicited the comments by complaining to the Chief about Brabant. It points to the testimony of John Reed who complained about Brabant's treatment of the City Clerk. The City argues that, at worst, the Chief's comments were ambiguous, were not coupled with a specific threat of reprisal and were relatively isolated. It notes that the Union's witnesses characterized the Chief's comments as related to personality, not Union business. The City also points out that the Chief was Union President for two years and has never before been the subject of a prohibited practice complaint in his nearly 20 years as Chief.

The City insists that the instant case is an attempt to embarrass the Chief by a disgruntled employe who was removed as senior fire fighter after the return of another fire fighter from a leave of absence. It claims this is the reason that Brabant was upset with the Chief and the comments reflect an issue of personality rather than politics. It asks that the complaint be dismissed.

The City suggests that the Union has raised inferences to scheduling or staff changes which may be contemplated by the City in the future and implies that the complaint is an attempt to taint such future decisions. It argues that even if a prohibited practice is found in the instant case, the remedy should be narrowly construed so as not to limit the lawful management rights of the City. It states that the Chief is not responsible for the final decisions on staffing and scheduling but it is the Police and Fire Commission. It opines that the remedy should be limited to cease and desist orders and notice postings and any additional relief would re-write the collectively bargained relationship between the parties. It concludes that any order should not infringe on legitimate management rights.

#### UNION'S REPLY

The Union disputes the City's arguments that the Chief's comments were "ambiguous," "not coupled with a specific threat of reprisal," "relatively isolated" and a "prediction." It submits that the comments were predictions of reprisal and the fire fighters took the comments as threats. It claims that the Chief's statements that he would make their lives miserable as long as Brabant was President were repeatedly made and unambiguously threatened reprisals. The Union asserts that the City's claim that the Chief's comments are related to "personality" issues is not a defense to threatening bargaining unit members for pursuing grievances and retaining a particular president. It notes that the Chief's comments were not limited to criticism of Brabant's personality and performance but were threats of reprisal to Union members and their choice of Union President. It disputes the City's claim that these comments were solicited by Union members. It points out that the comments went far beyond the usual scope of conversation he shared with fire fighters and the City's suggestion that the comments were a simple reaction to members' complaints should be dismissed. The Union contends that the City's charge that Brabant was "abrasive" is not supported in the record and the Chief never acted to correct such behavior had it occurred. It observes that no evidence supports these allegations and it lacks support. It admits that there were discussions about Brabant but nothing to show that he was abrasive or "agitated" anyone. It asserts that Chief Hoppe was bothered by Brabant's success in dealing with the Police and Fire Commission, but Brabant is simply doing his job as Union President and the Chief's displeasure is manifested by threats against Union members and his recalcitrant acceptance of Commission decisions. It suggests that it is the Chief who has a problem dealing with people and he readily admitted to that problem to the Police and Fire Commission on August 28, 1995. In light of the evidence, the Union seeks rejection of the City's attempt to portray Brabant as an abrasive agitator. It maintains that the threats were unsolicited and based on Chief Hoppe's hostility toward Brabant's success as an advocate for the Union.

The Union contends that its requested relief is narrowly tailored and necessary to protect the rights of its members by deterring future interference and discrimination and to effectuate the purposes of the Municipal Employment Relations Act. Contrary to the City's assertions, the Union states that its requested relief does not exceed the express parameters of the collective bargaining agreement. It seeks nothing more than meaningful relief that prevents the Chief from carrying out his threats with impunity. As for its request for costs and attorneys' fees, the Union alleges that there is no support for the City's defenses and they are simply pretextual efforts to veil the wrongful actions of the City. It insists that these should be awarded to deter future violations. The Union concludes that the evidence demonstrated that the City interfered with the rights guaranteed employees under the Municipal Employment Relations Act, the Chief discriminated against Brabant because of his protected activities and refused to bargain with the Union, and it requests the relief sought be granted.

#### CITY'S REPLY

The City likens the Union's arguments to a chef attempting to make an omelet with too few eggs and if there are not enough, no omelet. It observes that one opinion about Brabant's personality expressed on isolated occasions by the Chief does not create a prohibited practice omelet. It argues that the Union has attempted to mix the comments of the Chief with a resolved grievance, a resolution of the 12 hours scheduling, the resolved shift exchange grievance and proposed but unadapted travel restrictions. It observes that the Union's argument that the Chief's request as to the travel restrictions is "paramount to a refusal to bargain" fails to show how the City's action is any of the Union's business in the first place. It argues that none of these isolated incidents support the image of vindictiveness by the Union. It asserts that every grievable exercise of management rights under the Union's view would constitute a prohibited practice. It maintains that mere expressions of opinion about the Union President's personality makes normal management decisions "vindictive" by the Union because the result of the decision is not desired by the Union.

The City points out that the Union's brief ignores its own cited quotes of the Chief's testimony and mischaracterizes the testimony and corroboration by a Union witness as well as ignoring the fact that the Chief's explanation for a change in his relationship with Brabant was not rebutted.

The City insists that the record as a whole supports the conclusion that the personal relationship between the Chief and Brabant deteriorated but the union-management relationship functioned normally. It argues that the Chief's comments were an opinion of difficulties created by Brabant's attitude and were too isolated to constitute interference. It asks that the complaint be dismissed, or if a prohibited practice is found, the relief should be narrowly tailored.

## DISCUSSION

### Interference

Section 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer:

1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).

Section 111.70(2), Stats., describes the rights protected by Sec. 111.70(3)(a)1, Stats., as being:

- (2) RIGHTS OF MUNICIPAL EMPLOYEES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

Violations of Sec. 111.70(3)(a)1, Stats., occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. 2/ If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employe(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights. 3/ However, in recognition of the employer's free speech rights and of the general benefits of "uninhibited" and "robust" debate in labor disputes, employer remarks which inaccurately or critically portray the employe's labor organization and thus may well have a reasonable tendency to "restrain" employes from exercising the Sec. 111.70(2) right to supporting their labor organization generally are not violative of Sec. 111.70(3)(a)1, Stats., unless the remarks contain implicit or express threats or promises of benefits. 4/ Similarly, employer conduct which may well have a reasonable tendency

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2/ WERC v. Evansville, 69 Wis.2d 140 (1975).

3/ Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84); City of Brookfield, Dec. No. 20691-A (WERC, 2/84); Juneau County, Dec. No. 12593-B (WERC, 1/77).

4/ Milwaukee Board of School Directors, Dec. No. 27867-B (WERC, 5/95); Ashwaubenon Joint School District No. 1, Dec. No. 14474-A (WERC, 10/77); Janesville Board of Education, Dec. No. 8791 (WERC, 3/69).

to interfere with employe exercise of Sec. 111.70(2) rights will not be found violative of Sec. 111.70(3)(a)1, Stats., if the employer had valid business reasons for its actions. 5/ Section 111.07(3), Stats., provides that the burden of proof required is a clear and satisfactory preponderance of the evidence.

The Union has asserted that Chief Hoppe threatened employes by his statement that he would make their lives miserable as long as Brabant was Union President. The Union relies on John Reed's testimony that this statement was made on November 10 or 11, 1994. 6/ The undersigned finds that this statement or statements were not made on November 10 or 11, 1994. There is no corroboration of Reed's testimony that it occurred on that date. The undersigned does not credit Reed's testimony that the same discussion occurred a few days later related to the suspension grievance. 7/ Reed also testified that the Chief threatened to take away "garcia hours," however, this did not occur until at least March of 1995, 8/ more likely on April 12, 1995. 9/ This change did not occur because while a grievance was prepared it was not filed and the matter was resolved in discussions with the City's negotiator. Reed then testified that the discussion did not take place until after April 12, 1995. 10/ He later testified that it was late April or early June, 1995. 11/ Reed then testified that the Chief made the statement in discussing "garcia" hours, "As long as Terry is President, I'm going to make your lives miserable." on May 19, 1995. 12/ There are just too many inconsistencies as to the dates that the statement was allegedly made that it must be concluded that evidence fails to establish that it was ever made before May 19, 1995. Additionally, the Chief had issued a one-day suspension and no evidence indicates he was of the opinion that the suspension would not stand. Nothing in the Chief's statement referred to the grievance. The evidence failed to show that the Chief was upset at Brabant for filing a grievance over the suspension as Brabant was merely performing his responsibilities as Union President. It does not appear that the Chief was upset until the Police and Fire Commission settled the grievance and then the Chief was upset with the Police and Fire Commission and not with Brabant for filing it. Roger

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5/ City of Brookfield, supra, footnote 4.

6/ Tr. 45.

7/ Tr. 49.

8/ Tr. 48-50; Exs. 4 and 20.

9/ Exs. 4 and 7.

10/ Tr. 52.

11/ Tr. 53.

12/ Tr. 55.

Reed testified that sometime between June and August, 1995, he and John Reed were present when the Chief stated that something had to be done to get rid of Brabant as President of the Union or the Chief would make life miserable for them. 13/ He further testified that this occurred a couple of other times during this time frame. 14/ Both John Reed's and Roger Reed's testimony as to what the Chief stated to them is consistent and that was that the Chief would make their lives miserable as long as Brabant was the Union President, however the undersigned credits Roger Reed that this occurred between June and August, 1995, not earlier because of the many discrepancies in John Reed's testimony. The Chief's statement is clearly an express threat that the Chief would do unpleasant things to the fire fighters as long as they support Brabant as Union President, a clear violation of Sec. 111.70(3)(a)1, Stats. It makes no difference whether the Reeds felt threatened or not or that the Chief intended to interfere with their rights to select who represented them. The Chief's comments contain a threat which has a reasonable tendency to interfere with the employes' Sec. 111.70(2), Stats., rights.

The Chief's assertion that he was merely responding to complaints from fire fighters about Brabant and he was merely telling them that they would have problems because Brabant was President and he was encouraging them to clean their own house or get them to change their attitude is not persuasive. The Chief testified that Brabant was abrasive and irritable to everybody. The Chief could have spoken to Brabant alone or disciplined Brabant or spoke to the fire fighters about Brabant as Brabant the fire fighter. If the Chief didn't like how Brabant treated the City Clerk or how he acted at a fire towards citizens, he could have taken action to change his conduct. The record fails to establish how Brabant's being the Union President was somehow significant as far as any of what the Chief perceived as a problem. Thus, the Chief's attempt to have Brabant removed as Union President does not explain how such a result would make Brabant less abrasive or irritating. It simply does not follow logically. It appears that the Chief's comments about the members getting rid of Brabant as President or they would be miserable or have problems is nothing more than a threat that has a reasonable tendency to interfere with the employe's protected rights. The underlying hostility between the Chief and Brabant may be personal for whatever reason but the Chief's reference to Brabant as President and his obvious attempt to get him removed as Union President is improper and violative of Sec. 111.70(3)(a), Stats. Therefore, the comments made to the Reeds during the summer of 1995, as well as the comment to fire fighters after the meeting on August 17, 1995, constitute interference in violation of the Municipal Employment Relations Act. The Union's assertion that the Chief's failure to tell Reed why he was denying Brabant's shift exchange request simply fails to establish that this alone constitutes interference under the Act.

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13/ Tr. 71.

14/ Tr. 72.

### Discrimination

Section 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to "encourage or discourage a membership in any labor organization by discrimination in regard to . . . tenure or other terms or conditions of employment." To prove a violation of this section the Union must, by a clear and satisfactory preponderance of the evidence, establish that:

1. Brabant was engaged in protected activities; and
2. The Chief was aware of those activities; and
3. The Chief was hostile to those activities; and
4. The Chief's conduct was motivated, in whole or in part, by hostility toward the protected activities. 15/

The Chief denied Brabant's request for a shift exchange so Brabant could attend the Fire Fighter Convention. The evidence establishes that Brabant was engaged in protected activities and the Chief was aware of those activities. As noted above, the Chief was personally hostile to Brabant and it would seem that in light of the Chief's comments seeking to remove Brabant as President that some of this hostility extended to Brabant's activities as Union President. The last issue is whether the denial of the shift change was motivated in whole or in part by the hostility toward the protected activities. The evidence fails to establish that it was. It is undisputed that the Chief was going to be out of town for a Police and Fire Commission seminar. 16/ Allowing the shift change would result in a staff shortage. The Union did not know it at the time and the Chief could have been more forthcoming about his reason for denying it. 17/ The matter was resolved when Brabant traded shifts with an employe who came off vacation. Inasmuch as Brabant was allowed the shift change to attend the Fire Fighter Convention after the staffing problem was resolved, there was not a clear and satisfactory preponderance of the evidence establishing that the initial denial was motivated, in whole or in part, by the Chief's hostility to Brabant's engaging in protected concerted activities and thus the charge of a Sec. 111.70(3)(a)3, Stats., violation has been dismissed.

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15/ The "in-part" test was applied by the Wisconsin Supreme Court to MERA cases in Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis.2d 540 (1967) and is discussed at length in Employment Relations Dept. v. WERC, 122 Wis.2d 132 (1985).

16/ Tr. 73.

17/ Id.



Section 111.70(3)(a)4, Stats., makes it a prohibited practice to refuse to bargain collectively with the Union. Section 111.70(1)(a), Stats., defines collective bargaining. Bargaining during the effective term of a collective bargaining agreement is waived as to matters covered by the agreement. 18/ Where the collective bargaining agreement is silent and there has been no bargaining on the issue prior to said collective bargaining agreement, the employer must maintain the status quo and bargain to impasse before implementing any change in wages, hours or conditions of employment. 19/ The evidence failed to establish that there has been any change in the status quo with respect to fire fighters being required to remain in the City during their off-duty time. As there was no change in status quo, there is no duty to bargain. Additionally, the meeting between the fire fighters and the Chief was at the suggestion of a member of the Police and Fire Commission and not a direction or offer to bargain over any matter. It also appears that the Chief is not the City's negotiator and there is no showing that he was authorized to bargain on behalf of the City. The evidence simply fails to prove that the Chief was obligated to bargain over any mandatory subject of bargaining. Inasmuch as there was no obligation to bargain, the Chief did not refuse to bargain and there has been no violation of Sec. 111.70(3)(a)4, Stats.

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

19/ City of Beloit, (11831) 9/74, aff'd in relevant part, nos. 144-272 and 144-406 (Dane Co. Cir. Ct.) 1/75, app'd to Wis. Sup. Ct., aff'd 74 Wis.2d 43 (1976); Oak Creek-Franklin School District No. 1, (11827) 9/74, aff'd No. 144-473 (Dane Co. Cir. Ct. 11/75).

The Chief has been found to have interfered with employees' rights and has been ordered to cease and desist from such conduct and the standard posting of notices has been required. The Union's requests for attorneys' fees and costs has been denied. The Commission has held that attorneys' fees are warranted only in exceptional cases where the allegations or defenses are frivolous as opposed to debatable. 20/ The City's defenses have not been shown to be so frivolous, in bad faith or devoid of merit so as to warrant the imposition of costs and attorneys' fees and the Union's request for same is denied.

Dated at Madison, Wisconsin, this 14th day of October, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/  
Lionel L. Crowley, Examiner

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20/ Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90) citing Madison Metropolitan School District, Dec. No. 16471-B (WERC, 5/81).