

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN COUNCIL 40,  
AFSCME, AFL-CIO,

Complainant,

vs.

VILLAGE OF NECEDAH,

Respondent.

Case 6

No. 53777 MP-3130

Decision No. 28652-B

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

vonBriesen, Purtell & Roper, S.C., by Mr. James R. Korom, on behalf of the Village.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

Amedeo Greco, Hearing Examiner: Wisconsin Council 40, AFSCME, AFL-CIO, ("Union"), filed a prohibited practices complaint with the Wisconsin Employment Relations Commission, herein "Commission", on January 22, 1996, alleging that the Village of Necedah, ("Village"), had committed prohibited practices within the meaning of the Municipal Employment Relations Act, herein "MERA", by unlawfully refusing to bargain with the Union; by interfering with the formation and administration of the Union; by threatening, interfering and coercing employees; and by terminating union adherent Raymond L. Housworth because of his union activities. The Commission on March 11, 1996, substituted the undersigned as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided for in Section 111.07(5), Wis. Stats. The Village filed its answer on January 31, 1996, and hearing was held in Necedah, Wisconsin, on March 12, 1996. The parties thereafter filed post-hearing briefs which were received by June 7, 1996.

Having considered the arguments and the record, I make and file the following Findings of Fact, Conclusions of Law, and Order.

No. 28652-B

## FINDINGS OF FACT

1. The Union, a labor organization, is the certified collective bargaining agent for the Village of Necedah's non-supervisory police force and maintains its offices at 8033 Excelsior Drive, Madison, Wisconsin. At all times material herein, David White, ("White"), has been one of its staff representatives and has serviced said bargaining unit.

2. The Village, a municipal employer, operates a Police Department in Necedah, Wisconsin, and maintains its offices at 100 Center Street, P.O. Box 371, Necedah, Wisconsin. At all times material herein, Frank J. Mootz, ("Mootz"), has been the Village's Police Chief, Dwayne A. Saunders, ("Saunders"), has been its Clerk/Administrator, and Scott Carter, ("Carter"), has been the President of the Village's Board of Trustees.

3. Raymond L. Housworth, ("Housworth"), was employed as a part-time Village police officer between August 13, 1994, to May 24, 1995, when he was made a full-time police officer and placed on one year's probation. He at that time was the only non-supervisory full-time police officer in the Village's Police Department which then employed about five (5) part-time police officers.

4. Housworth supported the Union's organizing drive which resulted in the Union filing a petition for election with the Commission on June 23, 1995. Police Chief Mootz initially wanted the Union to represent him and tried to start a union before Housworth was hired as a full-time employe. The Village apparently opposed that effort on the ground that Mootz was a supervisor and hence not eligible for such representation. Mootz in August, 1995, spoke to Village President Carter who told Mootz that the Police Department employes would be treated fairly. Mootz later that day told Housworth about their conversation by admittedly saying: "My own interpretation is we're going to get raises, we're going to get Wisconsin retirement, but in order for us to do this, we're going to have to drop the Union".

5. Based upon that representation, Housworth by letter dated August 7, 1995, informed Union Staff Representative White:

. . .

Dear David,

This letter is being sent to formally inform you of my decision to negotiate my wages and benefits with the Village of Necedah on my own, without the assistance of the Wisconsin Council 40, AFSCME, AFL-CIO Union. I further request that the Union cease all actions pertaining to myself & the Village of Necedah.

...

6. Mootz by letter dated August 7, 1995, also informed White:

...

Dear David,

This letter is being sent to formally inform you of my decision to negotiate my wages and benefits with the Village of Necedah on my own, without the assistance of the Wisconsin Council 40, AFSCME, AFL-CIO Union. I further request that the Union cease all actions pertaining to myself & the Village of Necedah.

...

7. By letter dated August 9, 1995, Attorney Fred D. Hollenbeck, who then represented the Village, informed the Commission:

...

Dear Mr. Yaeger:

About the time I received your letter of August 4 regarding the Village of Necedah, I learned that the Police Chief and the newly hired police officer no longer want to be represented by the union and they want to represent themselves in dealing with the Village. Where does this leave us?

...

8. Mootz subsequently told Housworth that they in fact would not get Wisconsin retirement benefits because employees had to be employed for three years with the Village before qualifying for them. Believing that he therefore needed union representation, Housworth then resubmitted a letter to the Union asking that it represent him. When Housworth told Mootz about his change of position, Mootz replied, "Oh, really."

9. Hollenbeck by letter dated August 23, 1995, informed the Commission:

...

Dear Mr. Yaeger:

The Village is prepared to agree to have the votes in connection with the police department members. In that way, they can both vote against the union and we can end any problems with having the union for any of the policemen.

Enclosed is a copy of a letter Mr. Becerra provided to the union. Where do we go with this?

If you recall, the issue of whether Mr. Becerra is management or not is presently before the Department. If Mr. Becerra is deemed to be management, obviously he is not in the union. If the union will stipulate that he is out of the bargaining unit, we can then deal with the three people remaining.

Please let me know.

...

10. The Commission on October 10, 1995, issued a Direction of Election ordering that an election be held to determine whether a majority of employes wanted union representation and it thereafter conducted a mail ballot election in November, 1995. Housworth was the sole eligible voter in said election and he voted for the Union. The Commission on November 7, 1995, counted his ballot and it on November 28, 1995, certified the Union as the exclusive collective bargaining representative for the following unit:

"all regular full-time and regular part-time employes with the power of arrest employed by the Village of Necedah, excluding supervisory, managerial and confidential employes. . ."

11. Earlier, Union Staff Representative White by letter dated November 20, 1995, informed Village Clerk/Administrator Saunders and Attorney Hollenbeck:

...

"Please be advised that the Union desires to commence negotiations as soon as possible for the Police bargaining unit. Therefore, I ask that you contact me at your earliest convenience so that we may schedule an initial bargaining session."

...

White received no reply to the letter at that time.

12. By letter dated November 20, 1995, but not mailed until November 28, 1995, White informed Saunders and Hollenbeck:

...

"Please find enclosed the Union's initial proposal for negotiations on an initial labor agreement for the police bargaining unit. Once again, I ask that you contact me at your earliest convenience so that we may schedule an initial bargaining session."

...

Enclosed with that letter was the Union's initial contract proposal. White received no reply to the letter at that time.

13. White by letter dated December 14, 1995, told Saunders:

...

"In a letter to you and Mr. Fred Hollenbeck dated November 20, 1995, I asked that a representative of the Village contact me so that we may schedule an initial bargaining session for the Police bargaining unit. I received no response to that letter. In another letter to you and Mr. Hollenbeck, sent out on November 28, 1995 (inadvertently dated November 20), I renewed my request that a representative of the Village contact me so that we may schedule an initial bargaining session. To date, I have received no response to this request either.

"Please be advised that I am **once again** requesting that a representative of the Village contact me so that we may schedule an initial bargaining session."

...

A copy of the letter also was sent to Attorney Hollenbeck. White received no reply to the letter at that time.

14. Mootz had several discussions with Housworth relating to his job performance, during which times he never disciplined Housworth. Housworth stated that "I had received suggestions that I might alter some of my law enforcement, but no reprimands as such"; that Chief Mootz told him on several occasions that he was doing a good job and that he wrote good reports; that Mootz also told him that he was "stopping too many people in the Village" and that he needed "to cut back"; that Mootz also spoke to him about patrolling outside the Village's limits; and that Mootz spoke to him after he, Housworth, had issued two tickets and arrested two drivers for being under the influence of drugs and/or alcohol when the drivers scored .00 and .03 on breathalyzer tests and passed blood tests for drugs.

15. Mootz spoke to Housworth on or about February 28, 1995, regarding his patrolling outside the Village limits. The Village has a policy of not sending out any of its police personnel outside of Village limits except in emergencies. Housworth, then a part-time employe, admitted that he had gone outside the Village limits even though no emergency existed. Mootz codified his remarks into the following memo, which was not given to Housworth at the time:

THE VILLAGE OF NECEDAH POLICE DEPARTMENT  
HAS JURISDICTION ONLY WITHIN THE VILLAGE LIMITS,  
UNLESS MUTUAL AID IS REQUESTED.

WHEN PATROLLING THE SQUAD NEEDS TO STAY  
IN THE VILLAGE LIMITS.

I HAVE RECEIVED A COMPLAINT FROM MR. AL  
JIROUSEK THAT THE SQUAD WAS SEEN AT THE DAVE  
SLEETER RESIDENCE. SLEETER RESIDENCE IS WELL OUT  
OF THE VILLAGE LIMITS. I SPOKE TO RAY, HE SAID HE  
WAS OUT THERE. DISCUSSED ON FEBRUARY 28, 1995.

I HAVE DISCUSSED IT WITH YOU BEFORE ON THE  
IMPORTANCE OF THE SQUAD PATROLLING WITHIN  
VILLAGE LIMITS ONLY.

I CHECKED YOUR LOG SHEET AND YOU WERE  
WORKING THAT NIGHT. PLEASE FOLLOW THE  
GUIDELINE SET FOR PATROLLING WITHIN VILLAGE  
LIMITS.

Mootz never told Housworth at that time that he was being disciplined over this incident.

16. In response to a written complaint filed by Village Clerk/Administrator Saunders, Mootz on March 10, 1995, again spoke to Housworth over his continued patrolling outside the

Village limits. Mootz codified his remarks into the following memo, which was not given to Housworth at the time:

THE VILLAGE OF NECEDAH POLICE DEPARTMENT  
HAS JURISDICTION ONLY WITHIN THE VILLAGE LIMITS,  
UNLESS MUTUAL AID IS REQUESTED.

WHEN PATROLLING THE SQUAD NEEDS TO STAY  
IN THE VILLAGE LIMITS.

I HAVE RECEIVED A COMPLAINT THAT THE  
VILLAGE SQUAD CAR WAS SEEN AT THE ADAMS  
COUNTY LINE (BRIDGE) ON MARCH 7, 1995 AT  
APPROXIMATELY 10:30 PM.

I HAVE DISCUSSED IT WITH YOU BEFORE ON THE  
IMPORTANCE OF THE SQUAD PATROLLING WITHIN  
VILLAGE LIMITS ONLY.

I CHECKED YOUR LOG SHEET AND YOU WERE  
WORKING THAT NIGHT. PLEASE FOLLOW THE  
GUIDELINE SET FOR PATROLLING WITHIN VILLAGE  
LIMITS.

Mootz never told Housworth at that time that he was being disciplined over this incident.

17. Mootz on September 20, 1995, spoke to Housworth over an improper arrest. Mootz codified his remarks into the following memo, which was not given to Housworth at the time:

ON SEPTEMBER 20, 1995, I MET WITH OFFICER  
HOUSWORTH IN REFERENCE TO AN ARREST HE MADE  
(CASE NUMBER 113-95N). OFFICER RAYMOND  
HOUSWORTH ARRESTED THE DEFENDENT FOR  
OPERATING A MOTOR VEHICLE WHILE INTOXICATED.  
THE DEFENDENT BLOOD ALCOHOL CONTENT WAS A .03.  
I EXPLAINED TO HOUSWORTH THE STATE RECOGNISES A  
LEGAL B.A.C. OF .10, UNLESS IMPAIRED BY THE  
INFLUENCE OF DRUGS OR ALCOHOL.

OFFICER HOUSWORTH UNARRESTED THE DEFENDENT  
AND BROUGHT THE DEFENDENT BACK TO BE RELEASED  
ON HIS OWN. OFFICER HOUSWORTH NOTIFIED THE



IMPOUND YARD (NOWICKI TOWING), AND HAD THE VEHICLE RELEASED TO THE DEFENDENT.

I EXPLAINED TO OFFICER HOUSWORTH THE DANGER INVOLVED IN ARRESTING AND UNARRESTING INDIVIDUALS. I ALSO EXPLAINED WHY HE WOULD RELEASE THE DEFENDENT BACK INTO HIS OWN CAR, IF HE WAS WORIED (sic) ABOUT HIS IMPAIRMENT.

I EXPLAINED THAT IT IS POOR POLICE PROCEDURES AND EXPLAINED TO HOUSWORTH THE PROPER WAY.

THIS VERBAL WARNING WAS TRIGGERED OFF A PREVIOUS ARREST THAT HOUSWORTH MADE ON A O.W.I. CHARGE. THE B.A.C. CAME BACK .00. I SENT FOR A DRUG SCREEN THE TEST WAS NEGATIVE FOR ANYTHING. THE CASE NUMBER IN QUESTION IS (080-95N

Mootz never told Housworth at that time that he was being disciplined over this incident.

18. Clerk/Administrator Saunders told Mootz in about November, 1995, that a female had complained to him that Housworth was following her around town. Mootz then prepared the following memo, which was never given to Housworth:

I WAS APPROACHED BY THE ADMINISTRATOR DWAYNE SAUNDERS, IN REFERENCE TO AN ANONYMOUS COMPLAINT TO HIM BY A FEMALE CLAIMING HARASSMENT BY OFFICER HOUSWORTH TO THE FEMALE. DWAYNE STATES THE GIRL WANTS TO REMAIN ANONYMOUS FOR FEAR OF RETALIATION. DWAYNE WONT RELEASE THE GIRLS IDENTITY. SO I CAN MEET WITH HER. THE GIRL HOWEVER RELATED THE FACTS TO DWAYNE. DWAYNE STATED THE GIRL IS BEING CONTINUOUSLY FOLLOWED BY RAY HOUSWORTH WHILE ON DUTY, WHEN SHE IS RETURNING FROM WORK. THE WOMEN SAYS RAY FOLLOWS HER RIGHT UP TO HER DRIVEWAY. THE WOMEN IS AFRAID TO GO TO WORK, SO SHE TAKES A DETOUR AROUND THE VILLAGE, TO BYPASS RAY WHEN HE IS WORKING.

Mootz does not know whether Housworth in fact harassed the woman in that fashion and there is no proof in the record that he did so. Mootz testified that he received other complaints from

other women to the effect that Housworth was following and/or harassing them. There is no proof in this record that Housworth did so.

19. Housworth had numerous conversations with Mootz regarding his activities in the citizens' militia to which he belonged. Housworth on October 24, 1995, met with Mootz and told him that he did not want to swear to that part of his oath of office which requires him to uphold the statutes pertaining to the United States of America because he did not want to support it as long as the federal government had anything to do with it. Mootz replied, "Well, I'm not going to change the oath of office" and that ended their conversation. Mootz codified the substance of that conversation into the following memo, which was never given to Housworth:

ON 10-24-95, OFFICER HOUSWORTH ADVISED ME THAT HE HAD NOT SIGNED THE EMPLOYEE HANDBOOK OR TOOK AN OATH OF OFFICE. I EXPLAINED TO RAY THAT HE DID AND SHOWED HIM THE OATH OF OFFICE HE HAD SIGNED. RAY THEN STATED HE WANTED THE LAST PHRASE TAKEN OFF THE OATH. THE LAST PHRASE WAS TO SUPPORT AND UPHOLD THE STATUTES PERTAINING TO THE UNITED STATES CONSTITUTION. I ASKED HIM WHY HE FELT THAT WAY, HE EXPLAINED AS LONG AS THE FEDERAL GOVERNMENT HAS CONTROL OF THE U.S. CONSTITUTION HE WAS NOT GOING TO SUPPORT IT. I EXPLAINED TO HIM THAT I WAS NOT GOING TO CHANGE IT.

Mootz never told Housworth at that time that he would be disciplined over this incident and he never ordered Housworth to cease in his militia activities.

20. Housworth had earlier signed the oath of office on August 12, 1994. The oath states as follows:

OATH OF OFFICE: As a Law Enforcement Officer, my fundamental duty is to serve mankind, to safeguard lives and property, to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the Constitutional rights of all men to liberty, equality and justice.

I will keep my private life unsullied as

an example to all; maintain courageous calm in the face of danger, scorn or ridicule; develop self-restraint and be constantly mindful of the welfare of others. Honest in thought and deed in both my personal and official life, I will be exemplary in obeying the laws of the land the regulations of my department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

I will never act officiously or permit personal feelings, prejudices, animosities or friendships to influence my decisions. With no compromise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities.

I recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of the police service. I will constantly strive to achieve these objectives and ideals, dedicating myself before God to my chosen profession. . .law enforcement.

I promise to uphold the laws of the Village of Necedah, The statutes of the State of Wisconsin, and the statutes of the United States of America.

21. Housworth met with Mootz on November 4, 1995, and asked whether he, Housworth, was being investigated for being a member of the citizens' militia. Mootz answered in the negative. Mootz codified the substance of that meeting into the following memo, which was never given to Housworth:

ON SATURDAY NOVEMBER 4TH 1995, I WAS APPROACHED BY OFFICER HOUSWORTH. RAY ADVISED ME THAT HE HEARD HE WAS BEING INVESTIGATED FOR BEING IN THE CITIZENS MILITIA. I ACTED SURPRISED AND ASKED WHERE HE GOT THAT INFORMATION. RAY ADVISED KIM STROMPOLIS ADVISED NIKE CHRISTOPHER WHO IN RETURN TOLD RAY. RAY THEN STATED HE HAS CHECKED PRIOR TO JOINING THE MILITIA, IF IT WAS LEGAL TO JOIN. I THEN ADVISED RAY THAT HE WAS NOT BEING INVESTIGATED FOR BEING IN THE MILITIA.

22. Mootz discussed Housworth's possible termination with Clerk/Administrator Saunders and Village President Carter in November, 1995, or December, 1995. They decided that Housworth should not be fired at that time because it was so close to the representation election and because the holiday season was coming up.

23. Saunders informed Housworth in a January 5, 1996 memorandum:

...

"As directed by the Village President, a performance evaluation has been placed on the January 8th regular meeting agenda. At this meeting the Board will move into closed session per Wis. Stat. 19.85(1)(c) to hear Chief Mootz evaluate your work performance during your probationary period.

"After the evaluation you will then be invited to meet with the board and the Chief. At that time it will be your option to meet in either open (public may attend) or closed session (public not in attendance).

"Please ensure you are able to meet the Board at the Village Hall at or about 9:00 P.M. on Monday, January 8, 1996."

...

24. The Necedah Village Board met in closed session with Housworth and received a performance evaluation regarding Housworth from Chief Mootz on the evening of January 8, 1996. The Board then reconvened in open session pursuant to Housworth's request. Village Board President Carter announced that the Board had received a performance evaluation from Chief Mootz who recommended that Housworth be terminated and that the Village Board had just voted to terminate him, effective that day. Housworth asked for a copy of the evaluation and was told by Carter that he would not get it because it was not in writing. Tom Rouse, Housworth's brother-in-law, was a member of the Village Board at that time and abstained from voting on whether Housworth should be terminated. The vote to terminate Housworth was otherwise unanimous.

25. Mootz prepared the following written notes which he used during the January 8, 1996, Village Board meeting, but which he did not then disseminate to anyone at that meeting:

KNOWLEDGE:

OFFICER HOUSWORTH HAS A GOOD UNDERSTANDING OF THE REQUIREMENTS OF HIS POSITION. I HAVE FOUND MYSELF ON OCCASION TO DIRECT AND INSTRUCT OFFICER HOUSWORTH ON VARIOUS DUTIES AND RESPONSIBILITIES OF HIS JOB. OFFICER HOUSWORTH HAS HAD SOME POOR ARREST, THAT COULD HAVE RESULTED IN A CIVIL SITUATION BETWEEN THE VILLAGE AND THE DEFENDENT.

ACCURACY AND NEATNESS OF WORK:

OFFICER HOUSWORTH IS VERY NEAT. I HAVE FOUND RAY TO LACK ON DIFFERENT WAYS OF REPORT WRITING OR ACTUAL ON THE JOB TYPE MISTAKES. THIS IS ONLY DUE TO LACK OF HANDS ON EXPERIENCE.

ORGANIZATION OF WORK:

OFFICER HOUSWORTH HAS A DESIRE TO BE VERY ORGANIZED IN HIS WORK. HOWEVER, THE EFFICIENCY OF HIS REPORTS NEED TO BE IMPROVED. OFFICER HOUSWORTH ON NUMEROUS OCCASIONS WAS UNABLE TO COMPLETE THE REPORTS OF HIS NORMAL WORK SHIFT REQUIRING, OVERTIME. I HAVE TALKED TO OFFICER HOUSWORTH ON MANY OCCASIONS ABOUT THE BUDGET ALLOWANCE FOR OVERTIME. AND TO USE HIS TIME MORE EFFICIENT.

PUBLIC:

OFFICER HOUSWORTH INTERACTING WITH THE PUBLIC NEEDS TO BE GREATLY IMPROVED. OFFICER HOUSWORTH DEMONSTRATES A HARD TYPE ATTITUDE TOWARD THE PUBLIC. LACKS THE GOOD SELECTIVE ENFORCEMENT ISSUES, THAT OFFICER HOUSWORTH COULD DEMONSTRAT (sic) WITH HIS POWER OF OFFICER DISCRETION GRANTED TO HIM.

OTHER:

OFFICER HOUSWORTH HAS HAD SEVERAL ANONYMOUS TYPE COMPLAINTS ON HIS CONDUCT WITH WOMEN WHILE ON DUTY.

OFFICER HOUSWORHT OVER A PERIOD OF MONTHS HAS DEMONSTRATED ANTI-GOVERNMENT TYPE ATTITUDE AND ACTIONS. AGAINST THE U.S. CONSTITUTION AND OUR FEDERAL GOVERNMENT. OFFICER HOUSWORTH ON OCCASION HAS BROKEN THE CHAIN OF COMMAND AND TOOK IT UPON HIMSELF TO DISCUSS SITUATIONS WITH BOARD MEMBERS WITHOUT CONFRONTING THE CHIEF OF POLICE.

REMARKS BY SUPERVISOR:

THIS EVALUATION COMES FROM THE COMPLAINTS ON OFFICER HOUSWORTH DURING HIS JOB AS A PROBATIONARY POLICE OFFICER WITH THE VILLAGE OF NECEDAH.

Attached to these notes were the various memos referenced in Findings of Fact Nos. 15, 16, 17, 18, 19 and 21, ante.

26. Housworth on January 8, 1996, asked to look at all materials in his personnel file so that he could defend himself against the charges then being made against him. The Village refused to supply him with any of the documents referenced in Findings of Fact Nos. 15, 16, 17, 18, 19 and 21, ante.

27. By letter dated January 23, 1996, and entitled "Initial Bargaining Session", Saunders

informed White:

...

As you know, Raymond Houseworth (sic) has been released from employment from the Village of Necedah Police Department. The circumstances leading to his dismissal is the reason we have yet to schedule an initial bargaining session for the police bargaining unit.

If you still wish to schedule a bargaining session for the police bargaining unit, please contact me at your convenience at (608) 565-2261.

...

Said letter was sent before the Village received a copy of the Union's prohibited practices complaint in this matter which was filed with the Commission on January 22, 1996. White did not respond to that letter.

28. Mootz never displayed any union animus in front of Housworth and there is no evidence that Mootz ever bore such anti-union hostility at any times material herein. Mootz in fact supported Housworth's union activities because he believed that he would get whatever increased benefits Housworth would receive as a result of having a union on the scene. Mootz's criticisms of Housworth's work and his recommendation that he be terminated were not pretextual in nature and were based on non-discriminatory considerations.

29. The Village Board's decision to terminate Housworth was not based on any pretextual or anti-union considerations.

30. As of the day of the instant hearing, the Village had not hired a full-time police officer to replace Housworth.

Upon the basis of the above and foregoing Findings of Fact, I make the following

#### CONCLUSIONS OF LAW

1. Respondent Village of Necedah violated Section 111.70(3)(a)1 of the Municipal Employment Relations Act by unlawfully promising benefits to employees if they voted against union representation.

2. Respondent Village of Necedah did not dominate or interfere with any union organization and it hence did not violate Section 111.70(3)(a)2 of the Municipal Employment

Relations Act.

3. Respondent Village of Necedah did not terminate police officer Raymond L. Housworth because of any anti-union considerations and it therefore did not violate Section 111.70(3)(a)3 of the Municipal Employment Relations Act.

4. Respondent Village of Necedah violated Section 111.70(3)(a)4 of the Municipal Employment Relations Act by unlawfully refusing to bargain with Wisconsin Council 40, AFSCME, AFL-CIO, until after January 23, 1996.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, I make and issue the following



ORDER 1/

1. IT IS ORDERED that those parts of the complaint filed by Complainant Wisconsin Council 40, AFSCME, AFL-CIO, which allege that Respondent Village of Necedah violated Sections 111.70(3)(a)2 and 3 of the Municipal Employment Relations Act are hereby dismissed.

2. IT IS FURTHER ORDERED that Respondent Village of Necedah cease and desist from interfering with the union activities of its employees and that it also cease and desist from refusing to bargain with Complainant Wisconsin Council 40, AFSCME, AFL-CIO.

3. IT IS FURTHER ORDERED that Respondent Village of Necedah post in conspicuous places the attached Notice which is marked as Appendix "A".

Dated at Madison, Wisconsin, this 12th day of August, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/  
Amedeo Greco, Examiner

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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

(Footnote 1/ continues on the next page.)

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(Footnote 1/ continues from the previous page.)

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).

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

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 the right of our employees to choose a collective bargaining representative by promising them benefits if they vote against union representation.
2. WE WILL NOT refuse to bargain with Wisconsin Council 40, AFSCME, AFL-CIO, or any other union selected by employees to represent them for collective bargaining purposes.
3. WE WILL NOT in any other way engage in unlawful conduct prohibited by Section 111.70(3)(a)1 and 4, of the Municipal Employment Relations Act.
4. WE WILL, upon demand, bargain in good faith with Wisconsin Council 40, AFSCME, AFL-CIO.

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

VILLAGE OF NECEDAH

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.

THE VILLAGE OF NECEDAH (POLICE DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

The Union asserts that the Village unlawfully refused to bargain with it when it failed to respond to Staff Representative White's repeated requests to bargain in November-December, 1995; that the Village engaged in unlawful interference and coercion when Chief Mootz first worked with Housworth in trying to gain union representation and when he later told Housworth that they would get pay raises and other benefits if they voted against the Union; that Chief Mootz unlawfully tried to dominate the Union; and that the Village unlawfully terminated Housworth because of his union activities. As a remedy, the Union seeks a traditional make-whole remedy on Housworth's behalf, a cease and desist order, and the posting of an appropriate notice.

The Village, in turn, asserts that its delay in responding to the Union's bargaining demands was justified because it "was concentrating its attention on the issues relating to Officer Housworth's termination of employment and delayed responding to the Union pending the resolution of this employment issue". The Village also claims that it terminated Housworth because of his sub-standard performance as a probationary employe, rather than for his union activities.

DISCUSSION

In agreement with the Union, I find that the Village violated its duty to bargain under Section 111.70(3)(a)4, Wis. Stats., when it failed to immediately respond to the Union's November 28, 1995, and December 14, 1995, bargaining demands set forth in Findings of Fact Nos. 12 and 13, ante, since a party's obligation to bargain is triggered under MERA after the Commission officially certifies the results of a representation election, which the Commission did here on November 28, 1995. The Village therefore was required to immediately commence negotiations on or about that date irregardless of whether it was considering Housworth's possible termination, as the latter fact hardly justifies the Village's nearly two-month delay in responding to the Union's demands for negotiations over an initial contract.

As a remedy, the Village is hereby ordered to cease and desist such unlawful conduct; to engage in good faith negotiations with the Union; and to post the attached Notice referred to above at page 17, ante.

As for Chief Mootz's activities and the question of whether he and the Village violated Section 111.70(3)(a)2 of the MERA, the record shows that Mootz did not involve himself in the Union's election efforts after he withdrew his support for the Union in his August 7, 1995, letter set

forth in Finding of Fact No. 6, ante. Prior thereto, there apparently was a bona fide dispute between the Union and the Village over whether Chief Mootz was a supervisor under Section 111.70(1)(i), of MERA. His prior active support for the Union - which even predated Housworth's hire as a full-time employe - is therefore readily understandable, particularly when there is no evidence that the Union ever objected to Mootz's pro-union activities before then. Having failed to object to them at that time, the Union is estopped from objecting to them now. As a result, there is no merit to the Union's claim that Mootz dominated or interfered with the formation of a union in violation of Section 111.70(3)(a)2, of MERA.

A closer question centers over whether the Village violated Section 111.70(3)(a)1, of MERA by interfering with, restraining, and coercing employes in the midst of the Union's election efforts.

As related above at Finding of Fact No. 4, ante, Mootz admitted here that he spoke to Village President Carter about the Union and that Carter then told him the Police Department employes would be treated fairly; that he told Housworth about his conversation with Carter; and that he then also told Housworth: "My own interpretation is we're going to get raises, we're going to get Wisconsin retirement, but in order to do this, we're going to have to drop the Union."

Mootz testified that this was his own personal opinion and that Carter never promised such benefits in their conversation, a point corroborated by Carter. That may be. Nevertheless, Mootz's remarks clearly indicated that Housworth would be rewarded if he withdrew his support for the Union. Such a promise of benefits was unlawful irregardless of whether Carter himself made that promise because Mootz, as Chief of Police, was clothed with apparent authority to act as the Village's spokesperson and because Housworth could reasonably believe that Mootz's remarks apparently represented what would happen if he voted against the Union. That is why those remarks violated Section 111.70(3)(a)1 of the MERA.

As a remedy, the Village is hereby ordered to cease and desist such unlawful conduct and to post the attached Notice referred to at page 17, ante.

Left is the Union's claim - which is the chief issue here - that the Village fired Housworth because of his union activities in violation of Section 111.70(3)(a)3 of MERA.

The Union correctly points out that this record contains all of the classic signs of a discriminatory discharge since: (1), Housworth actively supported the Union; (2), the Village knew that Housworth supported the Union, as he was the only eligible voter who voted for the Union in the representation election; (3), he was fired shortly after the Union was certified as the collective bargaining representative; (4), the Village apparently believed that Housworth's termination would relieve it of its bargaining obligations, as it admitted here that it delayed in responding to the Union's repeated bargaining demands because it was then focused on whether Housworth should be terminated; and (5), Housworth was never disciplined during his employment, with Mootz even

telling him that he was doing a good job.

The Village protests its innocence by asserting that it fired Housworth because of legitimate concerns over his job performance and that its termination was thus devoid of any anti-union considerations or union animus.

Standing alone, this claim of innocence is not dispositive of this issue because it is hardly likely that the Village would own up to any unlawful activity. In this connection, the Union cites my decision in Town of Spider Lake, Dec. No. 28038-A, 12/30/94, affirmed by operation of law, Dec. No. 28038-C, (2/14/95) wherein I stated:

"Oftentimes, the search for an illicit motive is difficult because direct evidence is not always available. That is why self-serving denials regarding motivation must be viewed with caution. For, as noted in Shattuck-Denn Mining Corp. v. NLRB, 362 F.2d. 466, 470 (9th Cir., 1966):

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

That also is true here.

Accordingly, it is necessary to closely examine all of the relevant facts to determine whether anti-union hostility motivated, in whole or in part, the Village's discharge decision. For without such proof of animus, this complaint allegation must be dismissed.

On this score, the Union asserts that such animus is shown by the following:

One, Saunders' alleged statement to Housworth - denied by Saunders - that he disliked unions.

Two, Attorney Hollenbeck's August 9, 1995, letter to the Commission set forth in Finding of Fact No. 7, ante, which reflects his knowledge that Housworth and Mootz had withdrawn from the Union and his further statement therein that because of their withdrawals:

"The Village is prepared to agree to have the votes in connection



with the police department members. In that way, they can both vote against the Union and we can end any problems with having the Union for any of the policemen."

Three, the Village's delay in stipulating to an election until after it appeared that employees were no longer interested in union representation.

Four, Mootz's alleged hostility to Housworth's decision to again support the Union after he sent his August 7, 1995, withdrawal letter set forth in Finding of Fact No. 5, ante.

Five, the supposed pretextual reasons given for Housworth's discharge and the "problems" with Housworth's work which did not surface until after the Union was selected as the bargaining agent.

Six, the Village's failure to tell Housworth about the charges lodged against him before it terminated him on January 8, 1996, and its failure to then give him the written documentation he requested regarding complaints about this work. 2/

There are several major problems with the Union's claim of animus.

For starters, we are not dealing with whether the Village had just cause to discharge Housworth and whether it followed the procedural requirements encompassed under that standard. Rather, the focus here is much narrower; i.e., whether the Union has satisfied its burden of proving that Housworth was fired because of his union activities. As a result, the discharge decision cannot be overturned merely because the Village may not have met its burden of proof under a non-existent contractual just cause standard.

Furthermore, I credit Mootz's testimony that Housworth was serving a one-year probationary period as a full-time employe at the time of his termination. As a result, Mootz's review of Housworth's work and his recommendation that Housworth be terminated was made in the normal course of business.

Furthermore, even assuming arguendo that all other misconduct charges were without merit, there is at least one charge which has merit and which, standing alone, forms an adequate basis for Housworth's discharge; i.e., his October 24, 1995, request to Mootz that he be relieved from that part of his oath of office - set forth in Finding of Fact No. 19, ante, which requires him to swear

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2/ At the hearing, I sustained the Village's objection to evidence showing that the Village has contested MERA's interest-arbitration provisions to its other municipal employes. I did so because employers have the lawful right to contest the applicability of Wisconsin Statutes and because that fact, in and of itself, is not evidence or proof of union animus.

allegiance to the federal government and his statement to Mootz that day to the effect that as long as the federal government has control of the United States Constitution, he was not going to support it.

While Housworth denies ever making such a request, I discredit his denial and find, as set forth in Finding of Fact No. 19, ante, that Mootz's contrary testimony must be credited because he appeared to be a more credible witness and because Mootz kept careful notes about this exchange with Housworth which are set forth in Finding of Fact No. 19, ante. In order to discredit Mootz, it therefore is necessary to find that Mootz fabricated those memos -which cannot be done given the absence of any evidence showing that Mootz engaged in such shenanigans.

Mootz's testimony on this issue was as follows:

Oh, October 24th, that day set me back. It disturbed me quite -- Ray approached me and questioned that he didn't think he signed an oath of office, and that question was he didn't feel he signed it in the handbook. And I said, "Well, I know you signed an oath of office," and I went to the personnel file, dug it out and brought it into him, and I showed it to him.

And he says -- he looked at me and said, "Well, I want this last paragraph taken off." And when he said that, I said, "What do you mean?" He said, "Well, this last paragraph pertaining to the United States of America," and that he said he didn't want to support that as long as the federal government had anything to do with it. And my exact comment to him was, "Well, I'm not going to change the oath of office," and that was the end of the conversation.

And I don't think that when Ray said that I realized what he said, and when it happened, the initial shock was, well, initially, "I'm not going to change it." I put it back in his personnel file, and of course, he left. And a few minutes later, I got to thinking about it and thought, "Wait a second. Something just isn't working," so I immediately -- I mean, I realized that no officer that's going to represent this police department who doesn't want to uphold the Constitution or the laws pertaining to the U.S. Constitution and the Statutes for the United States of America could work here. (Transcript, pp. 131-132).

Housworth himself recognized the severity of his conduct because he admitted on cross-examination that he deserved to be discharged if he in fact told Mootz that he would not swear allegiance to the federal government. Thus, the record shows the following exchange:

- Q. Okay. You would agree, wouldn't you, that if indeed you did tell the chief that you wanted to be relieved from your oath of office because you didn't support all of the laws of the federal government, that that would be a good reason to get rid of you, don't you think?
- A. Sure, if I don't agree with my oath of office, sure, that would be a good reason to get rid of me. (Transcript, p. 50).

Having found though Mootz' credited testimony that Housworth had indeed indicated his refusal to uphold his oath of office and to swear allegiance to the federal government, it must be concluded that the Village had a legitimate basis to terminate Housworth over this one incident alone and that Housworth's termination was unrelated to any unlawful, discriminatory considerations in violation of Section 111.70(3)(a)3, of MERA.

I credit Mootz' further testimony that he recommended that Housworth should be terminated for such things as travelling outside Village limits; because he issued tickets to individuals who were not legally drunk and/or not under the influence of drugs; and because he supposedly followed certain women home. This is not to say that Housworth should have been terminated over these incidents or that the Village had just cause to terminate him under a contractual just cause proviso. All that is being decided here is that Mootz had some basis for believing that Housworth should be terminated over these other matters. As a result, Mootz must be credited when he testified that his decision to recommend Housworth's termination was not based on any anti-union considerations. Indeed, the record shows that Mootz in fact favored the Union because he believed that he would receive whatever increased benefits the Union brought about for bargaining unit employees. Furthermore, Housworth himself admitted that Mootz never displayed any anti-union sentiments in front of him and the record as a whole fails to reveal any union animus on Mootz's part.

In order for the Union to prevail, then, it must prove that the members of the Village Board were motivated by union animus when they terminated Housworth on January 8, 1996. In fact, though, the members of the Village Board had legitimate reasons for accepting Mootz's recommendation that Housworth be terminated. Hence, I credit Carter and Saunders' testimony to the effect that their termination decision - and the Village Board's termination decision - were not based on any anti-union considerations.

To be sure, some facts indicate that the Village may not be a fan of collective bargaining and the unionization of its Police Department employees. That is evidenced by the Village's initial opposition to a representation election; the August 9, 1995, statement of Attorney Hollenbeck to the effect that such representation was a "problem"; the Village's refusal to stipulate to an election until after it learned in August, 1995, that Housworth and Mootz had withdrawn their support for the Union; the Village's refusal to immediately engage in collective bargaining negotiations after the

Union was certified as the bargaining agent on November 28, 1995; and Mootz's statement to Housworth that they would receive increased benefits even if they did not have a union.

These and other facts relied upon by the Union, though, are not enough to establish animus given the fact that Mootz's decision to terminate Housworth was not based on any anti-union considerations and the further fact that there is no proof that the members of the Village Board were driven by such considerations when they adopted Mootz's recommendation. Moreover, in weighing the record, I do not credit any of Housworth's disputed testimony relating to the circumstances leading up to his discharge since his refusal to admit that he tried to withdraw part of his oath of office casts doubt over the remainder of his testimony.

In short, the Union has failed to meet its burden of proof on this issue - which is why this complaint allegation must be dismissed.

Dated at Madison, Wisconsin, this 12th day of August, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/  
Amedeo Greco, Examiner