

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL NO. 139,

Complainant,

vs.

GREEN LAKE COUNTY,

Respondent.

Case 69
No. 54035 MP-3166
Decision No. 28792-A

Appearances:

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., Post Office Box 12993, Milwaukee, WI 53212 by Mr. John Brennan, Attorney at Law, appearing on behalf of the Complainant, Operating Engineers Local 139.

Mr. John B. Selsing, Corporation Counsel, 120 East Huron Street, Berlin, WI 54923, appearing on behalf of the Respondent, Green Lake County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel J. Nielsen, Examiner: On April 18, 1996, Local 139 of the International Union of Operating Engineers (hereinafter referred to as either the Complainant or the Union) filed a complaint of prohibited practices against Green Lake County (hereinafter referred to as either the Respondent or the County), alleging that the Respondent had violated Section 111.70, Stats., of the Municipal Employment Relations Act, 1/ by eliminating the position of SEP Coordinator in retaliation for the inclusion of that position in a unit represented by the Complainant. The Respondent generally denied any statutory violations. The Respondent generally denied any statutory violations.

1/ The original complaint alleged violations of Section 111, the Wisconsin Employment Peace Act. The complaint was amended at hearing to cite the statutory provisions applicable to public sector employers and employees.

A hearing was held on October 17, 1996 in Green Lake, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. A stenographic record was made of the hearing, and a copy of the transcript was received by the Examiner on November 5, 1996. The Complainant submitted an initial brief, to which the Respondent replied on December 24, 1996. The Complainant filed a reply brief which was received on January 6, 1997, whereupon the record was closed.

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

FINDINGS OF FACT

1. Green Lake County (hereinafter referred to as the County or the Respondent) is a municipal employer providing general governmental services to the County's population in south-central Wisconsin. The County business address is the Green Lake County Courthouse, 492 Hill Street, Green Lake, WI 54941.

2. The International Union of Operating Engineers, Local 139 (hereinafter referred to as the Union or the Complainant) is a labor organization, and is the exclusive bargaining representative for all full-time and regular part-time professional employees of the County.

3. The Complainant and the Respondent have been parties to a series of collective bargaining agreements, the most recent of which is for a terms of three years, 1995-1997. This most recent contract was executed on May 8, 1995, and contains provisions reflecting the parties' agreement on, inter alia, Recognition, Management Rights, Job Classes, and Wages:

ARTICLE 1 - RECOGNITION

The County recognizes the Union as the exclusive bargaining representative in the unit consisting of all full-time and regular part-time professional employees of Green Lake County, excluding supervisory, managerial, confidential, executive, temporary, craft, and casual employees.

ARTICLE 2 - MANAGEMENT RIGHTS

The Employer and Green Lake County retain and reserve the sole right to manage its affairs in accordance with all applicable laws, resolutions, ordinances and regulations. Included in this responsibility, but not limited thereto, is the right to determine the

number and classification of Employees; the services to be performed by them; the right to manage and direct the work force; the right to establish qualifications for hire and to test and judge such qualifications; the right to hire, promote and retain Employees; the right to transfer and assign Employees; the right to demote, suspend, discharge for cause, or take other disciplinary action subject to the terms of this Agreement and the grievance procedure; the right to release Employees from duties because of lack of work or lack of funds; the right to maintain efficiency of operations by determining the method, means and personnel by which such operations are conducted, including the right to contract out provided that the exercise of this right shall not result in layoff of permanent personnel; and to take whatever actions are necessary and reasonable to carry out the duties and responsibilities of the Employer. In addition to the foregoing, the Employer and Green Lake County reserve the right to make reasonable rules and regulations relating to personnel policies and matters relating to working conditions, giving due regard to the obligations imposed by this Agreement. The Employer shall give reasonable notice of new rules and regulations or changes therein as promulgated by it to the Employees and the Union. Any disagreement over the meaning or application of such rules and regulations may be the subject of a grievance; however, the Employer reserves total discretion with respect to the function or mission of the County, its budget, organization, and the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement.

JOB CLASSES

Class I:

Teacher (FRI); Case Manager (FRI)

Class II:

SEP Coordinator (FRI); Production Supervisor (FRI);
Workshop Supervisor (FRI)

Class III:

Social Worker I; Registered Nurse; Soil Conservationist;

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APPENDIX A - WAGE ADDENDUM 1995 - 1997

<u>EFF</u> <u>DATE</u>	<u>Class</u>	<u>START</u>	7-24 <u>MOS</u>	25-72 <u>MOS</u>	73-144 <u>MOS</u>	OVER 144 <u>M</u>
01/01/95	1	11.1539	11.6794	12.2298	12.7801	13.3552
01/01/96		11.4885	12.3907	12.5967	13.1635	13.7559
01/01/97		11.8331		12.9746	13.5584	14.1686
			12.0093			
01/01/95	2	11.4689	12.3696	12.5752	13.1411	13.7324
01/01/96		11.8130	12.7407	12.9525	13.5353	14.1444
01/01/97		12.1674		13.3410	13.9414	14.5688
			12.3420			
01/01/95	3	11.7867	12.7123	12.9236	13.5052	14.1129
01/01/96		12.1403	13.0937	13.3113	13.9103	14.5363
01/01/97		12.5045		13.7107	14.3276	14.9724

4. The County's non-professional employees, other than law enforcement and Highway Department personnel, are represented by Green Lake County Courthouse Employees, Local 514 C, AFSCME, AFL-CIO (hereinafter referred to as AFSCME).

5. Among the governmental services provided by the County is a Human Services Department which affords social services to the County's residents. Linda Van Ness is the Director of the Department and Leroy Dissing is the Deputy Director. The Department operates a unit called Fox River Industries, a rehabilitation facility dedicated to its developmentally disabled clients. Tony Jaworski is the Manager of the Fox River Industries Unit.

6. The County operates a Supported Employment Program (hereinafter referred to as SEP), a program intended to assess the capabilities and job skills possessed by developmentally disabled citizens, and develop job placements for those citizens. The SEP program is operated out of the Fox River Industries Unit. It was begun in 1984 as a vehicle for using available Department of Vocational Rehabilitation funds for job placement and supported employment and through 1990 was staffed by a Job Placement Specialist, Job Coach and Job Coach II. The Job Placement Specialist's position was included in the professionals bargaining unit represented by the Complainant, and the Job Coach and Job Coach II positions were in the non-professional unit represented by AFSCME.

7. In 1990, the County scaled back the SEP program because of a decrease in state funding. As part of the reorganization, the Job Placement Specialist and Job Coach II positions

were abolished and a new job, Supported Employment Program Coordinator, was created. By

resolution, the County Board dictated that no more than 50% of the cost of the new position be paid from County funds. The wages for the new job were set at the level of an Income Maintenance Worker II in the AFSCME contract, and the County assigned the job to that bargaining unit. AFSCME received written notification of this decision, but the Complainant was not formally notified of the change.

8. Rose Lund signed a posting for the job of Supported Employment Program Coordinator, and held the position from July 27, 1990 until she was laid off on May 16, 1996. She had previously worked for the program in positions of Job Coach and Job Coach II.

9. On October 18, 1994, the Complainant filed a unit clarification petition with the Wisconsin Employment Relations Commission, seeking to have the SEP Coordinator's position declared a professional position and have it included within the Complainant's professionals bargaining unit. AFSCME opposed the petition. The petition was held in abeyance pending attempts to resolve the dispute through the AFL-CIO Internal Disputes Plan. Those efforts were unsuccessful, and a hearing was held on September 28, 1995 before a hearing officer appointed by the Commission. The Respondent did not appear or otherwise participate in the hearing, and did not take a position on the unit clarification petition. Rose Lund was one of the witnesses at the hearing on the unit clarification petition. On March 6, 1996, the Commission issued its decision, Green Lake County, Dec. No. 24955-B, determining that the SEP Coordinator was a professional employee who was appropriately included in the professionals bargaining unit.

10. Lund did not initiate the Complainant's efforts to have her position clarified into the professionals bargaining unit. Shortly after the petition was filed, she met with Deputy Director Leroy Dissing and asked if he supported the idea of moving her job to the professionals unit. He replied that, if he were her, he would just leave it alone. He also commented that he did not like to see people get hurt.

11. In 1992, 1993, 1994 and 1995, the SEP program exceeded its budget, with the shortfall being made up, at least in part, through reimbursements from the budget of the Community Integration Program for SEP employees' work at placing clients in volunteer positions in the community. In 1992 some additional County money was also allocated for the shortfall. In 1993 and 1994, emergency funding was made available because both employees were on maternity leave for portions of those years. In 1995, part of the shortfall was made up by leaving the Job Coach's position vacant for a time.

12. In June of 1995, a long range planning report on Developmental Disabilities Services projected that nine new persons would access the supported employment program over the next five years. The caseload in 1995-96 was twenty. The implication of this projection is that there would be a reduced need for initial assessments in the future. The same report projected increased levels of service for supported employment clients as they moved from initial placements, funded by DVR, to second, third and subsequent placements which would not be paid for by the

State.

13. On July 20, 1995, Linda Van Ness sent a memo to the Finance Committee of the Human Services Board, advising them that the funds available from DVR had significantly decreased since the adoption of the 1990 resolution capping County funding of the SEP Job Coach at 50%, making that cap very difficult to abide by. She further advised the Board that the staff was looking at options for replacing DVR revenues, including increasing the CIP revenues, increasing service eligible for DVR reimbursements, or creating a cleaning crew of clients to generate revenues.

14. At the November 1995 Human Services Board meeting, the Department's staff was directed to develop options on how to restructure the SEP in order to avoid a budget shortfall.

15. Between the November and February meetings of the Human Services Board, the staff reviewed the SEP's fiscal situation and prepared a document entitled "Proposal - Restructuring of Supported Employment" outlining four options for the Board to consider: (1) Maintain the status quo in the program, and boost the County's funding levels to provide an additional \$18,030 from the levy; (2) Maintain the status quo in the program, but find an additional 4.5 DVR clients at \$4,000 each; (3) Reduce staffing; and (4) Contract out the entire program. This option paper was presented the Board at its February 13, 1996 meeting. Lund was present at the meeting, and expressed agreement with the notion that two full-time positions were not needed in SEP, given the projected declines in client population. At the February meeting, Dissing recommended laying off the Coordinator. The Board instead directed Lund, Jaworski and Dissing to develop a job classification which would allow the County to layoff the positions of Coordinator and Job Coach, and replace those existing jobs with a single position. The minutes of the February 13th Board meeting show the following account of the discussion:

February 13, 1996 Human Services Board:

Fox River Industries: Supported Employment Program: Dissing updated Committee members regarding the history of the Supported Employment Program. Back in 1990, a resolution stated that of the two positions, Supported Employment Coordinator and Job Coach, only 50.% of the Job Coach position can be funded through levy dollars. Other revenues have been: CIP dollars, case management, etc. Fox River industries has applied for grants and Berlin City Hall janitorial services. The potential for future Supported Employment placements in the next 5 years is projected at 9. Since the revenues can not be increased, the expenditures need to be decreased. (See attached.) Options: 1) go to County Board to change resolution; 2) decrease Supported Employment Coordinator to half-time or lay off and maintain vacant position with the possibility of filling the

position pending W-2 program changes in the future. The recommendation of the Human Services Personnel Committee was to lay off the Supported Employment Program Coordinator effective April 1, 1996 and maintain the vacant position pending future increased needs. Rose Lund was present to explain the expansion of the Supported Employment Program in the past eight years. At this point, Lund was in agreement that there is not the need for two full-time positions. Discussion followed.

Dissing, Jaworski, and Lund will meet to discuss needs for each position and duties that need to be performed. The matter will be discussed more at the next Human Services Personnel Committee meeting and a proposal will be presented. The main focus will be on client needs and what kind of position will best meet those needs.

16. Between the February and March meetings of the Human Services Board, Dissing, Jaworski and Lund met and developed a job description for the position of Community Employment Specialist. Jaworski prepared the final draft of the position description, which set 75% of the position's duties as job coaching, 15% as assessment and job development and 10% as administration and paperwork:

**GREEN LAKE COUNTY HUMAN SERVICE DEPARTMENT
FOX RIVER INDUSTRIES
COMMUNITY EMPLOYMENT SPECIALIST**

TITLE: Community Employment Specialist
Approximate number of employees in classification or with same title: 1

REPORTS TO: Fox River Industries' Manager

PURPOSE OF POSITION: Provide training, job development of community job sites, job placement, supervision and intensive ongoing support to chronically mentally ill and developmentally disabled adults at community-based job sites.

FUNDAMENTAL JOB DUTIES AND RESPONSIBILITIES:

A. ESSENTIAL FUNCTIONS: 75% of the time is spent job coaching and providing ongoing support to clients in paid community job sites and volunteer settings. In conjunction, serve as a liaison and contact between employer, co-workers, and

supported employees in the work setting. The employment specialist will facilitate between employers and co-worker communication between client's job responsibilities and their capabilities and build natural supports in the work environment. Approximately 15% of the time will be performing assessments and development of community job sites to DVR clients and volunteers; along with educating potential employers and civil organizations about Supported Employment Program.

10% will be spent maintaining all client files and providing related documentation as pertains to supported employment. Writing and implementing goals and objectives for those in supported employment program and attending annual staffings.

B. MARGINAL OR NON-ESSENTIAL FUNCTIONS:

Some training in word processing preferred.

PHYSICAL DEMANDS OF THE ESSENTIAL FUNCTIONS:

Any of these physical demands can be used in combination with the following areas: 75% of the time requires talking, hearing, far vision, light lifting, carrying, pushing, pulling, handling, and finger dexterity of objects weighing approximately 10 lbs. or less. Approximately 50% of the time is standing, walking, sitting, balancing, bending, twisting, far vision and using the fingers for things like typing. Lifting and carrying of objects weighing approximately 40 lbs. or less. Roughly 10% of the time is spent stooping, kneeling, crouching, and handling objects. Unusual situations may involve running, climbing ladders, pushing/pulling objects weighing 50-80 lbs. and using finger dexterity to manipulate small component parts.

WORKING CONDITIONS WHILE PERFORMING ESSENTIAL FUNCTIONS:

Approximately 85% is indoors. About 15% is working outdoors while enduring temperature changes between hot and cold weather. Present in unusual or non-routine Situations are working in extreme heat; hazardous conditions may result in mechanical problems, burns, and physical attack or injury from clients. Atmosphere conditions of job sites may have fumes, mist, gases, odors, and dust.

EQUIPMENT USED TO PERFORM ESSENTIAL FUNCTIONS:

Items include: typewriter, calculator, copy machine, computer terminal, fax machine, camera, and measuring device, etc., hammers, wrenches, screwdrivers, shovels, brooms, etc., ovens, food warmers, dishwashers, and mixers, etc. Other

equipment would be use of automobile or van. Factory settings may require hearing and eye protective equipment.

QUALIFICATIONS NEEDED: (Educational skills) Preferred: Associates Degree in the field of human services, developmental disabilities, or mental health or related fields with emphasis on supported employment; Willingness to obtain first aid and CPR certification in order to perform on clients if needed (training will be provided). Awareness of OSHA standards in industrial settings. Valid driver's license. Two to four years experience in working with the developmentally disabled and chronically mentally ill in behavior management techniques and knowledge of the physical and cognitive abilities.

This position description has been prepared to assist in defining job responsibilities, physical demands, working conditions, and skills needed. It is not intended as a complete list of job duties, responsibilities and/or essential functions. This description is not intended to limit or modify the right of any supervisor to assign, direct, and control the work of employees under supervision. The county retains and reserves any or all rights to change, modify, amend, add to or delete, from any section of this document as it deems, in its' judgment, to be proper.

The incumbent Job Coach did not have the qualifications necessary to do assessments, while Lund did have the qualifications to do job coaching. In the discussions surrounding the development of this job description, it was generally understood by the Department staff and managers, including Van Ness, Dissing and Jaworski, that Lund would fill the new position. At one point, Jaworski commented to Lund that he might seek to have the Union waive the posting requirement for new jobs, so that she could just claim the position. Jaworski also told Lund that the new position would have the same salary as her Coordinator's job.

17. March 13, 1996 was the day of the Human Services Board meeting at which the proposed new position was to be considered. During the day, prior to the Board meeting, Jaworski and Lund met briefly to review the presentation to the Board. In the course of that meeting, Jaworski did not raise any questions or concerns about the proposal, nor did he make any mention of the WERC's unit clarification decision moving Lund's position from the non-professionals bargaining unit represented by AFSCME to the professionals bargaining unit represented by the Complainant.

18. The Human Services Board met on the evening of March 13, 1996 to consider, among other things, the proposal for the consolidated position in SEP. Lund was not present at the

meeting. Dissing presented the proposal, and during the course of his presentation, Van Ness noted the presence of several union representatives in the audience and advised the Board that the WERC had moved the grievant's job from the AFSCME unit to the Operating Engineers' bargaining unit. At hearing this, Jaworski appeared to be startled, expressed surprise and immediately thereafter advised the Board that he did not believe that the program needed a position with 25% of its time devoted to assessment, planning and administration. Board member Steve Eilbert asked him if he was speaking against the proposal he had helped to develop, and Jaworski said he was because he thought that the coaching element of the job was more along the lines of 90% than 75% as stated in the proposal. He also said that the pay for the job in the professionals unit would be higher than was justified and that she should remain in the AFSCME unit. The Board Chairman stated that bargaining unit placement was a matter between the Personnel committee and the Unions and was not relevant to the discussion. In discussing the position, Jaworski used the term "she" to the point that the Board Chairman admonished him that they were discussing a job and not a specific person. After this discussion, the Board remanded the entire question back to the Personnel committee. The minutes of the March 13th meeting show the following account of the discussion:

Fox River Industries: Supported Employment Program Resolution:

Skipchak excused herself from the Supported Employment Program discussion.

Dissing reported that at the February Human Services Personnel Committee meeting, the recommendation to the full Human Services Board was to layoff the Supported Employment Coordinator position in order to meet the intent of the resolution in 1990 that created both positions within the Supported Employment Program (that of the Supported Employment Program Coordinator and Job Coach). That resolution stated that only 50% of the Job Coach's position could be funded with County levy. The other half of the Job Coach position and all the Supported Employment Coordinator position were to be funded with revenues other than county tax dollars. Over the year, the number of DVR-funded, supported Employment Program job placements has decreased to the point that only nine placements-of this type are expected in the next five years. The majority of client needs (70-80%) within the Supported Employment Program) require job coaching. The rationale was that since 50% of the job coaching position can be funded with county tax levy and the majority of Supported Employment Program requires job coaching, the Job Coach position should be retained. Any job assessment/development could be accomplished with existing staff

at Fox River Industries. Furthermore, by laying off the Supported Employment Program Coordinator, the position is maintained and can be refilled if unexpected numbers of people require job assessment/development where revenues can be captured or if W-2 (Wisconsin Works) requires this type of service.

The Human Services Board, at it's (sic) February 13, 1996 meeting, requested the Human Services Personnel committee to review the possibility of eliminating both the Supported Employment Coordinator and Job Coach positions, and creating a position that combined the duties of both. This is the current recommendation to the Human Services Board at this meeting.

Dissing, Jaworski and Van Ness again reiterated to the Human Services Board that needs within the Supported Employment Program - that being 70-80% job coaching rather than primarily assessment/job development. Van Ness also advised the Board that a recent WERC decision had removed the Supported employment Program Coordinator position from the AFSCME unit and placed it into the IUOE union.

After discussion, Brooks made a motion to send the resolution back to the Human Services Personnel Committee for further review of the different options, needs of the program and bring back a recommendation/resolution to the April 9, 1996 Human Services Board meeting. A special Human Services Personnel committee meeting will be set before the April 9th meeting to research and discuss the matter. The matter needs to be acted on in April because of fiscal issues. Neitzke-second. All ayes. Motion carried.

Severson asked Skipchak to return for the remainder of the Human Services Board meeting. 2/

19. On March 14, 1996, Jaworski and Lund had a conversation during which Jaworski congratulated Lund on being placed in the professionals bargaining unit and asked her why she had

2/ The first portion of this excerpt is drawn from Joint Exhibit #1, the Respondent's Answer to the complaint, which purported to include the minutes of all relevant committee and Board meetings. That exhibit did not include the second page of the discussion on this issue from the March Board meeting. That portion of the discussion, shown in italics, is drawn from Complainant's Exhibit #4. See transcript, pages 37-40.

not mentioned it to him. This was the first time Jaworski had mentioned the WERC's decision to Lund.

20. After the March meeting, Dissing and Jaworski met and put together a proposal to the Human Services Board which did not include a new, consolidated position, but instead called for the Job Coach to be retained and the Coordinator to be laid off, with assessment work being performed by Jaworski and other members of the professional staff. On the strength of

Dissing and Jaworski's recommendation, the Human Services Board voted at its April 9th meeting to layoff the Coordinator and retain the Job Coach. The minutes of the April 9th meeting show the following account of the discussion:

Fox River Industries: Supported Employment Program Resolution:

Skipchak excused herself from the Supported Employment Program discussion.

Dissing reported on the discussion that took place at the Human Services Personnel Committee meeting regarding the Supported Employment Program and the proposal to keep within the resolution of only 50t of the Job Coach position being funded by county levy. The recommendation was to lay off the Supported Employment Coordinator position with the option of reinstating the position if the need arises in the future and if funding is available.

After discussion, Wallenfang made a motion to lay off the Supported Employment Coordinator position at this time and reinstate the position if and when the need and funding increases. Neitzke-second. Discussion followed. Lund questioned Committee members regarding her concerns over the ability of management to continue to have job assessments, development and placement done if her position is laid off. Van Eperen questioned if the lay off had to do with fiscal constraints only. Van Ness reiterated that the decision is based on Program need and fiscal constraints.

Lund said that DVR uses order of selection in which more severe disabled individuals might not need an assessment.

Mr. Lund questioned that if the Supported Employment Coordinator were laid off, would there be any assessments done. in the Supported Employment Program. Van Ness explained that the waiting list

would continue as it already exists and assessments would be done by Fox River Industries Unit Manager or designee as needed.

Van Eperen discussed "spotty job" development as opposed to continuous job development which "sounds backwards". He expressed his concern that Supported Employment would not be able to increase their job development capability.

Van Ness explained that Fox River Industries employs over 40 individuals and there are approximately 23 individuals in the Supported Employment Program.

Questions followed regarding the fiscal part of the position and going to the County Board to change the resolution. Van Ness explained that there is not current fiscal justification of a presentation regarding the Supported Employment Program Coordinator's position to the County Board.

The motion was read again: Wallenfang made a motion to lay off the Supported Employment Coordinator position at this time and reinstate the position if and when the need and funding increases. Neitzke-second. Roll call vote. Wallenfang-aye; Neitzke-aye; Dallman-aye; Skipchak-abstain; Brooks-aye; Topham-aye; Severson-aye; Gustafson-aye; Eiler-aye. Motion carried.

Severson asked Skipchak to return for the remainder of the Human Services Board meeting.

21. Lund received a notice of layoff on April 15, 1996, informing her that she would be laid off effective May 3rd due to insufficiency of funds in the SEP. She was thereafter laid off.

22. From the date of the Commission's decision in the unit clarification through the date of her layoff, Lund continued to be paid according to the rates in the AFSCME contract.

23. Participation in a unit clarification proceeding is protected concerted activity.

24. Dissing and Jaworski were aware of the unit clarification proceeding.

25. Dissing and Jaworski were hostile to the effort to clarify the Coordinator's position from the AFSCME non-professionals bargaining unit into the Operating Engineers' professionals bargaining unit.

26. Dissing and Jaworski were, by virtue of their managerial positions, able to effectively recommend the nature and details of the reorganization of the Supported Employment Program to the Human Services Board.

27. Jaworski's change of position at the March 13, 1996 Human Services board meeting, when he argued against the proposal for a new, consolidated position of Community Employment Specialist and in favor of retaining the Job Coach, was motivated in part by hostility to the Complainant's protected concerted activity.

28. The assertion that the decision not to create the Community Employment Specialist job, but to instead retain the Job Coach was based on management's judgment that job coaching was the greater portion of the required duties is at least in part a pretext for retaliation against Lund based upon the clarification of her position into the Complainant's bargaining unit.

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

CONCLUSIONS OF LAW

1. That the Respondent, Green Lake County, is a municipal employer, within the meaning of Section 111.70 (1)(j), MERA.

2. That the Complainant, International Union of Operating Engineers, Local 139 is a labor organization within the meaning of Section 111.70(1)(h), MERA.

3. That Rose Lund is a municipal employee within the meaning of Section 111.70(1)(i), MERA.

4. That seeking the clarification of a bargaining unit is lawful, concerted activity within the meaning of Section 111.70(2), MERA.

5. That the decision not to create the position of Community Employment Specialist, and to instead layoff Rose Lund, was motivated in part by hostility to the Complainant's successful efforts to clarify Lund's position into the professional employees' bargaining unit, and constitutes interference with protected rights and discrimination in violation of Section 111.70(3)(a) 1 and 3, MERA.

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

ORDER 3/

IT IS ORDERED that the Respondent, Green Lake County, its officers and agents shall immediately:

1. Cease and desist from discriminating against Rose Lund or any other employee on the basis of the efforts of the International Union of Operating Engineers Local 139 to clarify the professional employees' bargaining unit;

3/ Footnote found on pages 15 and 16.

2. Take the following affirmative actions which will effectuate the purposes of the Act:
 - a. Immediately recall Rose Lund to the position of SEP Coordinator and make her whole for lost wages and benefits by virtue of the discriminatory layoff at the rate of pay she was receiving under the AFSCME contract prior to the layoff, plus any interim increases, pending the satisfaction of its duty to bargain with the Complainant over the appropriate rate of pay for her position;
 - b. Notify all employees, by posting in conspicuous places in its office where employees are employed. copies of the Notice attached hereto and marked "Appendix A". This notice shall be signed by the Respondent, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of thirty days thereafter. Reasonable steps shall be taken by the Respondent to insure that this Notice is not altered, defaced or covered by other material.
 - c. Notify the Wisconsin Employment Relations Commission within twenty days following the date of this Order of the steps taken to comply herewith.

Dated at Racine, Wisconsin this 11th day of April, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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- 3/ 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 (continued)

3/ (Continued)

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).

ATTACHMENT "A"

NOTICE TO ALL GREEN LAKE COUNTY EMPLOYEES

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 employees that:

1. WE WILL NOT discriminate against Rose Lund or any other employee because of their union activities.
2. WE WILL offer immediate reinstatement to Rose Lund to her former position of Supported Employment Coordinator, and will make her whole for her losses by virtue of her layoff in May of 1996.

GREEN LAKE COUNTY:

By _____ Signature
Title

This Notice will be posted in the locations customarily
used for posting notices to employees for a
period of 30 days from the date hereof.

This Notice is not to be altered, defaced, covered or obscured in any way.

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER**

Background

The Complaint as amended challenges the County's decision to layoff Rose Lund, who was the Coordinator of the Supported Employment Program in the County's Fox River Industries unit, which provides services to developmentally disabled citizens of the county. In 1995, the Human Services Department and Human Services Board determined that there had to be cuts in the budget of this program because of chronic deficits and a declining client population. The staff and Board of the Human Services Department considered a variety of options, including laying off Lund's position. In February of 1996, the Human Services Board directed the staff to put together a new position which would consolidate and take the place of both staff positions in the program -- the SEP Coordinator and the Job Coach. Deputy Human Services Director Leroy Dissing, Lund, and Fox River Industries Manager Tony Jaworski, Lund's immediate supervisor, worked on the new position description. It was generally understood that Lund would occupy the new job, both because she was the senior employee and because she was the only SEP employee who was qualified to do client assessments.

The proposal was presented to the Human Services Board in March of 1996. During the course of the presentation on the new position, Human Services Director Linda Van Ness announced that the WERC had issued its decision in a pending unit clarification, and had determined that Lund's job was a professional position, which should be included in the professionals bargaining unit represented by the Operating Engineers, rather than in the AFSCME non-professionals bargaining unit. After this announcement was made, Jaworski argued against the creation of the new consolidated job and in favor of laying off Lund and keeping the Job Coach.

The Board remanded the question to its Personnel Committee. Dissing and Jaworski presented a proposal to the Personnel Committee to layoff Lund and retain the Job Coach. This proposal was accepted by the Human Services Board at its April meeting, and Lund was laid off. The Complainant alleges that this was in retaliation for the unit clarification. The Respondent denies any prohibited practice.

Arguments of the Parties

The Complainant asserts that the County violated both Sec. 111.70(3)(a) 1 and 3. The test is whether (1) the employee was engaged in protected activity; (2) the employer was aware of those activities; (3) the employer was hostile to those activities; and (4) the employer's conduct was motivated, in whole or in part, by hostility toward the protected activities. In this case, Lund was engaged in protected activity, in the sense that her job was the subject of a unit clarification proceeding and she appeared as a witness in that proceeding. Clearly the employer was aware of the activity, as it had notice of the hearing and knew what position was in issue. Hostility is shown

by the comments of Leroy Dissing, who was approached by Lund and asked for his views on the unit clarification. His response, that she should leave it alone and that he hated to see people get hurt, can only be interpreted as hostility to the protected activity. The Union notes that Dissing never denied making these statements. The County's hostility to the clarification proceeding is further demonstrated by its refusal to pay Lund according to the Operating Engineers' contract once she was moved from the AFSCME unit, and by Jaworski's disconcerted reaction when he learned that Lund had been included in the Engineer's bargaining unit.

The decision to eliminate Lund's position was motivated by the County's hostility to her inclusion in the higher paid Engineer's bargaining unit. The plan up to the point of the Human Services Board meeting in March had been to create a new classification, and there is no serious dispute that Lund was to occupy that job. At that meeting, Jaworski first became aware of her inclusion in the unit, and he immediately changed directions and spoke against the proposal for a new classification and urged the Board to layoff Lund and retain the job coach. This quite literally took place in the middle of Dissing's presentation on the proposed new classification, and the only new factor that could have influenced Jaworski's decision making was the news that Lund had been placed in the Operating Engineers' unit. The only reasonable conclusion is that the decision to layoff Lund was directly related to the unit clarification decision, and was an act of retaliation against her and the local union for this protected activity. Thus the Complainant asks that Lund be reinstated and made whole for her losses, including those incurred as a result of the County's refusal to pay her under the Engineer's contract from the date of the unit clarification through the date of her layoff.

The Respondent denies any improper motivation for the elimination of Lund's position. The record amply demonstrates that budget reductions were demanded by a projected decline in the number of clients needing services from the County, specifically those services offered by Lund's position. While the Job Coach's caseload would not necessarily decline, the demand for caseload management and professional assessment clearly would. Thus the decision to eliminate Lund's position.

The Union's argument that the County was retaliating against Lund ignores the fact that she was represented by a Union for years before the layoff and, no matter what the outcome of the unit clarification, would continue to be represented by a union. Given this, it makes no sense to argue that the County was hostile to her inclusion in a union. Moreover, even Lund admits that the decision to eliminate her job was made well before any result was received on the unit clarification, and that this decision was based on client needs and budget restraints. From the affected employee's own testimony, it is clear that the basic decision to lay off the Supported Employment Program Coordinator was made without reference to the unit clarification. Instead, it was a neutral exercise of the County's contractual right to "determine the number and classification of employees, the services to be performed by them, and the right to release employees from duties because of lack of work or lack of funds." Human Services Director Linda Van Ness confirmed Lund's testimony as to the operational needs of the program, noting that job coaching was the greatest part

of the services to be provided. Accordingly, retention of the lower paid job coach position was the only logical choice open to the County.

In reply to the County, the Union notes that there is no dispute over the fact that a decision was made to eliminate a position, and that this decision was made before the parties knew the result of the unit clarification. The point of the complaint, a point which the County fails to address, is that the initial decision still involved having Lund continue her employment with the County. Once she was included in the Engineers' bargaining unit, this decision was changed and she was laid off. This change was in retaliation for the Union's victory in the unit clarification. It is the targeting of Lund, not the reorganization of the program, that constitutes a prohibited practice.

Discussion

Under the Commission's long-standing Muskego-Norway line of cases, 4/ the test of whether an employer's actions constitute discrimination in violation of Section 111.70(3)(a) 3 has four prongs:

1. The employee was engaged in protected activity;
2. The employer was aware of the activity;
3. The employer was hostile to the activity;
4. The employer's conduct was motivated, in whole or in part, by hostility to the protected activity.

A. Protected Activity and Employer Knowledge

The first two elements of the Muskego-Norway test are clearly established in the record. Lund herself was not the moving party in the unit clarification, and did not actively seek placement in the Complainant's bargaining unit. The concerted activity here is that of the Complainant. However if the purpose of an action taken against an employee is retaliation or discrimination for protected activity of others, the action is illegal notwithstanding the fact that the affected employee herself was not actively engaged in the protected activity.

5/ Thus for the purposes of this case, if the decision not to retain Lund was prompted by the Complainant's success in the unit

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

5/ Howard Johnsons, 209 NLRB 1122, 86 LRRM 1148 (1974).

clarification, Lund is treated as having been in the same shoes as those who actively engaged in the protected activity. As to the second element, the County concedes that its officers and agents were aware of the unit clarification petition, and knew that Lund's position was the object of the petition.

B. Hostility

The Respondent denies any hostility to the unit clarification, and denies that the decision to layoff Lund rather than going forward with the creation of the Community Employment Specialist position was motivated by such hostility. Much of the Respondent's argument is aimed at showing that there were legitimate economic reasons for reducing costs in the SEP and that the decision to layoff the Coordinator's position was arrived at well before the WERC's unit clarification decision was handed down. Those points are not in dispute. The Complainant's allegation is that there was in essence an agreement that Lund was to remain employed in a new position, and that this decision was changed in response to the unit clarification.

The evidence of hostility to the unit clarification by the County government as an overall entity is not particularly persuasive. The County did not appear at or take a position in the unit clarification hearing, in accordance with its established policy of letting the unions fight those issues out themselves. As for the Complainant's assertion that the County's refusal to pay Lund at the rate specified for the SEP Coordinator in the Operating Engineers' contract between the time her job was clarified into that unit and the time she was laid off constitutes evidence of hostility by the County, that is not conclusive as to hostility. The inclusion of the SEP Coordinator's position in the Operating Engineers' pay schedule was quite likely a surprise to the County, since the job had been included in the AFSCME bargaining unit for as long as that title had been in existence. 6/ This refusal to pay the higher rate may be interpreted as evidence of hostility, but standing alone it does little to establish that element.

While the County government as an overall entity may not have been hostile to the unit clarification, there is strong evidence that two of its principal agents in the Human Services Department were hostile. Lund testified that she spoke with Deputy Director Leroy Dissing about his view of the unit clarification petition, and that his response to her was that she should "leave it alone" and that he "hated to see people get hurt." 7/ Significantly, although Dissing was present

6/ At the hearing on this complaint, no one was able to give any clear explanation as to why this title was listed in the Operating Engineers' contract.

7/ Transcript, page 22.

during this testimony and was later called as a witness by the Respondent, he did not contradict this testimony. These statements are not open to an innocent interpretation. They reflect obvious hostility to the effort to have her job placed in the professional employees' bargaining unit as well as an implied threat of retaliation.

As for Jaworski, the evidence of hostility is circumstantial but strong. Before the decision in the unit clarification case, he participated in the formulation of the new position description. He told Lund that he would seek to have the posting provisions of the labor agreement waived so that she could simply assume the job, and told her that it would carry the same rate of pay as the Coordinator's job. He and Lund discussed the presentation of the position description on the day of the March Human Services Board meeting, and he made no mention of problems or concerns with the proposal. He likewise made no mention of any such problems or concerns at the Human Services Board meeting, until Van Ness announced that Lund's position had been included in the professionals bargaining unit. He then spoke against the proposal that he had helped to draft, arguing that the job coaching component of the job was much more than 75% and that the Board should simply retain the Job Coach and lay Lund off. The abruptness of Jaworski's change in direction is inexplicable, unless it was the direct result of Van Ness's announcement regarding the unit clarification.

In arriving at the conclusion that Jaworski's reversal of position was the result of hearing from Van Ness that the grievant had been placed in the professionals' unit, the Examiner has credited the testimony of Betty Bradley, a member of the Operating Engineer's bargaining unit who attended the meeting at Lund's request. Bradley testified that Jaworski appeared startled by Van Ness's announcement and made a statement along the lines of "What? She's in the operators now?" Dissing testified that Jaworski was aware of the WERC decision before the meeting because he had told him about it. However, Lund testified on rebuttal that Jaworski made no mention of the unit clarification until the day after the meeting, when he congratulated her and asked why she hadn't told him about it. Perhaps Jaworski did not fully understand what Dissing told him. In any event, the evidence of Jaworski's reaction and his immediate reversal in position are consistent with surprise at the news of the clarification, and his conversation with Lund the next day is inconsistent with advance knowledge of the decision. 8/

Prior to knowing the result of the unit clarification, Jaworski was committed to creating a new position for Lund. Immediately after hearing of the WERC's decision, Jaworski spoke out against that same proposal and urged that Lund's position be laid off without any provision for her continued employment. The only reasonable inference is that he was hostile to the Complainant's

8/ Although the choice of witnesses is a tactical decision, and should not normally weigh in the resolution of credibility disputes, I note that Jaworski played an obviously critical role in these transactions. He was available to the County as a witness but did not take the stand. Given that his testimony would obviously have been highly relevant to the resolution of the credibility issues, I infer from this that his testimony would have been adverse to the Respondent.

successful effort to clarify Lund's position into the professionals bargaining unit, and that is the inference that the Examiner draws. Thus the record evidence establishes that Dissing and Jaworski were hostile to the clarification of Lund's position into the professional unit.

C. Motive

The Respondent argues, inter alia, that the decision to lay off the Coordinator and retain the Job Coach was made by the Human Services Board, not by Jaworski or Dissing. This is true, but Van Ness acknowledged in her testimony that the Board's decision was based upon the recommendation of Jaworski and Dissing. 9/ If that recommendation was motivated in part by anti-union animus, the fact that it was the Board rather than the managers who ultimately acted does not remove the taint of the illegal motive. Citizen Boards customarily accord deference to the judgment of staff in technical areas. This is demonstrated by the fact that Jaworski's reversal of position on how much job coaching was needed versus assessment and administration dissuaded the Board from acting on his own recommendation in favor of a new position.

9/ Transcript, page 143.

In determining whether a decision is motivated by unlawful animus, the Commission must determine whether the reasons given for that decision are genuine or are instead pretextual. 10/ Here the decision to abandon the new position in favor of retaining the job coach was alleged to have been based upon the percentage of job coaching duties required by the program. However, that figure cannot have changed between the beginning of the March Board meeting and the point in the meeting at which Jaworski spoke against the proposal. Jaworski was the unit manager who oversaw this program, and he was intimately involved in crafting the new position description setting job coaching at 75% of the workload. Moreover, Lund had worked as both the Job Coach I and Job Coach II, and was conceded to be qualified to perform this function, so an increase in the job coaching component of the position should not have affected her suitability for the new position. It makes no sense whatsoever that Jaworski would very suddenly change his position in mid-meeting on this basis.

It is possible that there were other reasons for Jaworski's change of heart, but the explanation ascribed to him by the Respondent, which is essentially that he simply changed his mind about the degree of job coaching involved in the position, must be held to be pretextual. Given this, and given that the two individuals shown to have been hostile to the unit clarification were the two that effectively recommended the elimination of Lund's job and the retention of the Job Coach, the Examiner concludes that the Respondent's actions were motivated, at least in part, by hostility to protected activity.

Remedy

The evidence establishes that in the absence of the illegal motive, Lund would have been retained in the new consolidated position at the rate of pay she was then receiving. As a consequence of the discrimination, the new position was not established, and Lund was laid off. In order to make Lund whole, it is necessary that the County reinstate her to employment and pay her for her losses. The questions are what position Lund is entitled to, and what should be the measure of her damages.

One possible remedy is to order that Lund be placed in the position of Community Employment Specialist, which would literally put her in the position she would have occupied but for the discrimination. The Commission has broad remedial authority to effectuate the purposes of the Act, 11/ and ordering the creation of this position would be within the Commission's power. However, this would be an extraordinary remedy and a step that is not necessary to vindicate Lund's rights. The position of SEP Coordinator remains in existence. Although the County has determined that it needs a different mix of tasks than were formerly performed by Lund in the

10/ CESA 4, Dec. No. 13100-E (Yaffe, 12/29/77) at page 43.

11/ CESA 4, supra, at page 62, citing WERC v. Evansville, 69 Wis.2d 140, 130 N.W.2d 688 (1975).

Coordinator's position, the County retains the authority under the Management Rights clause to assign duties, and that right would extend to having the SEP Coordinator perform the needed job coaching work. Lund has performed that work in the past. Thus an Order recalling Lund to her former position would effectuate the purposes of the Act while at the same time avoiding undue interference with the County's ability to define and provide necessary services.

The Complainant argues that a make whole order must pay Lund at the rate specified for the SEP Coordinator in the Operating Engineers' contract, rather than at the lower rate contained in the AFSCME contract. The Examiner concludes that using the rate from the Operating Engineers' contract would be inappropriate. First, it must be noted that the job was, from its inception until the unit clarification decision in March of 1996, part of the AFSCME bargaining unit, and there is a real question as to whether there was ever any meeting of the minds on a rate for the job in the negotiations between the County and the Operating Engineers, or whether the inclusion of that pay rate in that contract was instead a clerical error. Moreover, the Complainant's argument for the higher rate ignores the fact that the loss here is that of the new job, which was not the Coordinator's job and which featured a heavier component of lower paying Job Coach duties. The promise that had been made to Lund by Jaworski was that she would retain her rate of pay, and when that promise was made the pay rate was that established in the AFSCME contract. As the duties of the Specialist's position would have differed from those of the existing classification, the parties would have been obligated to engage in bargaining to determine an appropriate pay rate. Should the County elect to consolidate the positions in the wake of this Order, or substantially modify the Coordinator's duties, the bargaining process will have an opportunity to take its course. Absent the negotiation of a different base rate, the appropriate measure of damages is the hourly wage Lund was receiving at the time of her layoff. Thus the backpay amount is to be calculated at the actual rate of pay Lund received at the time of her layoff, plus any generally applicable increase for employees in the Operating Engineers unit since that time.

Dated at Racine, Wisconsin this 11th day of April, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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