STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES #40, AFSCME, AFL-CIO, Complainant, vs. CITY OF NEW LISBON, Respondent.	Case 9 No. 54516 MP-3230 Decision No. 28935-A

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of Wisconsin Council of County and Municipal Employees #40, AFSCME, AFL-CIO.

Curran, Hollenbeck & Orton, S.C., Attorneys at Law, by Mr. Fred D. Hollenbeck, 111 Oak Street, P. O. Box 140, Mauston, Wisconsin 53948-0140, appearing on behalf of the City of New Lisbon.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Wisconsin Council of County and Municipal Employees #40, AFSCME, AFL-CIO filed a complaint with the Wisconsin Employment Relations Commission on October 10, 1996, and an amended complaint on October 15, 1996, and a further amended complaint on November 4, 1996, alleging that the City of New Lisbon had committed prohibited practices in violation of Secs. 111.70(3)(a)1, 2, 3, 4 and 5, Stats., by the City's individual bargaining with a bargaining unit employe, by laying off said employe because of his protected concerted activity and by violating the terms of the parties' collective bargaining agreement. On December 4, 1996, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing was held on December 30, 1996, and January 24, 1997, in Mauston, Wisconsin. The parties agreed to file briefs serially and the Complainant's reply brief was received on May 12, 1997. The Examiner,

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

FINDINGS OF FACT

1. Wisconsin Council of County and Municipal Employees #40, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and its offices are located at 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903. The Union is the certified exclusive collective bargaining representative of certain employes of the City of New Lisbon in a bargaining unit consisting of all regular full-time and regular part-time employes, including craft employes, but excluding confidential, supervisory, managerial and professional employes.

2. The City of New Lisbon, hereinafter referred to as the City, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its offices are located at City Hall, 404 State Street, New Lisbon, Wisconsin 53950.

3. The City and the Union have been parties to a collective bargaining agreement setting forth the wages, hours and conditions of employment for members of the bargaining unit. The agreement contains a grievance procedure which culminates in final and binding arbitration.

4. Scott Hansen, hereinafter Hansen, received information that the City might hire an electrical lineworker apprentice and submitted an application to the City on or about February 15, 1996, as well as his resume. Hansen's resume indicated that he had graduated from Dakota County Technical College in Rosemount, Minnesota, in June, 1995, and was in the Electrical Lineworker program. Hansen was not a licensed journeyman lineman. Hansen was later interviewed by City Council President Earl Bailey and Councilman Earling Dahl as well as Lineman Edmund Robison. The interview did not touch on the subjects of the rate of pay for the position nor the length of time for Hansen to obtain his journeyman's license. Sometime later Hansen was hired by the City and began work around June 17, 1996.

5. Upon starting his employment, Hansen was told he would be paid $6.24 per hour and he objected to the City Clerk and Councilman Dahl to no avail. Hansen approached City Council President Bailey who said he would look into the matter. Subsequently, Hansen was paid $10.40 per hour retroactive to his date of hire. $10.40 per hour is the contractual rate of hire for the Lineman classification.

6. Sometime in July, 1996, Hansen took a test at Chippewa Valley Technical College to determine where he would be placed in the apprenticeship program. Hansen did not do well on the test and his placement was at the start of the four year apprenticeship program. Hansen sought to retake the test but it was learned that further testing would not change the result and he had to start from the beginning of the apprenticeship program.

7. Sometime in the afternoon of September 16, 1996, Ed Robison told Hansen that the City Council was having a meeting that evening and they wanted Hansen to attend to talk about his employment. Hansen spoke to his Union Steward who advised him to attend the City Council meeting. Hansen also spoke to David White, Staff Representative, Council 40, who advised him to attend the meeting, see what the Council had to say and ask them questions. Hansen attended the meeting with the City Council and Mayor. There was a discussion of Hansen's test scores and enrollment in a school to complete his apprenticeship. Hansen was asked to leave the meeting for a period of time and then asked back into the meeting. The Mayor informed Hansen that the City would pay his training for the four-year apprenticeship program including room and board and travel expenses if Hansen would agree to remain a City employe for two years after attainment of his journeyman's license and if he left before that time, he would have to reimburse the City for of his training. During his apprenticeship, the City offered to pay Hansen $9.00 per hour. Hansen did not respond to the Mayor's proposal. The Mayor asked Hansen to take a few days or a week to consider the matter and if he wanted an apprenticeship under the conditions offered, to let the City know.

8. On September 20, 1996, Mr. White sent the City's Mayor the following letter:

> It has come to my attention that the City of New Lisbon is attempting to coerce Mr. Scott Hanson (sic) into signing a "contract" which would result in a substantial reduction in his rate of pay, requiring him to commit to working for the City for six years, and, if he left the employ of the City for any reason during that time, he would be obligated to repay the City the cost of his lineman training.
>
> Please be advised that such action on the City's part is violative of numerous provisions of Ch. 111.70, Wis. Stats., and will not be tolerated by this Union. I am hereby directing the City to immediately cease and desist from 1) interfering with, restraining, or coercing employees represented by Local 569-A in the exercise of their rights guaranteed under Ch. 111.70, Wis. Stats.; 2) attempting to obtain contracts with individuals in the collective bargaining unit; and 3) violating the terms of the labor agreement.
>
> Mr. Hanson (sic) is entitled to be paid $11.55 per hour commencing from his 90th day of employment.
>
> I will consider this matter to be settled upon receipt of a letter signed by the Mayor or other appropriate representative of the City that it will cease and desist from the activity cited in the second paragraph

of this letter, and that it has adjusted Mr. Hanson's (sic) pay, retroactive to his 90th day of employment, to the rate of $11.55 per hour.

If I do not receive such a letter by September 30, 1996, I will assume that the City is continuing its illegal conduct, and I will file charges with the Wisconsin Employment Relations Commission, seeking appropriate damages and interest.

9. The City by its attorney responded in a letter dated October 10, 1996, which stated as follows:

This is in response to your letter to Mayor Southworth, dated September 20, 1996, regarding the above. The City Council talked to Mr. Hanson (sic) regarding Mr. Hanson's (sic) seeming inability to obtain a journeyman lineman's license. As I understand it, Mr. Hanson (sic) is unable to pass even the initial test to obtain the journeyman lineman's license, let alone the second test. I understand that he failed both tests and, indeed, only got approximately 20% of the questions right on the second test.

Mr. Hanson (sic) was asked by the council to continue in the City's employment and to work toward a permanent position. To that end, the council offered to send him to vocational school for four years in the hopes that the additional education he would obtain would enable him to pass the tests. The council suggested that the City would pay for the schooling, if Mr. Hanson (sic) would agree to take the schooling. Further, the council suggested that he agree to continue working for the City for a period of six years from now. This would mean that he would be bound to the City for six years and, for instance, if he took another position after the City had expended money to train him, he would repay the City for City's out-of-pocket cost for his training.

The rate of pay you are suggesting ($11.55 per hour) is the pay due a journeyman lineman under the terms of the master contract. Mr. Hanson (sic) is not now and never has been a journeyman lineman and is not entitled to $11.55 an hour because he is unable to fill that position at this time. The City understands that the rate that should be paid for someone in apprentice training is something less than $7.00 an hour. The City recognizes that less than $7.00 an hour would not be acceptable to anyone and offered Mr. Hanson (sic) $9.00 an hour during the term of his training.

> Mr. Hanson (sic) indicated that he would think it over and let the council know the next day. The next thing the council heard was your letter of September 20.
>
> The City does not propose to pay Mr. Hanson (sic) $11.55 an hour for a job he cannot do. The City was trying to be fair with Mr. Hanson (sic) at providing him with employment and incentive to improve his ability to earn. If Mr. Hanson (sic) is not interested in this, Mr. Hanson (sic) will be laid off from his employment. We take your letter to be rejection of the City's attempt.
>
> It is my understanding that the council will consider laying off Mr. Hanson (sic) at its next regularly scheduled meeting.

10. On October 11, 1996, the City Council voted to lay off Hansen effective October 24, 1996, and by a letter dated October 16, 1996, Hansen was laid off effective October 24, 1996. There is no evidence that a grievance was filed by or on behalf of Hansen.

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

CONCLUSIONS OF LAW

1. The meeting between the City Council and Hansen on September 16, 1996, wherein Hansen was offered the payment of expenses for his apprenticeship training and $9.00 per hour during said apprenticeship in exchange for his commitment to work for the City for two (2) years after attaining his journeyman's license constituted individual bargaining by the City in violation of Sec. 111.70(3)(a)4, Stats., and derivatively, of Sec. 111.70(3)(a)1, Stats.

2. The City, by its decision on October 11, 1996, to lay off Hansen effective October 24, 1996, was motivated, in part, by its hostility toward Hansen's concerted protected activity and is violative of Sec. 111.70(3)(a)3, Stats., and derivatively, of Sec. 111.70(3)(a)1, Stats.

3. The alleged independent violation of Sec. 111.70(3)(a)1, Stats., has been subsumed into the Secs. 111.70(3)(a)3 and 4, Stats., violations.

4. The Union has failed to establish by a clear and satisfactory preponderance of the evidence any violation of Sec. 111.70(3)(a)2, Stats.

5. Inasmuch as the parties' collective bargaining agreement contains a grievance procedure which culminates in final and binding arbitration and that procedure has not been

exhausted, the Examiner will not assert the Commission's jurisdiction over the allegation that the City violated the contract and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.

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

ORDER 1/

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

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or

IT IS ORDERED that

1. The alleged violations of Secs. 111.70(3)(a)2 and 5, Stats., as well as an independent violation of Sec. 111.70(3)(a)1, Stats., are dismissed in their entirety.

2. The City of New Lisbon, its officers and agents, shall immediately:

a. Cease and desist from:

(1) Bargaining individually with Hansen with respect to wages, hours and conditions of employment.

(2) Discriminating against Hansen for engaging in protected concerted activity.

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

(1) Upon request, bargain in good faith with the Union over the wages, hours and working conditions of Hansen.

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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).

(2) Immediately offer to reinstate Hansen and make him whole by paying to him the appropriate wage rate of the Lineman classification from October 24, 1996, to the date of reinstatement, less any interim earnings and unemployment compensation, together with interest. 2/ Retain Hansen in the Lineman position for at least 30 days to allow him to successfully enroll in a Lineman's apprenticeship program.

(3) Notify all of its employes by posting in conspicuous places where notices to employes are usually posted copies of the Notice attached hereto and marked "Appendix A." The Notice shall be signed by the appropriate City official and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for forty-five (45) days thereafter. Reasonable steps shall be taken by the City to insure that said Notice is not altered, defaced or covered by other material.

2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect when the original complaint was filed on October 10, 1996, which was 12 percent.

(4) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days of the date of this Order as to the steps that have been taken to comply herewith.

Dated at Madison, Wisconsin, this 3rd day of July, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

APPENDIX "A"

NOTICE TO CITY OF NEW LISBON EMPLOYES REPRESENTED
WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL
EMPLOYEES #40, AFSCME, AFL-CIO

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 employes that:

1. WE WILL NOT bargain individually with an employe represented by the Council of County and Municipal Employees #40, AFSCME, AFL-CIO and will bargain only with the exclusive certified collective bargaining representative.

2. WE WILL NOT discriminate against Hansen or any other employe on the basis of having engaged in protected, concerted activity.

By _____
City of New Lisbon

Dated this _____ day of _____, 1997.

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

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint initiating these proceedings, the Union alleged that the City violated Secs. 111.70(3)(a)1, 3, 4 and 5, Stats., by individually bargaining with Scott Hansen. The Union twice amended its complaint alleging an additional violation of Sec. 111.70(3)(a)2, Stats., and alleged that the City responded to the Union's complaint of individually bargaining by laying off Hansen. The City answered the complaint as amended denying that it had violated any subsections of Sec. 111.70, Stats.

UNION'S POSITION

The Union contends that the City violated Sec. 111.70(3)(a)4, Stats., when it sought on September 16, 1996, to negotiate directly with Hansen over his wages, hours and conditions of employment. It states that Sec. 111.70(3)(a)4, Stats., establishes that once a group of employes has chosen a majority representative for purposes of collective bargaining, the City cannot negotiate directly with individuals in said bargaining unit on mandatory subjects of bargaining. It observes that the City Attorney's October 10, 1996 letter recites exactly the City's offer to Hansen. It points out that the City made no effort to involve the Union in this discussion and Councilman Dahl admitted individual negotiations with Hansen and this was a mistake. The Union claims that the fact that Union representatives were advised by Hansen of the September 16, 1996 meeting does not relieve the City of culpability. It argues that it's the City's obligation to notify the Union and not an individual. It further observes that Hansen was notified of the September 16, 1996 meeting on the afternoon of that day making it unlikely that he would be able to secure representation on such short notice and besides, the notice failed to inform him exactly what the meeting was about. It concludes that the evidence demonstrates a blatant violation of Secs. 111.70(3)(a)4 and derivatively (3)(a)1, Stats.

The Union maintains that the record demonstrates an independent violation of Sec. 111.70(3)(a)1, Stats. It argues that the City's response to Union Representative White's letter objecting to the City's bargaining directly with Hansen was to lay him off. It claims that the threat of a layoff for involving his Union representative constitutes an independent violation of Sec. 111.70(3)(a)1, Stats.

The Union contends that the City violated Sec. 111.70(3)(a)3, Stats., by laying Hansen off based in part on his protected concerted activity. It observes that Hansen was engaged in protected concerted activity and the City was aware of such conduct based on Mr. White's letter to the City's Mayor. It alleges that the evidence demonstrates that the City was hostile to Hansen's activity as demonstrated by Council Chairman Bailey's testimony that Hansen's involvement of the Union somehow constituted "harassment." Additionally, the City's October 10, 1996 letter was aggressive. It states that based on the totality of its conduct, the City's motivation in laying off

Hansen was his engaging in protected concerted activity, thereby violating Sec. 111.70(3)(a)3, Stats.

The Union asserts that the City violated Sec. 111.70(3)(a)5, Stats., by violating the terms of the agreement because the agreement allows layoff because of lack of work or other legitimate reasons. It insists that there were no legitimate reasons for the City to lay off Hansen as he performed all duties assigned to him and Mr. Bailey and Mr. Dahl were satisfied with his work and the fact that Hansen required schooling was not seen as a reason to terminate his employment. The reason for the layoff according to the Union was to retaliate against Hansen for seeking the assistance of the Union and not accepting the offer made by the City, which are not legitimate reasons under the parties' agreement, and therefore, the collective bargaining agreement was violated. It also argues that the City lacked just cause to terminate Mr. Hansen and its actions violated the agreement.

In conclusion, the Union asserts that the City clearly violated Sec. 111.70(3)(a)4, Stats., by individually bargaining with Hansen and Sec. 111.70(3)(a)3, Stats., by laying Hansen off based on retaliation and anti-union animus as well as Sec. 111.70(3)(a)5, Stats. It seeks a cease and desist order, reinstatement of Hansen, a notice posted as well as any other relief the Commission deems appropriate.

CITY'S POSITION

The City points out that when Hansen was informed of the meeting, he called Mr. White who advised Hansen to attend the meeting and see what would happen but not to say anything. It contends that the City terminated the grievant because the grievant was not eligible to do the work and was not willing to undertake the education necessary to enable him to obtain the journeyman's license. It argues that if Hansen was ready, willing and able to participate in schooling, either the Union or Hansen is at fault because no one made such willingness known to the City before the City terminated him.

UNION'S REPLY

The Union argues that the notice of the meeting given to Hansen was the afternoon of the same day as the meeting and contained little information about what the subject of the meeting was and certainly not wages and conditions of employment. The Union points out that the City never gave it any notice. The Union denies that Hansen was told not to say anything. The Union insists that the issue here is that no representative of the Union was present, and the City negotiated directly with Hansen when it was required by law to negotiate with the Union. The Union observes that the grievant was able to perform all the duties he was called on to perform. It states that Hansen was not simply asked to "participate in schooling" but was asked to take a pay cut and make other concessions. The Union objected to the City's individual bargaining activity and sought a restoration of the status quo.

The Union points out that the City did not respond to its September 20, 1996 letter until October 11, 1996, when it received the City's October 10, 1996 letter which did not state when the next meeting would be but it did occur on October 11, 1996, giving the Union no time to take preventive measures. It asserts that the timing evinces a motive to deny Hansen representation, was in retaliation, and is discriminatory. The Union submits that the City's arguments are revealing not it what it says but what it leaves unstated as it fails to explain its engaging in individual bargaining or its retaliation against Hansen. The Union observes that the City admits it terminated Hansen so the characterization of the October, 1996 action as a layoff was a ruse. It claims that the City never demonstrated just cause for the termination as required by the contract. The Union concludes that the City has committed every violation alleged and the appropriate remedy should be ordered.

DISCUSSION

Section 111.70(1)(a), Stats., provides that a municipal employer is obligated to bargain with the exclusive collective bargaining representative of its employes with respect to wages, hours and conditions of employment. Section 111.70(3)(a)4, Stats., provides that it is a prohibited practice for a municipal employer to negotiate directly with employes and such conduct constitutes a refusal to bargain collectively with the collective bargaining representative. 3/ The evidence establishes that the City sought to negotiate directly with Hansen over wages and conditions of employment. The record indicates that at no time did the City make an offer to the Union to bargain over Hansen's wages, hours and conditions of employment. The City in its brief pointed out that the Union was aware of the September 16, 1996 meeting; however, that meeting could have been about many things that were not negotiable or part of the contract. The City may have released Hansen on probation as September 16 was around the 90th calendar day from when Hansen may have started his employment. The mere fact that the Union might have been aware of a meeting does not operate as a defense for the City to individually bargain with a represented employe, particularly where the City never notified or offered to negotiate with the Union. Additionally, the City did not know that the grievant was in contact with the Union prior to the meeting and did not learn this until sometime after the meeting had occurred. The City made its offer with respect to wages and conditions of employment directly to Hansen and in doing so engaged in individual bargaining and violated Sec. 111.70(3)(a)4, Stats., and derivatively Sec. 111.70(3)(a)1, Stats.

3/ Amery School District, Dec. No. 26138-A (McLaughlin, 2/90), aff'd by operation of law, Dec. No. 26138-B (WERC, 3/90).

On September 20, 1996, the Union sent a letter objecting to the City's individual bargaining with Hansen. 4/ By a letter dated October 10, 1996, the City responded but did not offer to bargain with the Union but instead indicated that it considered the Union's letter to be a rejection of the City's offer to Hansen with respect to wages and conditions of employment and therefore Hansen would be laid off. 5/ Hansen was laid off by City Council action on October 11, 1996. 6/ The Union has alleged that the layoff of Hansen violated Sec. 111.70(3)(a)3, Stats.

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

1. Hansen was engaged in protected activities; and

2. The City was aware of those activities; and

3. The City was hostile to those activities; and

4/ Ex. 5.

5/ Ex. 6.

6/ Exs. 7 and 8.

4. The City's conduct was motivated, in whole or in part, by hostility toward the protected activities. 7/

It is irrelevant that an employer has legitimate grounds for its actions if one of the motivating factors for such action is the employe's protected concerted activity. 8/ If animus forms any part of the decision to deny a benefit or impose a sanction, it does not matter that the employer may have had other legitimate grounds for its action, as an employer may not subject an employe to adverse consequences when one of the motivating factors is his union activity. 9/ Evidence of hostility and illegal motive may be direct (such as with overt statements) or, more often, inferred from the circumstances. 10/

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

8/ LaCrosse County (Hillview Nursing Home), Dec. No. 14704-B (WERC, 7/78).

9/ Muskego-Norway, supra.

10/ In Town of Mercer, Dec. No. 14783-A (Greco, 3/77), the Examiner stated that:

> . . . it is well established that the search for motive at times is very

difficult, since oftentimes, direct evidence is not available. For, as noted in a leading case on this subject, 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 also self-serving. In such cases the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise, no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book.

The record establishes that Hansen was engaged in protected activities which includes the right to bargain collectively through the representative chosen by employes, namely, the Union. Mr. White's letter of September 20, 1996, to the City's Mayor indicates that the City's direct negotiations with Hansen would not be tolerated. 11/ The letter also insists on the contractual rate of pay for a Lineman be paid Hansen. 12/ It is evident that Hansen contacted the Union who, in turn, sent the City the letter. Hansen thus was engaged in protected activities. It is self evident that the City was aware of Hansen's activity as the City received the letter and the City responded to it. 13/ The evidence supports a conclusion that the City was hostile to Hansen's activity. It is noted that at no time after September 20, 1996, did the City offer to bargain with the Union concerning Hansen's wages and working conditions. The City also considered the Union's letter to be a rejection of the City's individual bargaining proposal that it made to Hansen. 14/ The City never withdrew its proposal to Hansen but considered the Union's objection to individual bargaining with Hansen to be Hansen's rejection. It seems evident that the City was hostile to Hansen's seeking the Union's intervention. In addition, the City decided to lay Hansen off at its meeting the very next day again without ever offering to negotiate any matter related to Hansen's employment. Thus, it is concluded that the City was hostile to Hansen's protected activities.

The last element, whether the City's layoff, was motivated, in part, by its hostility toward Hansen's protected activities, has also been proved. The City was willing to keep Hansen in its employ until he contacted the Union. It raised his pay to the contractual rate for Lineman when he objected without any involvement of the Union. It was willing to keep him employed and deal with him on wages, pay for training and travel until the Union objected to the City's activity. The City then laid off Hansen. The clear inference is that the City did not want to negotiate with the Union but wanted to continue its illegal bargaining with Hansen and when it became evident that would not occur, it laid Hansen off. The City wanted the benefit of its illegal conduct and when it could not attain it, it got rid of Hansen. These actions lead to the conclusion that the City was motivated in part by Hansen's protected activities. Thus, it is concluded that the City violated Sec. 111.70(3)(a)4, Stats., by its layoff of Hansen. It also committed a derivative violation of Sec. 111.70(3)(a)1, Stats., by its conduct.

11/ Ex. 5.

12/ Id.

13/ Ex. 6. The pertinent paragraph reads as follows:

> Mr. Hanson (sic) indicated that he would think it over and let the council know the next day. The next thing the council heard was your letter of September 20.

14/ Id.

The Union has alleged an independent violation of Sec. 111.70(3)(a)1, Stats. This violation alleged here is derivative and the City has been found to have violated it derivatively in the Secs. 111.70(3)(a)4 and 3, Stats., violations. This charge has been subsumed into these violations.

The Union alleged a violation of Sec. 111.70(3)(a)2, Stats., but offered no arguments in its brief in support of this charge. Sec. 111.70(3)(a)2, Stats., requires the City to initiate, create, dominate or interfere with the formation or administration of the Union. It requires conduct that is of such magnitude that it threatens the independence of the Union as the representative of employes. The City's conduct in this matter was not of such magnitude and it does not rise to the level required to establish a violation of Sec. 111.70(3)(a)2, Stats., and this charge has been dismissed.

The Union also alleged a violation of Sec. 111.70(3)(a)5, Stats. Generally, the Commission will not exercise its jurisdiction to determine the merits of breach of contract allegations in violation of Sec. 111.70(3)(a)5, Stats., where the parties' collective bargaining agreement provides a grievance procedure with final and binding arbitration. The rationale for this is to give full effect to the parties' agreed-upon procedures for resolving disputes arising under their contract. A grievance arbitration procedure is presumed to constitute a grievant's exclusive remedy unless the parties to the agreement have express language which provides it is not. Here, the parties' collective bargaining agreement provides for final and binding arbitration and contains no express language that it is not the exclusive remedy. No grievance was filed. The Union cannot assert a violation of Sec. 111.70(3)(a)5, Stats., when the contractual grievance procedure is the exclusive remedy and that exclusive remedy was not exercised and no valid excuses were offered for not exercising it. Thus, the undersigned declines to excuse the Commission's jurisdiction over the Sec. 111.70(3)(a)5, Stats., allegation and that issue has been dismissed.

As to the appropriate remedy for the individual bargaining and the retaliatory layoff, the undersigned has ordered a return to the status quo and directed the City to offer to bargain with the Union. Additionally, Hansen has been ordered reinstated to his position as a Lineman with back pay and benefits, less interim earnings, and any unemployment compensation received, plus interest at the statutory rate of 12%. It is evident from the record that Hansen does not meet the qualifications of the Lineman position in that the position description requires successful enrollment in or completion of an accredited Journeyman Lineman's apprenticeship program. 15/ Hansen has been given 30 days to enroll in an accredited apprenticeship program at Chippewa Valley Technical College or similar institution. An employer is not obligated to retain an employe in a position for which he is not qualified and Hansen's failure to meet the qualifications within 30 days allows the status quo to exist for a reasonable period to purge the City of its misconduct related to his layoff but beyond the thirty days the City need not retain Hansen if he is

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15/ Ex. 9.

still not qualified. If Hansen successfully enrolls in the apprenticeship program, then the City and Union are to negotiate over Hansen's wages, hours and conditions of employment. The City has also been directed to cease and desist from its illegal conduct, and to post notices and to inform the Commission as to the steps it has taken to comply with this remedial Order.

Dated at Madison, Wisconsin, this 3rd day of July, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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