STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHEAST WISCONSIN TECHNICAL COLLEGE, Complainant,

vs.

NORTHEAST WISCONSIN TECHNICAL COLLEGE FACULTY ASSOCIATION, Respondent.

Case 88
No. 53540
MP-3155

Decision No. 28954-B

NORTHEAST WISCONSIN TECHNICAL COLLEGE FACULTY ASSOCIATION AND AIMEE VAN GOETHEM, Complainants,

vs.

NORTHEAST WISCONSIN TECHNICAL COLLEGE AND WILLIAM EVANS, Respondents.

Case 92
No. 54372
MP-3205

Decision No. 28909-C

Appearances:
Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, P. O. Box 8003, Madison, WI 53708-8003, joined on the brief by **Ms. Joanne L. Huston**, Associate Counsel, appearing on behalf of the Northeast Wisconsin Technical College Faculty Association and Aimee Van Goethem.

Godfrey & Kahn, S.C., by **Attorney Robert W. Burns**, P. O. Box 13067, Green Bay, WI 54307-3067, on behalf of Northeast Wisconsin Technical College and William Evans.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel J. Nielsen, Examiner: On March 19, 1996, Northeast Wisconsin Technical College (hereinafter referred to as the College) filed a complaint with the Wisconsin Employment Relations Commission asserting that Northeast Wisconsin Technical College Faculty Association (hereinafter referred to as the Association) was committing a prohibited practice within the meaning of Sec. 111.70(3)(b)3 of the Municipal Employment Relations Act (MERA), by refusing to bargain over the wages, hours and conditions of employment applicable to the position of Student Health Nurse, which was occupied by Aimee VanGoethem. On August 19, 1996, the Association and VanGoethem filed a complaint with the Commission, alleging that the College and William Evans, the College's Vice-President of Human Resources, were committing prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 3, Stats., by laying off VanGoethem.

The Commission appointed Daniel J. Nielsen, an examiner on its staff, to hear both cases, and to make and issue appropriate Findings of Fact, Conclusions of Law and Order. A hearing was scheduled for January 16 and 17, 1997. The Association amended its complaint on October 11th, to add an allegation that the College had refused to bargain in good faith by subcontracting VanGoethem's job, and that the subcontract interfered with her protected rights and retaliated against her for protected activity, all in violation of Secs. 111.70(3)(a)1, 3 and 4. On October 26, 1996, the Association and VanGoethem moved to take the deposition of William Evans prior to the hearing in order to aid in their preparation. The Examiner denied the motion DEC. NO. 28909-A, NIELSEN, 11/7/96. On December 10, 1996, the College moved to consolidate the two complaints for hearing, a motion which the Association opposed on the grounds that the College's complaint had been resolved and should be dismissed. The Commission granted the motion to consolidate, reserving to the Examiner the decision as to whether the College's complaint should be dismissed DEC. NOS. 28954-A AND 28909-B, WERC, 12/27/96.

On January 16 and 17, 1997, hearings were held in Green Bay, at which time the parties were provided full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. At the hearing, the Association withdrew its refusal to bargain claim. A transcript of the hearings was prepared, and was received by the Examiner on February 8, 1997. The parties submitted post-hearing briefs and reply briefs, the last of which were exchanged through the Examiner on December 29, 1997.

On February 24, 1998, the Association petitioned to reopen the record to allow argument over the impact of the Commission's decision in GREEN LAKE COUNTY, DEC. NO. 28792-B (WERC, 12/97), a case reversing a decision by the Examiner which the Association had cited extensively in its brief. The College agreed to the request, and supplemental briefs were submitted by April 8, 1998. In conjunction with its supplemental brief, the College moved to reopen the evidentiary record to allow submission of additional evidence, in the form of the certified final offers of the parties in a pending interest arbitration proceeding. The Association ultimately agreed to the College's request, and the evidentiary

record was reopened. The final offers were submitted, and the parties submitted additional arguments over the significance of the offers, with the Association's argument being received on June 26, 1998, whereupon the record was closed.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

Now having considered the evidence, the arguments of the parties, the statutes and the record as a whole, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Northeast Wisconsin Technical College, hereinafter referred to as the College, is a municipal employer technical and adult educational providing services to the people in and around Green Bay in northeastern Wisconsin. The College's business address is 2740 West Mason Street, Post Office Box 19042, Green Bay, WI 54307-9042. At all relevant times, Dr. Gerald Prindiville was the President of the College, William Evans was the Vice President for Human Resources, David Wouters was the Vice President for Student and Community Services, and Donald Baus was the Vice President for Administration. Bonita Klika was the Registrar, and functioned as an assistant to Wouters and the direct supervisor of the Student Health office. During March, April and May of 1996, Prindiville was away on a sabbatical and Evans served as Acting President of the College.

2. Northeast Wisconsin Technical College Faculty Association, hereinafter referred to as the Association, is a labor organization affiliated with the Wisconsin Education Association Council, representing the professional employes of the College. Roy Smits is the President of the Association, Bill Johnson is the Association's Negotiations Chair and Rose Mastricola is the Grievance Chair. The Association's professional labor relations representative had been Dennis Muehl, Executive Director, Bayland United Educators ("Bayland"), 1136 North Military Avenue, Green Bay, WI 54303. Mr. Muehl died suddenly in late October of 1995, and was replaced on an interim basis by Jim Blank as Acting Director, and then Charles Garnier, as Interim Executive Director. Mr. Miguel Salas was ultimately hired as the new Executive Director for Bayland in March of 1996.

3. Aimee VanGoethem was employed as the College's Student Health Nurse from January of 1987 through June of 1996, when she was laid off. VanGoethem was contracted to work 188 7.5 hour days per year. At the time of her layoff, VanGoethem was paid $18.07 per hour, an annual salary of $25,478.70.

4. From the time the position was created in 1987 until November of 1995, the Student Health Nurse was not included in any bargaining unit, although VanGoethem actively sought inclusion of her position in the faculty bargaining unit represented by the Association. On March 31, 1994, the Association filed a petition with the Commission, seeking to clarify the

faculty bargaining unit to include the positions of Student Health Nurse and the AODA Specialist. On June 20, 1994, the College filed its own unit clarification petition, seeking to exclude twelve positions from the bargaining unit. Examiner Stuart Levitan held a hearing on the petitions on December 6, 1994 and January 30, 1995. At the January 30th hearing, the parties agreed to hold all issues other than the Student Health Nurse in abeyance. On November 6, the Commission issued its decision, holding that the Student Health Nurse was a professional employe within the meaning of Sec. 111.70(1)(l), Stats., and should be included in the appropriate unit consisting of:

> all certified personnel teaching at least 50% of a full teaching schedule at Northeast Wisconsin Technical College including classroom teachers and other related professional personnel who are employed in a professional capacity to work with students and teachers but excluding teacher personnel teaching less than 50% of the full teaching schedule, coordinator directors, supervisors, clerical and custodial employes. NORTHEAST WISCONSIN TECHNICAL COLLEGE, DEC. NO. 11602-A (WERC, 11/6/95).

The parties had an informal understanding that the Commission's decision on the Student Health Nurse would probably control the bargaining unit status of the AODA Specialist. However, the status of the AODA Specialist was not pursued during the period of time relevant to matter.

5. Sequence of Bargaining Over the Student Health Nurse

a. Following the Commission's decision in the unit clarification, it became apparent that the parties had a major disagreement over the wages to be paid to the Student Health Nurse. Prior to his death, Muehl advised Evans that the Association would likely propose retroactive payment to the nurse on the faculty pay schedule. Evans took the position that the Student Health Nurse's salary should remain at $18.07 per hour. In a letter sent February 12, Charles Garnier took the position that, under the Commission's decision in CITY OF OAK CREEK, DEC. NO. 27074-C (WERC, 5/25/93), the contract should automatically apply to VanGoethem as a matter of law, and that she should be placed on the salary schedule without any bargaining. Evans made repeated efforts to reach Garnier after this letter, and finally spoke with him on March 3. Garnier informed him that he wasn't interested in bargaining because the contract was automatically applicable.

b. On March 19, the College filed its prohibited practice complaint alleging that the Association was refusing to bargain in good faith through its insistence on automatically applying the faculty contract to VanGoethem. WEAC Staff Counsel Stephen Pieroni consulted with Garnier about the complaint, and attempted to persuade him that he was misreading OAK CREEK. Garnier persisted in his interpretation, contending that the General Counsel of the WERC had told him the case applied to the nurse's position. From Garnier's description of the conversation, Pieroni gathered that the General Counsel had merely referred him to the decision without suggesting that it applied. By April, Pieroni was able to persuade Garnier that it was not in the Association's interest to insist that the faculty contract applied to

VanGoethem as a matter of law. On April 24, Pieroni wrote to the College's attorney, and advised him that the Association was withdrawing its reliance on OAK CREEK, that this resolved the underlying issue in the College's complaint, and that the Association would petition for interest arbitration over the wages, hours and conditions of employment for the Student Health Nurse.

c. On March 13, Miguel Salas was hired as the new Executive Director of Bayland, and replaced Garnier. Salas read OAK CREEK differently than did Garnier, and agreed with Pieroni's letter withdrawing the Association's claim that it did not have to bargain.

d. On April 29, the Association's Treasurer wrote to Evans asking that the College withhold dues from the paychecks of VanGoethem and AODA Coordinator Strebel and remit them to the Association. After consulting with legal counsel, Evans wrote back on May 21, refusing the request. Evans noted that dues deduction was a creature of the contract, and that the Association's request for application of this contractual provision without bargaining was further evidence of a refusal to bargain in good faith.

e. On May 15, VanGoethem was given a notice of layoff.

f. On May 31, the Association filed a petition for interest arbitration over the Student Health Nurse. On June 4, Evans received a bill for half of the filing fee for the Association's petition. Evans was livid when he received the invoice, as he felt interest arbitration was inappropriate since, even though there had been some informal discussions about the nurse's position, no formal bargaining sessions had yet been held. He advised the Association's representatives of his feelings.

g. On June 27, the parties met for an initial bargaining session. The Association took the position that all provisions of the existing faculty contract should be applied to the Student Health Nurse. No agreements were reached in this meeting.

h. On July 30, the parties met with WERC Investigator Herman Torosian. At approximately 2:00 p.m., Torosian told Evans that he believed the parties had reached a tentative agreement, but that the Association was assuming VanGoethem would be recalled to the Student Health Nurse position as part of the agreement. Evans told Torosian that they could not make that assumption. He said he was not sure he would recommend that she be recalled as part of an overall agreement, but that in any event he had no authority to make that promise. The session then ended.

i. On August 6, Evans wrote to Torosian and Salas, summarizing what he termed the "conceptual agreement" on the Student Health Nurse reached in mediation. His draft included a 7.5 hour work day, 260 days per year, with 10 holidays and 20 vacation days, and an annual salary of $33,834. It also addressed layoff and recall rights of the position, and included a side letter committing to scheduling the job for no more than 188 days per year through July of 1999. Evans asked that Salas contact either Torosian or him to discuss the letter. Salas did not respond.

j. On October 15, Evans again wrote to Torosian, noting that he had never gotten any response to his August 6th letter, other than the filing of the Association's prohibited practice complaint. He asked for Torosian's assistance in determining where things stood and moving the process along.

k. On October 23, Salas wrote to Evans, denying that any tentative agreement had ever been reached, and communicating a counter-proposal. The counter-proposal agreed to a 12-month work schedule, and placed the nurse on the faculty wage schedule. The Association also proposed bumping rights for the nurse into vacant Nursing Instructor and Allied Health Instructor positions. Salas concluded by requesting additional face-to-face negotiations with the option of calling Torosian back if needed.

l. On December 11, Salas and Evans had further negotiations. Evans put proposals on the table dealing with the AODA Specialist in addition to the nurse. Salas disputed the introduction of this position to the bargain, noting that it was not specifically dealt with in the unit clarification decision. He advised Evans that he did not want to mix the AODA position into the negotiations over the nurse.

m. On November 24, 1997, the parties finalized their offers for interest arbitration over the nurse's position. By that point, the parties had agreed to also include the AODA Specialist. The College's final offer proposed a 40 hour work week, 260 days per year, with 10.5 holidays, and a sliding scale for vacation starting at 5 days and peaking at 20 days after ten years. The annual salary was set at $36,228 as of November 8, 1995 ($17.42 per hour) and $37,404 as of August 14, 1996 ($17.98 per hour). However, the College proposed to grandfather any employe employed as of January 1, 1996, at 188 days, and to guarantee no reduction in annual income to such employes. The Association proposed an annual salary of $39,070 as of November 6, 1995, based upon a seven hour work day, a calendar of 213 work days, 2 inservice days and 4 professional days. The Association's proposal also grandfathered employes on the payroll as of January 1, 1996, and guaranteed them no loss of annual income.

6. Budget Process and the Reallocation of the Student Health Nurse's Position

a. The College's annual budget process begins with submission of proposals by departments. An administrators' Budget Committee, comprised of Vice Presidents Wouters, Baus, and Evans and President Prindiville meets monthly beginning in January, with Prindiville generally being more active as the process nears its conclusion. The committee makes decisions in a collegial fashion, with every member having a chance for input on every decision, no matter which functional area the decision affects.

b. One item considered in the budget process is "new development" money. This is money devoted to changes, improvement and additions to programs. The Board gives the Committee guidance as to how much new money, including new development money, is available. Thereafter the Board allows the Budget Committee to work on the budget, and does not take further action until the final proposal is submitted. In the 1996-97 budget year, the

guideline for new development was $200,000 plus reallocations. Reallocations are savings from existing services that can then be directed to new developments.

c. As of February 2, 1996, the new developments proposal to the Board was $336,991 plus reallocations. The reallocations proposed were a Chemistry Instructor, an Auto Body and Paint Instructor, an LRC Secretary and an Operations Assistant, totaling $99,602.

d. As of March 13, 1996, the new developments proposal to the Board was changed to $50,000 plus reallocations. The reallocations were changed to 1.5 Chemistry Instructors, one Science Instructor, a Typing Lab Aid, a Communication Skills Instructor, a Marine Drafting Instructor and the Student Health Nurse, totaling $286,700. Only the nurse's position was filled with a continuing employe. The report to the Board on that date noted changes in anticipated revenues from prior reports -- projected state aids were flat rather than increasing, and projected federal revenues were changed from a 2% increase to a 2% decrease.

e. The savings from the reallocation of the Student Health Nurse were estimated at $20,000. This figure was arrived at using an estimate of approximately $37,000 as the cost of the job, counting salary and fringes. Evans provided this estimate of savings on the assumption that the position would be reduced to a part-time hourly staff position. Evans did not specifically investigate the cost of hiring a nurse on an hourly basis prior to the decision to recommend reallocation, but had seen job postings for the County seeking nurses at $18 per hour. By the time of the Board's hearing on the proposed budget, Evans was citing a $36 per hour figure provided by the Visiting Nurse Association.

f. Prior to the Budget Committee's decision to recommend reallocation of the nurse's position, the College had not received any complaints about the provision of student health services. None of the members of the Budget Committee spoke with VanGoethem about the manner in which services were delivered, nor were there any discussions with her about the possibility of working a different schedule of hours or days. Neither were there any such discussions with Bonita Klika, VanGoethem's direct supervisor.

7. May 15th is the date on which layoff notices must be given according to the faculty contract. The College's policy is not to make layoff decisions known until that date. On the evening of Tuesday, May 14, Evans called Klika at her home and informed her that VanGoethem would be laid off. This was the first that Klika became aware that the Student Health Nurse position would be eliminated.

8. On the morning of Wednesday, May 15, VanGoethem was summoned to Klika's office. Klika, William Evans and Association Grievance Chair Rose Mastricola were present. Evans presented her with a notice of layoff. After the meeting, Klika and VanGoethem spoke, and Klika told her that she was sorry, and that she had not known of the layoff beforehand. Klika and VanGoethem discussed possibilities for VanGoethem's continued employment, perhaps on a half-time basis, and VanGoethem expressed an interest in the part-time position. However, Klika told her that she really did not have any idea what the District's plans were.

9. On May 21, there was a meeting with Evans, Wouters, Salas, Rose Mastricola and members of the Association's Grievance Committee. At that meeting Wouters said he had no advance knowledge that the Student Health Nurse was going to be laid off, but Evans motioned him to be silent, cautioning that there was the possibility of litigation. Evans then explained that the layoff resulted from budget deliberations. Members of the Grievance Committee asked Evans about VanGoethem's right to claim the new part-time position, and Evans advised them that it was less than half-time and thus not subject to the contract. They inquired about possible accommodations for VanGoethem, including placement in other available positions. He told them she was free to make application for any open position she was qualified to fill.

10. On May 23 and June 12, the College's Board met in public sessions to discuss the proposed budget. VanGoethem addressed the Board, as did Evans and others. After VanGoethem had had her opportunity to speak on the 6th, Evans told the Board that she was in line to be paid $39 per hour, and that a visiting nurse could be hired for $36 per hour. The Board voted 4 to 3 against reconsidering the inclusion of the Student Health Nurse's position on the list of reallocations.

11. Klika was not given any guidance as to how to provide services in the wake of VanGoethem's layoff, and after the budget was given final approval in June, she started making calls to various nursing services to get cost figures. One of the providers she called was Instacare, a firm that the College had occasionally used in the past. Klika consulted with Wouters as to the number of hours that could be contracted, although not the cost per hour. Evans also cautioned her not to exceed 700 hours per year. Klika then entered into a week-to-week agreement with Instacare to provide a registered nurse. The contracted nurse worked an average of 2.7 hours per day, three mornings and two afternoons per week during the summer and fall of 1996. The College pays $45.00 per hour for the Instacare nurse. Unlike when VanGoethem was on staff, students were required to make appointments to see the Instacare nurse.

12. Starting in September of 1996, a half time position was created in the Student Health Office to perform clerical and record keeping functions of the office. Many of these functions had previously been performed by several other clericals in and around Student Services, although some had been done by VanGoethem while she was still on staff. The person assigned to this position has previously been employed in a position connected with the College's outreach to Proctor & Gamble, a position which was terminated. She was promised continued employment in a floater position somewhere at the Green Bay campus and was assigned to Klika's office in response to a standing request for additional clerical support in that office.

13. By seeking inclusion in the faculty bargaining unit, VanGoethem was engaged in protected, concerted activity.

14. By seeking to bargain an increase in wages, and other terms and conditions of employment for the Student Health Nurse, the Association was engaged in protected, concerted activity.

15. The College was aware of VanGoethem's protected concerted activity, and was aware of the Association's protected concerted activity on her behalf.

16. The College's stated reasons for reallocating the position of Student Health Nurse, laying off VanGoethem and replacing her with an outside nursing service -- increased flexibility and the redirection of $20,000 from her position to other new development items -- are pretextual. The actual reason for VanGoethem's layoff was hostility to and retaliation for her protected activity and the Association's protected activity on her behalf.

17. The layoff of VanGoethem for pretextual reasons had a reasonable tendency to restrain, coerce and interfere with the exercise of protected rights by VanGoethem and other employes.

18. Charles Garnier had a good faith belief that the Commission's OAK CREEK decision was applicable to VanGoethem's position. By the conduct set forth in Finding of Fact No. 5, the Association was not engaged in a refusal to bargain in good faith.

19. William Evans was at all times acting in his capacity as an employe and agent of the College in taking the actions described above.

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

CONCLUSIONS OF LAW

1. That the Complainant/Respondent, Northeast Wisconsin Technical College, is a municipal employer, within the meaning of Sec. 111.70 (1)(j), MERA.

2. That the Complainant/Respondent, Northeast Wisconsin Technical College Faculty Association, is a labor organization within the meaning of Sec. 111.70(1)(h), MERA.

3. That the Complainant, Aimee VanGoethem, is a municipal employe within the meaning of Sec. 111.70(1)(i), MERA.

4. That the Respondent, William Evans, is not a municipal employer, within the meaning of Sec. 111.70 (1)(j), MERA. Evans acted solely as an agent of the Respondent, Northeast Wisconsin Technical College in the events described above, and he is not properly named as a Respondent.

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

6. That seeking to bargain improvements in the wages, hours and condition of employment for the Student Health Nurse is lawful, concerted activity within the meaning of Sec. 111.70(2), MERA.

7. That the Respondent, Northeast Wisconsin Technical College, laid off Aimee VanGoethem in retaliation for her involvement and the Association's involvement in protected concerted activity, and thereby discriminated against her in violation of Sec. 111.70(3)(a)3.

8. That the Respondent, Northeast Wisconsin Technical College, through its retaliatory layoff, interfered, restrained and coerced VanGoethem and other employes in the exercise of their protected rights, in violation of Sec. 111.70(3)(a)1.

9. The Respondent, Northeast Wisconsin Technical College Faculty Association, did not refuse to bargain in good faith with the Municipal Employer, and did not violate Sec. 111.70(3)(b)3.

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

ORDER

1. The complaint in Case 88, No. 53540, MP-3155 is hereby dismissed in its entirety.

2. The complaint in Case 92, No. 54372, MP-3205 is hereby dismissed as to the allegations against Respondent William Evans personally.

3. The Respondent, Northeast Wisconsin Technical College, will cease and desist from discriminating against Aimee VanGoethem or any other employe on the basis of the efforts of the Northeast Wisconsin Technical College Faculty Association to clarify the professional employes' bargaining unit and/or bargain on behalf of professional employes.

4. The Respondent, Northeast Wisconsin Technical College, will take the following affirmative actions which will effectuate the purposes of the Act:

a. Immediately offer to reinstate Aimee VanGoethem to the position of Student Health Nurse on the terms determined by the collective bargaining agreement between the parties. If the terms of the contract are not known as of the date of this Order, the reinstatement is to be on the basis of the terms and conditions in effect at the time of her layoff, and the contract provisions shall be applied in accordance with the terms of the interest arbitrator's Award or any settlement

reached by the parties. The Respondent, Northeast Wisconsin Technical College, is further ordered to make VanGoethem whole for her losses from the discriminatory layoff.

b. Notify all employes, by posting in conspicuous places in its office where employes 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 26th day of August, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Examiner

APPENDIX "A"

NOTICE TO ALL
NORTHEAST WISCONSIN TECHNICAL COLLEGE EMPLOYES

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

1. WE WILL NOT discriminate against Aimee VanGoethem or any other employe because of their union activities.

2. WE WILL offer immediate reinstatement to Aimee VanGoethem to her position as Student Health Nurse, and will make her whole for her losses by virtue of her layoff in May of 1996.

3. WE WILL NOT interfere with the rights of municipal employes to engage in protected concerted activity, including the use of the unit clarification, collective bargaining and interest arbitration processes, or with the employes' rights to refrain from engaging in such activity.

NORTHEAST WISCONSIN TECHNICAL COLLEGE

By_____ _____
Signature Title

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

NORTHEAST WISCONSIN TECHNICAL COLLEGE

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

ARGUMENTS OF THE PARTIES

A. The Arguments of the Association and Aimee VanGoethem

1. The Association's Complaint

The Association takes the position that the College is guilty of both interference and discrimination, in that it eliminated Ms. VanGoethem's position in retaliation for the Association's efforts to negotiate higher wages after she was added to the bargaining unit. Ms. VanGoethem aggressively sought to have her position added to the bargaining unit, and the Association succeeded in having the job clarified into the unit. The Association thereafter proposed to have her placed appropriately on the existing salary schedule as a matter of law, relying on the Commission's decision in CITY OF OAK CREEK, DEC. NO. 27074-C (WERC, 5/25/93). The College took the position that the Association's proposal would cost it an additional $20,000 per year. Rather than seeking to ameliorate any cost impacts through good faith bargaining, the College retaliated against VanGoethem for the Association's protected activity in making a bargaining proposal.

While the College claimed that the decision to replace VanGoethem with a subcontractor was based upon neutral budgetary and service considerations, the record evidence shows otherwise. The Examiner must conclude that it was motivated by illegal hostility when he considers that:

- The elimination of VanGoethem's job was initiated by the College's Budget Committee, but none of the members of that committee were able to give a straight answer when asked who first suggested the move.

- David Wouters, the Vice President for Student and Community Services, claims to have started off the budgetary process seeking an increase of 10 days in VanGoethem's contract to expand nurse coverage during summer and evening sessions, and for outlying campuses, and further claims that this led to a discussion of other ways to provide this service. On cross-examination, he contradicted his testimony about seeking an additional ten days for VanGoethem. Moreover, he never mentioned this goal of expanded coverage to the subcontractor the College ultimately hired, and the total number of coverage hours was actually cut in half under the subcontract.

- Evans said that the committee sought to save money through this subcontract, but the fact is that the subcontractor was paid $45 per hour, or $31,500 annually, as compared to

$18.07 for VanGoethem, a total of $25,500 annually. Moreover, a secretary whose other job assignment was phased out was assigned to a 50% position with the nurse's office, doing work previously performed by VanGoethem, at a cost of $9.75 per hour.

- Evans admitted that the members of the Budget Committee discussed and analyzed the costs of the Association's bargaining proposal for the Student Health Nurse when deciding it would be better to subcontract the work.

- The decision to eliminate VanGoethem's position took place immediately after Evans received Garnier's February 12th letter demanding that the contract be applied to her as a matter of law. Before that letter was received, there was no proposal to eliminate her job in any of the draft budget recommendations. No member of the Budget Committee could explain why the Student Health Nurse suddenly became an issue in February, when the budget process had been underway since December, other than to cite a cut in new development funds from $200,000 in the original draft to $50,000. However, no member of the Committee could explain what new development projects were driving the need for the $20,000. There was $17,000 available for new developments even without this subcontract, and no one on the committee could explain what it was ultimately spent on.

The Association cites the Examiner's decision in GREEN LAKE COUNTY, DEC. NO. 28792-A (NIELSEN, 4/11/97), noting that the Examiner found in that case that hostility to the unit clarification process, and to the potential for having to pay higher wages as a result of the process, could prove illegal motive for a subsequent layoff, even where the person laid off had not played an active role in the protected activity. Here the College's hostility was directed at the Association's efforts to bargain or arbitrate a substantial increase in wages for VanGoethem's position after it successfully clarified her job into the bargaining unit.

Immediately after the Association took the position that VanGoethem should be automatically placed on the existing salary schedule, at a cost the College thought to be at least $20,000.00 per year, her job suddenly became an issue in the Budget Committee. The Committee allegedly decided to save money and expand services by hiring a contractor which provided half the service at a cost of $6,500 more per year, plus the cost of a newly assigned clerical. This is absurd, and clearly establishes that the budget and service concerns cited by the College are merely a pretext for retaliation and discrimination.

As there is no valid business justification for the layoff and the subcontract, and since they were aimed at punishing Ms. VanGoethem and the Association for seeking to bargain a professional wage for her position, the Examiner should also conclude that the College is guilty of interference. Given the close connection between protected activity and the elimination of this job, the College's action obviously has a reasonable tendency to interfere with, restrain and coerce Ms. VanGoethem and other employes in the exercise of their Sec. 2 rights. In remedy for these violations, the Association seeks reinstatement of Ms. VanGoethem to the position of Student Health Nurse retroactive to the date of her layoff, and an Order making her whole for her losses since that time.

2. The College's Complaint

The Association takes the position that the College has failed to prove any refusal to bargain in good faith. Garnier's initial position was that bargaining was not legally required, and that the Student Health Nurse position was automatically covered by the existing terms of the collective bargaining agreement. He based this position on the Commission's decision in OAK CREEK, and a discussion with the General Counsel of the WERC. OAK CREEK is an unusual decision, and it may be that Garnier's interpretation of it was wrong, but there is absolutely no evidence that his position was taken in bad faith.

The Association points out that it formally withdrew its reliance on OAK CREEK by a letter to the College's counsel on April 24, 1996, and offered to proceed to interest arbitration on the dispute. The parties participated in mediation sessions with a Commission investigator and ultimately took the dispute to interest arbitration. It is worth noting that the Association changed the substance of its proposal during the mediation sessions, even though no overall agreement was reached. In summary, the Association initially stood on a plausible reading of its legal rights, then agreed to the College's insistence on an exchange of proposals across the table, made proposals, and modified its position. Nothing in any of this shows bad faith. Accordingly the College's complaint should be dismissed.

B. The Arguments of the College

1. The College's Complaint

The College takes the position that the Association was clearly guilty of a refusal to bargain in good faith. William Evans tried continuously from November of 1995 onward to engage in actual collective bargaining over the wages, hours and working conditions of the newly accreted Student Health Nurse position. The Association adamantly refused, first taking the position that no bargaining was necessary because VanGoethem was automatically covered by the contract, then supposedly backed off this position. However, it immediately filed for interest arbitration, despite the fact that no negotiations had yet taken place. This intransigence and refusal to address the issues is symptomatic of bad faith and should result in a finding by the examiner that the Association has violated MERA.

2. The Association's Complaint

The College takes the position that the Association has utterly failed to prove any violation of MERA. Granting that the position of Student Health Nurse was eliminated and that this function was then filled by a subcontractor, and understanding that Ms. VanGoethem did not agree with the decision, the College notes that it has the right to manage its resources, including the right to change the manner in which it delivers services and to lay off employes. The only limitations on the right to manage the College are those specifically imposed by contract and by statute. The contract does not prohibit the decision to subcontract this function, and neither is there any statutory prohibition.

The decision to eliminate the nurse's job was made in the normal course of business, in accordance with the normal procedures for making budgetary choices. The Budget Committee reviewed its options, and the nurse's job was an attractive candidate for restructuring because it plays no role in generating enrollments and is a service that lends itself to purchasing from outside sources. The possibility had been discussed in prior years, but this year it was more seriously considered because the money available for new development had been slashed from $200,000 to $50,000, and reallocations were needed. It was raised by someone on the Committee during budget deliberations and was discussed generally, without any one Committee member taking the lead in the discussion. The discussion focused on the services provided, not on VanGoethem. The final decision to contract for these services was unanimous. VanGoethem was then notified of the recommendation, and was given two chances to make her case to the College's Board in public meetings, through her own statements and those of supporting witnesses. At no time in these meetings was there any suggestion by VanGoethem or the Association that the recommendation had anything to do with the addition of her job to the bargaining unit. In fact, as late as September of 1996, VanGoethem wrote in the Faculty Association newsletter that "I was laid off because of budgetary cuts and reallocations of services (not any reflection on my job performance)."

Although the Association attempted to show that the student health services were not as extensive or as good after VanGoethem was laid off, this is irrelevant. The level and the quality of services is not the Association's concern, nor is it a matter within the jurisdiction of the Examiner. Even if a decision is shown in hindsight to have been ill-considered or poorly implemented, it is not a prohibited practice for an employer to be mistaken. The only issue before the Examiner is whether the decision-making process itself was free of illegal animus, and the record in this case shows that it was.

The College argues that the Association has failed to show an essential element of its case, that the decision to lay off VanGoethem was motivated, even in part, by hostility to protected activity. The Association named Evans as a Respondent in its complaint, and claimed that he was the mastermind behind the elimination of the Student Health Nurse. That is refuted by the testimony of the other Budget Committee members, who could not remember who raised the issue but agreed that no one in particular pushed for the change. The allegations that Evans was hostile to VanGoethem or out to get her is simply that -- an unsupported allegation.

Finally, the College points out that, even if Evans or other administrators were somehow hostile to VanGoethem, the actual decision to lay her off was made by the College Board, after it had heard arguments against the cuts by VanGoethem, the Association and others. Thus the ultimate decision maker in this case was wholly free of discriminatory intent, and acted in full knowledge of the pluses and minuses associated with the reorganization of the student health services function. As the decision was completely within the legitimate rights of management, and since there is no evidence of any hostility or discriminatory motive on the part of the administration that recommended the change in services or the Board that ultimately made the decision, the Association's complaint must be dismissed in its entirety.

C. The Responsive Arguments of the Association and Aimee VanGoethem

The Association asserts that the College's claim of a legitimate, non-discriminatory motive is impossible to sustain on this record. The suggestion that the College acted to save $20,000 out of its $48 million budget is inconsistent with the fact that its decision ended up costing it substantially more money to deliver substantially less service. Its claim that it needed to free up funds for new development is inconsistent with the fact that it could not explain where the already available new development money was spent. The only possible conclusion from this record is that the College acted from fear that it would have to pay VanGoethem significantly higher wages under the Association's proposal for folding her into the contract. The College was hostile to that prospect, and headed it off by eliminating her job.

The Association urges rejection of the College's expansive claim that the exercise of management rights cannot be reviewed by the WERC, noting that this completely ignores the law regarding discrimination. Likewise, the College's attempt to hide behind the fact that the Board is the ultimate decision maker must be rejected. The vice presidents who made up the budget committee are the agents of the College, and it is held responsible for their illegal acts. Finally, the Association characterizes the College's claim that VanGoethem and the Association did not claim discrimination until well after the fact as being cynical and ironic. The record shows that the Association was seeking information relative to the layoff decision as early as May of 1996, and that the College stonewalled those requests.

D. The Responsive Arguments of the College

The College rejects the Association's conspiracy theories, noting that the Association's brief is filled with conclusory statements as to intent, but no proof to provide a basis for those statements. Boiled down to its essentials, the Association is arguing that because the layoff followed the unit clarification decision, it was caused by the unit clarification decision. It is clear and settled law that a coincidence of timing may be cited to support a finding of hostility, but must be evaluated in light of all the evidence. Unlike the Examiner's decision in GREEN LAKE COUNTY, in this case all of the evidence shows that it was purely a coincidence of timing, not some illegal motive, that linked the unit clarification and the layoff. The subject of subcontracting these services had been discussed for years, and this was the year that pressures on the new development budget finally made it an attractive alternative.

E. The Supplemental Arguments of the Association

The Association extensively cited the Examiner's decision in GREEN LAKE COUNTY, a case involving a sudden change in plans for reorganizing a County department immediately after County officials discovered the incumbent program coordinator, an employe named Lund, had been moved from a non-professionals bargaining unit to a professionals bargaining unit through the unit clarification process. The Examiner determined that the change in plans, and subsequent layoff of Lund, was an act of retaliation for the Union's success in the unit

clarification. After the conclusion of the briefing schedule in this case, the Commission issued its decision in GREEN LAKE COUNTY, DEC. NO. 28792-B (WERC, 12/18/97), reversing in part the Examiner's decision. The Association sought leave to submit supplemental arguments. The College acquiesced, and both parties argued the significance of the Commission's decision.

The Association asserts that the Commission's decision in GREEN LAKE COUNTY was based upon a highly unusual reinterpretation of the record of that case, and that it should therefore be construed very narrowly. The Commission did not address the Examiner's conclusion that there was no plausible explanation other than hostility for the County's decision to lay off Lund instead of going forward with the plan it had already devised for reorganizing her department and retaining her in the job, nor did the Commission explain this change in position came in the middle of a meeting in which the only change in circumstances was that her supervisor learned for the first time that she had been moved to the professionals bargaining unit. Neither did the Commission explain why Lund, who was far more experienced in the functions of the remaining job, was not retained as originally planned over a far less experienced employe. Given these and other defects in the Commission's reconstruction of the record, the Association urges that the precedential effect of the decision be limited to the facts of GREEN LAKE COUNTY itself.

The Association also argues that, even if the Commission's decision in GREEN LAKE COUNTY is correct and entitled to full precedential value, the facts of that case and the facts of this case are distinguishable in several important respects. The Commission found that the County's decision to lay off Lund was motivated by proven funding shortfalls and declining service needs, and that the supervisors acted in good faith. The Association notes that the United States Supreme Court found in NLRB V. GREAT DANE TRAILERS INC., 38 U.S. 26, 87 SCT 1792 (1967), that even inherently destructive conduct could be excused if there was persuasive evidence that the conduct was motivated by legitimate business considerations. In this case, the College faced no financial difficulties, and the only service concern was a desire to expand nurse coverage. Thus it is not possible to find that there were legitimate business reasons for replacing the Student Health Nurse with a subcontractor who charged more and provided less service.

The Commission found in GREEN LAKE COUNTY that hostility to the outcome of a protected process was not illegal, but that hostility to employe participation in the process or to the process itself was illegal. In this case, the College was clearly hostile to the bargaining and interest arbitration process, since it did not know the outcome of the process when it laid off Ms. VanGoethem. Instead, it completely cut off any opportunity to have the reasonableness of the Association's bargaining position tested in the interest arbitration process.

The Association refers the Examiner to the decision of the Michigan Employment Relations Commission in AFSCME V. ECORSE PUBLIC SCHOOLS, 5 MICHIGAN PUBLIC EMPLOYEE REPORTS ¶23083 (WERC, 10/7/92), in which the MERC held, under a statute

virtually identical to MERA, that taking action adverse to an employe's interests in response to an effort to bargain higher wages, absent any financial or operational justification for the action, constitutes prima facie evidence of interference.

F. The Supplemental Arguments of the College

The College notes that the Association's arguments were constructed almost exclusively on an analysis of the Examiner's decision in GREEN LAKE COUNTY and that its case must fall with that decision. The Commission properly clarified the fact that hostility to the outcome of a protected process is not itself discrimination. It is hostility to the process, or retaliation for using the process, that is prohibited. Here, the record shows that the College had no hostility whatsoever to the unit clarification process involving the Student Health Nurse, and in fact conceded that the position was suitable for inclusion in an appropriate bargaining unit. The only issue raised by the College relative to the unit clarification was whether the faculty unit was an appropriate unit for this position. The mere fact that the College exercised its legal rights and made arguments before the Commission cannot now be held to show that it was hostile to the process.

The Association's initial brief repeatedly identified an unwillingness to pay the salary increase sought by the Association as "the precipitating activity which prompted the Respondent's decision to lay off Ms. VanGoethem..." and stated that, "In this case, the Respondent's attitude was identical to that of the employer in GREEN LAKE COUNTY in that both employers wanted to avoid paying the employe the higher salary contained in the professional employe's collective bargaining agreement." The Association has conceded that, even under its own theory, it was the result of the bargaining and/or interest arbitration process, not use of the process or the process itself, that motivated the College's decision. It cannot now disavow those statements simply because the Commission has corrected the Examiner's error. Thus, in accordance with the Commission's decision in GREEN LAKE COUNTY, the instant complaint must be dismissed.

Finally, the College strenuously objects to the Association's attempt to make new arguments beyond the scope of the GREEN LAKE COUNTY decision in what was intended to be a limited supplemental argument. The decisions of the United States Supreme Court in GREAT DANE TRAILERS INC. and the Michigan Employment Relations Commission in ECORSE PUBLIC SCHOOLS have nothing to do with Commission's decision in GREEN LAKE COUNTY, and any arguments based on these decisions should be disregarded.

DISCUSSION

I. Association's Complaint - Sec. 111.70(3)(a)3 - Discrimination

The Association alleges that the decision to eliminate VanGoethem's job was retaliation for the Association's effort to have her included in the bargaining unit and to raise her wages.

In order to succeed on a claim of unlawful discrimination, a complainant must show by a clear and satisfactory preponderance of the evidence that:

(1) the employe has engaged in protected, concerted activity;

(2) the employer was aware of such activity;

(3) the employer was hostile to such activity; and

(4) the employer's complained of conduct was motivated at least in part by such hostility. 1/

1/ MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 WIS.2D 540, 151 N.W.2D 617 (1967), hereinafter referred to as "MUSKEGO-NORWAY"; COOPERATIVE EDUCATION SERVICE AGENCY #4, ET AL., DEC. NO. 13100-E (YAFFE, 12/77), AFF'D, DEC. NO. 13100-G (WERC, 5/79), hereinafter "CESA #4".

There is no question that Ms. VanGoethem was engaged in protected activity when she sought inclusion in the faculty bargaining unit, nor that the Association's efforts to include her in the unit, have her covered by the contract, and bargain higher wages for her were all protected activities. Neither is there any dispute over the College's knowledge of all of these activities. The issues before the Examiner are whether the College was hostile to these activities and whether the decision to lay off VanGoethem was motivated in whole or in part by that hostility. Central to those questions is whether the proffered reasons for the layoff decision are pretextual.

A. <u>Pretext</u>

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. N.L.R.B. 362 F 2D. 466, 470 (9 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.

In this case, there is little overt evidence of hostility. 2/ Certainly the College and the Association had a variety of conflicts over the Student Health Nurse position, including litigation over its inclusion in the bargaining unit, a bitter argument over whether the position would automatically be covered by the contract and difficult negotiations over the compensation package. None of those, standing alone, proves hostility. The overall environment may have been tense, but taken in isolation, every action by the College was within its legal rights and in the case of the argument over the OAK CREEK decision, it appears that the College had the legal high ground. If there is to be a finding of hostility and improper motive, it must flow from reasonable inferences drawn from the overall circumstances.

2/ Wouters testified on cross-examination that he had no "formal" knowledge of hostility by Evans to VanGoethem and her efforts to be included in the bargaining unit, but knew of rumors that there was tension between the two. The Examiner notes this testimony, but does not find it sufficient to prove hostility by Evans.

A very large part of the Association's case depends upon a finding that the College's stated reasons for deciding to lay off VanGoethem and subcontract her work are pretextual. A finding of pretext may itself be proof of illegal motive. 3/ Certainly the timing is quite suspicious. The Student Health Nurse's job was clarified into the bargaining unit in November of 1995. On February 2nd, the budget report to the Board did not list it as among the positions to be reallocated. On February 12th, Garnier formally advised Evans that the Association sought automatic contract coverage of the position, and three weeks later the job appeared on the list of positions to be reallocated. Timing alone does not generally prove pretext, but it may be persuasive evidence when combined with other evidence.

3/ "...where, as here, the respondent's stated motives for discharge are discredited, it may be inferred that the true motive for discharge is an unlawful one which respondent seeks to disguise." HEARTLAND FOOD WAREHOUSE, 256 NLRB 940, 107 LRRM 1321 (1981). See also CESA #4, SUPRA; TOWN OF MERCER, SUPRA; CITY OF MEDFORD ELECTRIC UTILITY, DEC. NO. 28440-D (NIELSEN, 5/29/97), AFF'D CITY OF MEDFORD ELECTRIC UTILITY, DEC. NO. 28440-E (WERC, 10/9/97); LEMON DROP INN, 269 NLRB 1007, 116 LRRM 1443 (1984).

In this case, the College's officials deny that the layoff of VanGoethem and the subcontracting of health services had anything to do with the unit clarification or the Association's bargaining position. Wouters said the reorganization was based on a desire for greater flexibility in the provision of health services, including coverage at other campuses, on nights and during the summer. Evans and Baus cited the need to save $20,000 through reallocation of this position when the 1996-97 new development money was reduced by $150,000.

Wouters never asked VanGoethem about working a different schedule, and never discussed any service complaints, concerns or limitations with her. Neither did he have any such discussions with Klika. Wouters testified that he believed targeted hours by a

subcontractor would provide better, more focused service, but as of the hearing he had no idea whether the contracted nurse has been asked to work nights and in fact has never seen the schedule for the contracted nurse. Neither Wouters nor anyone else was able to explain how the figure of 700 hours per year related to the College's plans for improved flexibility. Wouters expressed the opinion that VanGoethem could not be scheduled differently because he thought she had an individual contract, although he did not know if she really had such a contract, what the terms of the contract might be or whether the contract could be amended or renegotiated. Wouters was, on the whole, evasive and unconvincing in his explanations, and the Examiner does not credit his explanation.

Evans estimated that the Student Health Nurse cost approximately $37,000, and that $20,000 could be saved by making this an hourly, part-time position. Thereafter, he explained to the Board that it would be 700 hours per year. However, it appears that no one ever investigated what it would cost to hire a nurse before this decision was made, aside from Evans' testimony that he believed he could get one for $22 per hour because he had seen County job postings come through his office at $18 per hour. 4/ More to the point, no one gave Klika guidance as to how much she should spend on an hourly basis to hire a nurse. Evans merely stressed that it had to be less than half time, which is the threshold for representation by the Association. No consideration was given to hiring VanGoethem for the part-time position, even though all concede that she was a satisfactory nurse and she had told Klika she might be interested in the job. The Instacare nurse costs the College $31,500 for 700 hours per year, or approximately $5,500 less than it cost them in wages and benefits to employ VanGoethem for 1,410 hours per year. Put another way, the College now pays at least 170% of the former hourly cost for nursing services.

4/ Evans conceded on cross examination that by the time he briefed the Board on the recommended reallocation, he was probably using a $36.00 per hour figure supplied by the Visiting Nurse Association.

The various vice-presidents explained the layoff decision in terms of wanting to improve the way in which these services were delivered, and a pressing need to save at least $20,000 so that money could be redirected to new development. Before the decision was made, no one defined what the problems might have been in health services delivery, nor did anyone actually investigate whether these problems, whatever they might have been, could be addressed by the existing structure. After the decision was made, no one made any effort to insure that the subcontractor was actually delivering services in some materially different way, other than ensuring that she worked less than half-time. Likewise, after VanGoethem was laid off, the College made no effort whatsoever to find out whether any money was actually being saved, much less the urgently needed $20,000.

The Examiner noted at the hearing that it is not a prohibited practice to make a bad decision, and the College cites this remark several times in its brief. However, when a sophisticated business operation such as NWTC, whose vice-presidents have many years of experience in budgeting and administration, sets out to improve services and save a substantial

amount of money and ends up simply reducing service hours by 50% and paying nearly the same amount for those reduced services, it is incumbent on them to explain how the decision could have gone so far wrong or risk the conclusion that the stated reasons are merely a pretext for some other goal. Here the Administration's utter indifference to whether it actually achieved the alleged service improvements or cost savings makes it impossible to find that these were the true reasons for the reallocation. Instead, the timing of events and the lack of any plausible relationship between the stated goals and ends actually realized lead the Examiner to conclude that proffered reasons are pretextual. The remaining question is: A pretext for what?

B. <u>Hostility to Use of a Protected Process vs. Hostility to the Results of the Process</u>

The Association largely conformed its arguments in the initial round of briefing to the Examiner's decision in GREEN LAKE COUNTY, DEC. NO. 28792-A (NIELSEN, 4/11/97), wherein he concluded that the employer had laid off an employe in retaliation for a union's success in moving her position from a non-professional employes bargaining unit to a professional unit. Thus the Association asserted that the layoff in this case was due to hostility to the possibility of having to pay higher wages to VanGoethem as a result of her movement to the faculty bargaining unit and the Association's hard line stand in bargaining. However, after the initial briefing schedule was completed, the Commission issued its decision on review, GREEN LAKE COUNTY, DEC. NO. 28792-B (WERC, 12/18/97), wherein it reversed the Examiner. Supplemental arguments were accepted, addressing the significance of the Commission's decision. The Association argued that the Commission's decision should be narrowly construed and that this case was distinguishable from GREEN LAKE COUNTY. The College took the position that the Commission correctly decided the matter and that the Association was bound to its original arguments.

In GREEN LAKE COUNTY, the Commission distinguished between adverse employment decisions motivated by hostility to protected activity and those motivated by hostility to the results of protected activity. Where an action is retaliation for engaging in a protected activity, such as a unit clarification proceeding or the process of collective bargaining, it is interference and discrimination within the meaning of Secs. 111.70(3)(a)1 and 3, MERA. Where, on the other hand, the employer's action is a response to the results of a protected process -- an increase in wages resulting from collective bargaining, for example -- it is not necessarily interference or discrimination. Instead, it may be in the latter case that the result of the protected process triggers a valid business or public policy concern on the part of the employer. The mere fact that the result giving rise to the valid concern flows from a protected process does not mean that the employer is prevented from responding. This has been and is settled law in Wisconsin. 5/

5/ See, for example, CITY OF MEDFORD ELECTRIC UTILITY, SUPRA; CITY OF BELOIT, DEC. NO. 27779-B (WERC, 9/26/94); PRICE COUNTY, DEC. NO. 24505-A (GRATZ, 4/88).

Having observed that there is a distinction between retaliating for using a protected process and responding to the results of the process, it also bears noting that the line between the

two is not always easy to draw. However, if the distinction is to have any meaning at all, an employer claiming to have taken an adverse employment action in response to the results of a protected process must at a minimum persuade the Commission that it had a good faith belief that the results of the process were known or could be predicted with some reasonable degree of certainty when it acted, and also explain why these results logically led to the action taken. Otherwise, if hostility to results of a process can be based on what might possibly result from a process, no matter how remote the possibility, the distinction drawn by the Commission completely vanishes. 6/ In GREEN LAKE COUNTY, the Commission concluded, contrary to the Examiner, that the County had a good faith belief that the movement of the employe from the non-professional bargaining unit to the professional employes bargaining unit would inevitably lead to a wage rate in excess of what it could afford. In the Commission's view, the subsequent decision to retain a non-professional employe and lay off the professional employe was a good faith, if possibly misguided, response to the results of the unit clarification process.

6/ It is always possible to construct a scenario in which the results of a process might be bad: A petition for unit clarification might mean that the position becomes represented, which could lead to collective bargaining, where the union might make excessive demands, and an arbitrator might accept the Union's final offer on other grounds or by mistake, and that could lead to budget problems. This chain of speculation would not justify a claim that eliminating the person's job when the petition for unit clarification was filed was a response to the results of the process.

In determining whether the motivating hostility in this case was to the Association's protected use of the unit clarification and bargaining processes, or to the results of those processes, the Examiner begins by noting that he is not bound to the interpretations of the record argued by the parties in their briefs. The fact that the Association attempted to structure its initial arguments to track the Examiner's decision in GREEN LAKE COUNTY rather than anticipating the Commission's later decision does not preclude a fresh analysis of the factual record to determine whether the layoff meets the Commission's definition of hostility to the use of the process. Likewise, the fact that the College never claimed that it was hostile to the results of the clarification or bargaining processes, but rather made the layoff decision on the basis of factors completely unrelated to the representational status of the Student Health Nurse, does not prevent the Examiner from considering this possible defense. A complaint case is not an arbitration case, and the application of MERA is not controlled by the theories of the parties in the same way that the interpretation of a bilateral contract may be. While the Examiner does not assume the role of an advocate, making the case for one party or the other, it is his duty to analyze the record before him in light of the law and draw the appropriate conclusions, no matter how the parties themselves may have characterized the evidence in their written arguments.

In this case, if the College were hostile to the results of moving the nurse into the faculty unit or bargaining over her salary, it has to have been because the cost of her services would have increased. However, the bargaining process was nowhere near completion when the decision to add VanGoethem to the reallocations list was made, and an experienced professional such as Evans could not reasonably have believed that simply because the Association proposed a huge increase for this job it would inevitably succeed in obtaining such an increase. There is no evidence in this case -- as there was in GREEN COUNTY -- that an increase in the nurse's salary, even a substantial increase, would have impaired the College's ability to maintain existing services within its $48 million annual budget. Neither is there evidence that a substantial increase would have priced VanGoethem out of the existing market for nurses at technical colleges. Thus if there was hostility to the results of the bargaining process, it was hostility to results that were not yet known and could not be predicted, and whose overall negative effect could not be quantified.

In concluding that the College did not act out of hostility to the results of the unit clarification or bargaining process, the Examiner is influenced by the fact that the outcome of the layoff is actively inconsistent with a concern about cost. The College ultimately paid $45 per hour for a service that once cost it $18 per hour. Under the very implausible OAK CREEK theory advanced by Garnier -- a theory ultimately rejected by everyone, including Garnier -- directly placing the nurse on the faculty schedule would have cost an extra $14 per hour. Even counting roll-ups on the salary and fringe benefits, and completely ignoring the costs of the clerical employe assigned to the health office after the layoff, keeping VanGoethem was a far cheaper proposition for each hour of service. If the differential in hours is factored in and all fringes are counted, 700 hours of the subcontracted nurse's time cost the College 85% of what it spent for 1,410 hours of VanGoethem's time.

The record evidence does not allow for a reasonable inference that the College acted out of concern over the results of VanGoethem's or the Association's use of protected processes. The course of action elected by the College instead demonstrates a lack of concern over the cost of nursing services, so long as those services were provided at less than the half-time threshold for membership in the bargaining unit. Accordingly, the Examiner concludes that the cost and service explanations offered by the College are not the true reasons for the layoff decision, and that it was instead motivated by hostility to the use of the unit clarification and bargaining processes. The use of those processes is protected activity, 7/ and retaliation against employes for such activity is a prohibited practice. 8/

7/ "Protected activity is ... a shorthand reference to those lawful and concerted acts identified and enforced by the MERA." CITY OF LACROSSE, DEC. NO. 17084-D (WERC, 10/83)

8/ GREEN LAKE COUNTY, DEC. NO. 28792-B (WERC, 12/18/97); BROWN COUNTY, DEC. NOS. 2815-F, 28159-F (WERC, 12/96), AFF'D CIR. CT. BROWN COUNTY 9/97; KEWAUNEE COUNTY, DEC. NO. 21624-B (WERC, 5/85); WINNEBAGO COUNTY, DEC. NO. 16930-A (DAVIS, 8/79), AFF'D BY OPERATION OF LAW, DEC. NO. 16930-B (WERC, 9/79).

C. The Good Faith of the College Board

The College argues that any improper motive the administrators may have had in recommending the layoff of VanGoethem is cleansed by the fact that the ultimate decision was made by the College's Board, and there is no evidence of hostility or bad motive by the members of the Board. This argument ignores the realities of the decision making process as between professional administrators and part-time citizen boards. Such boards are policy and oversight bodies, and they customarily and appropriately give great deference to the recommendations of the professionals they employ to manage the operation:

> 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. GREEN LAKE COUNTY, DEC. NO. 28792-A.

> "…However, as correctly found by the Examiner, if agents of Respondent ... were hostile toward use of the unit clarification process, and that hostility was at least a partial basis for Respondent's layoff of Lund, Respondent violated Secs. 111.70(3)(a)1 and 3, Stats... GREEN LAKE COUNTY, DEC. NO. 28792-B.

Attempting to construct a firewall between those who have the authority to effectively recommend actions and those who ratify the recommendations would render all but the clumsiest acts of discrimination immune from review. The MUSKEGO-NORWAY standard prohibits acts which are motivated "in part" by anti-union animus, and where the initiation of the adverse employment decision was so motivated, the fact that this motive was concealed from those who subsequently and forseeably approved the act does not remove the illegal taint.

II. Association's Complaint - Sec. 111.70(3)(a)1 - Interference

The Association alleges that the elimination of VanGoethem's job on the heels of her inclusion in the unit and in the midst of efforts to bargain on her behalf must necessarily chill other employe's exercise of their protected rights, regardless of the College's subjective intent in taking these actions. While a persuasive argument might be made along these lines, the Examiner finds it unnecessary to engage in a CEDAR GROVE style interference analysis. 9/ The Examiner has concluded that the College is guilty of discrimination under Sec. 111.70(3)(a)2, and it necessarily follows that there has been a derivative violation of Sec. (3)(a)1.

9/ CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91).

III. College's Complaint - Sec. 111.70(3)(b)3 - Refusal to Bargain

The College alleges that the Association engaged in a refusal to bargain in good faith by first insisting on automatic application of the contract to VanGoethem, and then petitioning for interest arbitration without first engaging in face-to-face bargaining sessions. The College also notes that the Association refused to moved from its initial position that the entire contract must be applied to VanGoethem.

A claim of bad faith bargaining must be evaluated on the totality of the circumstances. CITY OF MADISON, DEC. NO. 17300-C (WERC, 7/83). The College's complaint has essentially two aspects. First, it cites Garnier's letter of February 12 taking the position that the Commission's OAK CREEK decision should cause the nurse's position to automatically be covered by the contract without bargaining. After Pieroni wrote to the College's attorney on April 24, withdrawing the Association's reliance on OAK CREEK, the Association sought interest arbitration before any direct bargaining took place, and continued to assert that the contract should apply in toto to the nurse's job.

With respect to Garnier's reliance on OAK CREEK, the question is whether his reading of the decision was so palpably wrong that he knew or should have know that it did not apply and he was obligated to bargain with Evans over the nurse. In OAK CREEK, the Commission decided that the City had not committed a prohibited practice by implementing its bargaining proposals regarding a newly created position in the Police Department prior to interest arbitration, because interest arbitration was not available for the position. The Commission noted that this was a newly created job, not an existing position which had been clarified into the unit, and therefore the wages, hours and working conditions for the job did not constitute a "new agreement" subject to interest arbitration. Instead, the contract was held to be immediately applicable to the position, notwithstanding the acknowledged need to bargain a wage rate for the new classification and deal with other issues unique to the job.

There is no question that Garnier was wrong about the scope of the OAK CREEK decision. At the same time, the record does not allow me to find that he knew he was wrong when he took this position. There are two primary factors leading to this conclusion. The first is the testimony of WEAC Staff Counsel Stephen Pieroni that he discussed the decision with Garnier, and had to struggle to persuade him that it was not applicable to VanGoethem's situation. This indicates that Garnier was not simply adopting a bargaining posture for Evans' benefit, but sincerely believed his interpretation was correct. The second factor in my conclusion is that there was no discernible advantage to Garnier or the Association in taking the position that OAK CREEK applied, once it became clear that Evans disagreed. The Association could not better VanGoethem's wages, hours or conditions of employment simply by asserting OAK CREEK's applicability. The only way to advance their argument would be litigation before the Commission or the courts, where they would almost surely lose. Unless Garnier honestly believed that the faculty contract applied to VanGoethem as a matter of law,

is citation of OAK CREEK was self-defeating. 10/ Accordingly, I conclude that the Association was proceeding in good faith when it took the erroneous position that it was not required to bargain with the College over VanGoethem's wages, hours and conditions of employment.

10/ Given the change in position announced in Pieroni's April 24 letter, it is not necessary to determine whether Garnier would have violated Sec. 111.70(3)(b)3 if he had persisted in his OAK CREEK argument after his own lawyer told him he was wrong.

After Pieroni advised the College's attorney that the Association would bargain over the nurse's job, the Association promptly filed an interest arbitration petition and continued to take the position that the entire faculty contract should be applied to VanGoethem. While Evans was frustrated and upset about the petition, he agreed to meet with the Commission investigator. During the investigation, the Association's bargainers indicated through Investigator Torosian that they would enter into a tentative agreement if VanGoethem was recalled. The terms of the possible agreement were substantially different than those that the Association had insisted on before the mediation. This conceptual agreement was reached just over three months after the Association agreed to bargain. It unraveled, apparently because the College could not assure the Association that VanGoethem would be recalled to the nurse's job as part of the deal.

It is not difficult to understand Evans' anger at what he viewed as the Association's recalcitrant and unreasonable posture in the early months of these negotiations, nor his frustration at dealing with a faculty team he regarded as inexperienced. His frustration was heightened by the May 30th filing of a petition for interest arbitration. The filing of an interest arbitration petition without first engaging in face-to-face bargaining is not an action that is generally conducive to productive negotiations. However, premature filing of a petition is not in and of itself a refusal to bargain, AUGUSTA SCHOOL DISTRICT, DEC. NO. 28857-A (SHAW, 2/4/94), and I note that substantial movement was made by both sides at the July 30th mediation session, even though on a contingent basis. Given that the parties were attempting to negotiate the terms and conditions of employment for a position in which the incumbent had just been laid off, and that the layoff decision itself predictably became a central focus for the Association, I cannot conclude that the Association's approach to bargaining evinced an unwillingness to reach agreement. It may have evinced an unwillingness to reach agreement on terms that were not acceptable, but that is not a statutory violation.

IV. Remedy

As set forth above, the Examiner has concluded that the proffered reasons for the layoff of Aimee VanGoethem were pretextual, and that the College took its action as retaliation against VanGoethem and the Association for protected activities. It thereby violated both Secs. 111.70(3)(a)1 and 3, Stats. In order to effectuate the purposes of the Act, it is necessary to reinstate VanGoethem to her position and make her whole for any losses suffered by reason of the layoff. The amount due her will ultimately be determined by the collective bargaining agreement. As of the close of the record, the contract had not been resolved. Pending the

outcome of the collective bargaining and interest arbitration process, VanGoethem is entitled to back pay and benefits on the basis of her compensation package as of the date of the layoff. This amount is subject to her duty to mitigate damages. Owing to the high profile of this dispute, and the chilling effect of the discriminatory layoff, effectuating the purposes of the Act also requires the posting of a notice to employes.

Dated at Racine, Wisconsin, this 26th day of August, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Examiner

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