

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

OSHKOSH PROFESSIONAL POLICE OFFICERS  
ASSOCIATION,

Complainant,

vs.

DAVID W. ERICKSON and THE CITY OF  
OSHKOSH,

Respondents.

Case 267  
No. 54297 PP(S)-3196  
Decision No. 28971-A

Appearances:

Mr. Frederick J. Mohr, Attorney at Law, 414 East Walnut Street, Suite 261, P.O. Box 1015,  
Green Bay, WI 54305.

Mr. William G. Bracken, Coordinator of Collective Bargaining Services, Godfrey & Kahn,  
S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, WI  
54902-1278.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Oshkosh Professional Police Officers Association filed a complaint on July 12, 1996, with the Wisconsin Employment Relations Commission alleging that David W. Erickson and the City of Oshkosh committed prohibited practices and violated Sec. 111.70(3)(a), 1, 2, 3, and 5 by removing newsletters from the Association's bulletin board and by threatening discipline for the posting of Association newsletters. The Commission appointed Karen J. Mawhinney, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. A hearing was held in Oshkosh, Wisconsin, at April 22, 1997, and the parties completed filing briefs by June 30, 1997. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Oshkosh Professional Police Officers Association, herein called Association or Union, is a labor organization with its offices at 414 East Walnut Street, Suite 261, P.O. Box 1015, Green Bay, WI 54305.

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2. The City of Oshkosh, herein called the City or Respondent, is a municipal employer with its offices located at 215 Church Avenue, Oshkosh, WI 54901. David W. Erickson, herein called Erickson or the Chief, is the Police of Chief for the City of Oshkosh, and is a named Respondent.

3. The Association has had a bulletin board since at least 1981, possibly longer. It is located on the back wall of the resume room (also called the roll call room) in the basement of the Safety Building in a secure area, behind locked doors. The resume room is used to give assignments at the beginning of the shift, and there are pigeon holes in there for individual officers, work stations for doing reports, a computer and printer, a file cabinet, etc. Access to the room is limited to employes in the Safety Building, including jailers, dispatchers, civilian employes, and community service officers which are high school students working part time. Groups that tour the building, such as boy scouts and girl scouts, would be able to see the bulletin board. There are no Department policies that deal specifically with bulletin boards, and the parties have not negotiated over the Association's use of the bulletin board. The collective bargaining agreement for 1995-1996-1997 states in Article X:

The employer agrees to maintain in substantially the same manner, all benefits, policies, and procedures related to wages, hours, and conditions of employment not specifically referred to or altered by this Agreement.

On August 14, 1992, Chief of Police James Thome wrote the Chairman of the Association, Allan Perry, the following letter:

It has come to my attention that you, or someone from the union, has been posting union notices, etc. on the Department blackboard in the Resume Office. I would point out to you that the City of Oshkosh furnishes a bulletin board which is to be used solely for the union and personal notices, etc. I am sure that you know which board that is but to clarify any confusion you may have, it is the board located on the far wall of the Resume Office. Please refrain from using any other Department bulletin board for union business, except the board located on the far wall of the Resume office, unless you receive approval from an officer with a rank of Lieutenant or above. Any union notices, etc. that are posted on any other board will be removed and returned to you or erased.

Over the years, the bulletin board has contained much more than Association business. Employes have put up notices for bake sales, cars for sale, parties, and other items on the bulletin board. Some postings in the past have criticized Department policies. None of those prior postings was removed, until the newsletters at issue in this proceeding.

4. Sergeant James Lehndorf was an officer with the Department for 29 years until he retired before the hearing in this matter. As a sergeant, he was a member of the bargaining unit and had

daily supervision over seven to ten other officers in conjunction with the shift lieutenant and another sergeant on the shift. The Association gave Lehndorf permission to post a newsletter on the bulletin board. The newsletter was called *The Cutting Edge* and was meant to be humorous and satirical. Fifteen issues of *The Cutting Edge* were published by Lehndorf, with Issue No. One dated February 7, 1996 and the last one published June 16, 1996.

5. Chief Erickson directed that *The Cutting Edge* newsletter be taken down. He felt the newsletter was demeaning and insulting to minorities and women, and that it created a hostile work environment and a liability issue for the City because of the content regarding women and Hispanics. On May 31, 1996 Chief Erickson sent Sergeant Lehndorf the following memorandum:

Effective immediately, you will no longer be allowed to distribute or display your newsletter within any facilities or vehicles under the jurisdiction of the Oshkosh Police Department. This order does not prevent you from continuing to publish and distribute the newsletter outside the Oshkosh Police Department but only affects those areas under department control.

I must warn you that anyone found posting your newsletter shall be subject to discipline. Also you should be aware that portions of your newsletters have come very close to and may have violated some policies within the Oshkosh Police Department. In particular, Policy 117, having to do with harassment based on ones race, color, religion, gender, national origin, age, or disability. Rule of Conduct 214.06 Conduct Towards Others, in particular, officers and employees shall treat superior officers, subordinates or peers with respect. They shall be courteous and civil at all times in all of their relationships with one another when on duty and in the presence of others, superiors shall be referred to by rank and title. Rule 214.03 - General Conduct, Officers and employees shall conduct themselves at all times in such a manner as to reflect favorably upon themselves, the city, the department and the police service, whether on or off duty officers and employees shall avoid any conduct they know or should know will bring the department to disrepute.

As a supervisor, you have a special relationship with your subordinates and other officers and supervisors within the Oshkosh Police Department. The content of your newsletter stretches and strains that relationship and opens yourself and the organization to accusations of harassment or discourtesy. I have notified the OPPA that permission was never extended for the purpose of posting items on their bulletin board which could be considered to contain references which are derogatory, defamatory or detrimental to morale and/or in violation of any department policy.

Chief Erickson sent a memorandum to himself on May 31, 1996 regarding his meeting with Lehndorf on *The Cutting Edge*:

At approximately 2:10 p.m., I met with Sgt. Jim Lehndorf in my office. Also present was Mike Novotny representing the OPPA and Captain Harold Graves.

I gave Sgt. Lehndorf a letter to him regarding his newsletter and then read it out loud so everyone could hear it. When I was finished, I asked him if he had any questions. He stated, "No." I told him that if he should develop some questions, not to hesitate to let me know or if he needed any clarification to let me know.

Det. Novotny asked if Sgt. Lehndorf would be allowed to continue to put his newsletter on the bulletin board if he were to remove or refrain from making any statements that would be considered offensive. I told him that I didn't know how that was possible now that it has happened and the fact that it has been established that the city has a liability as to what is posted on that board. I couldn't allow that because we would be doubly liable for anything he said. I couldn't accept that kind of a risk. He asked what the status of that board was and how it came about. Captain Graves mentioned that to the best of his knowledge it was an informal gentleman's agreement between Chief Thome and the Union Board a few years back. Sgt. Lehndorf, at this point, mentioned that he thought it was a matter of federal law having to do with union organizations at the turn of the century. That was all he knew about it.

After a lengthy discussion on those issues where I continued to state that I felt the newsletter could no longer be allowed in the building at all because of previous stated concerns, I reiterated the fact that just because Jack Marquez might not find the references in the newsletter offensive, especially to Hispanics, that doesn't mean that no one else does. I stated that I personally found those remarks offensive as well as the ones relating to Chris Cerutti. Mike Novotny mentioned something to the fact that you could have some Asian people coming through and they might find something objectionable. I pointed out like the comment reference to the yellow horde that appeared in one of his articles. Again, I stated that the person that the article is directed toward, does not have to object. Anybody can object that while it is inside our environment, it is used as a public meeting place and a training room and a wide variety from outside our organization are there and are exposed to that and it just couldn't be accepted.

Sgt. Lehndorf asked me if anybody else had made statements that may be offensive would be treated the same way. I pointed out to him that, yes, we would take it seriously and we would look at it. I mentioned that in this particular case he was not being disciplined. There was no discipline at all. Had I thought he was being malicious, or intentionally trying to offend people, we would be doing disciplinary action right now. We take this issue of sexual ethnic harassment very seriously and if he had some concerns he should point them out.

I also addressed the issue of the possibility of a prohibitive practice concern in this matter, that is, that he is expressing grievances and complaints that cannot be addressed properly. There is a grievance section of the contract and that is the proper venue for that where issues of concern or disagreement can be brought to a closure. In the newsletter that cannot happen and those issues are left to fester.

With that they left the meeting. Before closing I again asked him if he had any questions and when he said no I told him not to hesitate if he did.

6. Chief Erickson found certain portions of most of the newsletters objectionable. He cited the 13th issue dated May 6, 1996 as particularly offensive. One sentence he objected to was the following:

*The other day I'm sitting out at the picnic table after work, which is where Eichy says I spend all my time ..(LIES MAN LIES) and I hear this call go down.*

...

"Eichy" noted above referred to Lieutenant Eichman. The Chief primarily objected to the following portion of the newsletter:

*For all you "non Spanish" speaking types out there, "Cinco de Mayo" means: "Fifth of May" and is Jack Marquez's favorite Mexican National holiday.*

*The kid comes up to me the other day around the "Quatro de Mayo" and says "Hey Lippy...Joo theenk personnel would give me that as another paid holiday man..I gotta go to L.A. man..""??? Then I say.."What..you got a car jumpin contest out there or somethin..""???*

*Then Jack says..."LOOK KNOCKWURST BREATH..."!!! Then I say.."That's Sergeant Knockwurst breath to you Knob..or*

*should I say "SENIOR KNOB"...!!! About this I start to feel bad to "dissin" the kid cuz me and him is Mucho Compadre's and went to war together on the old Power Shift and besides he always helps me order the good stuff at Tortilla Flats..right.."???*

*ANYWAY...I say.."Lets try it Mejo but we gotta couch it in terms they understand like.."Day Off...Pay...I leave...Go Home...L.A....Cousin Morte'.....Shit like that..."!!!*

*Then Jack says "Great idea Lippy but they always ask for that death notice..How do I cover that..."??? Then I say..."HAYSOOSE Christmas dude...I gotta spell it out for ya.. While you're out there just snip one outta the Obit column man...Ninety percent of the State of California is non Anglo type, Mexican illegals, so how they gonna check...besides I remember you tellin me once your Mamma said you was related to all of them anyway, so if they wanna try lookin, let em...By the time they track down all those blood lines man, Henry Cisneros will be Chief of Police, and you'll be back in "GIT-MO", listenin in on Castro like you used to do MAN...Only this time..No Tequila breaks...Only prune juice..You "Latin Types" don't age well..."!!!*

The Chief did not receive any complaints about this article noted above. This may have been one of the newsletters that he removed. In the 12th issue dated April 28, 1996, the Chief objected to the following paragraph which apparently referred to a dispatcher at the County Sheriff's Department:

*(Side note)...Ole Mee-Shell was out there cuz somebody told her Brett Favre just drove through the lot looking for her. She thought all those fan letters with perfume splashed all over em, and those "special lingerie" articles she was shipping to him every week finally paid off..right..."???*

In Issue No. 11, dated April 21, 1996, the Chief objected to an article with the heading "*JOO LIKE TUCK AND ROLL WITH THAT?*"

*The other day Cutter bounces up to me and says.."Guess What Sergeant Knob...?" And I say.."Gee...I don't know...That coffin you and your wife sleep in get repossessed or something.."??? Then Cutter says...HELL NO..We paid cash for that man"!!! "They even threw in the steer skin liner and hog rings which come in "PRITTEE HANDY" if you know what I mean..."??? Then I say.."I DONT WANNA KNOW WHAT YOU MEAN KNOB"...They got laws against some of that stuff and I ain't gettin called as a witness in no auto-erotic snuff film caper, just cuz you ran your mouth in public man.."!!!*

*ANYWAY...Ole Cutter says.."You wanna hear about this or*

*not Smart Ass".... Then I say.."THAT'S SERGEANT SMART ASS TO YOU KNOB...Get to the point. I got things to do..""!! Then Cutter says.."I just found out they ain't gettin rid of old Tac Van..They're gonna fix it up and I already got Jack Marquez to do the job.." Then I say.."ARE YOU COMPLETELY NUTS OR WHAT.."??? Then Cutter says..."Whatta ya mean.."???*

*Then I say.."That thing is meant to carry about 15 people right..""? Then Cutter says.."Yeah..about that why..""? Then I say.."Just where in the hell do you think you're gonna put those people when Jack gets done with it..""? Then Cutter says.."I still don't get what you mean..""?*

*Then I say.."You have quite obviously forgot the dude's ethnic heritage here "Vato"...Those hot blooded Hispanic types ruin every vehicle they get their hands on man..""!! Then Cutter says..."I still don't catch your drift here.."?? Then I say.."You couldn't catch a drift in the middle of a January blizzard you COFFEE SOAKED BUGGY SPRING...Once that Mexican starts messing with that truck, you're gonna lose all that space in the back to a bunch of car batteries, so that thing can jump up and down at the traffic lights ...AND...You better hope we don't arrest any knobs more than two feet tall man, cuz Ole Speedy Gonzales there is gonna shave that thing down so low it'll look like a bouncin man hole cover with emergency lights""!!*

...

*"AND...I hope to hell you ain't got no allergies man..cuz you're gonna have to get used to a bunch of those little dogs with springs in their neck bobbin away in all that "monkey fur" he's gonna glue to the dashboard man..."!!*

*"AND...You better love hearin "Wooly Bully" comin outta those 8 foot stadium speakers he's gonna install in the ceiling man..Those things will melt your cajone's and instantly strip any exposed body hair, if you ain't got your head covered..Why the hell you think they always got those "Do Rags" on their heads man...It's to deflect all those sound waves and stop the grease in their hair from catchin fire man..."!!*

...

Chief Erickson objected to the following portion of Issue No. Eight, Dated March 29, 1996, because he believed it held Sergeant Duff up to ridicule and referred to "Fudd" from the cartoons, although no one complained about this article.

*. . .A couple seconds elapse and in walks Tony "Fudd"...(that's his name ever since Pat Hanson mis-stroked her typewriter keys one time and it came out "Fudd" instead of "Duff")...!!!*

*ANYWAY....Stevie's got "The Fudd" dressed up in a CSO uniform and he's holding a moth eaten VCR....*

Also, in the same newsletter, the Chief objected to the following paragraph:

*I heard a nasty rumor about "someone" measuring up one of our female personnel the other day. I didn't know I could do that...Will that person please tell me how you swung that...I may need some practice for my new life after police work...I just decided to become a clothing vendor...Was that your tape measure or can I obtain one from QVC or what???*

Detective Novotny told the Chief that one of the sergeants was measuring the female officer for bicycle equipment or for uniforms and had measured the inseam. Novotny did not provide a name and no complaint was received from a female officer. Chief Erickson objected to portions of Issue No. Six, dated March 14, 1996, because of references to a word processor Chris Cerutti (called Little Red in the issue) and Mark Schafhauser, a night shift officer. The article read:

*Dear Lippy,*

*I have a problem with my boyfriend and I need your advice. When I met him I knew it was love at first sight..As a matter of fact even though I'm only 4 feet tall, he can look me square in the eye. That's what first attracted me to him...he was just my size so I didn't get a stiff neck looking up at him and he shares my taste in clothes...He also wears them occasionally...he's especially fond of the "lacy ones"!!!*

*Anyway...Lately he's become addicted to "Fishing Shows" and leaves me alone in "Our Room" and prefers Babe Winkleman's figure to mine.*

*Even though I have vibrant red hair and dress in my best tie-dyed T-shirts, he'd rather see Babe in his trout catching waders. He gets positively orgasmic over seeing a Large mouth bass wiggling at the end of 3 lb test line. What can I do???*

*Little Red*

*Dear "Little Red,"*

*I've seen this syndrome only once before. It's obvious to me that this vertically challenged little knob was conceived in the immediate presence of a gold fish bowl. There had to be at least two fish present in the bowl which would explain his "split personality." The bowl was probably on the nightstand at the exact moment of conception. There's only one way to cure this "fish fetish" and*



*reverse the process. First, Get yourself the following items: two large boxes of uncooked Quaker Oats; One magnum bottle of maple syrup; One twelve once size green vegetable dye; And, one queen size bed sheet..no starch.*

*Next, go down to Exclusive Company and get the Environmental tape, "Waves Against a Rowboat"...Unplugged version!!! Next either rent or buy a Ghetto Blaster Stereo Boom box with graphic equalizer.*

*Once you have all these items, take them into the bathroom and begin running a bath. As the tub is filling, take off all your clothes. Spread the queen sized bed sheet out on the floor and sprinkle the two boxes of "Uncooked" Quaker Oats evenly over the entire surface of the sheet. After you have the oats on the sheet, take your "green" vegetable dye and begin dyeing the Quaker Oats green.*

*After you've dyed the oats, begin smearing the maple syrup all over your body until its completely covered. Once you've done that, get down and start rolling around in the oat, dye mixture until the stuff covers your entire body. Having done that, shut off the water...it should be ready by now. Next remove the draw string from the window blind assembly and place one end in your mouth, leaving the other end loose for now.*

*Next...slip the "Waves" tape in the Boomer and ram the volume up to "Max" and hit the "Play Button." Quick jump in the tub making sure the free end of the blind draw string is hanging over the edge of the tub. Start splashing around vigorously and wait...It shouldn't be more than 30 seconds or so before your "beloved" short knob wakes up from his two case consumption of "fishin brew" and hears the commotion. You have to remember he fell asleep during the Fishing Show so his sub conscious is pre-programmed already. He's gonna hear the tape rolling, hear the splashing, and hazily think he's got a bite on the other side of the boat. In his condition, he'll just think he's on a huge bass boat and won't notice he's running into the bathroom.*

*Once he charges in, he's gonna see you floppin around in the tub and think he's just caught a trophy fish. There ain't no stoppin a "motivated fisherman" under these conditions!!! He's gonna grab his "line" and set the drag (he won't know the difference believe me)!!! Once he has a tight grip on the line, you yank him into the tub with you!!!*

*All you need do at this point is whisper in his ear, "What kinda bait you use honey?" And when he says "Worms" you remind him where his worm collection is and "BAM" the reverse transfer of*

*fish back to woman is sealed!!!*

*This should take care of your problem although you may have to reinforce it a couple times a week for the first year or so. Just lay in a large supply of oats and stuff so you don't have to keep running to the store. Its kinda like "strike while the iron is hot" if you know what I mean!! Those fishin shows are only on 10 or 15 channels about 5 times a week, so you gotta be prepared.*

*Once you got it ingrained in his mind, your only problem is "how do I get this dog and pony show into the bedroom." I haven't figured that part out yet so maybe you should turn the bedroom into an aviary and maybe the little Bastard will fixate on the birds and fly in there!!!!!!!*

The Chief objected to comments in the 9th issue, dated April 6, 1996, that referred to Captain Puestohl:

*To the Knob that approached Captain Puestohl and asked him if it was true that he was actually storing 1500 cases of "Girl Scout Cookies" over on 3rd Street, so his boys could sell them,...."ARE YOU NUTS"???*

*The Captain has two very nice kids and apparently you are missing a few shooters. Do you actually believe that story???*

The Chief objected to the above portion of the newsletter because he felt that a person was held up for ridicule for approaching the captain. In the 4th issue, the Chief objected to an article which was headed "Mitchie Takes His Revenge." Officer Paul Michler was "Mitchie."

*I ran into one of Mitchie's old war buddies about two weeks ago. After he figures out I know Ole Mitchie, he starts waxing nostalgic about when he and Mitchie were in "The Nam" together. I tell him how much I really respect him and Mitchie for fighting the yellow hoard over there and he tells me to "Shut the hell up" so he can tell me this story.*

...

In the same issue, the Chief objected to a portion of an article under the headline "Erickson's Special Olympics Begin" where the article referred to Captain Puestohl as "Little Jay" and referred to Lieutenant Eichman as "Eichy." He felt the following article was somewhat demeaning to their positions as captain and lieutenant, holding them up to ridicule, and they complained about this article:

*A couple of weeks back I'm heading down the hall towards the north end of the building and I hear this rather heated discussion. I usually avoid that part of the building at all costs but I had to "Go" so I headed for the "facility" in spite of my reservations.*

*The reason I'm not crazy about that part of the building is that it always seems several degrees colder down there. I also make DAMN sure I have my crucifix displayed prominently "OUTSIDE" my shirt when I go there.*

*As I get towards the end of the hall the Captain comes bustin around the corner outta the Chief's office and almost knocks me down. He keeps goin and I hear Dave sayin "GET OUT THERE AND STOP HIM BEFORE HE HURTS HIMSELF..THERE ISN'T ANY TWO MILE JEEP PUSH IN MY FITNESS PROGRAM!!!*

*Now I'm not the brightest guy in the world but after this I figure somethings gotta be goin on right??? I turn around, put my personal discomfort on hold and follow the Captain. As I get outside I see Little Jay draggin one of the CSO's outta a jeep and takin off outta the lot.*

*As this point I gotta see what the hell this is all about so I jump in my squad and give chase. We fly down Jackson northbound and get all the way out by Nolte's. As I get closer I see another Jeep, red lights goin, rammed up against the curb in the northbound lane.*

*As I get closer I see Eichie rollin around on the ground holding his wrist and in obvious pain. I'm right behind the Captain as we run up to where Eichie is floppin around and Little Jay says "What Happened Ron??? At first all we hear is "THAT GOD DAMNED SITTER ... I'LL KILL HIM...I WAS DOIN GREAT..AND THAT FAT KNOB HADDA RUIN IT FOR ME!!!!*

*After we get Eichie calmed down to mere hysteria, Little Jay says "Gee Ron..I don't see how you can blame Tony for this..He isn't even around." Eichie says "OH YEAH...OH YEAH???" "Let me tell you what that Knob did..!!! Somebody told me that this was gonna be an event in the fitness program...I think it was Lehndorf..Anyway I figure I'll get in a little practice on my lunch hour right? So after I get it shoved outta the lot it seems to be goin pretty good right..? So I'm pickin up steam and passin New York goin about 20mph right? As I fly by Congress I turn to wave at my Old Lady who's standing there on the corner cheering me on Okay?*

*"Its right after that I feel this bouncin around inside the jeep and all of a sudden its like Dicky Paine is comin the other way with one of his caterpillars..BAM...The jeep feels like it hit a brick wall and my wrist snaps."*

*About this time Little Jay says "Gee Ron..I still don't see what all this has to do with Tony?" Then Eichie says.."YOU DON'T HUH..YOU DON'T HUH..Well for your information that knob musta crawled in there and fell asleep instead of doin his Hit and Runs and just as I've got her up to about 30..He rolls over and kicks it into park!!!!*

*About this time Little Jay is doubting the Lieutenant's veracity because he doesn't see Big Tony anywhere right?? So Little Jay says.. "Okay Ron..Lets say I believe you...If that's the case, where is Tony now..???"*

*About this time Eichie is turning a sickening shade of purple and he says.. "I'LL TELL YA WHERE HE IS...If you'll notice CAPTAIN...The wind is outta the northwest RIGHT..???" And Little Jay says "Yes..I believe it is...But I still fail to see the connection here Ron???"*

*Then Eichie says "Do you happen to smell anything CAPTAIN..WELL DO YOU..???" Then Little Jay says.. "Yes I think I do but its hard to describe accurately..!!!! Then Eichie says.. "ITS CHICKEN YOU KNOB...CHICKEN...!!! Then Little Jay says.. "Okay..lets say for argument's sake it Is Chicken...I still don't find a connection here Ron..!!*

*Then Eichie says... "LET ME SPELL IT OUT FOR YOU CAPTAIN...!!! Its like a bear wakin up after he hibernates..The first thing he does is head for food..THAT FAT KNOB WOKE UP AFTER HE JAMMED ME AND CAUGHT A WHIFF OF COLONEL CHICKEN OVER THERE AND RIGHT NOW HE'S OVER THERE FILLIN HIS FACE...HE'S PROBABLY GONE THROUGH ABOUT 3 BUCKETS BY NOW...YOU GONNA GO OVER THERE AND DO SOMETHIN OR NOT..???"*

*Then Little Jay says.. "Gee Ron...I hate to interrupt his meal..why don't we wait til he's finished and I'll get him in..Okay"?? Then Eichie says.. "MEAL...MEAL...YOU CALL WHAT HE DOES EATING A MEAL...WHY DON'T YOU WALK OVER THERE AND TRY AND TAKE IT AWAY FROM HIM....THAT AIN'T NO MEAL...ITS A FEEDING FRENZY..You see the same thing if you throw a cow into a tank of sharks...ITS DISGUSTING!!!!*

*"I'M SICK OF THIS CRAP....NO COMPASSION....I'M LEAVING FOR THE DAY..I'M GOIN TO MABEL'S FOR SOME PAIN KILLER..TELL LIPPY HE'S GOT THE SHIFT!!!!*

Chief Erickson stated that the captain and lieutenant complained about the above article, and the Chief found is demeaning to their rank. He also highlighted certain portions of Issue No. Three, dated February 21, 1996 in preparation for the hearing in this matter. He took note of the following portions of the newsletter:

*The last time I checked, the First Amendment to the Constitution still grants me the right to free speech and I've received permission from the OPPA to place this letter on their board. This*

*does not mean that anyone connected with the union agrees with anything I say. What it does mean is that they recognize my right to say it.*

*I've been told that writing this letter is beneath the dignity of a supervisor and that I'm setting a bad example for the officers. Anyone who knows me knows that is complete utter cow droppings. I think we're all adult enough to recognize the difference between a satirical newsletter and how I treat people in my role as a supervisor.*

...

*There are a number of us who do get hurt both emotionally and financially by the way things are, but we still do our job and damn well too. My last little audience before the "One Finger" promotional committee was a travesty and you know it so I hardly think I need to hear that I'm the bad example around here. HEY...THAT FELT GOOD!*

Chief Erickson believed that the "One Finger" promotional committee was a reference to a meeting he had with Lehndorf and the City Manager to discuss a promotional position opening up in the Investigative Services Bureau. The reference to Lehndorf having been told that writing the letter was beneath the dignity of a supervisor was from a consultation he had with Lieutenant Eichman, Captain Van Ness or Captain Puestohl, the Chief assumed. The issue over a lieutenant's position resurfaced in Issue No. Nine, dated April 6, 1996:

*I also took particular exception to being treated like dirt over that opening for Lieutenant in the Investigative Services Bureau. When you see the relationships in play here and watch the rules change to eliminate the most qualified people for these positions, you have a "slight tendency" to look for answers. There may come a day when someone outside this agency would look at my resume and ask me why I hadn't progressed farther. Try and explain that one to an outsider and also live with the fact that someone could pull that file out of a hat to justify this bullshit.*

*There will be a day of reckoning for all this I hope, but it will be too late for people like you and me...(Well some of you anyway).*

*The result of the meeting was that I now hold in my hot little hands, a letter which states that Lippy's a hellava swell fellow and he didn't take no drugs. Jesus...Ain't that what I've been saying all this time!!! You have to read between the lines to find the apology and who may have worked extra hard to make these accusations stick, but Hey...he knows who he is and God will get you for it pal!!!*

The Chief believed the above article to be critical of the administration's promotional decisions. The Chief admitted that a section of the 14th issue, dated May 15, 1996 that he highlighted was critical of his administration:

...

*To top this whole thing off there is a school of thought in upper administration, that these kids should be doing all this "just for the experience"..!!!*

*Just what in the hell are these people supposed to live on while they are gaining all this "experience"..??? The people who subscribe to that philosophy must expect them to live on that "rarefied" air "they" breathe, that causes them to come up with this archaic garbage...!!!*

...

*Somebody better tell "lil Britt" that she's gonna have to look "elsewhere" for her uniforms..The MATTEL Corporation just dropped their "Munchkin Wear" Line..!!!*

On the top of the 5th issue dated March 7, 1996, someone wrote the words "Whine! Whine! Whine!" on the newsletter. The Chief highlighted this handwritten portion because he thought that someone within the organization was criticizing the newsletter, although he did not know who wrote the words. He then highlighted the following section:

*Just when I thought I could get away from the political flavor of these letters, I was proven wrong again. Its not my fault, because things keep happening for which there must be a response.*

...

*The second little thing that happened was that one of our administrators mentioned in passing that he thought my letter was "very funny"..BUT...Wasn't I coming on a little strong with the anti-anti stuff....!!! JESUS..I can't imagine where the hell he got that???*

Another portion of the 4th issue that the Chief highlighted was the following:

*I certainly still feel the pain from all the hypocritical backstabbing and double dealing.....There are a lot of people out there who don't know and couldn't care less about our internal garbage.*

The Chief could not remember why he highlighted all of the areas. Some were done after the prohibited practice suit was filed. He denied that he removed the newsletters because they were critical of his policies or the Department's policies. He admitted that he did not like critical notices posted on the bulletin board in the past but he left those alone. He received complaints from the captain of patrol, and his supervisor, the lieutenant first shift. No Association members complained to the Chief. The office manager told him that no one wanted to say anything for fear that Sergeant

Lehndorf would overhear them and mock them in his newsletter.

7. The newsletters dealt with work place issues in several instances. In Issue No. 2, the following article appeared, dealing with stress and the physical fitness program:

*I've gotta get outta this place while I can still tie my shoes and feed myself. I had to pick up the newspaper to find out that I might beat the hell outta somebody if I don't pump iron and run every day.*

*Did someone take away my pepper spray when I wasn't looking? Are all the things I learned from experience about controlling a situation both physically and verbally, null and void because I don't participate in a department program for physical fitness?*

*Nobody has to tell me that I should quit smoking and get more exercise but I resent the implication that I'm gonna "cap" someone if I don't. What the hell kind of scare tactics are these?*

*This is just the kind of press we need when we've got one of our favorite defense attorneys, Mary Lou Robinson telling everybody that we're shooting people because we watch too much TV. I guess that's how we got so fat and lazy and why we need to use excessive force. I really need this kind of character assassination right now. First tell me that I'm gonna run the risk of using excessive force by not running enough and then tell me that the reason I do it is because I watch too many cop shows to show me how.*

*Those of us who are now in the twilight of our careers are now also being told we look too old when we retire. I wonder how the hell that happened? If I want to reduce my stress level so I don't look so old, all I have to do is get outta here!!!!*

*When I was in school I had an Organizational Psychology major. This discipline deals with the psychology of the work place. Everything from where you keep your pencils to foster a more pleasing work station, to why people develop a wide range of psychological problems at work.*

*It was during my Junior year that I spent most of my time working with a grad student on stress levels in the work place. We did a number of field studies right here at the department. We used bio-feedback techniques which measured skin temperature under stressful conditions. There is a direct correlation between higher levels of stress and lower skin temperature and right about now you can call me "snake"..!!*

*You see folks, what nobody wants to admit is that this place*



*drives people nuts. You cannot go anywhere within the walls of this pie shaped monolith without being regaled with sagas about who's rammin who. They're fighting in the records division, they're fighting in the bureau, and pretty soon this place is gonna be run by volunteers because the rest of us are gonna be on Thorazine!!!!*

*The problem is that its very difficult to carve someone up if you all work toward common goals and remove the "all for me" pathway to stardom. There are a few of us who have been slapped down repeatedly for holding that unique philosophy and branded non-team players for expecting something to be done about it. A lot of damn good officers have gone from here looking "65" when they were actually in their 50's. I can tell you one thing for certain. It wasn't because the answer to their problems was not pumping enough iron.*

In the 3rd issue, Lehndorf responded to his right to post the newsletter on the bulletin board:

*First let me express my heartfelt thanks to all of you who have approached me to say how much you enjoy this letter. I had no idea that it would have this much impact. I must have had at least 20 people tell me that they really got a kick out of it.*

*I even had one guy seek me out in my office alone to tell me how much he enjoyed it. He said it was "really great to hear people laughing around here again." He was so enamored with me, he leaned down like he was gonna give me a kiss. I quickly backed away and said, "HEY..HEY..HEY..I don't go in for that kinda stuff...Besides. My wife is right up the hall..What if she comes in and catches us?"*

*I'm sure he doesn't want to be identified so I won't embarrass him. I don't think he'd have a problem with people knowing he made a pass at me but I'm equally sure he wouldn't want it known that he supports anything I do. The reason for that is I'm about as popular as a preemptive strike of the Ebola Virus in some circles.*

*Someone felt so strongly about it that they crept in one day and surreptitiously stole my last letter off the board. Whoever that was ..(and I know who you are) disagree with me all you want but please do not incur the wrath of my new Civil Rights attorney.*

*The last time I checked, the First Amendment to the Constitution still grants me the right to free speech and I've received permission from the OPPA to place this letter on their board. This does not mean that anyone connected with the union agrees with anything I say. What it does mean is that they recognize my right to*

say it.

*I've been told that writing this letter is beneath the dignity of a supervisor and that I'm setting a bad example for the officers. Anyone who knows me knows that is complete utter cow droppings. I think we're all adult enough to recognize the difference between a satirical newsletter and how I treat people in my role as a supervisor.*

*I thought I made it abundantly clear in the first one that most of this stuff is not meant to degrade anyone. I've spoken to everybody I've "zinged" and they aren't upset with me, and if they were I wouldn't do it. I have decided to lay off Felker for a while because he's developing a persecution complex and God knows Bill has suffered enough, right??? Bill...I really do like you but you're so much fun!!!!*

*Where was a going with this before I...OH yeah?!!! I'm sure I've left a bad taste in the mouths of certain people who are in a position to decide my future around here. The sad part is that you already did that before this letter was ever conceived. I've been in those small rooms where I've been lied about many times. I know the truth about everything and I still do my job.*

*There are a number of us who do get hurt both emotionally and financially by the way things are, but we still do our job and damn well too. My last little audience before the "One Finger" promotional committee was a travesty and you know it so I hardly think I need to hear that I'm the bad example around here. "HEY..THAT FELT GOOD!*

In the 4th issue, Lehdorf wrote about the working environment:

*Everytime I start to think about all the negative stuff I see around me and find myself feeling sorry for myself, it hits me. In about 100 years none of this is gonna mean anything. What we now think is so absolutely catastrophic will pale in direct proportion to the amount of time that passes. That's how I keep my perspective.*

*I certainly still feel the pain from all the hypocritical backstabbing and double dealing that seems to prevail but you have to keep all your oars in the water nonetheless. Ole Scurvy and I are big fans of the Red Green Show on PBS. At the end of each episode ole Red says "Keep you stick on the ice." Theres more philosophical wisdom there than may be readily apparent. Even though you may want to take that stick and do some nasty things with it, you owe it to yourself to maintain your dignity and stay in the game.*

*There are a lot of people out there who don't know and couldn't care less about our internal garbage. All they expect is service and protection and you owe it to them to provide it.*

*I don't care if you're a burn out and got the biggest grudge from here to Vladivostok, you still can't forget what you were hired to do.*

*You should take pride in your personal accomplishments even if you seem to be the only one who knows about them. I've seen and continue to see people who use their personal disappointments as an excuse to goof off and do substandard work. WAKE UP!!! You're not only failing to live up to that oath you took all those years ago but you're also pissing off your fellow employees who may have to clean up after you.*

*I hope some of you didn't get the idea that this newsletter was one sided and meant to be a torch in the name of insurrection. I detest all forms of behavior that are malicious, no matter whose lap they fall in.*

*We all have our moments but we shouldn't be cultivating an entire career of me, me me!!! You may know people who live by that standard but that doesn't mean they'll still promote you!!! We owe it to the "young folks" to make sure they don't develop negative outlooks before they have the chance to experience all these subtle little nuances of police work. Why should they get advanced knowledge of all that lies ahead. Let em find out the hard way like we did.*

*Did I just resort to some more retrograde negativism???*  
*DAMN...its worse than I thought!!!!*

*The bottom line here is man (or cops) are judged more by their actions than their words which pretty much makes this whole newsletter irrelevant doesn't it..???*

Issue No. 5 had the following article regarding promotions:

*Just when I thought I could get away from the political flavor of these letters, I was proven wrong again. Its not my fault, because things keep happening for which there must be a response. Over the past week, two significant events took place. First I checked my pigeon hole one day to find someone had the unmitigated gall to slip in one of those promotional suggestion sheets...MY Pigeon hole!!!*

*I wish they'd knock this stuff off. A number of us have*

*experienced this absolutely "fair and impartial" selection process and we don't have any suggestions for improvement. Unless...you count what I said to the chief the last time they "reorganized the whole system for one position. It just happened to be a position I was seeking and for which no one else was remotely more qualified.*

*I know I said that we must get away from this "me" stuff but theres a story here and my example points out why, this type of crap is such a cruel hoax, perpetrated upon people who know better. There was a "comments" section at the bottom of that sheet...You want comments...here they are...!!!*

*Stop treating us like fools. We already know whats wrong with this process and no amount of phony, transparent attempts to ask us for input is gonna detract from what we already know is wrong. I know first hand how you conduct these deliberations.*

*These processes remind me of the Miss America Pageant..If you're popular enough and can spew forth some phony rhetoric about saving the world...You're in!!! I also know what lengths you'll go to keep the rest of us out...I've been there!!!*

*I've been dragged into your little rooms where you've used your authority to perpetuate the lies and use your "system" against me. I've taken your God Dammed drug tests when everyone knows I hate that shit. I found out how you tried your best to put words in peoples mouths that would declare me a "dirty cop"...!!! It didn't work did it...??? I'll tell you why it didn't work. It didn't work because even the criminals you tried to persuade to hang me, know more about my character than you do. Even they wouldn't say what you wanted them to say so you could exact your pound of flesh. I'm telling this story because there may be a few people who may actually benefit from it. What they can learn is not to use me as an example to do anything. For those of you who would like to know the whole story here without the "allegoric" vagueness of it, look me up and I'll be glad to tell you the whole truth behind it.*

*I don't even care much about the impact of what's happened to me anymore. I've still gone out there and given my best to the people who pay my salary and thats what really counts anyway. I survived a miserable childhood fraught with poverty and alcoholism so theres not much I can't withstand but keep trying ...you may get it right yet. Be careful though...I BITE!!!*

*The second little thing that happened was that one of our administrators mentioned in passing that he thought my letter was "very funny" ..BUT...Wasn't I coming on a little strong with the anti-anti-stuff...!!! JESUS...I can't imagine where the hell he got that idea ??? Its a good thing I "take drugs" to control my "instability" or God knows what I might say!!!*

Issue No. 6 dealt with working conditions in the following article:

*I had a sit down with one of our administrators the other day and he expressed his dissatisfaction with the impact these letters are having on you folks. He was concerned that I'm promoting dissent and creating more problems for them in their efforts to improve conditions around here. I assured him that it is not my intent to do anything but express opinions and reflect what most of us know to be serious problems left unresolved.*

*I think I've pretty much made it abundantly clear that we all need to realize who we really work for and because of our own internal problems, we're losing perspective and some people are not measuring up. They don't need me to point this out but there is so much frustration among the people I come in contact with that I've chosen this vehicle to call attention to it.*

*The problem is that we don't seem to be looking hard enough at the root causes of why these things are happening. The answers lie in how we treat each other and what efforts are being made to eliminate the problems so we can do what we were hired to do. I thought this was fairly evident to everyone but I guess it needs to be clarified.*

*There are good, decent, hardworking people in this organization who are finding these conditions almost intolerable. I told this gentleman that if he thought I was alone in expressing these sentiments then he was operating in a vacuum.*

*I've said this before but I guess it needs saying again...I do not expect anyone to follow my example. You people don't need me to tell you anything. If you disagree...TELL ME..I'll be more than glad to put it here for everyone to read.*

*We all haven't been doing enough to make this a better organization but the responsibility for changing our direction lies with those in power. We haven't been doing enough to put a stop to these conditions and there are too many agendas in play here.*

*I know administration feels that dissenting opinions and especially those expressed in this manner, are counter productive. Well, they would be if only a small percentage of us felt that way but I think we know that's not the case here. There are people in this organization who are using it for their own personal playground and some who need to be held accountable for their actions both past and present.*

*I see things every day that make me want to throw up and you see them too. When are we going to realize that the people "out there" deserve better? Pretending that things don't exist and putting*

*the blame on others is not solving the problems. Instead of making excuses and looking for ways to suppress opinions other than our own, why don't we use that to reverse this long standing tradition of getting mine first.*

*I think that after he realized my frustrations were perhaps not unique, or at least considered it, we came to a "warm fuzzy" phase and I felt good about it. I assured him that I would try to lighten up but this is a "two way street". I expect no less than I deliver.*

*I also aired the real story behind what is now known as my "addictive" escapade. He assured me he was not aware of the circumstances previously and I guess that's the whole problem here. My example only points out why it is so important to expose this kind of treatment so it can't happen to others.*

*I also need to tell you that I've asked for the entire file on this bogus incident. I've been told previously that it couldn't be located. The request is now formally in writing. Its been at least four or five years and I still haven't been told that the so-called investigation was even completed...Hows that for fair treatment...???*

*Theres one other little snippet I need to tell you about and I'll quit boring you will all this. I learned through my sources that copies of these letters are ending up at City Hall. Now I know for a fact that nobody over there is so enamored with me that they need "copies" of these things. If I had to speculate I'd say they're not through making my life miserable yet.*

In Issue No. 7, an article called "Missing File" stated the following:

*Everyone knows that even if you get beefed for the "wrong attitude" on a simple traffic stop, and someone files a personnel complaint, there always is a paper trail behind it. Then where the hell is the file on my alleged substance abuse and other so-called unprofessional behavior during my stint on the old Power Shift???*

*I received a response to my open records request and curiously, nothing can be found!!! I've received a letter from above that says Chief Erickson contacted former Chief Thome and he, Thome, says there never was an investigation because there was "no basis for one"!!!*

*There is something very rotten here folks. I was put through one hell of a lot of pain and embarrassment on the basis of these phoney allegations and now "nothing can be found"!!! I know for a fact that these allegations were made, that I voluntarily took a drug test, and that people were interviewed, confidential reports were submitted, and at least two high level administrators were directly involved in the "investigation," so where the WHERE THE HELL IS THE FILE..???*

*There seems to be a credibility problem here and it isn't mine!!! I've got a former Chief of Police saying there was no*

*investigation and a Captain who I know conducted it, both saying it doesn't exist!!! Do you suppose that someone could be less than truthful here???*

*It bogels the mind to think that this kind of allegation could be made and an investigation done and yet no record can be found. Is it possible that this was a "witch hunt" on the "QT" and someone doesn't want it known???* I've got my own very plausible information on the why's and how's and, what I intend to do about it is also very "QT" for now.

In Issue No. 9, Lehndorf wrote about a meeting he had with the Chief and three Captains:

*I would like to thank Tom Lichtfuss for appearing with me at the meeting with The Chief and the three Captains last Wednesday, April 3rd. Thanks Tom!!! We had the meeting to resolve the issue of what happened to the file on those bogus accusations about me that I've been harping about for so long. There were two people in the room who understood why it was important to have this resolved but unfortunately Tom and I failed to appreciate the other "more important" questions being asked.*

*The bottom line here was there ain't no file and "why was I so upset with something that happened so long ago" and.. "why did I wait so long to bring it up"???* Its always been there but I think I began tallying the score when I looked seriously at approaching the end of my career and having some "mis-placed" documents filed away somewhere where they could "pop up" at the whim of someone who may not exactly invite me over for dinner!!!

*I also took particular exception to being treated like dirt over that opening for Lieutenant in the Investigative Services Bureau. When you see the relationships in play here and watch the rules change to eliminate the most qualified people for these positions, you have a "slight tendency" to look for answers. There may come a day when someone outside this agency would look at my resume and ask me why I hadn't progressed farther. Try and explain that one to an outsider and also live with the fact that someone could pull that file out of a hat to justify this bullshit.*

*There will be a day of reckoning for all this I hope, but it will be too late for people like you and me...(Well some of you anyway).*

*The result of the meeting was that I now hold in my hot little hands a letter which states that Lippy's a hellava swell fellow and he didn't take no drugs. Jesus...Ain't that what I've been saying all this time!!! You have to read between the lines to find the apology and who may have worked extra hard to make these accusations stick, but Hey...he knows who he is and God will get you for it pal!!!*



And in Issue No. 10, Lehndorf wrote about sexual harassment in the work place:

*I came into work the other day and learned we have another memo reminding us of our personal obligation to stamp out sexual harassment in the work place. I fully agree that there is no place for this kind of thing anywhere, including within the environs of our place of employment.*

*I was written up once for having a small picture of some scantily clad beach bunnies on motorcycles, something you can see on Bay Watch about 15 times an episode. I was told that "someone" could perceive that kind of thing as offensive, and I guess anything is possible but I did not intend to offend anyone.*

*That picture was for my own personal enjoyment, cuz everyone knows how fond I am of "motorcycles"!!!*

*The point here is that we have formal rules and "informal" application of those rules, contingent upon who happens to be perceived as breaking them. Something is breaking down when a small picture, which is not intended to offend anyone is wrong, and particular people have blatantly, and with specific intent, continued to flaunt those rules without fear of discipline.*

*We all know the stories and have witnessed the real objectional behavior, and yet certain people remain un-scathed by the fair application of our own policies. There are two reasons for this phenomenon. First: The people doing it...and Third: Fear on the part of the offended to complain formally.*

*If we are sensitive to the feelings of others then we "ALL" should be sensitive to those needs, without regard to "who" happens to be causing the pain. The law and our policies mandate that each of us has an obligation to not only refrain from these offensive practices, but also we must report anyone who does.*

*"ALL RIGHTY THEN"..!!! The next time I hear someone tell me that they would prefer not to go see a particular individual for decisions because he "leers" and makes very suggestive comments, I'm bringin down the hammer man!!!*

*And the next time I hear of or see the neurotic display of self manipulation in the immediate presence of any female personnel, I'm making a supervisor's arrest.*

*The real point here is that "all" this kind of behavior, if perceived by the individual as offensive, is wrong, and "who" you are doesn't enter into it. The key here is, "if perceived by the individual". We all kid around and usually its mutual in a conversation between friends, but when the line gets crossed, I don't care who you are, you better be called to task for it, and I don't much give a rip if you happen to be of "preferred status" or not!!!*

*I understand the "impetus" for this latest memo was that little "measurement" session by a particular supervisor. I also heard a rumor that two of our other friends complained about it. When I heard who the three principles were in this little scenario, I said "Wait a minute...Let me get this straight...You've got one pervert doing the measuring and two other perverts complaint about it...is that about it...??? WHAT IN THE HELL IS THIS WORLD COMING TO...????*

In Issue No. 12, Lehndorf noted that someone was stealing his newsletters:

*Spring is coming and you can tell by all the creatures surfacing around you like the cute butterfly I found in my graphics library.*

*Speaking of creatures, some slow witted knob has been stealing my newsletters man. I had to put up (3) copies and a very stern letter the last time.*

*It is absolutely inconceivable to me why someone would risk a hefty fine and short term incarceration for the perverse pleasure of sneaking down and grabbing someone's art form man!!! Whoever this anal retentive, single helix, mutation is may live to regret it after I consult with my button man.*

*Speaking of button men, me and Ole Scurvey who has been know to pop a few buttons, got severely chastised the other day for taking too long on our break. There were two reasons for this flagrant disregard for company rules. Reason one is that Ole Scurvey can't possibly cram that much food into 15 minutes and reason two is that we were discussing police work and lost track of time.*

*We were wrong and I took responsibility for leading him astray. Even when Ole Scurvey said "I don't get it man.."I've missed at least several breaks in the past month, so they owe me man"!!! I calmly told him "HEY KNOB...RULES IS RULES..YOU THINK YOU'RE MANAGEMENT HERE...Us cannon fodder types don't question...We do not do as they do...Only do as they say...OK??*

In Issue No. 14, Lehndorf wrote about CSO wages:

*I've just finished submitting a cover letter and proposal to administration, to attempt to upgrade the wages of our CSO'S. I can't take credit for the actual research into the comparables which were used in the process. That effort was made by Jamie Resch and he did an excellent job.*

*Resch's research revealed that our CSOs are paid*

*considerably less than other agencies in the state, and in some cases, have far less duties to perform. Since I was delegated to administer this program, I've made a few changes and learned a few things about it.*

*One thing I've learned is that "everyone" wants a piece of these kids, for whatever dirty little job that needs doing. And, they aren't always real courteous about the plight these kids face.*

*I remember the times when we didn't have these kids to fall back on. You needed traffic direction at an accident scene, you got your rear end out and did it. You needed someone to pick up dogs or bicycles, you got an appropriate means of transportation, and you did it.*

*There are a multitude of tasks these kids perform, and for very little thanks and pay. They now are being tapped to fill in at the complaint desk for part time desk persons who can't or won't work at particular times.*

*We need to remember a few things about this program and those who work in it. First, they make \$5.25 an hour and most need these jobs to help offset their school expenses. There are agencies who expect far less in terms of responsibilities, and pay far more.*

*Next, they are being used as "gofers" for anything someone needs, be that you people or almost every division in this department. Its become so prevalent that its no longer appreciated but expected and I hear very few thanks being offered by those who make the most demands.*

*To top this whole thing off there is a school of thought in upper administration, that these kids should be doing all this "just for the experience"..!!!*

*Just what in the hell are these people supposed to live on while they are gaining all this "experience"..??? The people who subscribe to that philosophy, must expect them to live on that "rarefied" air "they" breathe, that cause them to come up with this archaic garbage...!!!*

*My first job was with a soft drink company. I busted my ass for long hours and little pay but even those "slave merchants" didn't expect me to do it for "nothing"..!!! None of this surprises me and shouldn't surprise you, but these kids aren't used to being treated like expendable cannon fodder at the whims of the socially elite..!!!*

*The next time you're sitting in your nice warm squad car and barking for a CSO to get their tails over to do traffic in below zero weather, remember...There was a time when they're weren't any...and you'd be there yourself pal. Then think at freezing your read end off "THE EXPERIENCE" and (unreadable copy) pretty much sums up who better get their thinking in for a (unreadable copy) job.*

The above issue was the last newsletter published before Chief Erickson directed that no more newsletters be put up. However, there was another issue, the 15th issue dated June 16, 1996, in which the headline stated: UNION BOARD ONLY. The following is the content:

*A funny thing happened on the way to this newsletter...I WAS CUT OFF...!!! Of course so were the United States Constitutional protections of the Right to Free Speech and a Wisconsin State Statute pertaining to my right to exercise those rights without fear of interference, coercion, or restraint, but hey...Why should a few blood shed laden laws get in the way of putting a stop to such a gross example of "borderline racism" and "borderline sexual harassment", right...???*

*By now you must be asking.."What the hell is this all about..""??? Well there's an interesting little story here, but before I get on with it, I need to clarify a few things.*

*First let me thank everyone who expressed support for me in this matter. I include in those numbers, Tom Lichtfuss, Attorney Fred Mohr, and all of you who were so kind and generous with your comments.*

*It took a letter from Mr. Mohr to re-assert what rights I have in regard to these letters, and to interrupt a process which was meant to stifle those rights.*

*Before I continue, I need to admonish you all to:*

**PLEASE RE-POST THIS ON THE OPPA UNION BOARD,**  
*when you're through reading it, or you or anyone else may never see it again...!!!*

*Now on with the story...*

*I've known since their inception, that copies of these letters were finding their way to City Hall. I've also known that numerous trips were made back and forth between these two buildings with the express purpose for putting a stop to them. I'm also convinced that the phone lines between a couple offices were hot with conversations which were directed toward the same goal. It took every bit of more than fifteen weeks to finally come up with an ostensible reason to justify this action.*

*If you're somewhat fuzzy on what an "ostensible" reason is, let me explain. An "ostensible" reason is one where you declare one thing and actually mean something else.*

*On May 31, 1996, shortly after 2 PM, I was called in and read a prepared letter which basically accused me of making "borderline" racist, and "borderline" sexual harassment remarks in these newsletters.*

*I was also informed that in order to prevent the department from getting sued over my reprehensible behavior, that I was no longer allowed to put these letters anywhere in the building, and that included the OPPA Union bulletin board, which I was told was only here because "Jim Thome" allowed it here a few years ago.*

*Even though I had already decided what steps I would take in regard to this little exercise in "Lippy Bashing", I remained calm and only interjected a few brief comments throughout. One of those comments alluded to the fact that "No One", "allowed" us to have this Union board except a few early 1900's labor organizers. I also mentioned that it might be a good idea to check a few Federal Statutes and they just might find one which ensures our right to have this board.*

*You see folks, if you're going to ignore such basic constitutionally guaranteed human freedoms, why not ignore them all. After all, what's a few minor inconveniences when you're pursuing such lofty goals such as stamping out a blight on the reputation of the department.*

*Probably one of the most uncomfortable aspects of sitting in one of those rooms again, was the utter hypocrisy of it all. Here I was being accused of making "borderline" racial and "borderline" sexual harassment statements in my letters, and as everyone knows, there has never been anything in them that can't be heard on any comedy or satirical program aired daily on television.*

*One of the terms I had used in one of the letters was brought up as an example of how grossly racist I had been. The term, "yellow hoard" was cited as an example. I remember it well and had used it in reference to the little piece I had done on Ole Mitchie and his days in the Nam.*

*This is what happens when you're limited in your scope of reference and knowledge...You grab at something without thoroughly checking it out and use it as a basis to prove your point. The actor Larry Linville who played Ole "Frank Burns" on the M.A.S.H. series coined that phrase in one of the episodes which has since aired in syndication about 1000 times. I guess the law suits against him have been so over whelming that whoever it originally offended hasn't got around to me for borrowing it yet.*

*I also have a real problem with hypocrisy and there certainly was enough of that commodity being slung at me by certain individuals who need to re-check their selective memories on who may offend and under what circumstances. Lets see who it is that has brought the power of office down on me "AGAIN" without regard for their own contributions to offensiveness.*

*Several years ago I spent a month in Spain. One of the*

*things I noticed very soon was that the waiters who stood by your table had their rather curious habit of "clutching" themselves while they waited for your order. I learned that this is very common in that country and is dismissed as almost a cultural phenomenon. The only problem is that this "ain't" Spain and a number of "our" female employees don't like it one bit, but are somewhat reluctant to complain about it.*

*You can draw whatever conclusions you like from this but I haven't had one woman that I'm aware of who feels offended enough from anything I say in these letters, to compare it to anything coming close to that kind of behavior.*

*Like I said...Hypocrisy...!!!*

*That pretty much makes my point about "Sexual Harassment" and fostering an intimidating atmosphere, I'd say wouldn't you...??? Now lets tackle the "racial" thing here a little and see where that leads us on this path of good intentions by this department, Okay...???*

*I don't have any better friends than Jack Marquez. Jack and I have a long history of good times and mutual respect for each other. We've been to each others homes, worked very closely on a number of dangerous situations and share a strong bond based on this friendship. That is why it sickens me to tell you this next little example of department concern for racial sensitivity.*

*In the past, I've kidded Jack about "car jumping" and things of that nature in these letters. Keeping in mind the respect I have for him, lets just see who his so-called protectors are from me, and who these people are that feel it necessary to stamp out my disrespect for anyone of Hispanic descent.*

*A few years ago Jack was interviewing for a Detective's position on this department. The oral board of interviewers was from out of town, but yet performing a function for this department. After his interview, he was told he didn't make it and later found out why.*

*It seems that one of the interviewers had made the comment after the selections were made that.."At least we got rid of the Spic.." Several people of rank on This Department, did absolutely nothing about it and later told Jack that it was "ONLY A JOKE...!!!*

*ONLY A JOKE...That's my friend you're talking about and you have the guts to accuse ME of being racially insensitive...??? I've tried like hell to find some Hispanic blood in my genes, because, unlike Jack, I would own this place after being treated like that. This man has a proud heritage and you people "allowed" him to not only be hurt and humiliated but didn't even have the guts to defend him and make it right...!!!*

*Some more God Damned Hypocrisy...!!!*

*There's more here people...Don't leave now..I'm just getting warmed up...!!!*

*It seems there was another interview process a while back and this time it was for a civilian position on this department. There were two high ranking staff officers and two civilians on this panel. At some point, one of the applicants was this black lady who had credentials that would put most of this department to shame. After the interview was completed, one of these "high ranking" staff officers, made statements such as..(and I'm paraphrasing here)...If she was hired she would help meet our "minority quota" and the fact that she was applying here was maybe because her husband was in prison up here...!!!*

*You also need to know that same individual was right there in the room supporting this little session of Slapping Lippy down for these newsletters...!!!*

*It is just my opinion of course but is anyone beginning to get the impression that maybe..just maybe..trying to put a stop to these letters has less to do with my humorous references and more to do with my comments about the true nature of conditions on this department..?*

*That brings me to another little criticism of my character. I've been told (and reminded of policy) that I'm not living up to the behavior of a supervisor because I write these letters. I'm supposed to be setting a bad example and am disrespectful and borderline insubordinate.*

*There's that word "Borderline" again. You all know me and also should know how I do my job and how I treat people in that role. What you may not know or may have forgotten is that almost all of the people who are now accusing me of being a poor supervisor, used to work for me at one time. The hypocrisy here is that not a damn one of them learned to treat people in the way I've just described to you from me.*

*I've been told, as have many of you, that we need to foster an atmosphere of respect for each other and refrain from things which degrade and humiliate people. Nothing I say in these letters is meant to degrade or humiliate anyone. The editorial sections are the truth and the rest is an attempt to light the load a little around here.*

*All I've ever advocated is that we work together to give the people in this city a competent, professional police department. I demonstrate that to the public in my own actions and I expect each of you to do the same. One of my other friends (and co-workers) Gary Pepler likes to call me the "crank" because I use humor to get*

*my points across. Every day I'm confronted with major decisions and everyone knows that decisions and everyone knows that humor switches to dead serious, damn quick when the situation calls for it.*

*I'm my own worse enemy here and I know that. It would be very easy to ignore all the things I know about this place and the people in it, but then how much of a person would I be if I pretended things are just fine. Things are NOT just fine and you all know why, too. When I took that oath of office about 29 years ago, I don't remember anything in it which said I wasn't allowed to be critical when I saw a definite trend which compromised my role as a law enforcement officer.*

*I've seen people lie, cheat steal and use their position for some form of personal gain, and I'm supposed to ignore that...???* *I've seen people stepped on, persecuted, and discriminated against for position and promotion, and even been a victim of it myself numerous times, and I'm supposed to shut my mouth and pretend a lot of people aren't hurting because of it...???* *When the hell are some people going to realize that you can't expect a group of people to work together when all you do is give the outward appearance of professionalism and then inwardly treat people like dirt.*

*I'll tell you why people. This whole thing is about power. Who has it..who wants it..and who needs more of it and wants to keep it. If it wasn't for that little equation, every new person entering this department could look forward to the rewards of the work and be comfortable that they had an equal shot at rewards based on fairness and equality from within. They wouldn't have to worry about the rules changing in mid-stream if they're not a "team player".*

*There is no team...!!! If this were a private sector business, we'd have gone under years ago. Ask my friend Jack how he feels about his "team"..???* *His "Team" let some out of town jerk call him a "Spic" and then said it was only "A JOKE"...!!! Guess what you assholes...I AIN'T LAUGHING...!!!*

8. Detective Michael Novotny has been with the Department for 27 years. His nickname is "The Silver Tongue," and he called his newsletter by that name and published it on December 20, 1996. His newsletter consisted of the following:

*This newsletter is being written to assist union member in their daily activities as officers of the O.P.D. There will be features that are meant to inform and educate all officers. I can go no further without thanking a fellow officer who initiated the first newsletter Sgt. Jim Lehndorf. While certain people attempted to squelch his freedom of speech the rest of us found his letter humorous, insightful, and to the*



*point. Thank you Jim we hope you enjoy your retirement. Also, thanks for the name!*

*On to the Health corner. If you would come across a person with the following symptoms what would you think? A twitch of a facial muscle, involuntary movements of the extremities, face, shoulders, and the voluntary muscles, uncontrollable, inarticulate sounds. The sounds produced can be inarticulate and meaningless, such as repeated throat clearing, grunts, or sniffing. In some cases child like behavior may manifest itself. Officers should not be concerned if they meet a person displaying such a series of symptoms. This is a genetic disorder and not a disease that is contagious. The disease is called Tourette Syndrome and it has many subdivisions. Also only in 30% of cases are obscene words used. So, have a little patience when encountering such a person. Next issue we will talk about paranoia.*

*Physical fitness has become a hotbed of talk so we'll try to clarify some of our problems. As you may or may not know the council approved \$24,000 for physical fitness although \$32,000 was asked for by the administration. When it was suggested by council members that we should hire a officer figures were revised down. The administration told the council that this was not enough to hire an officer. Also check your memo dated 12/11/96 now it's not even enough to hire an officer in mid-year! You can do your own figuring to check the veracity of that statement! One wonders what all the press blitz was about! Does this quote seem appropriate? Figures lie and ????? figure!*

*In coming to the end of this newsletter we need to express our respect and admiration for two of our fellow officers. MANY THANKS to Ofc. Tom (Ollie) Ziebell and Sgt. Jim (Lippy) Lehdorf. You two have made all our careers a lot more enjoyable and worthwhile. We'll miss you and not forget you!*

**UNION FOREVER!!**

Novotny stated that he had been experiencing some trembling in his right hand and had looked at computer information to see if he was going to have a serious problem. He looked at information regarding Parkinson's Disease and Tourette Syndrome, and he was startled to find out that only 30 percent of the people with Tourette Syndrome cursed. He had always thought that a person with Tourette Syndrome always cursed. He thought that by putting this information out in his newsletter, people would realize that someone with certain actions was not threatening. Captain Van Ness pulled down the above newsletter, with approval from Chief Erickson. Van Ness had a loud discussion with Novotny about the matter, and Novotny told him that he had no evil intention

and he resented the fact that Van Ness found evil intentions behind the newsletter. Novotny stated that both he and Officer Thomas Lichtfuss have twitching of facial muscles and involuntary movements. The Chief found the portion regarding Tourette Syndrome demeaning to him, and considered it to be a personal attack. He has a twitch, wiggles his nose and sniffs. He does not have Tourette Syndrome.

9. Acting City Manager Gerald Konrad sent the following memorandum to all police officers on December 18, 1996:

I have received a copy of a communication called "The Silver Tongue" written by Detective Novotny. I find the distribution of this type of insensitive, immature and irresponsible communication to be reprehensible. I have ordered a copy of this memo to be sent to the Oshkosh Police and Fire Commission so that they may be apprised of the caliber and lack of professionalism that exists in some of the department personnel. I am also investigating the possibility of removing the bulletin board entirely if this type of viciousness continues. I am extremely disappointed that a few employees with their own agendas can spread so much negativism on an otherwise positive and progressive department that we can be proud of.

Konrad thought the article on Tourette Syndrome was directed at the Chief because the Chief has many of the symptoms described in the newsletter. He felt the article was demeaning and that it was written in a demoralizing manner to undermine the Chief's authority.

10. The Department has 117 full time employes and 32 part time employes. There are 32 women and one Hispanic and one Native American. The Department has a policy regarding harassment. The Chief believes that the newsletter *The Cutting Edge* violated that policy by creating a hostile work environment by holding women and Hispanics up to ridicule. He thought the quote about the "yellow horde" could create a problem when recruiting Asian American officers. A Departmental rule, number 284.42 states:

Officers and employees shall not publicly criticize or ridicule the department, its policies or other officers by speech, writing or other expression where such speech, writing, or other expression is defamatory, obscene, unlawful, undermines the effectiveness of the department, interferes with the maintenance of discipline, or is made with reckless disregard for truth or falsity.

Another rule, number 214, deals with general conduct, and states:

Officers and employees shall conduct themselves at all times in such a manner as to reflect favorably upon themselves, the City, the department and the police service.

...

It is the fundamental policy of the department that officers and employees treat all persons with courtesy and respect.

Officers and employees shall perform their duties attentively and courteously, avoiding rude, threatening, harsh, insulting, profane, insolent, or demeaning language, and they shall maintain a professional bearing regardless of provocation to do otherwise.

...

Officers and employees shall treat superior officers, subordinates, peers, with respect. They shall be courteous and civil at all times in their relationships with one another when on duty and in the presence of others. Superior officers shall be referred to by rank/title.

...

All officers and employees are strictly charged with establishing and maintaining a high spirit of cooperation within the department.

...

Failure or refusal of any officers or employee to obey a lawful order given by a superior officer shall be insubordinate. When on duty, the act of ridiculing an officer or his/her orders whether in or out of his/her presence is also insubordination.

The Chief felt that some of the newsletters violated the rules. The second issue referred to Lehndorf's dog having an operation on his testicles. The Chief thought the article to be crude. In the third issue, the Chief thought that reference to Stevie Schauz being somewhat of a "klutz" could violate the rules, as well as a comment around a child going to day care until "he's old enough...to smack around." Lehndorf, who refers to himself as "Lippy," was once instructed to remove a picture of three or four women in thong bikinis leaning over a motorcycle, and he referred to that incident in the tenth issue, saying that he was written up for having a small picture of some "scantly clad beach bunnies." The Chief felt that the picture or post card violated Department policy. The Chief said he told Lehndorf that he could still write his newsletter on his own time and distribute it on his own but that he objected to having it within the Department. However, when Novotny asked if the newsletter could be posted if it contained no statements that would be considered offensive, the Chief said no, that he could not post a newsletter regardless of its content. The Chief believed that Lehndorf's motive was to be humorous and not malicious.

11. Joaquin Marquez has been employed by the Department for 14 years. There were references in one of the newsletters to him, but he was not offended by the newsletter. Lehndorf called him to ask how to spell certain Spanish words before the article was published. Marquez

took the article as a joke, and believed that most of the other officers saw it the same way and were not offended by it.

12. Thomas Lichtfuss has been employed by the Department for 15 years and has been a member of the Association for 14 years. He has been an officer of the Association for about six years and was Union President during the time that the newsletters were posted. As far as he can remember, the bulletin board has contained personal notices, apartments for rent, cars for sale, names of baby sitters, and cartoons. Officers frequently cut pictures out of the paper which depict an officer doing something and put a different caption on it and put it on the board. Lichtfuss stated that these are usually pretty funny, but that if someone did not understand the inside joke, it could be construed as being offensive. He did not find anything in *The Cutting Edge* newsletters to be offensive, and he thought Lehndorf brought a lot of concerns that other officers have into the open in a humorous and satirical way. People were then talking about these matters, and Lichtfuss thought it was great that people started to talk about things that had frustrated them, so he allowed Lehndorf to continue to post the newsletters on the bulletin board. For example, Lichtfuss noted that Lehndorf talked about the promotional process in a humorous fashion, and many people including himself felt the process was unfair. Physical fitness was also a contentious issue within the Union membership, and Lehndorf's light hearted treatment of it got people talking about it. Before Chief Erickson banned the newsletter, he and Lichtfuss had a discussion about the newsletters. The Chief stated that the newsletters were inappropriate, that they were racist and sexist, and Lichtfuss disagreed. Lichtfuss felt that the Chief was banning the newsletter because Lehndorf was criticizing the Chief and his decisions.

13. Randy Van Ness is a Captain with the Department and he reviewed the newsletters. He talked to Lehndorf informally once in the break room and told him that while a lot of it was humorous, some of it was inappropriate and detrimental to the Department. He objected to some references to nicknames and references to minority type issues and organizational type issues. He spoke with Lehndorf about a week or so later in an office. Van Ness thought there were references to things such as promotions, discipline, and investigations that were not accurate. Van Ness was upset by Novotny's newsletter, because he thought that it referred to the Chief and was demeaning and embarrassing and that it undermined his position as Chief. So he took the original newsletter of *The Silver Tongue* down the day after it was posted, and later that afternoon, a second copy was posted that said "Do Not Remove" on it. Van Ness talked to Novotny about it and told him that it was inappropriate because it referred to the Chief. He was emotional about it and upset with the content, and he told Novotny that it should not be posted again. Van Ness wrote a summary of the conversation that occurred on December 18, 1996, and it states:

At approximately 1:53 pm, I observed another copy of The Silver Tongue (volume 1, issue 1) placed on the corkboard on the back wall in the resume room - I had removed the original in the morning hours. On the bottom of the copy was written and underlined "Do Not Remove." Discussions with Personnel Director Norb Svatos

and Chief Erickson were such that this so called newsletter was not appropriate for posting on the resume board.

I removed the new copy from the board and upon returning upstairs, I observed Detective Novotny in the hallway. I asked Detective Novotny if I could speak to him and I went into his office. I showed Detective Novotny the copy that I removed from the board and asked him who was responsible for it and for placing it on the board. Detective Novotny stated to me that he was responsible for it and that he placed it on the board.

I informed Detective novotny that I found it offensive, slanderous, inappropriate, unprofessional and detrimental to the organization. Detective Novotny disagreed and felt that it was appropriate to be placed on the board as there was no name associated with the references, and that his freedom of speech rights provided the avenue for the posting of this so called newsletter. It is my opinion that officers who have been with the department for any period of time would likely identify the individual referred to in the newsletter as Chief Erickson. Referring to him in this fashion erodes his credibility and tends to create a hostile and inefficient work environment. The newsletter also contained speculative and inaccurate information (ie, money for physical fitness program) which would tend to further disrupt and divide the organization.

I informed Detective Novotny that this newsletter was to stay off from the board and that if they (OPPA) wished to pursue the matter further, that they may do so through the grievance process which has already been initiated with Sergeant Lehndorf's The Cutting Edge. Detective Novotny seemed to indicate to me that this issue would stay off from the board, but that there would be other newsletters written and posted (another edition).

14. Jay Puestohl is a Captain in the Department and is familiar with the newsletters. He found some of the material to be offensive and not conducive to good working relationships. He removed one newsletter to make a copy of it and put it back. He spoke to Lehndorf about the newsletters a couple of times and the notes he kept regarding those conversations as the following:

3-13-96

To: File

From: Jay Peustohl

I spoke with Jim Lehndorf in the shift cmdrs office about his newsletter dated March 7th. In it he wrote a story about Lt. Eichman receiving an injury to his wrist. In the story he referred to the Lieutenant as Eichy and to me as Little Jay. I told Sgt Lehndorf that I didn't personally care what he wanted to call me but we did have a department rule which required subordinates to refer to superiors by their title. I told him I felt if he was going to write about a department superior, he should abide by that rule. If we didn't adhere to it in this instance, we might as well not have it as it will be unenforceable in the future. Lehndorf said he had not considered the rule and had not intended to violate it.

3-27-96

As I was eating in the break room about noon, (name omitted) asked me if my children had sold their girl scout cookies. I asked (name omitted) what (name omitted) meant. (Name omitted) said that Sgt Lehndorf had written something about my kids selling cookies and (name omitted) then asked if it was just a joke. I told (name omitted) I didn't know as I didn't usually read Sgt Lehndorf's literature, but my kids are not members of the girl scouts.

(Name omitted) comments caused me to wonder what (name omitted) was talking about so I did locate a copy of Sgt Lehndorf's newsletter dated March 14, 1996. In it is another story, now referring to me again as little Jay and being responsible for having some girl scout cookies stored at the 3rd St garage for my children. I presume the newsletter was written and posted on or before the date that I spoke to Sgt Lehndorf about his references to his superiors. I am concerned that I was portrayed as using the garage for some person reason, albeit contrived by the writer. This is not true although it was apparently thought to be a reporting of fact at least by (name omitted).

4-2-96

Today I met (name omitted) in a hallway. I asked (name omitted) if (name omitted) thought that thing about my kids selling girl scout cookies was true. (Name omitted) said yes and apologized for causing any bad feelings.

Later I again met with Sgt Lehndorf in the shift cmdrs office. I told him that some people actually believed what he wrote in his newsletter and so my reputation was being impugned by his fictive

accounts of me. I expressed my displeasure and asked him to stop including me in his writing. He said he didn't think anyone would have taken the cookie story seriously and asked me who it was. He said he would talk to the person. I told him that wasn't necessary, that he should just leave me out of his writing.

Puestohl got the nickname of "Little Jay" because there was a lieutenant on the day shift named Jay Pistol, a large man referred to as "Big Jay." After Lieutenant Pistol left, the nickname "Little Jay" stuck with Puestohl. Puestohl was concerned about the story about using the garage for storing cookies because officers had asked him in the past if they could use the garage for working on cars or washing them, and he had denied other officers the use of the garage for personal business. The person who approached Puestohl about the cookie story was not a member of the bargaining unit. Puestohl did not receive any complaints about the newsletter although he heard some comments about it.

15. The newsletters called *The Cutting Edge* published by Sergeant Lehndorf contained material related to matters of collective interests and were in part lawful, concerted activity. The newsletters also contained material which may have been viewed as offensive to Hispanics, Asians, and women.

16. The newsletter called *The Silver Tongue* published by Detective Novotny contained material related to matters of collective interest and was in part lawful, concerted activity. It also contained material which was a personal attack on Chief Erickson, and was therefore not protected activity.

17. The Respondents had a legitimate business reason for removing newsletters which may have been offensive to women, Hispanics or other ethnic or minority groups.

18. The Respondents' refusal to allow Sergeant Lehndorf to post any newsletter, regardless of its content, on the Union's bulletin board, had a reasonable tendency to interfere with the exercise of employees' rights guaranteed by Sec. 111.70(2), Stats.

19. The record does not show by a clear and satisfactory preponderance of the evidence that the Respondents' removal of the newsletters and threat to discipline for posting such newsletters was motivated in part by anti-union considerations or by their hostility toward lawful, concerted activity.

20. The parties' collective bargaining agreement has a grievance procedure culminating in final and binding arbitration.

Based upon the above and foregoing Findings of Fact, the Examiner makes and issues the following

## CONCLUSIONS OF LAW

1. Respondents did not violate Sec. 111.70(3)(a)1 or 3, Stats., by removing newsletters called *The Cutting Edge* from the Association's bulletin board and threatening discipline for posting said newsletters where such newsletters contained material that exposed Respondents to charges of allowing a hostile environment to exist for women, Hispanics and other ethnic groups.

2. Respondents did not violate Sec. 111.70(3)(a)1 or 3, Stats., by removing a newsletter called *The Silver Tongue* from the Association's bulletin board where such newsletter contained a personal attack on Chief David Erickson.

3. Respondents, by refusing Sergeant Lehndorf to publish and post any newsletter on the Association's bulletin board when Sergeant Lehndorf offered to remove all offensive material from the newsletters, interfered with, threatened and coerced him in the exercise of his rights guaranteed by Sec. 111.70(2), Stats., and therefore, violated Sec. 111.70(3)(a)1, Stats.

4. The Commission will not assert its jurisdiction to determine whether the Respondents have violated Sec. 111.70(3)(a)5, Stats.

5. There is no evidence that Respondents dominated or interfere with the administration of the Association, and therefore, did not violate Sec. 111.70(3)(a)2, Stats.

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

### ORDER 1/

IT IS ORDERED that Respondents, City of Oshkosh and Chief David W. Erickson, shall immediately:

1. Cease and desist from violating Sec. 111.70(3)(a)1, Stats., by interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Sec. 111.70(2), Stats.

2. Take the following additional affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

(a) Notify all employees in the bargaining unit represented by the Association by posting in conspicuous places where notices to employees are usually posted, copies of the notice attached hereto and marked Appendix "A," which shall remain posted for sixty (60)

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1/ Footnote found on following page.



days. Reasonable steps shall be taken to insure that said notice is not altered, defaced or covered by other materials.

(b) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days of the date of service of this Order, as to what steps it has taken to comply with this Order.

IT IS FURTHER ORDERED that, with the exception of the violation of Sec. 111.70(3)(a)1, Stats., as found in Conclusion of Law 3, the complaint is hereby dismissed in its entirety.

Dated at Elkhorn, Wisconsin this 19th day of August, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Karen J. Mawhinney /s/  
Karen J. Mawhinney, Examiner

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

Section 111.07(5), Stats. Provides:

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

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

APPENDIX "A"

**NOTICE TO CITY OF OSHKOSH EMPLOYEES REPRESENTED BY  
OSHKOSH PROFESSIONAL POLICE OFFICERS ASSOCIATION**

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

1. WE WILL NOT interfere with employees in the exercise of their protected rights under Sec. 111.70(2) of the Municipal Employment Relations Act by prohibiting them from posting newsletters on the Association's bulletin board in the Resume Room where such newsletters deal with matters of concern to members of the bargaining unit and such newsletters do not otherwise offend women, ethnic groups, or attack individual members of the Police Department.
2. WE WILL NOT in any other or related matter violate Sec. 111.70(3)(a)1 of the Municipal Employment Relations Act.

Date: \_\_\_\_\_

By \_\_\_\_\_  
Chief David W. Erickson

By \_\_\_\_\_  
On Behalf of City of Oshkosh

THIS NOTICE MUST BE POSTED FOR SIXTY (60) DAYS FROM THE DATE SIGNED AND POSTED, AND THIS NOTICE MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

CITY OF OSHKOSH

MEMORANDUM ACCOMPANYING FINDINGS OF  
FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES:

The Association:

The Union asserts that the City has violated Sec. 111.70(3)(a)1, 3 and 5 by its actions. The Union has a right to maintain its bulletin board free of interference from management, and this right is protected by statute. The right to use a bulletin board is a mandatory subject of bargaining when it relates to collective bargaining matters, and is a permissive subject when it regards non-related issues. Under the present circumstances, the use of the bulletin board is a right protected by Sec. 111.70(2) regardless of whether the material is related to collective bargaining or not. The Union has enjoyed the unfettered use of its bulletin board for at least 15 years. The labor contract contains a maintenance of standards clause which prohibits management from reducing this benefit. Therefore, regardless of the matter posted on the bulletin board, it is a protected right of employees.

There are three specific acts by the Respondent that had a reasonable tendency to interfere with the Union's exercise of its rights, the Union states. The Chief's removal of the newsletters from the bulletin board had a reasonable tendency to interfere with the employees' rights of free expression. Lichtfuss explained that the newsletters frequently dealt with hot collective bargaining issues, and Lehndorf's humorous treat of issues such as the promotional procedure and the physical fitness program opened up the membership's discussions on these topics which directly relate to collective bargaining issues. The Chief's removal of the newsletter was widely known and had the effect of stifling discussion regarding these bargaining issues, especially criticism of the Chief's proposal for the physical fitness program.

The Union states that a public employe's right to free expression is guaranteed, particularly on collective bargaining matters. The Chief's actions in removing the newsletters were not motivated by his concern for their sexual or racial content, and he did not get any complaints except from the supervisors who should not have been reading the Union bulletin board in the first place. The Chief removed the newsletter primarily because it criticized his policies, as disclosed in his August 31, 1996 memo to himself where he acknowledges that if Lehndorf's newsletters contain nothing but Union business, he still would have them removed. He testified that he was going to prevent Lehndorf from posting the newsletter regardless of its content, and that he had the authority to determine who could publish matters on the Union bulletin board. It was not necessary that the Chief intend to interfere with the Union's free exercise of its rights to constitute a prohibited practice, but his intention to interfere with those rights could not be more evident.

The second action of the Chief which is a violation is the memorandum dated May 31, 1996 in which the Chief not only threatens Lehndorf with discipline for publishing the newsletter but also threatens discipline to anyone found posting his newsletter. This threat had the tendency to

interfere with Association members' rights to publish matters on the bulletin board. The threat was extended to anyone and not limited to matters that might be considered sexually or racially offensive. The Chief expressly prohibited the posting of any newsletter regardless of content, which might have contained collective bargaining matters.

The third act complained of is the Acting City Manager's memorandum of December 18, 1996 in which Konrad threatens the loss of the use of the bulletin board to all members of the Association. Konrad is trying to manipulate the content of what appears on the board, and this had a reasonable tendency to interfere with the Union's rights. In fact, no further newsletters were published after this memorandum was issued.

Therefore, the Union submits, the removal of the newsletters together with the threats of discipline or loss of benefits serve to interfere, restrain and coerce employees in the exercise of their rights of free expression. The Chief's claim that he was concerned about the sexual or racial content of the newsletters is a subterfuge, since he prohibited the posting of the newsletter regardless of its content. The unspoken reason for the ban was Lehndorf's criticism of the Chief's promotional procedure and his proposed physical fitness program. The Chief successfully stifled criticism which had a chilling effect on the Association members.

As to the claim of a violation of Sec. 111.70(3)(a)3, Stats., or a discrimination claim, the Union points out that the posting of the newsletters on the Union bulletin board was a protected, concerted activity, that Chief Erickson was aware of this activity and was hostile toward it. The Union's proof must rely on indirect evidence, as is often the case. The Chief testified that he had the authority to determine who could put matters on the bulletin board and that he was prohibiting Lehndorf from publishing newsletters regardless of their content. The Chief's own copy of the newsletters showed that he highlighted not only areas that he claimed were sexually or racially offensive, but also text related to collective bargaining matters. He claimed that he highlighted these areas in preparation for the hearing. However, one can surmise that the Chief believed he could remove the newsletters if they contained critical material related only to collective bargaining. If the Chief were concerned about offensive material, he could have blackened out anything offensive and let the rest of the newsletter appear.

The Union asserts that Novotny's newsletter discusses tourette's Syndrome and the physical fitness program, and there is nothing in the newsletter which is offensive. Yet the newsletter was removed with the Chief's assent. The Acting City Manager threatened to remove the bulletin board if such newsletters were re-posted. This is a threat to deny a benefit if one engages in protected activity. The Union has posted whatever it wanted on its own bulletin board without interference for many years. That right was infringed upon by the Chief, whose actions were motivated in part by his hostility toward the union and its opposition to some of his programs.

The Respondent also violated the collective bargaining agreement, a violation of Sec. 111.70(3)(a)5, Stats., the Union claims, by violating the "Previous Benefit" clause of the contract. A bulletin board is a benefit to employees, and it always contained more than just Union business. The removal of the newsletters and the threat of discipline restricted a previous benefit of the Union.

## The City:

The City submits that the publications do not represent any concerted activity engaged in by the Union for collective bargaining or mutual aid and protection, and that the Union's contention that Sec. 111.70(3)(a)1 was violated is without merit. The newsletters did not pertain to official Union business and were not official Union publications. They were written off duty and had little, if anything, to do with the Union's representative capacity for protecting the wages, hours and working conditions of employees. None of the objectionable articles was related to collective bargaining or to concerted activity undertaken by employees for mutual aid and protection. In one issue, Lehndorf even stated that while he had permission from the Union to place the newsletter on their board, that did not mean that anyone connected with the Union agreed with anything he said.

The Union failed to meet its burden of proving by a clear and satisfactory preponderance of the evidence that any action taken by the respondents interfered with, restrained or coerced the Union's right to engage in concerted activities for collective bargaining or other mutual aid or protection. No restriction has been placed on the Union's ability to post material dealing with wages, hours and working conditions or material criticizing the job performance of other employees or criticizing existing policy, procedures or practices of the Department. The only material that has been restricted is that which is vulgar, offensive, sexist or racist and material that undermines the authority of Department officers. Such material violates Department policies and rules of conduct as well as law.

The City argues that even if its conduct could be construed as interfering with the exercise of any right under Sec. 111.70(2), Stats., it had valid business reasons for prohibiting the newsletter from being posted. An employer may properly restrict employees from posting on a bulletin board provided by the employer defamatory or derogatory comments about the employer, obscene or immoral statements, postings that would have a disruptive effect on employees, and notices which are detrimental or disloyal to the management. The Respondents prohibited the posting of the publications of "The Cutting Edge" and "The Silver Tongue" because many of the articles in them were inappropriate and detrimental to the Department. The references to Hispanics, Italians, Asians and women were derogatory, offensive and demeaning to ethnic groups and women. Many of the articles contained rude and vulgar comments and innuendo of a sexual nature in violation in the Department's rules and policies against sexual, racial and ethnic harassment in the work place and in violation of existing state and federal law. The City and the Chief were concerned because the newsletters contained material that could have subjected the Department to accusations of sexual and ethnic harassment. Additionally, the newsletters were demeaning and disrespectful toward supervisory officers by using nicknames such as "Eichie" and "Little Jay" and the personal attacks on the physical quirks of Chief Erickson. Many employees believed that the article on Tourette's Syndrome was directed at the Chief, and that it was not only demeaning and embarrassing but also undermined the Chief's authority to direct the Department. The Code of Conduct requires officers and employees to treat superior officers, subordinates and peers with courtesy and respect and to refer to superior officers by rank/title. The Department policy expressly prohibits employees from publicly criticizing or ridiculing the Department, its policies or other officers by defamatory,

obscene, unlawful speech, writing or other expression which undermines the effectiveness of the Department, interferes with maintenance of discipline, or is made with reckless disregard for truth or falsity.

The City states that it is not an unfair practice to forbid the distribution on company property of literature which is insulting and defiant and which scurrilously lampoons the officers of a company and its supervisors. The Chief's May 31, 1996 memo made it clear that Lehndorf was not prevented from publishing and distributing the newsletter outside the Department. The only restriction was that the newsletters could not be posted on the City-owned bulletin board and could not be distributed in the premises of the Department. This restriction was narrowly tailored to meet legitimate business reasons -- to preserve morale, maintain a work environment free of harassment, preserve the chain of command and authority of managers, and avoid liability of a lawsuit for racial, sexual or ethnic discrimination or harassment.

Although the Union alleged a violation of Sec. 111.70(3)(a)2 in its Complaint, it presented no evidence to prove a violation to dominate the Union. Where the Complainant alleges a statutory violation in its Complaint but does not offer proof at hearing, the issue is deemed to have been dropped and the examiner focuses only on charges on which evidence is offered. As to the allegation of a violation of Sec. 111.70(3)(a)3, the City reiterates that the Union was not engaged in any concerted activity that was protected by Sec. 111.70(2), Stats. The newsletters only reflected the views of two employees who were Union members. Further, the Union failed to prove that either the City or the Chief acted with any anti-union animus in restricting the posting of the publications from the bulletin board. No violation of Sec. 111.70(3)(a)3, Stats., is established without evidence of hostility towards the Union.

The City also argues that the Union failed to prove a violation of Sec. 111.70(3)(a)5, Stats., and that the restriction on the posting of the newsletters did not violate any provision of the 1995-1996-1997 labor contract. No provision of the contract deals with the use of the bulletin board by the Union. The Union argues that the standards clause was violated and that the 1992 letter from Chief Thome gave it the right to post on the bulletin board in the back of the resume room. But the letter gave the Union the right to post matters relating to Union business on the bulletin board, and it asked the Union to refrain from using any other Department bulletin board for Union business. Again, the publications at issue were not official publications of the Union and did not deal with official Union business. The Union has never had permission to post items on the bulletin board which could be considered to contain references which are derogatory defamatory or detrimental to morale or in violation of Department policy.

Furthermore, the City argues that the newsletters were not protected by the First Amendment to the U.S. Constitution. The objectionable articles did not deal with matters of political, social or other concern to the community, but only with matters of private interest to Lehndorf and Novotny. The Union's belief that it had a First Amendment right to post a swastika on the bulletin board or to post the words "nigger" or "yellow horde" is mistaken. Moreover, negative references to co-workers and superior officers may be regulated because they do not involve matters of community concern and are likely to have a seriously disruptive impact on the



administration of the Department.

The City asks that the Union's Complaint be dismissed with prejudice and that the City and Chief Erickson be awarded attorneys' fees and costs they incurred in defending against this Complaint.

The Union's Reply:

The Union first notes that the publications are concerted activity. It is well settled that a single employe's actions are considered concerted activity if the conduct of the employe is an attempt to enlist the support of fellow employes for their mutual aid and protection. The Respondents' claim that none of the objectionable articles addressed any issue related to collective bargaining is not supported by the evidence. Issue 2 addressed stress in the work place. Issue 3 addressed free speech, concerted activity. Issue 4 addressed a positive working environment. Issue 5 -- promotions. Issue 6 -- Department morale. Issue 7 addressed the questionable maintenance of personnel files. Issue 8 addressed sarcasm regarding CSO's. Issue 10 addressed sexual harassment in the work place. Issue 11 had a satirical article regarding negative press about a fellow member. Issue 12 addressed criticism of management for removing the newsletter. Issue 13 addressed a reminiscence of departmental conditions. The only issue of "The Silver Tongue" addressed physical fitness. Therefore, every issue of the newsletters cited by the Respondents as objectionable contains comments and information which are vitally important to the well-being of the officers and the Department. Lehdorf is a satirist who understands the pulse of the Department and the needs of its members, and his newsletters brought to the fore certain issues which have been a constant irritant to the members. His newsletter directly addresses the working conditions of the employes and their need for mutual protection against the subversive tactics of the Chief. The newsletters are a concerted activity which were engaged in for the mutual aid and protection of union members.

The Chief threatened discipline and removed the newsletters which were a lawful, concerted activity. He took the extreme position that Lehdorf could not publish his newsletter even if the newsletter addressed only collective bargaining issues. The Chief's threat of discipline and his refusal to allow any newsletter to be posted interfered, restrained and coerced members of the Complainant in the exercise of their guaranteed rights.

While the Respondents have argued that it had valid business reasons for prohibiting the display of the newsletters, all the legal authority cited by the Respondents involved private employment. The freedoms enjoyed by public employes differ significantly from those enjoyed by private employes, and the valid business reason exception is inapplicable under the facts of this case. The U.S. Supreme Court has held that the First Amendment safeguard of the right of free speech is extended to public employes but not to private employes. A public employe cannot be disciplined for public statements which are true although critical of his/her employer, and a public employe cannot be disciplined for false statements unless they are knowingly and recklessly made if done so in a public forum.

The valid business reason exception is severely limited when applied to public employment. In order for the government's interest to justify abridgement of speech, an employe or public

servant must occupy a policy making position. Where no contract language restricts what constitutes a proper posting, an employer's ability to exercise censorship will be based on the past practice of the parties. Further, the burden rests on the employer to show that objectionable notices caused disruptive employee behavior, and there is no such evidence in the record. None of the members of the Union complained to Erickson about the newsletters. The Department has a long standing past practice of allowing the Union to determine what is posted on its own bulletin board, and it was inappropriate for the Chief to attempt to alter this practice unilaterally. Under both state and federal precedent, a non-policy making public employe cannot be disciplined for critical remarks about an employer.

The Union further replies that the Respondent's claim that there is no evidence of anti-union animus is contrary to the record. Evidence of hostility more often than not must be inferred from the circumstances. The Chief threatened Lehndorf with discipline if he posted any further newsletters. Lehndorf offered to limit the content of the newsletters to collective bargaining issues, and the Chief still refused him the option of posting the newsletters. If the Chief's concern was based solely on valid business reasons, he would have allowed Lehndorf to continue to publish newsletters without offensive material. The Chief could have taken less drastic measures, such as moving the bulletin board to a location where only officers had access or require offensive areas to be blacked out or asked to view the newsletter for objectionable material before it was posted. Instead, the Chief prohibited the newsletter altogether.

During the hearing in this matter, the Chief had his own copies of the newsletters which he had highlighted, and the highlighted areas disclosed that the Chief was concerned not only about offensive material but also about material which was critical to his agenda. This evidence strongly suggests that the Chief's motive was to squelch Union dissent and criticism regarding his views on the promotional procedure and the physical fitness program. The circumstantial evidence adequately discloses that the Chief's actions, in part, were based on anti-union animus.

The Union states that the Respondents' attempt to use Chief Thome's letter to support its position is based on one sentence taken out of context. The Union has established a long standing past practice of uninhibited use of its bulletin board, and Erickson's interference violated the maintenance of standards clause of the contract and thus violated Sec. 111.70(3)(a)5.

While the Respondents have argued that the newsletters do not enjoy the guarantees of the First Amendment, this issue is secondary, because even absent protection of the guarantee, the Chief's actions still violate labor law. The Union notes that Wisconsin limits a public employer even further than the federal rulings, and the state supreme court has held that in order for the government to abridge speech, an employe or public servant must occupy a policy making position. Since neither Lehndorf nor Novotny held a policy making position, their right of free speech could not be abridged. The newsletters discussed matters of public concern, such as stress in the work place, a positive working environment, Department morale and sexual harassment. The discussion regarding the promotion methods and a physical fitness program are directly related to matters of public concern. The Respondents made no attempt to clearly demonstrate that the newsletters substantially interfered with Lehndorf's or Novotny's official responsibilities or with any

departmental operation.

The Union states that the Respondents' argument that it had a right to impose a reasonable restriction on the newsletter is laughable. The Chief never negotiated any alternatives and prohibited the posting of any newsletter. Lehndorf's letter was published for many months without any disruptive effect to the Department. It is well settled that prior restraint in First Amendment matters is applied only in the most extreme circumstances, and it was totally inappropriate under these circumstances.

#### The City's Reply:

The City takes issue with the Union's statement that the bulletin board was in a secured area and that access to the board is limited to employees of the Safety Building. The evidence proved that various employees as well as various public groups have access to the resume room and could view anything posted on the bulletin board. The Union's contention that it was engaging in a protected right is not supported by the evidence, which proved that the publications were not official publications of the Union. Lehndorf stated in his third issue that the permission from the Union to place the newsletter on their bulletin board did not mean that anyone connected with the Union agreed with anything he said.

Even if the newsletters could be said to be Union activity, the Union does not have the unfettered right to use the bulletin board regardless of the matter posted on it. The Union never had permission to post items which could be derogatory, defamatory or detrimental to morale and/or in violation of any Department policy. The articles in the newsletters progress from one making a sexual remark about Lehndorf's dog to articles containing derogatory and disrespectful references to women, different ethnic groups, other officers in the Department, to a down right vicious attack on the physical mannerisms of Chief Erickson. Lehndorf was counseled by Captains Puestohl and Van Ness on at least four separate occasions concerning the fact that parts of his newsletters were inappropriate, but he continued to write objectionable articles and made fun of the fact that he had been counseled about the newsletter.

In both the public and private sector, management has the right to restrict employees from voicing opinions during working hours that tend to disrupt morale or interfere with the operation of the work place. The Respondents argue that they clearly had the right to place a reasonable time, place and manner restriction on the posting and distribution of the publications at issue and violated no statutory or constitutional right of the Union in doing so.

The Respondents also believe that the Union failed to prove that there was Union hostility or anti-union animus. The Union wants this conclusion inferred from the fact that the Chief highlighted sections of the newsletter dealing with offensive matter as well as policy and collective bargaining concerns. However, the Chief testified that the highlighting was done after the prohibited practice was received and in discussions with counsel. The Chief has never told the Union that it could not criticize his policies or post articles critical of them on the bulletin board. The Union admitted that the bulletin board frequently had postings critical of the Department's

policies but those were not taken down. If the Respondents were attempting to censor criticism of Department policies, other postings would have been removed.

The Respondents take issue with the Union's statement that the Chief prohibited the posting of any newsletter regardless of content. What the Chief prohibited was the posting of further editions of "The Cutting Edge," because of the history of derogatory, demeaning and disrespectful articles about women, different nationalities and fellow and superior officers which continued after Lehndorf had been counseled about them. But Erickson placed no restriction on the Union's ability to post some other publication on the bulletin board which did not contain demeaning or derogatory statements and which were not in contravention of the Department rules and policies.

The fact that the Chief had not received any complaints regarding the racist or sexist nature of these newsletters and that no Union members had complained proves nothing. The articles were negative and hostile towards management and were clearly likely to have a disruptive effect on the management of the Department if allowed to continue. An employer does not need to allow events to unfold that disrupt the office before taking action. Chief Erickson believed that Lehndorf, as a supervisor, was jeopardizing his relationship with officers under his command because they would be reluctant to bring issues to his attention. The Respondents argue that a newsletter like "The Cutting Edge" would have a chilling effect on officers if everything they did was subject to ridicule on a public bulletin board.

#### DISCUSSION:

##### Interference:

Section 111.70(3)(a), Stats., states:

It is a prohibited practice for a municipal employer individually or in concert with others:

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

Section 111.70(2), Stats., referred to above, states:

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

To establish a claim of interference, a complainant must establish by a clear and satisfactory preponderance of the evidence that the respondent's conduct contained either some threat of reprisal

or promise of benefit which would tend to interfere with, restrain or coerce employes in the exercise of the section (2) rights. 2/ It is not necessary to demonstrate that the employer intended its conduct to have such effect, or even that there was actual interference; instead, interference may be proven by showing that the conduct has a reasonable tendency to interfere with the exercise of protected rights. 3/ However, employer conduct which may well have a reasonable tendency to interfere with an employe's exercise of Sec. 111.70(2) rights will generally not be found to violate of Sec. 111.70(3)(a)1 if the employer had valid business reasons for its actions. 4/

In City of LaCrosse, Dec. No. 17084-D (WERC, 10/83), the Commission elaborated on concerted and protected activity as follows:

The MERA does not refer to "protected" activities. Sec. 111.70(2) of the MERA identifies certain rights of municipal employes which, broadly stated, are "to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection..." The rights thus identified are enforced by Secs. 111.70(3) and 111.70(4) of MERA. Protected activity is, then, a shorthand reference to those lawful and concerted acts identified and enforced by the MERA. Thus, acts which are not lawful or not concerted within the meaning of Sec. 111.70(2) of MERA are not protected.

It is impossible to define "concerted" acts in the abstract. Analysis of what a concerted act is demands an examination of the facts of each case to determine whether employe behavior involved should be afforded the protection of Sec. 111.70(2) of MERA. At root, this determination demands an evaluation of whether the behavior involved manifests and furthers purely individual or collective concerns.

In applying the above analysis to the instant case, the Examiner finds that there are examples of lawful, concerted activity engaged in for the purpose of mutual aid or protection within the meaning of Sec. 111.70(2), Stats., and such examples are found in Finding of Fact #7. The Respondents have argued that the newsletters do not constitute concerted activity because they do not pertain to official Union business and were not official Union publications, and that the objectionable articles did not address any collective bargaining issues or concerted

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2/ Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84).

3/ City of Brookfield, Dec. No. 20691-A (WERC, 2/84).

4/ Cedar Grove-Belgium Area School District, Dec. No. 25849-B (WERC, 5/91).

activity undertaken by employees for their mutual aid and protection. However, the newsletters do not have to be official Union publications or pertain to official Union business to be concerted activity. 5/ The Respondents note that Lehndorf stated in his newsletter that the fact that he had permission from the Union to put the letter on their board did not mean that anyone connected with the Union agreed with anything he said. The relevant point is that the Union did give him permission to put his newsletter on the Union bulletin board and continued to give him such permission. The Union President, Tom Lichtfuss, testified that he allowed Lehndorf to continue to post the newsletters on the bulletin board because people were talking about matters of importance in the work place. Lichtfuss knew that the Chief objected to them before the Chief actually banned them, but he decided as Union president to allow the newsletters to be posted on the Union bulletin board.

While many of the articles in "*The Cutting Edge*" were not written for any mutual aid or protection and show no collective concerns, other articles show such collective concerns. As noted above in City of LaCrosse, the behavior must further collective concerns rather than individual concerns. There are several examples of articles that furthered collective concerns. In particular, the second issue dealt with stress and the physical fitness program, issues of ongoing importance to the bargaining unit. The fifth issue dealt with promotions and the sixth issue dealt with working conditions. The tenth issue dealt with sexual harassment in the work place and a memo given out about that topic. The fourteenth issue dealt with wages for CSO's. 6/ These particular issues are the strongest evidence of dealing with subjects for the purpose of mutual aid or protection. There are other articles which the Union asserts also fall into this category because they also deal with work place issues. However, the point here is that the newsletters generally, although not in every article, constituted concerted activity within the meaning of Sec. 111.70(2), Stats., contrary to the Respondents' assertions.

There is no dispute that there was a threat of discipline for posting further newsletters. Thus, the Complainant has established that there was concerted activity and that the Respondents threatened reprisals which would tend to interfere with the exercise of Sec. 111.70(2), Stats., rights. The threat of discipline obviously had a tendency to interfere with the exercise of those rights -- in fact, it prohibited such exercise entirely. The Respondents argued that there was no interference and no restriction was placed on the Union's ability to post material dealing with wages, hours and working conditions. But there was just such a restriction -- Chief Erickson told Novotny and Lehndorf that Lehndorf would not be allowed to put any newsletter on the bulletin board, even if the newsletters refrained from making any offensive comments. This restriction was overly broad and interfered with the rights guaranteed in Sec. 111.70(2), Stats., and therefore violates Sec. 111.70(3)(a)1, Stats.

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5/ School District of Nekoosa, Dec. No. 25026-A (Gratz, 5/88), aff'd by operation of law (WERC, 6/88).

6/ The record does not show whether CSO's are part of the bargaining unit.

The other question left in looking at the claim of interference is whether the Respondents had valid business reason for their actions, and therefore could restrict the use of the bulletin board for certain material (but not all as noted in the above paragraph). The City asserts that Erickson decided that the newsletter could no longer be posted on the bulletin board because it was demeaning and insulting to minorities, women and supervisory officials and created a hostile work environment and a liability issue for the City. The City claims that the restriction was tailored to carry out the Police Department's legitimate objectives of preserving the morale of the Department, maintaining a work environment free of harassment, and preserving the chain of command and authority of managers.

The Union argues that the valid business reason exception is severely limited in public employment, and that a public servant must occupy a policy-making position in order to justify abridgement of speech. The Union cites Pawlich vs. Barry, 126 Wis.2d 162 (Ct.App. 1985) to state that under both state and federal precedent, a non-policy making public employe cannot be disciplined for critical remarks about an employer. It is not the remarks about the employer that are objectionable (although this is a matter of some dispute), but the remarks about Hispanics and Asians and women that made the Respondents nervous about the newsletters' contents. Although the Union believes that the Chief did not object to the newsletters until they became critical of his administration or policies, the newsletters were always critical and the second issue shows that clearly. Certainly, the Chief admitted objecting to some of the articles that attacked his administration, such as the 9th issue regarding promotions and the 14th article regarding CSO wages.

The Respondents have a legitimate and valid business reason to keep the work environment free from offensive literature that is racist, sexist or derogatory to ethnic groups. The newsletters had elements of potentially offensive matters, as noted in Finding of Fact #6. The 11th and 13th issues had articles that could easily offend Hispanic people. The fact that Marquez, the only Hispanic person on the police force, did not object to it does not mean that the Employer should allow it to be posted. An employer may have to balance the right of an employe to free speech with the right of other employes to be free from a hostile environment where such free speech attacks and offends other people.

Accordingly, the Respondents did not violate Sec. 111.70(3)(a)1 by removing offensive newsletters. However, the blanket prohibition on the posting of any newsletter was overly broad, and violated Sec. 111.70(3)(a)1, Stats. Lehndorf could have published a newsletter that dealt with nothing but collective bargaining matters, and the Chief's refusal to allow Lehndorf to post any newsletter on the Association's bulletin board has a tendency to interfere with employe rights guaranteed in Sec. 111.70(2), Stats.

The Union has also complained that Konrad's memo which threatens the loss of the use of the bulletin board to all bargaining unit members interferes with the rights guaranteed in

Sec. 111.70(2), Stats. Konrad's memo followed the posting of the newsletter published by Novotny, called *The Silver Tongue*. The last half of the newsletter involved collective concerns -- the physical fitness program -- but the first half was a personal attack which is not protected by Sec. 111.70(2), Stats. The Commission has held that statements which are made as a personal attack and not in good faith are unprotected and an employe may be properly disciplined for such conduct, even if it is part of protected concerted activities. 7/ Konrad's memo did not threaten the loss of the bulletin board for the use of lawful, concerted activity. His memo threatened removing the bulletin board if such personal attacks, which are not protected, continued. 8/ Accordingly, there is no violation of MERA in Konrad's memo.

Discrimination:

Section 111.70(3)(a)3, Stats., provides that it is a prohibited practice for a municipal employer to encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment. In order to prevail on this count, a complainant must prove that:

1. The employe was engaged in law and concerted activities protected by MERA; and
2. The employer had knowledge of those activities; and
3. The employer was hostile towards those activities; and

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7/ City of Kenosha, Dec. No. 25226-B (WERC, 4/89).

8/ While Novotny testified that he was not referring to Chief Erickson in his article on Tourette Syndrome, it strains plausibility to find that this article was directed at anything other than the Chief's mannerisms.



4. The employer's action was based, at least in part, on hostility towards those activities. 9/

Evidence of hostility and illegal motive (factors three and four above) may be direct (such as with overt statements of hostility) or, as is usually the case, inferred from the circumstances. 10/

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9/ Milwaukee Board of School Directors, Dec. No. 23232-A (McLaughlin, 4/87), aff'd by operation of law, Dec. No. 23232-B (WERC, 4/87).

10/ Thus, 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 (CA-9, 1966):

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If direct evidence of hostility or illegal motive is found lacking, then one must look at the total circumstances surrounding the case. In order to uphold an allegation of a violation, these circumstances must be such as to give rise to an inference of pretext which is reasonably based upon established facts that can logically support such an inference. 11/ Regarding the fourth element, it is irrelevant that an employer has legitimate grounds for its action if one of the motivating factors was hostility toward the employee's protected concerted activity. 12/ In setting forth the "in-part" test, the State Supreme Court noted that an employer may not subject an employee to adverse consequences when one of the motivating factors is his or her union activities, no matter how many other valid reasons exist for the employer's action. 13/ Although the legitimate bases for an employer's actions may properly be considered in fashioning an appropriate remedy, discrimination against an employee due to concerted activity will not be encouraged or tolerated. 14/

The first two elements have previously been established, that the employee was engaged in lawful and concerted activity protected by MERA and that the employer knew about that activity. The issue for the charge of discrimination in this case centers on whether or not the Respondents

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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."

- 11/ Cooperative Education Service Agency #4, et al., Dec. No. 13100-E (Yaffe, 12/77), aff'd, Dec. No. 13100-G (WERC, 5/79).
- 12/ LaCrosse County (Hillview Nursing Home), Dec. No. 14704-B (WERC, 7/78).
- 13/ Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis.2d 540, 562 (1967).
- 14/ Employment Relations Dept. v. WERC, 122 Wis.2d 132, 141 (1985).

were hostile towards that activity and whether or not the removal of the newsletters and threat of discipline was based at least in part on hostility toward the activity.

The Union has argued that the Chief's motivation was in part due to his Union hostility, as shown by his own copy of the newsletters that highlight not only areas that might be considered offensive but also areas that related only to collective bargaining matters. The Chief claimed that he highlighted the newsletters in preparation for the hearing. However, the Union surmises that the Chief believed he could remove the newsletters if they contained material

related only to collective bargaining matters, since that is consistent with the Chief's decision to prohibit Lehndorf from posting his newsletter regardless of the content. If the Chief were only concerned about offensive material, he would not have prohibited Lehndorf from publishing a newsletter that had no offensive material, the Union asserts. The Respondents assert that the Union has failed to present any evidence to show that they acted with hostility.

The only evidence of potential hostility is that the Chief refused Lehndorf the option of posting newsletters even when Lehndorf offered to limit the content to omit any offensive material, and that the Chief highlighted portions of the newsletters which dealt with collective bargaining matters. The record does not show exactly when the Chief highlighted certain portions, and the Examiner cannot infer anything from the fact that the Chief highlighted those portions of the newsletters. In responding to a question of why he would not allow the newsletters to be continued under any circumstances, the Chief only stated that he was afraid that the City and the Department would be doubly liable if he allowed it to continue and the same thing happened. 15/ The memo he drafted to himself after his conversation with Lehndorf and Novotny show the same reasoning. The timing of the Chief's actions does not infer hostility. Although the Union believes that the Chief tolerated the newsletters until his administration and programs were under attack, the Department's administration and programs were a constant source of amusement for Lehndorf's sharp wit. The total circumstances of the case will not support an inference of hostility. Therefore, the charge of discrimination is dismissed.

Contract Violation:

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15/ TR., page 78.

The complaint alleges a violation of Sec. 111.70(3)(a)5, Stats., which makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement. 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 for final and binding arbitration. 16/ The parties' bargaining agreement has a provision for final and binding arbitration in Article XVI. The parties must live with their bargain, and the Commission's policy is to give full effect to the parties' agreed-upon procedures for resolving disputes arising under their contract. There, the undersigned will not exercise the Commission's jurisdiction over the contract dispute and the allegation of a violation of Sec. 111.70(3)(3)5, Stats., has been dismissed.

Because no evidence was presented or argued that Respondents violated Sec. 111.70(3)(a)2, Stats., this portion of the complaint has also been dismissed.

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16/ Joint School District No. 1, City of Green Bay, et al., Dec. No. 16753-A, B (WERC, 12/79); Board of School Directors of Milwaukee, Dec. No. 15825-B (WERC, 6/79); Oostburg Joint School District, Dec. No. 11196-A, B (WERC, 12/79).

Conclusion:

For the reasons stated above, the Examiner has found a violation of Sec. 111.70(3)(a)1, Stats., in the overly broad order to not post any newsletter on the Association's bulletin board, no matter what the content. All other allegations have been dismissed. The Respondents' request for attorney fees is denied.

Dated at Elkhorn, Wisconsin this 19th day of August, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Karen J. Mawhinney /s/  
Karen J. Mawhinney, Examiner