STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO, Complainant,

vs.

WALWORTH COUNTY METROPOLITAN SEWERAGE DISTRICT, Respondent.

Case 3
No. 55049
MP-3287

Decision No. 29129-A

Appearances:

Mr. Laurence S. Rodenstein, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, on behalf of the Complainant.

Axley Brynelson, Attorneys at Law, 2 East Mifflin Street, P.O. Box 1767, Madison, Wisconsin 53701-1767, by **Mr. Michael J. Westcott** and **Ms. Leslie A. Fiskey**, on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On April 1, 1997, Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter the Complainant, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission wherein it alleged that the Walworth County Metropolitan Sewerage District, hereinafter the Respondent, violated Secs. 111.70(3)(a)1, 2, 3 and (3)(c), Stats. by discharging an employe for engaging in protected, concerted activity immediately prior to the representation election among Respondent's employes. On April 16, 1997, the Respondent filed an answer to the complaint wherein it denied it had committed the prohibited practices alleged, and also raised as affirmative defenses that it had no knowledge of the alleged union organizing activities of that employe, that it had legitimate, non-discriminatory business reasons for discharging the employe, who was a probationary employe, that Complainant has failed to state a claim under Sec. 111.70(3)(c), Stats., and that the employe has failed to take reasonable measures to mitigate his damages.

The Commission appointed David E. Shaw, a member of its staff, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the matter. Hearing was held before the Examiner on December 2, 1997, in Elkhorn, Wisconsin. A stenographic transcript was made of the hearing and the parties filed post-hearing briefs by January 26, 1998.

Having considered the evidence and arguments of the parties, the Examiner now makes and issues the following

FINDINGS OF FACT

1. The Respondent, Walworth County Metropolitan Sewerage District, is a municipal employer with its principal offices located at 975 West Walworth Avenue, Delavan, Wisconsin 53121. Respondent maintains and operates an advanced wastewater treatment facility located in Delavan, Wisconsin which collects and recycles domestic wastewater. At all times material herein, Joseph Cannestra has been employed as Respondent's Administrator, Stephen Miller has been employed as its Chief of Operations, and Steven Scheff has been employed as its Operations and Maintenance Supervisor. Overall supervision of the Respondent is by a Board of Commissioners appointed by the Walworth County Board of Supervisors. Cannestra reports to that Board of Commissioners.

2. The Complainant, Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter the Union, is a labor organization with its principal offices located at 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903. At all times material herein Robert Lyons has been employed as the Union's Executive Director and Laurence Rodenstein has been employed as a Staff Representative for the Union.

3. Ray Greenlee has been employed by Respondent as an Operator since approximately 1980. Peter Borgo has been employed by Respondent as a Laboratory Technician/Supervisor since approximately 1984. Mark Polazzo has been employed by Respondent as a Waste Water Operator since April of 1996.

Robert Smage was employed by Respondent as a Maintenance Mechanic from September 16, 1996 until his termination, effective March 7, 1997. New employes serve a one-year probationary period and Smage was still in his probationary period at the time he was terminated. Respondent's employes are "at will" employes.

4. In 1995, Complainant petitioned for an election among Respondent's employes. During that organizing campaign, Cannestra became aware that Borgo supported the organizing effort. Cannestra wrote letters to several employes at that time, including Borgo, which they received two or three days prior to the election. In his letter to Borgo, Cannestra indicated he

was aware Borgo supported the Union organizing effort and noted that Borgo had been chosen as the "bearer of the flag" for the cause. Cannestra went on to list favors or privileges that the Respondent had granted Borgo in the past and indicated that such flexibility on the Respondent's part would probably not be available if the employes unionized. The Respondent engaged in a campaign prior to the representation election to encourage its employes to vote against having a union represent them. In that representation election, a majority of the employes voted not to have union representation. There was no retaliatory action taken against Borgo or other employes as a result of their attempt to organize a union.

5. On July 23, 1996, Cannestra and Scheff interviewed Smage for the position of Maintenance Mechanic with Respondent. During that interview, Smage was given a copy of the job description for the Maintenance Mechanic position which listed as one of the "Qualifications", the "Ability to obtain Wisconsin Commercial Driver's License," and listed a "Commercial Driver's License" (CDL) under "Desirable Training and Experience". Also during that interview, Scheff and Cannestra asked Smage questions from a prepared list, which included the following:

> 5. Do you have any experience driving trucks, farm equipment, tractors or other heavy equipment? Do you have a CDL? Is there anything in your driving record that could prevent you from obtaining a CDL?

In addition to these questions, Scheff also asked Smage if he had any "OUI's", "DUI's", "DWI's", or any other problems in his driving record that would prevent him from obtaining a CDL. Smage responded to the effect that there was no problem in that regard. At that time, Smage's Wisconsin driver's license had been revoked since March 15, 1996 for operating under the influence (OUI) and he was not eligible for reinstatement of his license until May 23, 1997. Smage also did not have an "occupational" license which would have allowed him to operate a vehicle on a restricted basis. Since his driver's license was under revocation and he did not already possess a CDL, Smage was not eligible to obtain a CDL during the period he was employed.

Smage began work for the Respondent as a Maintenance Mechanic on September 16, 1996 and he thereafter operated Respondent's vehicles on public highways on a routine basis as part of his duties related to maintenance at the sludge sites and virus sites, and drove a Respondent-owned vehicle to attend a workshop in Cedarburg, Wisconsin, and also drove Scheff to Madison, Wisconsin in a Respondent-owned vehicle to pick up a truck. At no time during his employment with Respondent did Smage have either a regular driver's license or a restricted occupational driver's license, and at no time did Smage inform anyone in Respondent's management that he did not possess a valid Wisconsin driver's license or of his driving record in Wisconsin. Smage applied for and received a temporary occupational driver's license on March 7, 1997 and received a "permanent" occupational driver's license on March 10, 1997.

6. Early in January of 1997, a majority of Respondent's employes met with Complainant's Executive Director, Robert Lyons, at the New Horizons Restaurant to learn what having a union might do for them and to discuss whether to attempt to organize. Lyons explained their legal rights and protections with regard to organizing and many of the employes present signed cards for the purpose of obtaining a union representation election. The persons present decided to meet again later in January at the home of Don Collins, an employe of Respondent.

On January 24, 1997, Complainant filed an election petition with the Wisconsin Employment Relations Commission requesting that the Commission conduct a representation election among Respondent's employes.

By letter of January 27, 1997, Douglas Knudson, an Examiner on the Commission's staff, notified Respondent of Complainant's election petition along with a copy of said petition, which Cannestra received mid-afternoon on Tuesday, January 28, 1997. Cannestra was not aware of this organizing effort on the part of Respondent's employes until he received the letter and copy of the election petition from Knudson.

On January 30, 1997, approximately twelve of Respondent's employes again met with Lyons at the home of employe Don Collins to discuss organizing a union. At that meeting, the employes discussed the issues they would like to see addressed, what having a union could do for them, the impact of unionizing on work assignments, and looked at collective bargaining agreements the Union had negotiated. The employes also decided Smage and Greenlee would be the "contact persons" who Lyons could contact or who would contact Lyons.

After he received Knudson's letter, Cannestra had overheard employes discussing that there was going to be a meeting at Collins' home for the purpose of discussing organizing a union and afterward heard that there had been such a meeting. On the Monday following the meeting at Collins' home, at the regular weekly meeting, Cannestra raised the topic of the employes' interest in organizing a union, made comments regarding a number of issues or concerns that had also been raised at the meeting at Collins' home and commented to the effect that he felt that the employes did not need a union. Due to Cannestra's having commented on a number of issues that had been discussed at the meeting at Collins' home, at least several of the employes suspected that Cannestra had been informed about that meeting and what was discussed.

7. Respondent's pay periods are bi-weekly and begin on a Wednesday and end on a Tuesday. Employes fill in their own time sheets, indicating their hours worked each day and turn in the time sheets weekly, either at the end of the work day on Tuesday or the start of the work day on Wednesday. Miller is responsible for reviewing and approving the employes' time sheets and he then gives them to Cannestra who also reviews them and gives final approval for

pay purposes. Employes are permitted, with approval, to use "make up" time for unexpected emergencies - take the time off and then make it up later, usually in the same pay period if it is possible. Employes are also permitted to use compensatory time they have accumulated to be taken later with management approval. To use paid time off, such as vacation, compensatory time, floating holidays and make-up time, employes are required to submit leave request slips to their supervisor.

On January 28, 1997, Smage went to Respondent's Chief of Operations, Steve Miller, at approximately 12:30 p.m. and asked if he could leave early for a family emergency and Miller told him that he could. Later that afternoon, Smage went to Cannestra and told him that "Steve" had given him permission to use compensatory time that afternoon and showed Cannestra his time slip sheet with "5" written in the space for "regular hours" for that date. Smage left work early on that date and called in the next day, Wednesday, January 29th, saying he was taking a floating holiday for that day. Smage returned to work on Thursday, January 30, 1997.

When Miller was reviewing the employes' time sheets for the pay period (January 22 - February 4) he noticed that Smage had indicated he took a "floating holiday" for January 29th, the first day of the second week of that pay period, and had not submitted a leave request slip for that floating holiday. Miller took Smage's time sheets to Cannestra and asked him how he should handle it. In reviewing that matter, Miller and Cannestra discovered that the "5" for the number of regular hours worked on January 28, had been changed to an "8". Cannestra checked with Scheff to see if Smage had made any request to him to use compensatory time for that day or arranged with him to make up the three hours from January 28 and Scheff told him that Smage had not done so. Smage submitted a leave request slip for January 29th on February 5, 1997, and did not make arrangements to make up the time he was off on January 28th.

8. In November of 1996, Scheff held a meeting with four employes, including Smage, in part for the purpose of setting the goal for them to obtain their CDL in early 1997. The topic was discussed in anticipation of transporting sludge in 1997. Scheff discussed this again with these individual employes during his regular quarterly talks with employes in early January of 1997. Scheff was concerned with Smage's hesitancy about taking the test for the CDL and his comment that he was having some problems renewing his driver's license. Scheff later discussed his concerns about Smage with Miller and Cannestra. Cannestra subsequently talked to a representative of Respondent's liability insurance carrier, Lehn, in the latter part of February of 1997. Lehn and Cannestra discussed obtaining a new list of the Respondent's employes with their driver's license numbers so the carrier could update its records. That had been done in the past by posting a sign-up sheet for employes to write in their name and driver's license number. Cannestra posted such a sign-up sheet from February 24 to February 26, 1997 in the breakroom. Next to his name, Smage had written in Scheff's driver's license number, which also appeared on the sign-up sheet beside Scheff's name. Cannestra sent the sign-up sheet

to Lehn, who then called Cannestra informing him that the number beside Smage's name was the same as Scheff's and asked Cannestra to have the employes verify their driver's license numbers. Without saying anything about Scheff's number being by Smage's name, Cannestra took the sign-up sheet around to the employes before work or on break time to have them verify their driver's license number. When Cannestra asked Smage to verify his number, Smage took out his wallet and then changed the number next to his name to the correct number. Cannestra asked him about the wrong number next to his name and Smage answered to the effect "It must have been them guys." Cannestra asked who that was and Smage then explained that other employes kiddingly refer to him as "Steve's brother" and took Cannestra out to his truck and showed him a sticker that said "Steve's brother". After Cannestra left, Smage and several other employes went to the "P.M. Shop" at which time Smage told them he had made a mistake and put Scheff's driver's license number next to his own name, more or less as a joke.

Cannestra sent the corrected sign-up sheet back to Lehn who then contacted the Wisconsin Department of Transportation to check Smage's driving record. Lehn subsequently sent Cannestra a summary of Smage's driving record which noted at the end that his driver's license had been revoked. Lehn later sent Cannestra a more detailed record which indicated that Smage's driver's license was on revocation for "OUI" at the time he started his employment with Respondent and that he did not have an occupational driver's license.

9. Near the end of the workday on Friday, March 7, 1997, Cannestra met with Smage, Miller and Scheff. Cannestra again asked Smage about the incorrect driver's license number next to his name on the sign-up sheet and asked him who "them guys" were. Smage then said that he must have written down his "old" driver's license number. When Cannestra said that could not be, as it was Scheff's number, Smage did not respond. Cannestra then voiced his concerns about Smage driving the Respondent's vehicles without a license. In response, Smage stated that he did have a driver's license. Cannestra then informed Smage that he was being terminated for falsifying his time sheet and his driver's license number, lying during his interview in response to the questions about his ability to obtain a CDL and for driving Respondent's vehicles on public roads without a driver's license. Cannestra also gave Smage the following written notice of termination:

> March 7, 1997
>
> Dear Mr. Smage:
>
> As you know, you are a probationary employee. Numerous irregularities regarding your employment have come to my attention. After reviewing these irregularities involving your employment, I conclude that your employment must be terminated as of this date.

My review has revealed that you:

1. Have falsified your time sheet.

2. Provided inaccurate information during your job interview regarding your eligibility to obtain a commercial driver's license.

3. Refused to cooperate in my review regarding the facts and circumstances resulting in an inaccurate driver's license number for you being submitted to our motor vehicle insurer.

The termination of your employment is effective immediately. You will be provided information regarding your rights to continuation insurance coverage.

Yours truly,

WALWORTH COUNTY METROPOLITAN
SEWERAGE DISTRICT

Joseph S. Cannestra /s/
Joseph S. Cannestra
Administrator

Cannestra and Scheff then escorted Smage from Respondent's premises. Smage was the first employe to be terminated since at least 1984.

10. Following the regular weekly meeting on March 10, 1997, Cannestra informed the employes present that Smage had been discharged and that there were reasons for his being fired; that Smage had violated his trust on three occasions; and that it had nothing to do with the Union. Cannestra also indicated that his lawyers had said it was not a good idea to fire Smage at a time when the employes are trying to obtain a union, but that it was up to him and he felt he had the right to fire Smage since he was still on probation. Cannestra did not state the specific reasons for terminating Smage.

At sometime subsequent to March 10, 1997, during break time in the breakroom, Cannestra was asked by an employe about what was happening with Smage, and Cannestra responded to the effect that he had been denied unemployment compensation and reiterated that his discharge did not have anything to do with the Union.

11. Prior to Smage's termination, Respondent's employes had discussions at work regarding the union organizing effort, but did not do so following being notified of his termination by Cannestra on March 10, 1997.

12. Cannestra, Miller and Scheff were not aware that Smage had been chosen as a "contact person" for the Union organizing effort until Cannestra received a copy of the instant complaint filed in this case on April 1, 1997. Greenlee subsequently stated to Cannestra that he knew Smage was not discharged because of his union activities.

13. The Respondent had legitimate non-discriminatory business reasons for discharging Robert Smage on March 7, 1997 and anti-union animus was not part of the basis for Cannestra's decision to discharge Smage on that date.

14. Cannestra's addressing of several topics at the regular weekly staff meeting that had been discussed by the employes and Lyons at Collins' home the preceding week, did not have a reasonable tendency to interfere with the exercises of those employes' rights under Sec. 111.70(2), Stats.

15. The Respondent had valid business reasons for announcing Smage's termination and stating that the termination had nothing to do with the Union.

Based upon the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. The Respondent, Walworth County Metropolitan Sewerage District, its officers and agents, by discharging Robert Smage from employment, did not discriminate within the meaning of Sec. 111.70(3)(a)3, Stats.

2. The Respondent, Walworth County Metropolitan Sewerage District, its officers and agents, by the comments of Joseph Cannestra regarding the discharge of Robert Smage and regarding certain topics that had been discussed at the Union's organizing meeting held on January 30, 1997 did not interfere with the exercise of Respondent's employes' rights under Sec. 111.70(2), Stats., within the meaning of Sec. 111.70(3)(a)1, Stats.

3. Joseph Cannestra, acting on behalf of Respondent Walworth County Metropolitan Sewerage District, by the acts set forth in paragraphs 1 and 2, did not violate Sec. 111.70(3)(c), Stats.

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

ORDER

The complaint filed in this matter is dismissed in its entirety.

Dated at Madison, Wisconsin, this 21st day of April, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/
David E. Shaw, Examiner

WALWORTH COUNTY (METROPOLITAN SEWERAGE DISTRICT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Union filed a complaint with the Commission alleging that the Respondent violated Sec. 111.70(3)(a)3, and derivatively, 1, Stats., by discharging its employe, Robert Smage, at least in part, because of its animosity towards his having engaged in protected, concerted activities, and violated Sec. 111.70(3)(a)1, Stats., by interfering with its employes' rights under MERA by its Administrator, Joseph Cannestra, making comments at a weekly staff meeting about topics that had been discussed at a Union organizing meeting, and by his telling Respondent's employes on at least two occasions that the discharge of Smage had nothing to do with the Union, and that Cannestra's actions on behalf of Respondent also violated Sec. 111.70(3)(c), Stats.

The Respondent filed an answer to the Union's complaint wherein it denied that it had committed any prohibited practices by discharging Smage or by the comments he made to its employes by Cannestra, and alleged as affirmative defenses that it had no knowledge of Smage's alleged union organizing activities, that it had legitimate non-discriminatory business reasons for discharging Smage, who was a probationary employe, that the complaint fails to state a claim under Sec. 111.70(3)(c), Stats., and that Smage has failed to take reasonable measures to mitigate his damages.

POSITIONS OF THE PARTIES

Union

With regard to the alleged violation of Sec. 111.70(3)(a)3, Stats., the Union notes that there is a four-part test that must be satisfied to establish such a violation in this case:

1. Smage was engaged in protected activities; and

2. Respondent was aware of those activities; and

3. Respondent was hostile to those activities; and

4. Respondent's conduct was motivated in whole or in part, by hostility toward the protected activity.

MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. W.E.R.B., 35 Wis. 2d 540 (1967); DEPARTMENT OF EMPLOYMENT RELATIONS (DER) V. W.E.R.C., 122 Wis. 2d 132 (1985). Whether or not the

employer has legitimate grounds for its actions, if one of the motivating factors for the actions is the employe's protected, concerted activity, the discharge cannot be upheld. MUSKEGO-NORWAY, supra; DER, supra; and LACROSSE COUNTY (HILLVIEW NURSING HOME), DEC. NO. 14704-B (WERC, 7/78).

Evidence of hostility and illegal motivation may be inferred from statements or from circumstances. TOWN OF MERCER, DEC. NO. 14783-A (Greco, 3/77). Under the Court's decision in MUSKEGO-NORWAY, supra, the Commission may draw inferences regarding union animus from established facts which logically support such inferences. The Court noted in that case that the Commission (then Board) placed considerable weight on the timing of the dismissal. 35 Wis. 2d at 563-564. In DER, supra, the Commission noted the difficulty faced in proving union animus as the motivation for the employer's actions and the need to rely in part upon inferences that "can reasonably be drawn from facts or testimony."

The Union asserts several inferences can be drawn from the testimony of employes Greenlee, Borgo and Polazzo regarding Cannestra's statements about the motivation behind Smage's dismissal. Cannestra made his statements on March 10, 1997, the first working day following Smage's dismissal on March 7th, at the end of a weekly staff meeting at which all of the employes were present. Those statements contained two "very problematic elements":

(1) Cannestra fired Smage even though his lawyers did not think it was a good time, nor did they believe it was a good idea.

(2) Cannestra disclaimed any connection between his decision to discharge Smage and Smage's union activity.

The last statement was also repeated by Cannestra later at an assembly of employes. The Union asserts that it may be inferred from Cannestra's repeated denials that he believed that others would interpret his actions as being the result of Smage's union activity.

With regard to the first two elements of the four-part test, Smage was generally recognized by employes as being one of two Union contact persons and was designated as such at the organizing meeting held at employe Collins' home. Testimony showed that Cannestra knew many of the details of that meeting. It is also reasonable to infer that if he knew of Borgo's role in the Union's previous organizing campaign, he knew of Smage's and Greenlee's role in this organizing drive. Cannestra's disavowal of union animus as a motive in terminating Smage further demonstrates his knowledge of Smage's union activity.

Cannestra's hostility can be illustrated by his action in the Union's first organizing drive, as well as by his actions in the current drive. In the first drive, Cannestra composed a multi-page letter to Borgo as the "bearer of the flag" for the Union prior to the first election. That

letter is "replete with unstated threats" of withdrawing privileges if the Union won and is "fraught with cajole and implied threats." Cannestra's hostility is amplified in the letter's attachment of Borgo's salary history and a very broad questionnaire designed to discourage union organization. The purpose to be inferred from all of this was to make Borgo think twice about his future with Respondent as a result of his role as the Union contact person.

Cannestra's intent regarding his statements to employes after the meeting at Collins' home was similar to his intent regarding his actions toward Borgo. He wanted to make it clear to the employes that he knew exactly what had taken place at the organizing meeting at Collins' home in order to discourage union activity by letting them know they could not organize in privacy. No other inference can be reasonably drawn as to why he would publicly describe issues discussed at the meeting the following day, but that he wanted to make his knowledge of the meeting known. His comments had the desired effect of interfering with the organizing campaign, as there is no record of any subsequent Union meeting between the meeting at Collins' and the termination of Smage.

The fourth element of the test, i.e., motive, is often the most difficult to prove. While Union animus may be inferred from Cannestra's stated animus toward Union organizing, the best evidence is his repeated denials that Smage's termination was not due to Union activity. The Union questions why Cannestra would tell the employes the reasons he fired Smage and that it had nothing to do with his Union activity, and why he would discuss the termination of any employe in front of all of the employes. The Union asserts that the Respondent's witness, Polazzo, testified that few employes believed Cannestra and felt what he really meant was that he fired Smage <u>because</u> of his union activity.

The Union further questions why Cannestra would "brag" to the employes that he fired Smage even though his attorneys indicated the timing was bad and that the action was not a good idea, unless his statements were designed to intimidate and coerce employes into giving up their organizing drive - to let them know he can fire them for Union activity even if his lawyers tell him he cannot.

The Union concludes that it has satisfied the four-part test necessary to prove a violation of Sec. 111.70(3)(a)3, Stats.

With regard to the alleged violation of Sec. 111.70(3)(a)1, Stats., the Union asserts that a violation occurs when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their rights under Sec. 111.70(2), Stats., and that a violation will be found even if the employer did not intend to interfere. CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 3/91).

The testimony of Polazzo confirms that Cannestra's statements and his firing of Smage had a chilling effect on the exercise of the employe's rights to organize a union. Polazzo testified that after Smage was fired, employes no longer discussed the union at work and that at meetings held off-premises, employes expressed concern that they might be fired like Smage. Since Polazzo was called as Respondent's witness, his testimony should be fully credited. It may be inferred from that testimony that the message Cannestra wished to send employes by firing Smage was clearly received by those employes.

Another example of statements that had a chilling effect on protected activity was Cannestra's recitation of the issues discussed at the meeting at Collins' home. Greenlee testified that Cannestra also stated that the employes did not need a union regarding those issues.

The Union asserts that Cannestra's testimony was contradicted on the pertinent points by three credible witnesses and their contemporaneous statements and that his testimony was not credible. Cannestra's actions toward Smage were calculated to have a chilling effect on the employes' organizing.

Last, the Union asserts that Cannestra's acting as an agent for Respondent in firing Smage and his "reckless disregard" for the legal advice he received in this matter constitutes a violation of Sec. 111.70(3)(c), Stats.

Respondent

The Respondent first asserts that the Union has failed to prove a violation of Sec. 111.70(3)(a)3, Stats. First, there is no evidence to support a claim that Cannestra, or any other supervisor, was aware of Smage's alleged union activities prior to his discharge. Further, the extent of Smage's involvement in organizing a union is questionable. Greenlee testified that Smage was not identified as a principal union organizer at the meeting at Collins', but rather, he and Greenlee were mentioned as "contact persons". Borgo also testified that Smage and Greenlee were not identified as principal organizers, but as persons Lyons could contact to keep channels open. Thus, the Union has not even demonstrated Smage was engaged in any protected, concerted activity. As to Cannestra's knowledge of Smage's involvement in the Union, no witness testified that Cannestra had knowledge that Smage was involved in any of the organizing prior to his discharge. Greenlee testified that he never identified Smage to Cannestra in that manner prior to the discharge. Polazzo admitted he had no evidence that would lead him to believe Cannestra had any knowledge of Smage's having been identified as a contact person or organizer for the Union, and that he did not know if such was "common knowledge" among other employes or among management personnel. Polazzo could not recall discussions among employes about who was heading the organizing drive, nor of any case of statements made in discussions between employes getting back to Cannestra. There is no evidence that Smage's organizing activities were so highly visible so as to make it plausible to conclude his activity was

common knowledge. There is also no evidence that either Scheff or Miller had knowledge prior to Smage's discharge that he had been identified as a union organizer or contact person. That is consistent with Scheff's testimony that he did not learn of Smage's alleged involvement in the Union's organizing until about a month after his discharge.

The Union cannot rely on Cannestra's discussion with employes at the first weekly meeting in February of 1997 to prove his awareness, as that meeting was the first following Cannestra's receipt of the copy of the January 27, 1997, election petition he received from the Commission. Naturally, Cannestra wished to speak to the employes about the petition. The Union's contention that Cannestra was aware of Smage's activities based upon an alleged verbatim repeat of what was said at Collins' home, is based upon "vague, non-specific 'impressions' and 'beliefs' unsupported by fact." While Greenlee testified he and Borgo had the "impression", and Borgo testified he "believed" that Cannestra was aware of what took place at Collins', they could not cite specific statements from Cannestra to support their belief. Borgo testified he noted the similarities in the topics of discussion at the two meetings, but could not identify a single specific topic that had been discussed at Collins' and by Cannestra. As there is no evidence that Cannestra was aware of Smage's alleged involvement in organizing a union, his decision to discharge Smage could not have been based, even in part, on hostility toward those activities.

Next, the Respondent asserts the Union has failed to establish that Cannestra bore animus toward the Union in general or toward Smage specifically. There is no evidence in the record of any derogatory comments regarding the Union or referencing Smage's alleged involvement with the Union. Cannestra's statement of his opinion that the employes are better off without a union is merely the exercise of an employer's right of free speech and is not sufficient to establish animus. ASHWAUBENON SCHOOL DISTRICT NO. 1, DEC. NO. 14774-A (WERC, 10/77); VILLAGE OF NECEDAH, DEC. NO. 28652-B (Greco, 8/96) aff'd by operation of law, DEC. NO. 28652-C (WERC, 9/96).

The Union's submission of campaign material provided to employes in the first organizational drive two years earlier is both irrelevant and insufficient to establish animus. Borgo conceded the letter sent to him was merely designed to persuade employes they do not need a union. Further, even though Cannestra learned of Borgo's union activity in the first organizing drive, no retaliatory action was taken against him. Similarly, in the present organizing drive, no action has been taken against Greenlee or Collins even though Cannestra may have been made aware of their union organizing involvement since Smage's discharge. The difference between them and Smage is that the latter engaged in misconduct.

Respondent also asserts that the Union has presented no evidence that Cannestra's reasons for discharging Smage were pretextual or that his decision was based upon hostility toward Smage's alleged union activities. In determining motive, it is appropriate to consider the evidence showing that Smage was discharged for legitimate reasons. D.E.R., 122 Wis. 2d at 142; MUSKEGO-NORWAY, supra. An employer is not required to demonstrate just cause for its action, rather the focus is whether the Union has met its burden of proving Smage was fired for union activities. Even if just cause was required, Respondent has easily met that standard based upon the record. The record evidence regarding the reasons for Smage's discharge is uncontroverted. Smage did not dispute the testimony of Respondent's witnesses regarding the circumstances that gave rise to the decision to fire him. Thus, an adverse inference is appropriately drawn against the Union on that basis. CONEY V. MILWAUKEE & S.T. CORP., 8 Wis. 2d 520, 527 (1959). The undisputed testimony establishes that Cannestra's reasons for discharging Smage were not pretextual, rather they were consistent with legitimate employer expectations of employe honesty. Smage first lied in his interview regarding his driving record and his ability to obtain a CDL. He subsequently falsified his time sheet for January 28, 1997, and lied to Cannestra about having received approval to use compensatory time from Miller. Smage later provided false information regarding his driver's license number and then lied to Cannestra about how the incorrect number was placed next to his name. Further, Smage's job duties required him to drive Respondent's vehicles on public roadways, and the fact that he did so without a driver's license placed the Respondent at significant risk for liability.

Regardless of the number of Smage's duties that would require a CDL, the eligibility to obtain a CDL is a qualification of his job and that requirement is communicated to all applicants for the Maintenance Mechanic position. More importantly, Smage was not fired for not having a CDL, but for lying about his eligibility to obtain a CDL, falsifying his driver's license number and for continuing to drive Respondent's vehicles without a license. Further, Smage was a probationary employe during all of this time and there was no evidence that Smage was treated differently than any other of Respondent's employes who engaged in similar misconduct. Cannestra's decision to fire Smage was based upon legitimate business reasons, and not upon hostility toward the Union, and it cannot reasonably be concluded otherwise based upon the record.

While the timing of Smage's termination may be probative, it is not dispositive. ROCK COUNTY, DEC. NO. 28494-A (Jones, 1/96) aff'd by operation of law, DEC. NO. 28494-B (WERC, 2/96). In this case, Cannestra made the decision to discharge Smage after learning that Smage had been driving Respondent's vehicles without a driver's license and combining that with Smage's having lied and falsified records. Absent any evidence of hostility, the timing of Smage's discharge cannot be used to establish discrimination.

With regard to alleged interference, Respondent asserts that the test is not whether an employe made comments critical of the employes' collective bargaining representative, but whether such statements expressed or implied threats of reprisal or promises of benefits. JANESVILLE SCHOOL DISTRICT, DEC. NO. 8791-A (WERC, 3/69). Even employer conduct that would have a reasonable tendency to interfere will not be found to violate Sec. 111.70(3)(a)1, Stats., if the employer has valid reasons for its actions. SCHOOL DISTRICT OF RIPON, DEC. NO. 27665-A (McLaughlin, 1/94) aff'd by operation of law, DEC. NO. 27665-B (WERC, 2/94). Respondent had valid reasons for terminating Smage and none of its conduct contained any threat or promise. Cannestra's reassurance that the termination had nothing to do with the Union was an attempt by Cannestra to provide employes with the truth about the termination and to dispel any false rumors relating to the Union or that Cannestra had a hostile intent toward the Union. Polazzo testified that rumors about Smage's termination started before Cannestra spoke to the employes on March 10th and Borgo admitted that a termination during a union organizing drive would concern employes and could cause them to think that the organizing activity had something to do with it. The attempt to characterize Cannestra's comments on March 10th as a "formal meeting" regarding Smage's termination is misguided. That discussion took place after the regular weekly meeting. Borgo also admitted that he had no basis of comparison as to whether such was out of character for Cannestra, as he could not recall any other employe being terminated in his twelve years with Respondent.

Cannestra's statement that Smage had been denied unemployment compensation benefits was in response to an employe's question and not at a meeting, as the Union alleged. There was no testimony to support the allegation in the complaint that Cannestra's tone was intimidating. Also, the argument that the notations in the written statements of Borgo, Greenlee and Polazzo that they did not want the statements shared with Cannestra shows they were afraid of him, is unconvincing. Greenlee admitted that Cannestra's opinion the employes were better off without a union was not the reason he did not want his statement shared with his employer. Borgo's concern about protecting confidentiality is questionable, since he knew from prior experience that Cannestra would not retaliate. The Union has failed to prove that Respondent did not have valid business reasons for its conduct or that its conduct had a reasonable tendency to interfere with employes' exercise of their rights under Sec. 111.70(2), Stats.

With regard to the alleged violation of Sec. 111.70(3)(a)2, Stats., Respondent asserts that there is no evidence that Respondent's conduct interfered with in any manner, or threatened the independence of the Union so as to turn it into a proponent of Respondent's interests rather than of the employes'. Thus, no violation may be found in that regard.

As to remedy if a violation is found, the Respondent asserts that demands for make-whole relief and reinstatement must be denied. In dual motive cases, the examiner must consider the legitimate reasons that contributed to the employer's decision to terminate the employe. D.E.R.,

supra. It would be inappropriate to reinstate a probationary employe who engaged in conduct such as Smage has and subjected his employer to substantial potential liability.

DISCUSSION

(3)(a)3

Sec. 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer:

> 3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; but the prohibition shall not apply to a fair-share agreement.

It is well established that in order to establish a violation of Sec. 111.70(3)(a)3, Stats., it must be proved by a clear and satisfactory preponderance of the evidence that the municipal employe was engaged in protected, concerted activity; that the municipal employer's agents were aware of that activity; that the municipal employer, or its agents, were hostile towards that activity; and that the municipal employer's actions toward the municipal employe were motivated, at least in part, by its hostility toward the municipal employe's protected, concerted activity. EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122 Wis. 2d 132 (1985).

The first part of the above test is satisfied by Smage's involvement in the Union's organizing drive as one of the "contact persons" with whom the Union's organizer, Lyons, could communicate.

As to the second part of the test, the Union relies on Cannestra's comments at the weekly staff meeting on the Monday following the organizing meeting at Collins' home to establish that he was aware Smage and Greenlee had been selected as the "contact persons" for the Union at that meeting. The testimony in that regard is that Cannestra made comments regarding a number of issues or topics that had been discussed at the meeting, giving employes the impression that he knew all that had gone on at the meeting. Both Cannestra and Scheff denied knowing prior to their decision to terminate Smage that he was a "contact person" for the Union. The meeting at Collins' was on Thursday, January 30, 1997 and Cannestra had received the letter from Knudson and a copy of the Union's election petition on Tuesday, January 28th. Cannestra was aware of the organizing effort prior to the meeting at Collins' and he admitted overhearing employes talking about an upcoming meeting and afterward hearing there had been a meeting at Collins'. In order for Cannestra to comment on topics that had been discussed at that meeting it was not necessary for him to have known what had been discussed at the meeting. There are only so many issues or concerns that cause employes to consider organizing a union to represent them and these same parties had gone through a union election campaign less than two years before.

Comments by Cannestra regarding insurance, wages, etc., are as easily explained by Cannestra's prior experience with the Union's first organizing campaign as they are by his having been informed of the contents of the meeting by some unidentified informant. The evidence is at best inconclusive on this point.

Assuming *arguendo*, that the Union has established that Cannestra was aware of Smage's having been selected as one of the Union "contact persons", the Union must establish animus toward such activity on Cannestra's part, and that such animus was part of the basis for the decision to terminate Smage. With regard to animus, the Union correctly notes that animus may be inferred from facts established in the record. In this case, the Union relies upon Cannestra's efforts in the first representation election campaign, especially his letter to Borgo, as well as his statements at the weekly meeting following the meeting at Collins' home and his statements that Smage's discharge had nothing to do with the Union. While Cannestra's letter to Borgo, as well as other campaign materials that were distributed by Respondent in the 1995 representation election campaign, indicated an effort to dissuade Respondent's employes from voting for union representation, such does not by necessity establish animus toward the employes' engaging in protected, concerted activity. STATE OF WISCONSIN, DEC. NO. 18397-A (Davis, 4/82), aff'd DER V. WERC, 122 Wis. 2d 132 (1985). A municipal employer has the right to convey the opinion of its management that both it and its employes are better off without having a union represent the employes, as long as in doing so that communication does not contain threats of reprisal or promises of benefit for engaging in protected activity or for refraining from doing so. ASHWAUBENON SCHOOL DISTRICT NO. 1, DEC. NO. 14774-A (WERC, 10/77); WESTERN WISCONSIN TECHNICAL INSTITUTE, DEC. NO. 12355-B (WERC, 8/74). Similarly, there is no evidence that Cannestra's comments about topics discussed at the January 30th meeting were more than permissible expressions of his opinion that the employes did not need a union to represent them. Both Greenlee and Borgo testified that is what they understood Cannestra to be saying. (Tr. 21, 38).

The Union contends that Cannestra's statement that Smage's discharge had nothing to do with the Union is, on its face, evidence of animus toward the Union or toward protected, concerted activity on the part of Respondent's employes. The Examiner does not agree. Such statements must be considered in the context of the particular circumstances. Cannestra testified that he informed the employes that Smage had been terminated for good cause and that it had nothing to do with the Union in order to dispel any rumors as to why Smage was fired. The evidence indicates that if Smage was not the first employe ever terminated by Respondent, he was the only employe who had been terminated in the last twelve years, according to Borgo's testimony. (Tr. 56). That Cannestra would feel compelled to inform the rest of the employes that Smage had been terminated in order to explain his absence was reasonable, as was the need to explain that it was not related to the Union's organizing effort, given the fact that the Union and the employes were engaged in such an effort at the time. It is also noted that, contrary to the Union's contention, the evidence indicates that Cannestra's March 10th announcement was

the only occasion on which he purposefully made such an announcement at a regular weekly meeting of the employes. Neither Greenlee nor Borgo could recall a second meeting at which Cannestra made such a comment (Tr. 23, 46), and Polazzo testified that Cannestra later stated that Smage had been denied unemployment compensation benefits and that his firing was not related to or caused by the Union in response to a question from an employe during break time in the lunchroom (Tr. 192, 194). Thus, Cannestra's testimony as to why he announced Smage's termination is credited. It is concluded that there simply is not sufficient evidence in the record to establish animus on the part of Cannestra, Scheff or Miller.

Last, as to Respondent's motives for terminating Smage's employment, the Union again cites Cannestra's statements that the termination was not related to the Union, his statement that he fired Smage even though his lawyers had felt it was not a good time to do so, and his holding a meeting to announce Smage's termination to the assembled employes. Again, as to the March 10th announcement by Cannestra, the evidence indicates that if Smage was not the first employe fired by Respondent, he was the first in a long time. The felt need on Cannestra's part to inform the employes of the termination on the next workday when all are assembled, i.e., the end of the regular weekly meeting on Monday, March 10th, is reasonable and not on its face indicative of a malevolent intent. Why Cannestra shared with the employes that his lawyers felt it was not a good idea to fire Smage, but had left the decision up to him, is unclear. While that statement is, as the Union asserts, problematic, it is not sufficient in the context of this case to establish animus as a factor in the decision to terminate Smage.

While finding animus as a motive in an employment action may be based upon inferences that can be reasonably drawn from the record evidence, evidence that the employe was terminated for valid business reasons tends to weaken such an inference. As the Wisconsin Supreme Court explained in its decision in EMPLOYMENT RELATIONS DEPARTMENT:

> The employee must show that the employer was motivated, at least in part, by anti-union hostility. Therefore, proof that the employee was discharged for legitimate reasons is relevant in determining the employer's motive. The WERC in this case explains,
>
> > "As the key element of proof involves the motivation of [the employer] and as, absent an admission, motive cannot be definitively demonstrated given the impossibility of placing oneself inside the mind of the decisionmaker, [the employee] must of necessity rely in part upon the inferences which can reasonably be drawn from facts or testimony. On the other hand, it is worth noting that [the employer] need not demonstrate 'just cause' for its action. However, to the extent that [the employer] can establish reasons for its action which do not relate to hostility toward an

> employe's protected concerted activity, it weakens the strength of the inferences which [the employee] asks the [WERC] to draw."

(122 Wis.2d at 142-143)

In this case, the Respondent overwhelmingly proved that it had legitimate business reasons for terminating Smage immediately. The uncontroverted evidence in the record is that Smage lied during his employment interview about his driving record and ability to obtain a Commercial Driver's License (CDL), falsified his time sheet for January 28, 1997, falsified his driver's license number in order to avoid discovery of his driving record and lied to Cannestra about doing so, and drove Respondent's vehicles on public roads without possessing a valid driver's license of any kind. It would only have been when Cannestra learned of Smage's driving record that Cannestra would have realized that Smage had lied in his interview and had been driving on the job without a license. The evidence establishes that it was when Cannestra learned these facts, albeit after checking with Respondent's attorneys, that he moved quickly to terminate Smage's employment. There is no evidence that any employes had been permitted to engage in such misconduct in the past without similar discipline.

Simply stated, based on the record as a whole, Cannestra's statement that he acted in the face of his lawyer's advice that it was not a good time to fire someone, is not sufficient basis for drawing an inference that Cannestra's decision to terminate Smage was motivated, at least in part, by animus toward Smage's having engaged in protected concerted activity. That being the case, it is concluded that the Respondent did not violate Sec. 111.70(3)(a)3, Stats., when it terminated Smage.

(3)(a)1

The Union also alleges that Cannestra's comments to the Respondent's employes at the weekly staff meeting regarding topics discussed at the January 30th meeting at Collins' home, his statements regarding the termination of Smage, as well as that termination, were intended to have, and did have, a chilling effect on the employes' exercising of their rights under Sec. 111.70(2), Stats., so as to constitute interference in violation of Sec. 111.70(3)(a)1, Stats. In this regard, the Union cites the testimony of Polazzo that prior to Smage's termination employes discussed the Union organizing effort at work, but no longer did so after Cannestra's statements to the employes on March 10th following Smage's termination.

Sec. 111.70(3)(a)1, Stats., makes it a prohibited practice for municipal employes

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

In determining whether that provision of MERA has been violated, the Commission applies the following standard:

> Violations of Sec. 111.70(3)(a)1, Stats. occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. . .If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere . . .(E)mployer conduct which may have a reasonable tendency to interfere with employe exercise of Sec. 111.70(2) rights will not be found violative of Sec. 111.70(3)(a)1, Stats. if the employer has valid reasons for its actions.

CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91), at pp. 11-12.

As stated above, while Cannestra was aware of the Union's organizing effort, via receiving Knudson's letter and copy of the Union's election petition, and had heard there was to be a meeting in that regard at Collins', there is nothing in the record regarding the substance of those comments beyond testimony that Cannestra mentioned some of the same topics that had been discussed at the meeting at Collins' and gave his opinion that such matters could be resolved without the need for a union. While Greenlee and Borgo testified they felt Cannestra knew all that had taken place at Collins', they offered no basis for their belief beyond his having addressed similar topics as those discussed by the employes at Collins' and they could not specify what those topics were. There has been no showing that those comments contained a threat of reprisal or promise of benefit regarding the employes engaging in protected concerted activity. It may be that the employes' fears or suspicions in this regard were more due to their surprise that Cannestra was aware of the Union's organizing effort, than to the substance of what he had to say.

As to Cannestra's statements to the employes on March 10th regarding Smage being terminated, the reasonableness of Cannestra's informing the employes of Smage's termination, as well as his perceived need to explain it was not related to the Union, have previously been discussed. It must again be noted, however, that the fact that such a "meeting" to inform employes of a termination had not been held before this is explained by the fact that Smage's termination was the first in at least twelve years; i.e., as long as Borgo had been employed at the Respondent. Therefore, it has been concluded that the Respondent had valid business reasons for its decision to terminate Smage immediately, and that given the uniqueness of an employe termination at the Respondent, and the fact that a Union organizing effort was under way at the time, it was reasonable for Cannestra to attempt to make clear that Smage's termination was not related to that effort. Thus, despite any chilling effect of Smage's

termination and the announcement of same, no violation of Sec. 111.70(3)(a)1, Stats., has been found.

(3)(c) and (3)(a)2

The Union has also alleged that Cannestra violated Sec. 111.70(3)(c), Stats., by committing prohibited practices on behalf of the Respondent. There having been no finding that Cannestra's actions and statements constituted a prohibited practice under Sec. 111.70(3)(a), Stats., there can be no finding of a violation under Sec. 111.70(3)(c) on his part.

In its complaint the Union also alleged a violation of Sec. 111.70(3)(a)2, Stats., but presented no evidence or argument to support such a finding and, thus, none has been made in that regard.

Dated at Madison, Wisconsin, this 21st day of April, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/
David E. Shaw, Examiner

DES/gjc
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