

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE POLICE ASSOCIATION and MICHAEL DURFEE, Complainants,

vs.

**THE CITY OF MILWAUKEE, A MUNICIPAL CORPORATION, and
THE BOARD OF FIRE AND POLICE COMMISSIONERS FOR THE
CITY OF MILWAUKEE**, Respondents.

Case 433
No. 55026
MP-3286

Decision No. 29270-A

Appearances:

Eggert & Edmonds, S.C., by **Attorney Michael J. Edmonds**, 1840 North Farwell Avenue, Suite 303, Milwaukee, Wisconsin 53202, appearing on behalf of the Complainants.

Mr. Thomas J. Beamish, Assistant City Attorney, City of Milwaukee, 200 East Wells Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On March 26, 1997, Milwaukee Police Association and Michael Durfee filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Milwaukee, a municipal corporation, and the Board of Fire and Police Commissioners for the City of Milwaukee had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 3 of the Municipal Employment Relations Act by denying Michael Durfee union representation at the hearing “which he was required to attend and which he reasonably believed could lead to discipline” and by denying Michael Durfee a promotion because of his use of sick leave and because of his filing of grievances under the parties’ collective bargaining agreement. The Commission appointed Dennis P. McGilligan, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. On February 6, 1998, the Respondents filed an Answer and a Motion to Dismiss the complaint “because the complaint

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fails to allege illegal events within one year of the filing of the complaint.” Hearing on the complaint was held on February 20, 1998, in Milwaukee, Wisconsin. The hearing was transcribed. On March 26, 1998, Complainants filed a Motion to Reopen the Record to include some documents in the record which was not opposed by Respondents. The parties completed their briefing schedule on May 4, 1998.

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

The Examiner, having considered the evidence and argument of the parties and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Milwaukee Police Association, hereinafter referred to as Complainant Association or Association, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and has its principal place of business at 1840 North Farwell Avenue, Suite 400, Milwaukee, Wisconsin 53202.

2. Michael Durfee, hereinafter referred to as Complainant Durfee or Durfee, is at all times material herein a municipal employe within the meaning of Sec. 111.70(1)(i), Stats., and is employed by the City of Milwaukee Police Department as a Detective.

3. City of Milwaukee, hereinafter referred to as Respondent City or City, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and has its principal offices at 200 East Wells Street, Milwaukee, Wisconsin 53202.

4. Board of Fire and Police Commissioners for the City of Milwaukee, hereinafter referred to as Respondent FPC or Board, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

5. At all times material hereto, the Association has been the exclusive bargaining representative of certain non-supervisory law enforcement employes of the Milwaukee Police Department (MPD) including Complainant Durfee.

6. In July, 1993, Michael Durfee took an examination for a promotion to the position of Lieutenant of Detectives. Based on his test results, Durfee ranked fourth on the list of candidates for the position. That list was adopted by the Board of Fire and Police Commissioners for the City of Milwaukee on August 12, 1993.

7. Between July, 1993 and April, 1994, the three persons ranked higher than Michael Durfee were promoted. Another Lieutenant of Detectives position opened in April, 1994; however, Durfee was not promoted. At that time, there were two Lieutenant of Detectives positions open.

8. On July 22, 1994, Chief of Police Philip Arreola (Arreola) submitted a letter to the Board of Fire and Police Commissioners for the City of Milwaukee in which he objected to Michael Durfee's promotion, due in part to a pending disciplinary matter. Arreola asked that one position be "held open" and that the person who was fifth on the list be given the other position. The Board concurred with Arreola's request.

9. By letter dated August 11, 1994, Arreola provided to the Board of Fire and Police Commissioners for the City of Milwaukee his reasons for objecting to the promotion of Michael Durfee to Lieutenant of Detectives as follows:

Currently Detective Michael L. Durfee is facing Departmental charges for misconduct. The incident giving rise to the charges occurred while Detective Durfee was off duty and involved allegations that he used excessive force and profanity in arresting several juveniles. There were a number of witnesses to the incident. If sustained, charges involving use of excess force and profanity, especially against juveniles, would constitute a serious misconduct.

The Lieutenant of Detectives position is a supervisory position. Detective Durfee's involvement in the incident referred to above, his substandard attendance record, and his lack of respect for authority clearly indicate that he does not possess the qualifications necessary to become a supervisory officer in the Criminal Investigation Bureau of the Milwaukee Police Department.

Promotions are not automatic. I have objected to the promotion of Detective Michael Durfee to Lieutenant of Detectives because I have serious misgivings about his suitability to assume the greater responsibilities of that supervisory rank. I firmly believe that the high standards of law enforcement, particularly those applicable to supervisors, and the public interest, require this.

10. By letter dated August 18, 1994, Arreola provided additional information to the Board of Fire and Police Commission relative to the pending promotion of Michael Durfee. That information consisted of a report to Arreola from Vincent M. Partipilo, Inspector of Police, dated May 17, 1994, wherein he stated regarding the arrest situation Durfee was under investigation for:

. . . this clearly indicates that Det. Durfee does not possess the totality of qualifications necessary to become a 'Supervisory Officer' on the Milwaukee Police Department. . . ., his conduct and methods were officious, abusive, and demonstrated a lack of professionalism, sensitivity and self-control."

Partipilo added in his report:

Det. Durfee has demonstrated to me, other supervisors and even his peers, a lack of sensitivity and a seemingly constant resistance to authority. He is well known to file grievances against managerial decisions, most of which are frivolous, and then file the same complaints frequently under the guise that such was necessary to protect his action. He is also known to write reports that are intended for review by colleagues for investigative continuance, in such a purposefully loquacious manner to a point of obfuscation that could only be intended to confound and embarrass supervisors and his peers --- to say nothing of its detriment to the progress of an investigation. Supervisors were required to speak to him far to (sic) often before this deficiency was cleared up. Admonitions were documented in Evaluation Reports.

In looking at his recent attendance record, I find numerous one day absences spread out over the past several months mainly attributable to the flu or a cold. Staffing is not only critical at the supervisory level, but also difficult because one must draw from smaller numbers. This individual certainly does not possess the kind of attendance record I feel an employee should have when being considered for promotion.

In conclusion, considering the qualities, or lack thereof, alluded to above, especially considering the events involving the incident on the school bus, I feel Det. Durfee has demonstrated that he does not possess the qualities necessary to adequately perform the duties of a supervisor on the Milwaukee Police Department.

I would, therefore, recommend that for reasons stated and known, an objection to his promotion to Lieutenant of Detectives be made to the Fire and Police Commission at the next appropriate opportunity.

Partipilo recommended that all of the deficiencies noted above, "especially considering the events involving the incident on the school bus," should be brought to the attention of the Board of Fire and Police Commissioners at Arreola's next available opportunity.

11. On October 24, 1995, a hearing was held before Commissioners Leonard W. Ziolkowski, Phoebe Weaver Williams and Rosa M. Dominguez with Steven Fronk acting as Hearing Examiner on behalf of the Board of Fire and Police Commissioners of the City of Milwaukee. The hearing concerned an appeal from Milwaukee Police Department Order No. 10955 dated August 26, 1994, wherein "“Appellant Durfee was ordered suspended with-out pay for fifteen (15) consecutive days.” The fifteen (15) day suspension was for Durfee’s actions on March 14, 1994, wherein he boarded a school bus and arrested several juveniles. An additional hearing regarding appropriate disposition was conducted on January 9, 1996.

12. On January 18, 1996, Commissioner Rosa M. Dominguez issued a Summary of Proceedings, Findings of Fact and Decision in the above matter on behalf of the three Commissioners noted above. In said decision, Dominguez found that “the actions of Detective Durfee on March 14, 1994 were clearly inappropriate.” Dominguez noted that while Durfee’s desire to correct the behavior of the students arose out of concern for their safety and that of the public his actions “merely exacerbated the situation.” Dominguez stated: “His use of profanity and unnecessary force in this instance is unacceptable, and the fact that the action took place on a school bus in front of several juveniles is even more disturbing.”

Dominguez added: “To Detective Durfee’s credit, it would appear that he recognized his mistake and took appropriate action to mitigate the problem that existed.” Dominguez concluded that Durfee had expressed sincere and unequivocal remorse for his conduct and that it was unlikely that harsh discipline was required to prevent further misconduct of the nature in question.

Dominguez concluded that Durfee “is hereby suspended without pay for a period of eight (8) working days.”

13. On March 7, 1996, Michael Durfee appeared at an executive session of the Board of Fire and Police Commissioners for the City of Milwaukee. The Board met to determine the suitability of promoting Durfee to the position of Lieutenant of Detectives. Durfee appeared with Bradley DeBraska, Association President, and his personal attorney, Michael Guerin, who asked for the opportunity to attend the meeting in order to represent and to counsel Durfee. However, neither DeBraska nor Guerin were permitted to appear with Durfee during the Board’s executive session conducted on that date.

14. Three members of the Board of Fire and Police Commissioners of the City of Milwaukee were present on March 7, 1996, including Commissioner Leonard W. Ziolkowski. Durfee was sworn in at the outset of the meeting. Durfee described for the Board his years of service with the Department, including previous assignments, his graduate education, and his family circumstances. Durfee basically told the Board why he would make a good supervisor. The Board did not cut him off and gave him every opportunity to say why he should be promoted to the position of Lieutenant of Detectives. However, Durfee was questioned by Commissioner Ziolkowski about his attendance record and use of sick leave, his filing of grievances and his ability to relate to supervisors. Commissioner Ziolkowski also asked

Durfee about the recent discipline that had been imposed on him and whether he had appealed the matter to circuit court. Durfee responded that he had accepted the discipline and did not appeal it.

15. Following the March 7, 1996 meeting before the Board of Fire and Police Commissioners for the City of Milwaukee, Michael Durfee learned about the allegations by Inspector of Detective Vincent Partipilo that were contained in Arreola's letter dated August 18, 1994, to the Board as noted in Finding of Fact No. 10 above. Durfee instructed his personal attorney, Michael Guerin, to do what he could to get him before the Board again so that he could explain Partipilo's charges and his relationship with Partipilo. However, Durfee was "rebuffed" in his attempt to appear before the Board and make another presentation.

16. On April 4, 1996, the Board of Fire and Police Commissioners for the City of Milwaukee "upheld Chief Arreola's July 22, 1994, objection to the promotion of Detective Michael L. Durfee to the position of Lieutenant of Detectives." The vote was 3-0. Durfee's use of sick leave, and filing of grievances did not play any role in the Board's decision. Commissioner Ziolkowski testified that the incident on the bus "was a very, very important issue," and felt that it "reflected on his level of judgment and self control, his lack of professionalism" – qualifications in his mind that were necessary in order to be promoted to a high position in the Milwaukee Police Department. Commissioner Ziolkowski added: "if he had been promoted, it would have sent a signal I think not only to the community but to the officers on the Department that we were in essence overlooking that kind of conduct, which I personally could not tolerate."

17. The Board of Fire and Police Commissioners for the City of Milwaukee informed Michael Durfee of its action by letter dated April 9, 1996. The Board notified Arreola of its action by letter dated April 8, 1996.

18. On May 20, 1996, Michael L. Durfee and the Milwaukee Police Association commenced an action in Milwaukee County Circuit Court against the City of Milwaukee and the Board of Fire and Police Commissioners for the City of Milwaukee. In said action, the aforesaid plaintiffs raised various federal and state law claims about the circumstances surrounding the rejection of Durfee's promotion to Lieutenant of Detectives. In particular, the action complained that the aforesaid defendants' actions deprived the Association of its right to bargain and its right to rely upon the integrity of the promotion process, established through the bargaining process. Plaintiffs also requested that a temporary injunction be issued enjoining the defendants "from promoting or assigning anyone to the position of Lieutenant of Detectives, for which there is currently one opening, pending a determination of Durfee's right to one of those positions as the person next on the list of those to be promoted . . ." Plaintiffs further requested a permanent injunction to prevent the defendants from using similar procedures in the future "to prevent future attempts to deprive MPA members promotions to which they have a constitutional and contractual right." Finally, plaintiffs requested compensatory and punitive damages. In his affidavit in support of the ex parte motion for temporary restraining order Bradley DeBraska stated as follows:

1. I am the president of the Milwaukee Police Association, the certified collective bargaining union representing various ranks of non-management police officers employed by the City of Milwaukee.

2. I am familiar with the actions taken by the Board of the Fire and Police Commission for the City of Milwaukee and by Chief Philip Arreola in connection with Michael L. Durfee.

3. Members of the MPA must be able to rely upon the integrity and regulation of procedures for hiring, firing, disciplining and promoting officers. Members often make decisions in reliance upon that process, including decisions as to whether to pursue advancement in ranks, additional education, whether to become involved in community activities and whether to explore or to accept other employment opportunities.

4. Disruption of those procedures irreparably harms the Association because it interferes with the labor relationship negotiated and bargained by the City and the Association's 1800+ membership.

5. The failure to follow established procedures also thereby irreparably harms the Association's ability to fairly represent its members within the meaning of the Municipal Employment Relations Act.

19. On May 23, 1996, the aforesaid defendants filed a Petition for Removal in *DURFEE V. CITY OF MILWAUKEE*, CASE NO. 96-C-609 (E.D.-WIS). On June 1, 1996, the defendants moved to dissolve the temporary restraining order entered by the state court prior to removal. On June 26, 1996, the federal court granted the defendants' Motion to Dissolve Temporary Restraining Order which was filed on May 29, 1996. The court also issued an order requiring the parties to brief certain threshold jurisdictional issues including "whether the Milwaukee Police Association has standing to pursue the federal civil rights claims." On July 1, 1996, the court denied without prejudice a motion by defendants to dismiss the action which was filed on June 27, 1996. On July 30, 1996, the court issued a Decision and Order "that the Milwaukee Police Association is dismissed as a party Plaintiff for lack of jurisdiction." By letter dated November 21, 1996, Melanie R. Swank, Assistant City Attorney, wrote to Michael Guerin, Durfee's attorney, as follows:

We are in receipt of your letter dated November 19, 1996. We agree that the referenced stipulation and order for dismissal affects only Case No. 96-C-0609. There is neither an agreement nor any interaction between this matter and your reference to the union's unfair labor practice claim and Mr. Durfee's EEOC claim. In other words, we agree that those cases are not affected by the stipulation and order for dismissal of this case.

If you have any other questions, please feel free to call. Otherwise, we expect to receive the stipulation and order in the above-captioned matter within a few days. Thank you very much.

20. By December 10, 1996, the parties (plaintiff Michael Durfee, defendants City of Milwaukee and Board of Fire and Police Commissioners Leonard W. Ziolkowski, Phoebe Weaver Williams, Walt A. Buchanan, Rosa M. Dominguez, Michael J. Soika and Police Chief Philip Arreola) signed a Stipulation and Order for Dismissal providing “that the Court may enter an order dismissing this action on its merits, with prejudice, and without costs to any party.”

21. On December 23, 1996, the court issued an Order based on the above Stipulation dismissing the action with prejudice and without costs to any of the parties. The court also provided that the final order of dismissal should provide, in part, as follows:

Plaintiff Michael L. Durfee and Defendants City of Milwaukee, Leonard W. Ziolkowski, Phoebe Weaver Williams, Walt A. Buchanan, Rosa M. Dominguez, Michael J. Soika and Philip Arreola have stipulated to the dismissal of all claims and causes of action raised in this action and the court, the Honorable Thomas J. Curran, District Judge, presiding, having approved their stipulation.

22. An evaluation report of the Milwaukee Police Department for the period ending June 30, 1995, noted that Michael Durfee was a “fine investigator” who conducted his investigations “in a consistent and methodical fashion.” The report also noted that Durfee’s reports were “detailed and complete and he stays with an investigation until all of the solvability factors have been addressed.” The report added that Durfee willingly accepted new assignments including a great deal of bookkeeping for a recent undercover sting operation. Other earlier evaluations of Durfee were of a similar nature. For example, in a report for the period ending December 31, 1994, it was noted that Durfee was “an extremely well experienced investigator” who readily accepted new assignments “quickly grasping what needs to be done, and then follows through with a complete investigation.” Said report added that Durfee “is an excellent interrogator and during this past rating period he has cleared numerous burglary complaints following interviews with burglary suspects.” Finally, the report stated that Durfee “continues to perform well in his present assignment.” For a period ending June 30, 1994, a report indicated that Durfee “Establishes effective systems for information retrieval. Provides an intellectual atmosphere conducive to the stimulation and interchange of ideas . . . Can be relied upon to do the job and any other assignments.” The report noted “Superior Progress” under the heading “Progress Evaluation.” In a report for the period ending December 31, 1993, it was noted that Durfee “Demonstrates a high level of competence at investigations and record keeping. Communicates confidently with supervisors and peers. Combines technical skills with dependability and loyalty.” A report for the period

ending June 30, 1993, stated that Durfee “grasps the most difficult concepts and demonstrates a strong power of analytical reasoning.” Said report added that he “effectively organizes ideas for logical presentation and acceptance,” and “displays productive assertiveness.” Reports for the periods ending December, 1992 and June 30, 1992, contained similar comments.

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

CONCLUSIONS OF LAW

1. The Wisconsin Employment Relations Commission does not have jurisdiction to determine whether or not Respondents’ conduct occurring prior to March 26, 1996, violates any provision of Sec. 111.70(3)(a), Stats., because such conduct is beyond the one-year statute of limitations set forth in Sec. 111.70(14), Stats.

2. Respondents, by voting on April 4, 1996, to uphold Chief Arreola’s July 22, 1994 objection to the promotion of Detective Michael Durfee to the position of Lieutenant of Detectives, were not motivated in whole or in part by hostility toward the exercise of Durfee’s protected rights, and therefore, Respondents have not committed any prohibited practices within the meaning of Sec. 111.70(3)(a)3, or derivatively (3)(a)1, Stats.

3. Respondents, by voting on April 4, 1996, to uphold Chief Arreola’s July 22, 1994 objection to the promotion of Detective Michael Durfee to the position of Lieutenant of Detectives, have not interfered with, restrained or coerced Complainants in the exercise of their rights under Sec. 111.70(2), Stats., and therefore, have not committed an independent prohibited practice under Sec. 111.70(3)(a)1, Stats.

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

ORDER

IT IS ORDERED that the complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 22nd day of June, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Dennis P. McGilligan /s/

Dennis P. McGilligan, Examiner

CITY OF MILWAUKEE (POLICE DEPARTMENT)

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

One-Year Statute of Limitations

On February 7, 1998, Respondents filed a Motion to Dismiss the complaint on the grounds that the Wisconsin Employment Relations Commission lacks jurisdiction to proceed because the complaint fails to allege illegal events within one year of the filing of the complaint. At hearing on February 20, 1998, Respondents renewed said Motion. In addition, Respondents raised a second independent ground, over the objection of Complainants, in support of the aforesaid Motion to Dismiss. Respondents argued at hearing that the doctrine of res judicata and/or collateral estoppel prevents this matter from being litigated before the Commission. That argument will be addressed in the next section of the Memorandum.

Following argument at hearing on the Motion to Dismiss based on the one-year statute of limitations, the Examiner granted the Motion “with respect to any activity that occurred prior to March 26, 1996.” The Examiner also ruled that any separate complaint allegations that occurred prior to March 26, 1996, including paragraphs 8, 9 and 10 of the complaint; “and in particular March 7th, 1996,” fell outside the statute of limitations. The Examiner denied the Motion “with respect to the rest of the complaint” in particular paragraphs 11 and 13 which allege that Respondents denied Complainant Durfee a promotion to the position of Lieutenant of Detectives in violation of Sec. 111.70(3)(a)1 and 3, Stats.

Because paragraph 12 of the complaint, alleging a violation of Complainant Durfee’s statutory rights through Respondents’ refusal to allow him union representation at a “hearing” which he was required to attend and which he reasonably believed could lead to discipline, refers to the March 7, 1996 Board meeting, that alleged violation of the statute also cannot be addressed in this case because it is beyond the statute of limitations. For the same reason, the Examiner will not address Complainants’ allegations in paragraph 7 of the complaint. The Examiner bases this decision, as well as the decision noted above, on the following reasoning.

Section 111.70(14), Stats., reads: “The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged.” It has been strictly construed by the Commission and by reviewing Courts in the sense that a complaint filed 366 days after the act complained of was dismissed as untimely. CITY OF MADISON, DEC. NO. 15725-B (WERC, 6/79), AFF’D, DEC. NO. 79—CV-3327 (CIRCT DANE, 6/80).

In determining when the statute begins to run, the Commission has applied what it has characterized as “our general holdings that the statute of limitations begins to run once a complainant has knowledge of the act alleged to violate the Statute. [citations omitted].” STATE OF WISCONSIN, DEC. NO. 26676-B AT 6 (WERC, 11/91). However, in that same

decision, the Commission distinguished/reaffirmed its decision in JOHNSON V. AFSCME COUNCIL 24, DEC. NO. 21980-C (WERC, 2/90) in which it had rejected the complainant's contentions that she was not obligated to file her complaint within one year of the act alleged (February and March 1982 Union notifications that it decided not to arbitrate her grievance) because she did not discover the allegedly arbitrary nature of that act until 1982. STATE OF WISCONSIN, DEC. NO. 26676-B, SUPRA, AT 7.

In the instant case, the record is clear that Complainants were aware more than one year prior to their March 26, 1997 filing of the instant complaint of the events which occurred on March 7, 1996, and before that date. For example, Complainant Durfee testified that on March 7, 1996, a "hearing" took place before the Board at which time he was to address Chief Arreola's objection to his promotion (Tr. 46). Complainant Durfee attended the "hearing" with Association President, Bradley DeBraska, and his personal attorney, Michael Guerin (Tr. 46-47). DeBraska and Guerin "announced a desire to be present and to represent me and to counsel me," but "they were ordered out of the room." (Tr. 48) Nevertheless, Complainant Durfee proceeded with his presentation to the Board (Tr. 49).

In addition, the record is clear that on or about July 27, 1994, Complainant Durfee was informed of a letter from Chief Philip Arreola dated July 22, 1994, indicating that the Chief intended to pass him over for the open Lieutenant of Detectives position.

Complainants offered no persuasive evidence or argument at hearing or in their briefs contrary to the above conclusions. In fact, at hearing Complainants' counsel stated:

If you look to paragraph 13 of the complaint, and I'll deal with the City's second point first, which is questioning him on March 7th, 1996 with respect to specified subject matters allegedly in violation of the law, what our complaint really says is that Durfee's promotion was denied in part on the basis of his use of sick leave without any showing that he was not entitled to sick leave and because of his filing of grievances under the collective bargaining agreement. These aren't events which occurred on March 7th. The discussion or the hearing that was held with the Commission and with Mr. Durfee may have occurred on that date, but the decision did not occur and the City agrees it did not occur until April 4th, 1996, and therefore, I think that the City's motion to dismiss on statute of limitation grounds fails. (Tr. 11)

Based on same, and all of the foregoing, the Examiner finds that Complainants' claims relating to Respondents' conduct occurring prior to March 26, 1996, and, in particular, the March 7, 1996 meeting before the Board referred to in paragraphs 7-10 and 12 of the complaint, insofar as they constitute separate prohibited practice allegations, are time-barred by the Sec. 111.70(14), Stats., statute of limitations.

Claim Preclusion

Respondents argued at hearing that the complaint filed with the Commission is barred by the doctrine of claim preclusion, and that the application of that doctrine to the record facts entitled Respondents to dismissal of this action. Subsequent to hearing, Complainants, without objection from Respondents, filed a Motion to Reopen the Hearing to allow certain documents into the record which included, inter alia, a letter dated November 21, 1996, from Melanie R. Swank, Assistant City Attorney, to D. Michael Guerin regarding DURFEE V. CITY OF MILWAUKEE, ET AL., CASE NO. 96-C-0609 which provides in material part as follows:

. . . We agree that the referenced stipulation and order for dismissal affects only Case No. 96-C-0609. There is neither an agreement nor any interaction between this matter and your reference to the union's unfair labor practice claim and Mr. Durfee's EEOC claim. In other words, we agree that those cases are not affected by the stipulation and order for dismissal of this case.

Thereafter, as noted in Findings of Fact Nos. 20 and 21, the parties signed a Stipulation and Order for Dismissal; and the court, based on same, dismissed the first action.

On May 4, 1998, Respondents filed their reply brief wherein they stated:

In light of the material submitted to the examiner subsequent to the hearing, the respondents will not now rely upon the first argument advanced in the argument section of their initial brief that the complaint is barred by the doctrine of claim preclusion.

Based on same, and the record as a whole, the Examiner finds it unnecessary to address this argument of Respondents

Discrimination and Interference

Complainants ask that the Examiner find that Respondents violated Sec. 111.70(3)(a)1 and 3, Stats., when the Board rejected Durfee's promotion, in part, on the basis of his use of sick leave, and because of his filing of grievances.

The Examiner first looks at the alleged violation of Sec. 111.70(3)(a)3, Stats.

Section 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to "encourage or discourage a membership in any labor organization by discrimination in

regard to . . . tenure or other terms or conditions of employment.” To prove a violation of this section the Complainants must, by a clear and satisfactory preponderance of the evidence, establish that:

1. Complainants were engaged in protected activities; and
2. Respondents were aware of those activities; and
3. Respondents were hostile to those activities; and
4. Respondents’ conduct was motivated, in whole or in part, by hostility toward the protected activities. 1/

1/ The “in-part” test was applied by the Wisconsin Supreme Court to MERA cases in MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 WIS.2D 540 (1967) and is discussed at length in EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985).

It is undisputed that Durfee was engaged in protected activity when he filed grievances, and that Respondents were aware of those activities. Complainants argue that Respondents were hostile to those activities. The record certainly supports a finding that Inspector of Detectives Vincent Partipilo was hostile to this activity. In this regard, the Examiner notes Partipilo’s disparaging comments about Durfee’s many “frivolous” grievance filings which were contained in a report to Chief of Police Arreola from Partipilo dated May 17, 1994. In particular, Partipilo complained that Durfee’s use of the grievance procedure demonstrated “a seemingly constant resistance to authority.” The Examiner is also of the opinion that Chief of Police Arreola was hostile to this protected activity. In this regard, the Examiner points out that following Partipilo’s report to Chief of Police Arreola wherein he recommended that Arreola oppose Durfee’s promotion Arreola wrote to the Board objecting to Durfee’s promotion to the position of Lieutenant of Detectives based in part on “his lack of respect for authority.” Thereafter, Chief of Police Arreola provided additional information to the Board of Fire and Police Commission relative to the proposed promotion of Durfee which consisted of the Partipilo report in its entirety.

The record, however, does not support a finding that the Board of Fire and Police Commission was hostile to Durfee’s protected activity. It is true, as pointed out by Complainants, that Commissioner Ziolkowski asked Durfee about his attendance record, use of sick leave, his filing of grievances and his ability to relate to supervisors. It is also true, as pointed out by Complainants, that these were issues raised in Partipilo’s report which the Commission had a copy of. (Chief Arreola’s cover letter dated August 18, 1994, bears the Commission’s date stamp (Jt. Ex. No. 5). Commissioner Ziolkowski acknowledged that he

would have received the Partipilo memo for the purposes of considering Durfee's promotion (Tr. 107). However, Commissioner Ziolkowski emphatically denies that either Durfee's use of sick leave or filing of grievances played any role in his decision to reject Durfee's promotion (Tr. 103). Ziolkowski clearly stated that Durfee's filing of grievances was "an exercise of his rights and meant nothing to me." Ziolkowski testified persuasively that his vote to reject Durfee's promotion was based solely on the incident on the bus that was the subject of Durfee's prior discipline (Tr. 104).

Complainants accurately point out that if Commissioner Ziolkowski's explanation of the factors that motivated his decision are accepted, it took the vote of at least one more Commissioner to reject Durfee's promotion. However, instead of introducing evidence to support their contention that the other Commissioners who voted to reject Durfee's promotion were hostile to his protected activity Complainants attack Respondents' failure to call another Commissioner to testify instead of Kenneth Munson, the Executive Director of the Commission. The problem with this approach is that both Munson and Commissioner Ziolkowski testified, unrefuted by Complainants, that no Commissioner stated that they should deny Durfee his promotion based on his use of sick leave or filing of grievances. (Tr. 86-87, 102-104). Munson did not indicate that any of the Commissioners bore any hostility toward Durfee because of his protected activity.

However, assuming arguendo that there was hostility toward Durfee's protected activities, Respondents' conduct would have to be motivated by said hostility. Motive is difficult to determine as usually there is no direct evidence so it must be determined from the total circumstances. Complainants argue that Partipilo's memo resulting in Chief Arreola's objection to Durfee's promotion led to the questions raised by Commissioner Ziolkowski regarding Durfee's use of sick leave and filing of grievances. That may be. However, as noted above, Commissioner Ziolkowski recognized Durfee's right to file grievances. He also testified persuasively that this played no role in his decision to reject Durfee's promotion. Complainants offered no evidence that any other Commissioner voted to reject Durfee's promotion based on their hostility toward Durfee's protected activity. Based on same, and all of the foregoing, as well as the totality of the circumstances, the Examiner finds that the evidence simply fails to show that Respondents' actions were motivated by hostility. Thus, the allegation of Sec. 111.70(3)(a)3, Stats., violations has been dismissed.

Complainants have alleged a violation of Sec. 111.70(3)(a)1, Stats. Inasmuch as there is no Sec. 111.70(3)(a)3, Stats., violation, there is no derivative Sec. 111.70(3)(a)1, Stats., violation.

As far as an independent violation, Sec. 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer:

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

Section 111.70(2), Stats., describes the rights protected by Sec. 111.70(3)(a)1, Stats., as being:

(2) RIGHTS OF MUNICIPAL EMPLOYEES. 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 . . .

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. *WERC v. EVANSVILLE*, 69 WIS.2D 140 (1995). 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 and even if the employe(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights. *BEAVER DAM UNIFIED SCHOOL DISTRICT*, DEC. NO. 20283-B (WERC, 5/84); *CITY OF BROOKFIELD*, DEC. NO. 20691-A (WERC, 2/84); *JUNEAU COUNTY*, DEC. NO. 12593-B (WERC, 1/77).

Employer conduct which may well 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 had valid business reasons for its actions. *BLACKHAWK TECHNICAL COLLEGE*, DEC. NO. 28846-A (CROWLEY, 5/97) *AFF'D* DEC. NO. 28846-D (WERC, 12/97). Here, based on all of the foregoing, the Examiner finds no conduct by Respondents that would have a reasonable tendency to interfere with employe exercise of Sec. 111.70(2) rights.

In this regard, the Examiner rejects Complainants' argument that simply asking about Durfee's filing of grievances and his use of sick leave in conjunction with a promotional hearing has a chilling effect on the exercise of the rights afforded Durfee by the collective bargaining agreement and the Statute. Absent some other showing, the Examiner is not persuaded that by such limited conduct Respondents interfered with, restrained or coerced Durfee in his exercise of his Sec. 111.70(2), Stats., rights. However, assuming arguendo that there is such conduct, the Examiner finds that the Respondents had valid business reasons for their actions. In this regard, the Examiner notes that Durfee was eligible for promotion to a high supervisory rank in the Police Department. In this context, the Examiner is of the opinion that it would be appropriate for the Commissioners to obtain Durfee's response to the questions asked. In addition, as pointed out by Respondents, the Board decided not to promote Durfee based on his lack of qualifications for the position. As Commissioner Ziolkowski noted, "the incident on the bus reflected his level of judgment and self control, his lack of professionalism, and in my mind the qualifications so necessary for promotion." (Tr. at 102). Ziolkowski added:

. . . if he had been promoted, it would have sent a signal I think not only to the community but to the officers on the Department that we were in essence overlooking that kind of conduct, which I personally could not tolerate.

Based on all of the above, the Examiner finds that the evidence failed to prove any violation of Sec. 111.70(3)(a)1, Stats., and therefore, that charge has also been dismissed.

Dated at Madison, Wisconsin, this 22nd day of June, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Dennis P. McGilligan /s/

Dennis P. McGilligan, Examiner

