

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BARRY L. ALBERTS, Complainant,

vs.

THE STATE OF WISCONSIN, Respondent.

Case 476
No. 57369
PP(S)-303

Decision No. 29587-A

Appearances:

Mr. Robert Weber, Weber & Cafferty, S.C., Attorneys at Law, 2932 Northwestern Avenue, Racine, Wisconsin 53404, appearing on behalf of Complainant Alberts.

Mr. David Vergeront, Chief Legal Counsel, Department of Employment Relations, 345 West Washington Avenue, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of Respondent State.

Mr. Scott Hassett and **Mr. Bruce Davey**, Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of Intervenor Wisconsin State Employees Union (WSEU), AFSCME, Council 24.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On March 8, 1999, Barry L. Alberts filed a complaint with the Wisconsin Employment Relations Commission alleging that the State of Wisconsin had committed unfair labor practices within the meaning of Secs. 111.82 and 111.84(1)(a) and (c), Stats., by discriminatorily bypassing him for a promotion. On April 6, 1999, the Commission appointed Raleigh Jones, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.84(4) and Sec. 111.07(5), Stats. On May 6, 1999, the State filed an Answer and Affirmative Defenses. Hearing was held in

No. 29587-A

Milwaukee, Wisconsin on May 12 and June 17, 1999, at which time the parties were given full opportunity to present their evidence and arguments. Thereafter, the parties filed briefs, whereupon the record was closed September 2, 1999. Having considered the evidence and arguments of the parties, the Examiner hereby makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The State of Wisconsin, hereinafter referred to as the State or Respondent, is an employer which has delegated responsibility for collective bargaining purposes to the Department of Employment Relations, hereinafter DER, which maintains its offices at 345 West Washington Avenue, Madison, Wisconsin 53707-7855.

2. The Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, hereinafter referred to as the Union or Intervenor, is a labor organization which maintains its offices at 8033 Excelsior Drive, Suite C, Madison, Wisconsin 53717-1903. It is the exclusive bargaining representative for certain statutorily-created bargaining units, including the Security and Public Safety bargaining unit. The WSEU and the State were parties to a collective bargaining agreement that was effective from October 11, 1997 to June 30, 1999. That agreement contained a grievance procedure which culminated in final and binding arbitration.

3. The State operates an agency known as the Department of Military Affairs. That Department, hereinafter DMA, administers and provides facilities for the National Guard. The National Guard includes the Army National Guard and the Wisconsin Air National Guard. DMA has entered into various written agreements with the Department of the Army and the Air Force, National Guard Bureau. Pursuant to those agreements, DMA has specific obligations to provide certain firefighting and emergency services to the Air National Guard, including Aircraft Emergency Response, Medical Emergency Response, Hazardous Materials, and Confined Space. DMA provides these services at three airports in this state: Madison (Truax), Volk Field (Camp Douglas) and Milwaukee (Mitchell).

4. The Fire Chief at those three locations is a federal employe, and the Chief's subordinates are state employes. Thus, pursuant to one of the agreements referenced above, a federal employe supervises state employes. Below the Chief at each location is a Deputy Chief, who is a state employe. Subordinate to the Deputy Chief are Fire/Crash Rescue Specialists at the 1, 2 and 3 level, who are also state employes. The Fire/Crash Rescue Specialists are included in the Security and Public Safety bargaining unit referenced in Finding of Fact 2 and thus are covered by the collective bargaining agreement also referenced in the same Finding of Fact.

5. The Fire Chief at the Air National Guard Base at Mitchell Field in Milwaukee is Ed Tump. Chief Tump is in charge of the fire department on weekdays. The person in charge of the fire department on weekends is Guard Fire Chief Winn Powers. The Deputy Chief of the fire department is James Saler. The Mitchell Field Fire Department has three fire crews which have been designated red, blue and green. Each crew consists of three Fire/Crash Rescue Specialists. Each crew works 24 hours straight from 7:00 a.m. to 7:00 a.m. and then is off 48 hours. The Fire/Crash Rescue Specialist 3 on each three person crew is designated as the shift leader. Although the shift leader position is in the bargaining unit, the Employer considers it to be a leadership position. The shift leader essentially functions as the crew's lead worker and is the crew's liaison with management. The shift leader's duties include coordinating the crew during rescues and firefighting, providing on-the-job training, and writing the daily log. The crew pertinent to this case is the red crew. Prior to September, 1998, the red crew consisted of Bruce Kinyon, Barry Alberts and Gil Schaefer. Kinyon was the shift leader. He was a Fire/Crash Rescue Specialist 3 while the other two employees were Fire/Crash Rescue Specialists 2. Alberts was hired in June, 1990 as a Fire/Crash Rescue Specialist 1 and was promoted to his current position six months later. When Kinyon was absent from work, Alberts was often the acting shift leader.

6. Alberts has held a number of positions with WSEU, Local 91. In the mid-1990's, he was a steward and trustee for the local union. Stewards process grievances. In 1997, he was vice-president and chief steward of the local union. In 1998, he was the interim president of the local union for several months after the then-president retired.

7. The State's grievance records indicate that from June, 1990 to March, 1999, 13 grievances were filed and processed at the Mitchell Field Fire Department. These grievances were processed by four different union stewards during that time frame. Alberts was one of the four stewards. The State's records indicate that Alberts processed seven of these grievances. When Alberts processed grievances, he dealt with Saler at what is known as the "pre-step" of the contractual grievance procedure. Prior to October, 1998, Alberts dealt with the Fire Chief at the first step of the contractual grievance procedure. After October, 1998, the Employer's first step representative became the Base Commander. Prior to 1997, the Fire Chief was David South. Tump became Chief in March, 1997. Saler characterized South as friendly but ineffectual, and Tump as a "by-the-book" type person. After Tump became fire chief, Alberts dealt with him on five grievances. When Alberts dealt with Tump and Saler on grievances, they often disagreed with each other's position. Insofar as the record shows, none of their disagreements rose to the level of shouting or heated arguments. After Tump and Alberts had several grievance meetings, Tump quit speaking to Alberts at work. Both Tump and Saler complained to Kinyon several times about having to fight with the union in order to accomplish things they wanted to see happen in the fire station. When Tump and Saler referred to the "union" in this context, they were referring to Alberts. In addition to processing grievances filed by others, Alberts filed some of the above-referenced grievances

himself. In 1995, he filed a grievance which alleged that a crew was short-staffed for a four-hour period. That same year, he filed another grievance which alleged that then-Chief South had changed a past practice concerning the wearing of shorts. That same year, he filed another grievance which alleged that Saler had removed material from the Union bulletin board at the base fire station. Saler subsequently accused Alberts of stealing the material from his office, whereupon Alberts filed a grievance challenging Saler's accusation against him. In 1998, Alberts filed a grievance which alleged that a mandatory class on confined space was outside the job description of all Fire/Crash Rescue Specialists. This particular grievance was considered unfounded by several Fire/Crash Rescue Specialists, who succeeded in changing the status of this grievance from a union grievance to an individual grievance. That same year, Alberts filed another grievance which alleged that the Employer had unilaterally changed an existing work rule covering dress and appearance. That same year, he filed another grievance which asked for clarification of the State's chain of command for personnel matters at the Base. As a result of that grievance, Tump was replaced as the Employer's first step grievance representative by the Base Commander at Mitchell Field, Colonel Cozad. This occurred in the fall of 1998. Insofar as the record shows, just one of the above-referenced grievances has gone to arbitration, and that occurred in April, 1999; all the other grievances referenced above were settled or withdrawn.

8. In 1997, Chief Tump used a government cell phone and vehicle for personal use on several occasions. This matter later came to the attention of his base superiors, and he was formally reprimanded for same in December, 1997. The record does not identify who brought this matter to the attention of Tump's superiors.

9. On March 23, 1998, Alberts wrote to Congressman Jerry Kleczka and alleged that Chief Tump had engaged in "fraud, waste and abuse of government funds." This letter made three charges against Tump: 1) that he had used a government vehicle for his personal use; 2) that he had used a government cell phone for personal use; and 3) that he had misrepresented his hours worked on his time card. Congressman Kleczka responded to Alberts in a letter which indicated that in his (Kleczka's) view, Alberts had two avenues in which he could proceed: he could contact his base commander, Colonel John Cozad, with his concerns, or he could contact Lynn Boodry, the DMA's Human Resources Director. Insofar as the record shows, Alberts did not contact either Cozad or Boodry about the concerns referenced in his letter to Kleczka.

10. On May 1, 1998, Alberts filed a written complaint with the Inspector General alleging that Chief Tump had engaged in "fraud, waste and abuse of government funds." This letter repeated the three claims referenced in the letter to Congressman Kleczka, and added another: that Tump had purchased a "writeable CD rom for the Fire Department shift computer." Alberts requested that the Inspector General's Office take "action to stop this abuse." On August 10, 1998, Colonel William Anderson of the Inspector General's Office

responded to Alberts in writing and indicated, in pertinent part, that “our office is conducting a thorough inquiry into your allegations.” Tump subsequently learned of the Inspector General’s investigation. He (Tump) suspected that the complaint against him had been filed by the red crew (Kinyon, Alberts and Schaefer).

11. On August 25, 1998, Colonel William Anderson of the Inspector General’s office sent Alberts the following letter:

Dear Mr. Alberts:

This office has completed the inquiry concerning allegations of misconduct and misuse of equipment.

The allegation that Chief Tump misused a government vehicle and cellular telephone was substantiated. The 128th Refueling Wing previously conducted an inquiry where this misuse was identified, and has since taken action appropriate under command authority.

The allegation that Chief Tump misrepresented his working hours was neither substantiated nor refuted. The 128th Air Refueling Wing previously conducted an inquiry concerning work hours, and has since taken action to formalize and report working hours to insure compliance with current policy.

The issues concerning computer use, work safety and work management are within the state employee contract procedures. These procedures identify methods by which employees become involved in management actions and decisions. Accordingly, these issues are not within the investigative purview of this office due to the existing system of resolution. Ms. Lynn Boodry, State Human Relations, may provide additional assistance at (608) 242-3163.

The pit fire exercise conducted on May 2, 1998 by Wisconsin Air National Guard personnel was scheduled training and within their scope of authority. We found no violation of current regulation or policy in the conduct of this training. Additionally, we found no evidence of product endorsement or commercial representation of Wisconsin Air National Guard equipment.

From an Inspector General point of view, I consider this case closed.

Sincerely,

William H. Anderson /s/
William H. Anderson
Colonel, United States Army
Inspector General

Alberts did not believe there was a complete and thorough investigation, and subsequently filed an appeal. The record does not indicate the status of this appeal.

12. The State's recruiting and selection process is intended to insure fairness and consistency to job applicants, and provide the State with the opportunity to hire the best qualified person for the job. The basic components of this process are as follows: first, the position is posted; second, an exam for the position is developed; third, the exam is given and scored; fourth, interviews are held with an interview panel; and fifth, the interview panel makes a recommendation concerning who to hire.

13. Sometime in the spring of 1998, Kinyon let it be known that he would be retiring in September, 1998. Kinyon's retirement would create a vacancy for a shift leader position. Filling that position would require the use of the recruiting and selection process referenced in Finding of Fact 12. About the same time, another Fire/Crash Rescue Specialist 3 position was created. This particular position was created by upgrading the level 2 position previously occupied by Tekla Thorn to a level 3 position. This position was not a shift leader position, but rather was a tech services position (specifically, the Fire Prevention and Inspector Program Manager). Filling that position would also require use of the recruiting and selection process referenced in Finding of Fact 12. Although it was not universal knowledge by everyone in the fire department, Alberts knew that two level 3 positions were going to be filled at Mitchell Field; a shift leader position and a tech services position.

14. Sometime in the summer of 1998, Alberts, Kinyon and Schaefer were in the firehouse kitchen where they were engaged in workplace banter. Part of their conversation involved a level 3 position that was or would become vacant. It is unclear which forthcoming level 3 position was being discussed: the shift leader position or the tech services position. In any event, Schaefer asked Alberts if he was going to apply, and Alberts replied in the affirmative. Tump happened to walk into the room just as this colloquy occurred and heard same, whereupon he (Tump) stated words to the effect that it would be "a waste of time for him to apply." Everyone in the room understood that the "him" referenced in Tump's

comment was Alberts. Alberts, Kinyon and Schaefer did not think Tump was joking when he (Tump) made this statement. Tump testified that although he did not make it clear to those in the room, his “waste of time” comment referred to the tech services position, not the shift leader position. The next day, Kinyon told Saler about the statement Tump had made. Saler subsequently raised the matter with Tump, and Tump told Saler he (Tump) was joking when he made the statement. Saler later reported this to Kinyon.

15. On August 21, 1998, Alberts and Schaefer were again in the firehouse kitchen engaged in workplace banter when Guard Fire Chief Winn Powers entered the room and said something. Powers is a Guard member who, from time to time, is on the base as the weekend fire chief. Alberts and Schaefer were the only people in the room when Powers entered and spoke. Powers stated words to the effect of “we know who turned us in, and it’s not appreciated.” When Powers said this, he was looking directly at Alberts.

16. On September 11, 1998, Alberts and Schaefer were again in the firehouse kitchen engaged in workplace banter when Richard Ludowise entered the room and said something. Ludowise stated words to the effect of “So Barry, I hear you’re causing trouble again.” Alberts asked Ludowise what he was talking about, but Ludowise did not respond or elaborate any further on his comment.

17. Kinyon retired from State service in September, 1998, and the State decided to fill the vacancy.

18. Prior to Kinyon’s retirement, DMA Human Resources Specialist Barbara Sumwalt prepared the following draft version of a job announcement for a Fire/Crash Rescue Specialist 3:

**FIRE/CRASH RESCUE SPECIALIST 3
MADISON (AREA 8)
MILWAUKEE (AREA 5)
CAMP DOUGLAS (AREA 13)
JOB ANNOUNCEMENT CODE: 98968**

Department of Military Affairs (DMA). **FIRST VACANCY:** Mitchell Field, Milwaukee. The employment register established from this announcement will be used to staff vacancies which may occur during the next six to twelve months or longer in the Department of Military Affairs at the Air National Guard Base, Truax Field, Madison; the Air National Guard Base, Mitchell Field, Milwaukee; or the Combat Readiness Training Center, Volk Field, Camp Douglas. Starting pay is \$11.041 per hour. This classification is

included in the Security and Public Safety Bargaining Unit. A six-month probationary period is required. **NOTE:** These positions may require a non-standard work week. **JOB DUTIES:** Perform administrative and leadership duties. Lead and coordinate crews in rescue and first aid; prevent, control and extinguish fires involving buildings, grounds, aircraft, including military aircraft, various weapons and other materials. Preserve property; perform fire inspections; provide on-the-job training; and operate various fire, crash, rescue and associated equipment. **KNOWLEDGE, SKILLS AND ABILITIES REQUIRED:** Aircraft, including military aircraft, and structural firefighting rescue and fire prevention methods; CPR and first aid; equipment, chemicals and techniques used in fighting fires; general airport operations; operation of all fire fighting equipment, apparatus and tools; on-the-job and classroom training techniques necessary to train a crew in the performance of firefighting and emergency rescue operations. Effective written and communication skills. A background in fire service instruction and fire inspection is desirable. **SPECIAL REQUIREMENTS:** Applicants must have a valid driver's license and must qualify for a military driver's license. Applicants must not have any felony conviction records, as federal security clearances may be required. Required to obtain EMT certification. Must meet the minimum physical standards as established by the National Fire Protection Association for Airport Fire Fighters. **To request special application/examination materials, call (608) 242-3153 or write to Barb Sumwalt; DMA; State Human Resource Services Office; WING-SHR; 2400 Wright Street; P.O. Box 14587; Madison, WI 53714-0587; FAX (608) 242-3168; sumwab@dma.state.wi.us (e-mail). If calling, please have the complete job title and job announcement code available when you call. Materials requested by telephone will be mailed no sooner than the next working day after your request. Completed application and examination materials must be received at the above address by 4:30 p.m., September 28. Materials will be evaluated and applicants who appear best qualified will be invited to participate at the next step of the selection process.**

After Sumwalt had prepared this draft version, she consulted with Saler regarding same. It is normal practice for Sumwalt to consult with affected management officials about the content of job postings. In doing so, Saler requested that the following sentence, hereinafter identified as "the preferred candidate" sentence, be added to Sumwalt's draft version: "The preferred candidate will be certified by the State of Wisconsin as a Fire Officer One or certified by the International Fire Service Accreditation Congress (IFSA) as a Fire Officer One." This sentence was added to Sumwalt's draft version as the last sentence of the section entitled "Special Requirements". This was the only change made to Sumwalt's draft version. Sumwalt

testified that adding language to a job announcement concerning “the preferred candidate” serves two purposes: (1) an applicant, seeing the “preference”, is placed on notice and can decide whether to apply; and (2) it serves as a “tie-breaker” if all other factors are equal between two candidates. The Fire Officer One course, which is referenced by implication in “the preferred candidate” sentence, involves instruction in leadership skills, communication skills, management skills, group dynamics, motivation, counseling, etc. Saler knew when the sentence was added that Alberts did not possess Fire Officer One certification. After the job announcement was finalized, it was posted September 7, 1998. The job announcement covered both of the level 3 positions at Mitchell Field: the shift leader position and the tech services position.

19. Alberts and others applied for the level 3 vacancy referenced above. When Alberts applied, he indicated he was only interested in the shift leader position – not the tech services position. Alberts met the minimum qualifications for the level 3 position. All the applicants then filled out an “objective inventory questionnaire” which essentially was a written exam/application. DER and DMA then reviewed same and banded the applicants into groups of statistically similar scores. Alberts was ultimately placed in scoring band “A”, along with 17 other individuals. The 18 individuals in that scoring band were subsequently notified that they had been certified for both of the level 3 vacancies at Mitchell Field (i.e. both the lead worker position and the tech services position) and were invited to an interview. This notice specified “we will be interviewing for both positions at the same time.” This notice further provided: “candidates should bring a current resume and materials to support the objective inventory questionnaire to the interview, including references and phone numbers.”

20. Thirteen candidates were orally interviewed by a four-person interview panel. The four panel members were Mayor Steven Ford, Tump, Saler and Sumwalt. Ford is Tump’s superior officer. Ford and Tump are federal employees, while Saler and Sumwalt are state employees. The interviews were held on January 5, 6 and 7, 1999, with Alberts’ interview on January 6. All interviewees were treated in the same manner at these interviews. Each interviewee was asked the same set of 26 written questions by Tump. The interview questions were prepared by Saler who used the Fire Officer One Manual as a resource, and approved as appropriate and job-related by Sumwalt. None of the 26 questions dealt with airport matters. Saler testified that the reason none of the interview questions dealt with airport matters was because the “objective inventory questionnaire” had already addressed airports and airport experiences. In his interview, Alberts made it clear that he did not want the tech services position. The reason was this: he had an outside job that he could not keep if he took the tech services position. Alberts brought his original job-related certificates with him to the interview, but he did not bring copies of same for the panelists. When he was asked at the interview if he had copies of his certificates for the panelists, he replied that Saler had copies of them in his personnel file. All the other candidates who were interviewed brought copies of their certificates to their interviews for the panelists.

21. After all the interviews were finished, the four panelists proceeded to the selection process for the two level 3 positions. The panel members quickly decided that John Charlier was the best qualified candidate for the tech services position. The decision regarding the shift leader position took longer and was more involved. The panelists discussed all the interviewees in detail. The testimony of the three panel members who testified (Tump, Saler and Sumwalt) was that when Alberts was discussed, neither Tump nor Saler made statements directed at defeating or adversely impacting Alberts' attempt to be the successful candidate. The panelists eventually narrowed the list of candidates down to six, and then they ranked them. By unanimous decision, the panelists ranked the top six candidates as follows:

1. Richard Ludowise
2. Robert Rittenhouse
3. Alan Freitag
4. Barry Alberts
5. Barry Bosanko
6. Charles Wagner

The interview panel then jointly prepared and signed a written memo which set forth their rationale and justifications for their rankings. That memo provides in pertinent part:

The panel unanimously selected Richard Ludowise as the best candidate for filling the Shift Leader vacancy. Mr. Ludowise has more DOD certifications which are required per the Grants & Cooperative Agreements NGR 5-1/ANGI 63-101 than others interviewed, which include Firefighter 2, Airport Firefighter, Fire Instructor 1, Fire Officer 1, & Hazardous Materials Awareness. He also has the following State of Illinois certifications: Firefighter 2 & 3, Rescue Specialist/Roadway Extraction, Haz-Mat 1st Responder/Operation, EMT-Ambulance, Class B non-CDL Driver's license, Hazardous Materials Technician-A, Hazardous Materials Incident Command, & Hazardous Materials Technician-B. He is also certified as a Firefighter 2 with the State of Wisconsin. Mr. Ludowise answered the leadership skill questions in a highly effective manner. He demonstrates a positive teamwork attitude in his leadership methods. He has had on the job training as Fire Officer Lead Worker at the Great Lakes Naval Training Center & has routinely performed well while in this position. Tsgt Tump is the supervisor over Mr. Ludowise as an Air National Guard member, therefore Tsgt Tump is personally aware of Mr. Ludowise's work style and capabilities. Reference checks were made and Mr. Ludowise has exceptional references.

Mr. Rittenhouse would be the 2nd choice for the Lead Worker position. Mr. Rittenhouse provided good answers to the questions. He holds four of the required DOD certifications. His reference checks were also good. Mr. Rittenhouse indicates that he prefers the Lead Worker position because of the hours and the travel time from Madison. He also indicates that he is aware of how the system works and would take a job in Milwaukee until he would have the opportunity to transfer back to Madison.

Mr. Freitag is the 3rd choice for the Lead Worker position. Mr. Freitag provided good answers to the questions. He holds four of the required DOD certifications. His reference checks were also good. Mr. Freitag indicates that he prefers the Lead Worker position because of the hours and the travel time from Madison, also because he currently fills in as lead worker and has more experience in that area, would be more effective in that capacity. Mr. Freitag also has good reference checks.

Mr. Alberts is the 4th choice for the Lead Worker position. Mr. Alberts provided good answers to the questions. He holds four of the required DOD certifications. Mr. Alberts currently works as F/CRS2 at the Mitchell Field DMA Fire Department. He does not always demonstrate the ability to play as a “team” member. On a daily basis he has not indicated a desire to further his training, though in the interview he did indicate he would do so.

Mr. Bosanko is the 5th choice for the Lead Worker position. Mr. Bosanko provided good answers to most questions. He holds four of the required DOD certifications.

Mr. Wagner is the 6th choice for the Lead Worker position. Mr. Wagner has only one of the required DOD certifications. His background better suits him to the Fire Prevention & Inspector Program Manager vacancy. His Confidential Reliability Questionnaire indicates that he did plead guilty to a 1992 misdemeanor. Mr. Wagner did work as a F/CRS2 at Truax Field in 1990 – 1992.

The DOD certificates referred to in this memo refer to the Department of Defense (DOD) certificates each candidate had. The record indicates that of all of the candidates, Ludowise had the most DOD certificates.

It was Sumwalt’s idea to add the sentence to the paragraph dealing with Alberts that says he (Alberts) is not a team player. Sumwalt testified she based this sentence on her observation of “the attitude he displayed” at the interview and “the way he answered the questions.”

22. Two of the panelists then conducted reference checks on the top three candidates and completed a supporting documentation form. Tump conducted the reference check on Ludowise, and Saler conducted reference checks on Rittenhouse and Freitag.

23. Tump then talked with close friend Sidney Sharpe about the four finalists. Sharpe is the Town of Brookfield Fire Chief, and has over 30 years of military firefighting experience. Sharpe was familiar, to varying degrees, with the four finalists. Without being told by Tump how the panelists had ranked the top four finalists, Sharpe ranked them from one to four as follows: Ludowise, Rittenhouse, Freitag and Alberts. Sharpe's ranking was identical to the panelists' ranking.

24. The interview panel then recommended to DMA Human Resources Director Lynn Boodry that Ludowise be offered the shift leader position. Boodry accepted this recommendation.

25. Ludowise was offered the level 3 shift leader position and he accepted same. Alberts was subsequently advised orally and in writing that he was not the successful candidate.

26. On March 8, 1999, Alberts filed the instant complaint alleging that his being bypassed for promotion violated SELRA.

27. The record does not establish by a clear and satisfactory preponderance of the evidence that the State's failure to select Alberts for the Fire/Crash Rescue Specialist 3 shift leader position was motivated even in part by Alberts' past union activities.

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

CONCLUSIONS OF LAW

1. The State's failure to select Barry L. Alberts for the Fire/Crash Rescue Specialist 3 shift leader position was not motivated even in part by Alberts' past union activities. Consequently, the State's non-selection of Alberts for that position did not violate Sec. 111.82 or Sec. 111.84(1)(c), Stats.

2. Tump's and Powers' statements to Alberts did not interfere with the rights guaranteed to State employees in Sec. 111.82, and thus did not violate Sec. 111.84(1)(a), Stats.

Based on the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

The complaint of unfair labor practices is dismissed.

Dated at Madison, Wisconsin this 18th day of November, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

DEPARTMENT OF EMPLOYMENT RELATIONS
(DEPARTMENT OF MILITARY AFFAIRS)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Pleadings

In his complaint, Alberts alleged that the State violated Secs. 111.84(1)(a) and (c) of SELRA when it failed to select him for the shift leader position. The State's answer denied it had committed any unfair labor practices by not selecting Alberts for the shift leader position.

POSITIONS OF THE PARTIES

The Complainant

It is the Complainant's position that the State's agents committed unlawful discrimination and interference by their actions herein. It makes the following arguments to support these contentions.

The Complainant addresses the unlawful discrimination claim first. He contends that the State's failure to promote him to the shift leader position violated Sec. 111.84(1)(c) because it was based in part on anti-union animus toward his past protected concerted activities. According to the Complainant, it established all the elements required for a finding that the State violated Sec. 111.84(1)(c) when it failed to promote him. Specifically, it asserts that the record establishes that Alberts engaged in protected, concerted activity; that the State was aware of that activity; that the State's agents (Tump and Saler) were hostile toward that activity; and that their failure to promote Alberts to the shift leader position was based, at least in part, on that hostility.

The Complainant believes that the record evidence concerning the first two elements just noted is undisputed. It notes in this regard that Alberts was a steward, vice-president and interim president of the local union for several years, during which time he processed grievances. The Union further notes that in processing those grievances, he dealt directly with Saler and Tump. The Complainant also asserts that his whistleblowing activities were activities protected by Sec. 111.82, and that Respondent's contention to the contrary is unavailing.

Next, with regard to the third element referenced above (hostility), the Complainant contends that Saler and Tump were hostile to, and disliked Alberts for, engaging in protected activities. According to the Complainant, their hostility was established by the following direct and circumstantial evidence. First, the Complainant cites Kinyon's testimony that both Saler and Tump complained to him about the union's obstreperous positions, and "having to fight with the union in order to accomplish their objectives." Second, the Complainant avers that prior to "Tump's ascending to chief", he had a good working relationship with Tump, but once Tump became chief, "and had several confrontations with Alberts in his role as a union representative, Tump quit speaking" to him. The Complainant asserts that the personal animosity that existed between himself and Tump was reciprocal. Third, the Complainant notes that the Inspector General "substantiated" two of the (whistleblowing) charges he made against Tump, and that Tump was removed from the grievance process as a result of a grievance he filed. According to the Complainant, it is unlikely that these two activities endeared him to Tump. Fourth, the Complainant cites the fact that Guard Fire Chief Powers told him, in front of Schaefer, that he (Powers) and Tump knew who had turned them in (to the Inspector General) and that it was not appreciated. Fifth, the Complainant cites the fact that Ludowise, who turned out to be the successful shift leader applicant, told Alberts in the lunchroom that he had heard that he (Alberts) was making trouble again. Sixth, the Complainant cites the fact that while Alberts and his co-workers were discussing the upcoming level 3 exam process, Tump told Alberts it would be a waste of time (for him) to apply. The Complainant believes the only logical inference which can be made from Tump's statement is that he was threatening - indeed assuring - Alberts that he was unpromotable. The Complainant further believes that Tump's testimony that his statement was in refererence to the tech-services position is not credible given the other testimony and the fact that Tump knew that Alberts was not interested in the tech-services position. The Complainant argues that the only reasonable inference that can be drawn from the foregoing points is that Saler and Tump were hostile to Alberts and his past protected activities.

Next, the Complainant believes it established the fourth element needed to prove a violation of Sec. 111.84(1)(c), namely that the State's failure to promote him to the shift leader position was based in part on management's hostility towards his past protected activities. To support this premise, the Complainant cites what it calls the "coincidence of timing" between his protected activities and his not being promoted. It notes in this regard that the statements of Tump, Powers and Ludowise occurred about the same time as he filed his complaint with the Inspector General, and applied for the level 3 position. The Complainant also noted that that fall, he got Tump removed as the Employer's first step grievance representative. The Complainant avers that overall, these circumstances establish illegal discriminatory motivation on the part of Saler and Tump. The Complainant places particular reliance on Tump's "waste of time" statement. According to the Complainant, that one statement alone is dispositive on the issue of whether Alberts was bypassed due, in part, to his protected activities.

Next, the Complainant argues that the State did not offer any convincing reasons for not promoting him. In his view, he was qualified for the shift leader position because of his “excellent evaluations”, the fact that he “had considerably more experience as a Fire/Crash Rescue Specialist than Ludowise”, the fact that he “had considerably more time as an airport employe” than Ludowise, and the fact that he had “considerably more expertise as a lead worker” than Ludowise. In the Complainant’s view, there is no logical explanation for his non-promotion except for his past union activities. The Complainant argues that the reasons advanced by the State for not promoting him were not only pretextual, but also were not plausible, valid or convincing. First, the Complainant addresses the point that he did not bring duplicate copies of his certifications to the interview by simply noting that Saler had copies of those documents in his (Alberts’) personnel file. According to the Complainant, this means that the interview panel had access to Alberts’ certifications. The Complainant therefore submits that the Respondent’s “missing certificates” argument is pretextual. Second, Alberts asserts that the fact that the Town of Brookfield fire chief ranked the candidates in the same order as the interview panel proves little because that fire chief is a close personal friend of Tump’s and aside from that, town fire chiefs are not part of the State’s promotional process. In the Complainant’s opinion, Tump should “have sought the advice of an impartial expert rather than shopping around for a friendly witness.” Third, the Complainant asserts that the State’s job posting constitutes further evidence of illegal conduct. To support this premise, the Complainant notes that Saler inserted the “preferred candidate sentence” into the posting, and that he did so knowing that Alberts did not have Fire Officer One certification. The Complainant argues that the addition of this sentence to the posting effectively denied him “meaningful consideration” for the position. The Complainant also disputes the Respondent’s assertion that the civil service process “hermetically seals out” the opportunity for bias. Fourth, the Complainant believes it is significant that Saler prepared all the interview questions and that none of the questions had to do with air force base firefighting operations. Fifth, the Complainant calls attention to the fact that when the interview panel prepared a written memo setting forth their rationale for their rankings, they specifically noted that Alberts was not a team player. As the Complainant sees it, this reference was a reference to his union activities. The Complainant asserts that even if it was Sumwalt who added this remark to the document, she had no first hand basis to make this remark, so she must have relied on assertions from Tump and Saler that Alberts was not a team player.

In addition to the unlawful discrimination claim addressed above, the Complainant also contends that the State’s agents unlawfully interfered with his protected activities. Thus, the Complainant also raises an interference claim. To support this claim, it cites two factual situations which have already been referenced, namely the statements made by Chiefs Tump and Powers to Alberts and his co-workers. In the Complainant’s view, their statements constituted unlawful interference.

Finally, the Complainant asserts that regardless of the authority of the Wisconsin Personnel Commission, the WERC has the authority to remedy the unlawful discrimination and interference which Complainant has suffered. In order to remedy the alleged promotion discrimination, the Complainant seeks an order promoting Alberts to the shift leader position or, in the alternative, paid as if he had received the promotion, until such time as he is promoted. Thus, Complainant seeks an award of backpay. In order to remedy the alleged unlawful interference, the Complainant seeks a cease and desist order and the appropriate notice. The Complainant also seeks an award of actual attorney's fees.

The Respondent

The State begins its argument in this case by asserting that the Complainant has a vendetta against Tump and is "out to get" him. To support this premise, it notes that he (the Complainant) tried to get Tump fired and/or severely punished by filing charges with the Inspector General. It also notes that Alberts successfully embarrassed Tump by eliminating his role in the grievance procedure. In the State's view, this case, wherein Alberts blames Tump for his not being selected as the shift leader, is part of Alberts' efforts to "get" Tump.

That said, it is the State's position that its conduct herein did not constitute unfair labor practices. The State acknowledges that it cannot take an employee's protected activity into account when making a promotion. It argues that here, though, the Complainant failed to meet his burden of presenting clear and convincing evidence that the State's action in selecting someone other than himself for the shift leader position was the result of his protected activities. According to the State, proof of a nexus between his exercise of protected activities and his non-selection is lacking here. Aside from that, the State contends that the Complainant's failure to be selected for that position was based on the superior qualifications of others and on his own qualifications shortcomings. It elaborates on these contentions below.

The State first addresses the Complainant's contention that Powers and Tump made statements to Complainant that constituted unlawful interference in violation of Sec. 111.84(1)(a).

With regard to Powers' August 21 statement, it notes at the outset that Powers denied making the statement attributed to him. The State asks rhetorically why Powers would even get involved in something that is so removed from himself. Second, the State notes that when Alberts filed his charge with the Inspector General, he did not file charges against Powers, only Tump. Third, the State asserts that Alberts was just plain wrong when he claimed that the Inspector General's investigation was over when Powers supposedly made his statement, because the record indicates the Inspector General's investigation was still ongoing at the time.

Fourth, aside from that, the State avers that Powers was not a state employe and not a “management” person with respect to Complainant, so Powers’ statement, even if made, cannot be imputed to the State, any more than the comments of the general public could be.

Turning to Tump’s “waste of time” statement, the State maintains that when the totality of the circumstances surrounding that statement are considered, along with the fact that Tump’s comment was aimed at the tech-services position, that statement should not rise to the level of unlawful interference.

Next, the Respondent addresses the Complainant’s unlawful discrimination claim. With regard to the first element necessary to prove a violation of Sec. 111.84(1)(c), the State acknowledges that Alberts engaged in protected activities in his capacity as union steward and/or union officer. Beyond that though, the State avers that Alberts “whistleblower activities” are not covered by Sec. 111.82. The State contends that when Alberts complained to Congressman Kleczka and the Inspector General, he was doing this by himself and for himself – not for his colleagues. The State further submits that whistleblower activities and claims of retaliation unrelated to union activities are not governed by SELRA, but instead by Sec. 230.80. The State therefore argues that Complainant has filed in the wrong forum and in an untimely manner for an alleged retaliation claim. The State further claims that the Complainant has failed to take those steps enumerated in Sec. 230.80 in order to avail himself of its protections.

Aside from the point just referenced about the first element, the State also contends that the Complainant failed to prove the third and fourth elements for a Sec. 111.84(1)(c) violation. Specifically, the State argues that the Complainant failed to prove it was hostile to his protected activities, and that it did not select him for the shift leader position in part because of that hostility.

The State’s analysis of the third element involves two separate and distinct activities: the Complainant’s “whistleblowing activities” and his union activities.

It addresses Albert’s whistleblowing activities first. According to the State, Tump and Saler were not hostile toward Alberts because of his whistleblowing activities for one simple reason: they did not know of same. To support this premise, it cites their testimony that they did not know he was behind the Inspector General’s investigation until they read the instant complaint. With regard to using Powers’ statement as evidence of hostility, the State repeats the contention previously made that Powers is not a State employe and therefore his statement, even if made, cannot be imputed to the State.

With regard to Alberts' union activities, the State contends that actual proof of hostility is lacking here. The State maintains that while there were certainly disagreements between Alberts and Tump/Saler concerning grievances, such is the norm in labor relations, not the exception. In the State's view, the grievance processing record documented herein is nothing out of the ordinary and certainly does not show evidence of heated discussions. The State reviews the various incidents relied upon by the Complainant for the proposition that these matters show that hostility existed between him and Tump and Saler. However, after reviewing same, the State reaches the opposite conclusion, namely that those events do not show hostility by Tump and Saler towards Alberts. First, the State asserts that there were not frequent confrontations between Alberts and Tump or Saler because there were not that many grievances. Second, the State believes that the 1995 incident between Alberts and Saler is stale, and therefore should not be used to establish hostility.

The State also argues that Alberts has not proved that there was a connection between his non-selection for the shift leader position and his protected activities (i.e. the fourth element to prove a Sec. 111.84(1)(c) violation). In the State's view, the totality of the record does not prove to the requisite standard that the decision to not promote Alberts was partially attributable to his protected activities.

The State avers that its civil service process "hermetically sealed out" the opportunity for any bias against the Complainant in the promotion process. It maintains that this conclusion is verified by the following points. First, the State asserts that its civil service rules and regulations were followed to the letter during the examination and interview phases. To support this premise, it cites what it calls Sumwalt's uncontradicted testimony that the applicable rules and regulations were followed herein. Second, the State contends that the post-interview selection process was also conducted fairly. Third, the State claims that there is no credible testimony that the interview panel was biased against the Complainant either during the interview or afterwards. With regard to the former, it calls attention to the Complainant's acknowledgement that he was treated like all the other interviewees during the interview. With regard to the latter, the State notes that Tump's and Saler's ranking decisions were in line with those of the other two panelists. The State avers that the ranking decisions of all four panelists were based on the candidate's credentials, as well as the following "hard, uncontradicted facts": that the top three candidates had Fire Officer One certification while the Complainant did not, and that Ludowise had more DOD certificates than the other candidates including the Complainant. Aside from that, the State argues there is absolutely no evidence that Tump and Saler exerted influence on the other two panelists to not select Complainant for the position.

Finally, the State believes that the selection of Ludowise as the most qualified candidate is corroborated by other means. First, it calls attention to the fact that the top three candidates were all "preferred candidates" in that they had Fire Officer One certification, while the Complainant did not have that certification. The State believes that since the Complainant was

not a “preferred candidate”, this means he was not the most qualified candidate. The State maintains that its desire for the “preferred candidate” to be someone with Fire Officer One certification was job-related, justified and entirely appropriate because the shift leader job description specifies that 40% of the duties are leadership-related. It avers that the “preferred candidate” qualification was not a subterfuge to minimize the Complainant’s chances for promotion. Second, the State calls attention to the fact that Powers and Sharpe, who together have 50 years of combined firefighting experience and who knew both Ludowise and Alberts, rated Ludowise as the top candidate. Third, the State maintains that the experience, education and training of the top three candidates are all greater than Alberts, so Alberts credentials do not establish him as the best qualified candidate. It specifically cites the following: 1) that Ludowise has more military base fire department experience than Alberts; 2) that Ludowise was a shift leader for Powers during their six-month Desert Storm stint at Malmstrom Air Force Base, Montana; 3) that Ludowise has five DOD certificates, while Alberts has four (three of which were achieved through “grandfathering”); and 4) that Ludowise has the “preferred candidate” certification.

In conclusion, the State submits that if Alberts had been a “preferred candidate”, and/or had similar job experience, training, education and certificates to the other candidates, then certainly an inference could be drawn that he was not selected because of his protected activities. The State emphasizes though that is not what the evidence shows. According to the State, the evidence clearly establishes that Alberts was not the best qualified by a substantial margin; that he was not a “preferred candidate”; and that he had less training, certifications and job experience than the other top three candidates. The State therefore requests that the complaint be dismissed.

In the unlikely event that a violation of SELRA is found, the State contends that the remedies suggested by the Complainant are inappropriate. It avers that if either a (1)(a) or (1)(c) violation is found, the only appropriate remedy is a cease and desist order. It maintains that under the State’s civil service laws, the Complainant cannot be given the shift leader position. To support this premise, it cites two decisions of the Wisconsin Personnel Commission wherein that agency found that it was inappropriate to remove an incumbent from a position and appoint the appellant instead. The State also argues that an award of back pay (pay differential) is inappropriate. To support this premise, it again notes that the Complainant was not the most qualified candidate. It avers that even if the statements complained of were not made, Complainant would still not have been selected because he was not a “preferred” candidate. The State asks rhetorically how someone can be awarded money for a job which he would not have attained in any event as confirmed by a simple analysis of the qualifications of the top four candidates. It further avers that to award back pay in perpetuity or until Complainant secures a level 3 position assumes that Complainant would pass probation.

The Intervenor

WSEU did not file a brief.

DISCUSSION

The Legal Standards

The complaint alleges State violations of Secs. 111.84(1)(a) and (c), Stats. The legal standards which govern these subsections are as follows.

Sec. 111.84(1)(a), Stats., makes it an unfair labor practice for the State to “interfere with, restrain or coerce state employees in the exercise of their rights guaranteed in s. 111.82.” Sec. 111.82 guarantees State employees the right to engage in certain “lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.”

The Wisconsin Supreme Court has observed that:

It is helpful to compare the wording of MERA and SELRA, whereupon we find that the rights guaranteed to employees under these acts are identical. . .It would be illogical to apply a different test to MERA than SELRA merely because a different group of protected persons are involved (municipal employees versus state employees). 1/

1/ STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 122 WIS.2D 132, 143 (1985).

This observation has been reflected in the test applied by Commission examiners to determine an independent violation of Sec. 111.84(1)(a), Stats., for the test parallels that used to determine an independent violation of Sec. 111.70(3)(a)1, Stats. The test requires that the complainant demonstrate that the complained of conduct was “likely to interfere with, restrain or coerce” union-represented employees in the exercise of their rights protected by

Sec. 111.84(2), Stats. 2/ This is an objective test which does not require proof that the State

2/ See STATE OF WISCONSIN, DEC. NO. 19630-A (McLaughlin, 1/84); AFF'D BY OPERATION OF LAW, DEC. NO. 19630-B (WERC, 2/84); STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES (DHSS), DIVISION OF CORRECTIONS (DOC), DODGE CORRECTIONAL INSTITUTION (DCI), DEC. NO. 25605-A (Engmann, 5/89), AFF'D BY OPERATION OF LAW, DEC. NO. 25605-B (WERC, 6/89); STATE OF WISCONSIN, DEC. NO. 25987-A (McLaughlin, 10/89), AFF'D BY OPERATION OF LAW, DEC. NO. 25987-B (WERC, 12/89).

intended to interfere with the exercise of protected rights. 3/

3/ See THE STATE OF WISCONSIN, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, DEC. NO. 11979-B (WERC, 11/75).

Sec. 111.84(1)(c), Stats., makes it an unfair labor practice for the State to “encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment.” The reference to “other terms or conditions of employment” has been held to include promotional opportunities. 4/ Not

4/ CITY OF MADISON, DEC. NO. 28020-A (Jones, 5/97, AFF'D BY OPERATION OF LAW, DEC. NO. 28020-B (WERC, 6/97).

promoting or not selecting an employe for a position because of his/her past union activity falls within this proscription. Thus, an employer cannot take an employe’s union activity into account when making a promotion or selection decision. In order to establish a violation of this section, a complainant must show all of the following elements:

1. That the employe had engaged in activities protected by Sec. 111.82; and
2. That the State was aware of those activities; and
3. That the State was hostile to those activities; and

4. That the State undertook action against the employe, based at least in part, on that hostility. 5/

5/ STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 122 WIS.2D 132, 140 (1985); STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS, DEC. NO. 25393 (WERC, 4/88); STATE OF WISCONSIN, DEC. NO. 25987-A (McLaughlin, 10/89); STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS, DEC. NO. 25284-B (Engmann, 5/90), AFF'D, DEC. NO. 25284-C (WERC, 11/90).

Under Wisconsin's "in-part" test, anti-union animus need not be the employer's primary motive in order for an act to contravene this statute. 6/ If animus forms any part of the

6/ 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). It was applied to SELRA cases in EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985).

decision to deny a benefit or impose a sanction, it does not matter that the employer may have had other legitimate grounds for its action. 7/ An employer may not subject an employe to

7/ Ibid.

adverse consequences "when one of the motivating factors is his union activities, no matter how many other valid reasons exist" for the employer's action. 8/

8/ MUSKEGO-NORWAY, SUPRA, at p. 562.

Application Of The Legal Standards To The Facts

Section 111.84(1)(c)

Attention is focused first on the Complainant's contention that the State's conduct herein violated Sec. 111.84(1)(c). In the context of this case, the above-noted (1)(c) test requires that the Complainant demonstrate that he engaged in protected activities; that the State had knowledge of those activities; that the State was hostile towards those activities; and that the State's decision to not select Complainant for the shift leader position was based, at least in part, upon said hostility.

Parts of elements one and two above are disputed and parts are undisputed.

Attention is focused first on the parts that are undisputed. It is undisputed that as a union steward and union officer, Alberts has filed and processed grievances. Those grievances were "activities protected by Sec. 111.82." In processing those grievances, Alberts dealt with Saler and Tump concerning same. Obviously, they had first-hand knowledge of his union activities.

That said, it is disputed whether Alberts' whistleblowing activities were covered by Sec. 111.82, and whether Saler and Tump were aware of same. The Complainant answers both questions in the affirmative while the Respondent answers them in the negative.

Although the Examiner will need to resolve the question of whether whistleblower activities are covered by Sec. 111.82 later in this **DISCUSSION** (specifically the section dealing with the interference claim), there simply is no need to address it here. The reason is this: having just found that Alberts' union activities qualified as protected activities within the meaning of Sec. 111.82, and that his supervisors had knowledge of same, elements one and two have been satisfied. That being so, it is unnecessary, at least at this juncture, to decide whether Alberts' whistleblower activities are covered by Sec. 111.82.

The focus now turns to elements three (hostility) and four (illegal motive). Both are in issue herein. Evidence of hostility and illegal motive may be direct (such as with overt

statements of hostility) or, as is usually the case, inferred from the circumstances. 9/ Here, the record will be reviewed for evidence of both types. If direct evidence of hostility or illegal

9/ *Thus, in TOWN OF MERCER, DEC. NO. 14783-A (Greco, 3/77), the Examiner stated that:*

“. . .it is well established that the search for motive at times is very difficult, since oftentimes, direct evidence is not available. For, as noted in a leading case on this subject, SHATTUCK DEAN MINING CORP. v. N.L.R.B. 362 F 2D, 466, 470 (9 Cir., 1966):

Actual motive, a state of mind being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book.”

motive is found lacking, the Examiner will then look to the total circumstances of the case. In order to uphold an allegation of a violation, these circumstances must be such as to give rise to an inference of pretext which is reasonably based upon established facts that can logically support such an inference. 10/

10/ *COOPERATIVE EDUCATIONAL SERVICE AGENCY #4, ET AL., DEC. NO. 13100-E (Yaffe, 12/77), AFF'D, DEC. NO. 13100-G (WERC, 5/79).*

The Complainant cites the following matters to support the conclusion that Tump and Saler were hostile toward his union activities: 1) the fact that Tump and Saler complained to Kinyon about “fighting the union”; 2) Alberts claim that after he had several grievance meetings with Tump, Tump quit speaking to him at work; 3) the fact that some of his whistleblowing charges were substantiated by the Inspector General and the fact that Tump had been removed from the grievance process as a result of a grievance he had filed; 4) Powers’ statement of August 21, 1998; 5) Ludowise’s statement of September 11, 1998; and 6) Tump’s “waste of time” statement.

In addressing the third element, one analytical path would be to address each of the above-referenced matters individually and decide whether it is sufficient to show hostility to union activities. Another analytical path would be to consider them all collectively. In this particular case, the Examiner has decided to use the latter approach. After considering the above-referenced matters collectively, the Examiner has decided that, when taken as a whole, they establish that Tump and Saler were hostile to Alberts' union activities.

This finding allows the discussion to proceed to the fourth and final element necessary to prove a (1)(c) claim, namely illegal motive. As previously noted, this element involves the question of whether the Employer's non-selection of Alberts for the shift leader position was motivated, in part, by hostility towards Alberts' past union activities.

Attention is focused first on whether direct evidence exists which establishes that Alberts was not selected for the shift leader position because of his past union activities. The Complainant contends that there is, citing Tump's "waste of time" statement. As the Complainant sees it, that statement, in and of itself, establishes the fourth element.

In the Examiner's view, Tump's "waste of time" statement certainly shows that Tump did not consider Alberts to be shift leader material. On its face though, that is all the statement shows. Specifically, it does not address the question of why Tump thought Alberts was not shift leader material: was it because of his past union activities or was it due to work-related reasons? Since there is nothing in Tump's statement expressly linking Alberts' past union activities to Tump's view that he was not shift leader material, it is held that this particular statement does not constitute direct evidence of illegal motive.

Having addressed the only claimed direct evidence that Alberts was not selected shift leader because of his past union activities, and found it wanting, the focus turns to whether an inference can still be drawn from the total circumstances of the record, and reading between the proverbial lines, that this is what occurred.

In support of this assertion, the Complainant cites the following matters: 1) what it calls the "coincidence of timing" between his protected activities and his not being promoted; 2) the inclusion of the "preferred candidate" sentence into the job announcement; 3) the fact that Saler prepared all the interview questions and that none of them had to do with air force base firefighting operations; and 4) the fact that when the interview panel prepared a written memo setting forth their rationale for their rankings, they indicated therein that Alberts was not a team player. Each of these matters is reviewed below.

Attention is focused first on what the Complainant calls the “coincidence of timing” between the Inspector General’s response to the charges he filed, the statements made by Tump, Powers and Ludowise to him, Tump’s removal as the Employer’s first step grievance representative, and the fact that he was not selected for the shift leader position. All the foregoing matters except the last one occurred in the summer and fall of 1998; Alberts did not get the position until January, 1999. In the opinion of the Examiner, the timing of the foregoing events do not support an inference that Alberts was not selected shift leader because of his past union activities.

Next, the Complainant asserts that when Saler inserted the “preferred candidate” sentence into the job announcement, this effectively denied him “meaningful consideration” for the position because he does not have Fire Officer One certification. It may be that Saler added Fire Officer One certification to the job announcement for that very reason (i.e. to cut Alberts out of the running). However, even if that was the case, the Employer still had the right to add the “preferred candidate” sentence to the job announcement. In other words, management was not foreclosed from seeking someone with Fire Officer One certification. The reason is this: when a position is posted, management gets to establish the parameters of what it is looking for. It decided that the “preferred candidate” for the shift leader position was someone with Fire Officer One certification. A review of the shift leader job description indicates that a big part of the job involves tasks that can fairly be characterized as leadership-related. The record indicates that Fire Officer One certification involves, among other things, leadership training. That being so, Fire Officer One certification was a job-related, objective criteria.

Next, the Complainant calls attention to the fact that Saler prepared the test questions and that none of them had to do with air force base firefighting operations. If the Complainant is attempting, via this argument, to challenge the content validity of the questions asked at the interview, it had to prove it. It did not. Insofar as the record shows, no suspect questions were asked and no unlawful inquiries were made of Alberts at the interview. It does not suffice to simply note who drafted the questions and to note that none of them had to do with air force base firefighting operations. The record indicates that the test questions were taken from the Fire Officer One Manual, and were approved as appropriate and job-related by a DMA human resources specialist. The Examiner therefore finds no connection between the test questions that were asked and Alberts non-selection for the shift leader position.

Next, the Complainant calls attention to the fact that when the interview panel prepared a written memo setting forth their rationale for their rankings, they specifically said that Alberts is not a team player. While the Complainant believes this statement is a reference to his union activities, there is nothing in the statement which makes such a connection obvious. It is certainly possible for an employe to not be a team player independent of union activities. Moreover, the drafter of this sentence, Sumwalt, testified she based the statement on the attitudes she thought Alberts exhibited at the interview.

Having addressed the foregoing matters, further attention is focused on what happened during the interview and selection phases. During the interview, Alberts was treated like all of the other interviewees in that he was asked the same set of questions. There was at least one thing which occurred during the interview though which made Alberts stick out unfavorably: while the other interviewees brought copies of their certificates to the interviews for the panelists, Alberts did not. Following the interviews, the panelists discussed all the applicants before ranking them. Insofar as the record shows, when the panelists discussed Alberts, Saler and Tump did not actively campaign or lobby against him (Alberts). Specifically, they did not make statements to the other two panelists which were directed at defeating or adversely impacting Alberts' attempt to be the successful candidate. Aside from that, the Complainant does not contend that Tump and Saler somehow controlled the other two panelists and their decisions, nor is there any basis in the record for the Examiner to so find. The panelists then ranked the candidates. Tump and Saler's ranking decisions were in line with those of the other two panelists. Returning again to the memo the panelists wrote which set forth their rationale for their rankings, the Complainant believes that the sentence therein stating that Alberts is not a team player must have come from Tump and Saler. According to the Complainant, it could not have come from Sumwalt because she had no first-hand basis on which to make this remark. The record evidence shows otherwise. Sumwalt testified it was her idea to add the sentence saying that Alberts is not a team player, and that she based this sentence on her (first-hand) observation of "the attitude he displayed" at the interview and "the way he answered the questions." Nothing in the foregoing proves that the interview panel was biased against the Complainant because of his past union activities during either the interview or selection phases.

Finally, the Examiner finds that the explanations offered by the State for Ludowise's selection and Alberts' non-selection cannot reasonably be found to be pretextual. If Alberts had been a "preferred candidate" with Fire Officer One certification, and had more training and certificates than the other candidates, then certainly an inference could be drawn that he was not selected because of his past union activities. However, that is not what the evidence shows. As noted in Finding of Fact 21, Ludowise had the "preferred candidate" certification while Alberts did not. Additionally, Ludowise had more DOD certificates than the other candidates, including Alberts. The interview panel determined that three other candidates had better credentials and qualifications than Alberts did. Nothing in the record indicates this decision was not objective. Most importantly, the Complainant has not shown that the interview panel ranked him fourth because of his past union activities. Given the foregoing, there simply is not sufficient evidence in the record to infer that Alberts was not selected shift leader because of his past union activities.

In summary then, the Examiner has found that although Tump and Saler were hostile towards Alberts' past union activities, the evidence does not support a conclusion that he was not selected for the shift leader position, even in part, because of that hostility. Consequently, it is held that the State's non-selection of Alberts for the shift leader position did not violate Sec. 111.84(1)(c), Stats.

Section 111.84(1)(a)

Having so found, attention is turned to the interference claim. The premise for this claim is that Powers' statement and Tump's "waste of time" statement constitute unlawful interference.

My analysis of this claim begins with the following comment. When I addressed the hostility element of the (1)(c) claim earlier, it was noted that the Complainant relied on six separate matters to establish hostility. Two of the six factual matters were Powers' statement and Tump's "waste of time" statement. For purposes of discussion, I lumped all six factual matters together and found that, when considered collectively, they were sufficient to establish hostility. The reason this point has been noted again is this: in my view, the fact that Powers' and Tump's statements were used to establish the third element for a (1)(c) claim does not mean that a (1)(a) violation has automatically been shown. The interference claim raised herein is a separate and independent (1)(a) claim, not simply a derivative of the (1)(c) claim.

Attention is focused first on Powers' statement. As noted in Finding of Fact 15, on August 21, 1998, Powers told Alberts "We know who turned us in, and it's not appreciated." Alberts interpreted it to be a reference to the charges he had filed with the Inspector General.

It is unclear to the Examiner why Powers would involve himself in this matter by making such a statement. He is not Alberts' supervisor, and insofar as the record shows, does not work with him. Aside from that, Alberts did not file charges with the Inspector General against him - just Tump. Be that as it may, I find that Powers made the statement attributed to him.

Powers' statement does not reference Alberts' union activities. Instead, it implicitly references the charges he (Alberts) filed with the Inspector General. Powers was obviously unhappy with Alberts for filing those charges.

The charges which Complainant filed against Tump can fairly be characterized as whistleblower activities. A variety of state and federal statutes give employees whistleblower protection for certain conduct related to the workplace. Commonly referred to as whistleblower statutes, those statutes generally prohibit employers from discharging or otherwise discriminating against an employee who files a complaint or report with a government agency, opposes an illegal act, cooperates in a governmental investigation, or testifies in a legal proceeding. One such statute is Sec. 230.80, Stats. That section deals with whistleblower activities and claims of retaliation which are unrelated to union activities.

The question here is whether whistleblower activities are protected by Sec. 111.82. Based on the following rationale, I find they are not. As previously noted, Sec. 111.82 gives State employees the right to engage in “lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.” The whistleblower activities referenced in Findings of Fact 9-11 do not fall under any of the rights specifically enumerated in Sec. 111.82. When Alberts complained to Congressman Kleczka and the Inspector General about Tump, he did so by himself and for himself. There is no evidence in the record that he did so “for the purpose of collective bargaining” or for the “mutual aid or protection” of his co-workers.

Since Alberts’ whistleblower activities were not protected by Sec. 111.82, it was not a violation of Sec. 111.84(1)(a) for Powers to express his personal dissatisfaction and unhappiness with Alberts for filing charges with the Inspector General.

The focus now turns to Tump’s “waste of time” statement. As noted in Finding of Fact 14, sometime in the summer of 1998, Tump overheard Alberts tell Schaefer that he was going to apply for the upcoming level 3 position, whereupon Tump stated words to the effect that it would be “a waste of time for him to apply.”

Tump’s statement was addressed earlier in the **DISCUSSION**, specifically in the section dealing with the fourth element of a (1)(c) claim. Therein I wrote:

In the Examiner’s view, Tump’s “waste of time” statement certainly shows that Tump did not consider Alberts to be shift leader material. On its face though, that is all the statement shows. Specifically, it does not address the question of why Tump thought Alberts was not shift leader material: was it because of his past union activities or was it due to work-related reasons? Since there is nothing in Tump’s statement expressly linking Alberts’ past union activities to Tump’s view that he was not shift leader material, it is held that this particular statement does not constitute direct evidence of illegal motive.

I believe this rationale also applies to the interference claim. The Complainant has not demonstrated that this particular statement interfered with the rights granted to State employees in Sec. 111.82. Accordingly, Tump’s “waste of time” statement did not violate Sec. 111.84(1)(a), Stats.

In conclusion, no unlawful discrimination or interference has been shown. The complaint has therefore been dismissed. Complainant's request for attorney's fees is denied.

Dated at Madison, Wisconsin this 18th day of November, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner