STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BELOIT CITY HALL AND RELATED EMPLOYEES UNION, LOCAL 2537, AFSCME, AFL-CIO; BELOIT DPW EMPLOYEES UNION, LOCAL 643, AFSCME, AFL-CIO and FIREFIGHTER LOCAL UNION NO. 583, IAFF, AFL-CIO, Complainants,

vs.

CITY OF BELOIT, Respondent.

Case 141
No. 57548
MP-3518

Decision No. 29738-A

Appearances:

Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1734 Arrowhead Drive, Beloit, Wisconsin 53511, appearing on behalf of the Complainants Beloit City Hall and Related Employees Union, Local 2537, AFSCME, AFL-CIO; Beloit DPW Employees Union, Local 643, AFSCME, AFL-CIO and Firefighter Local Union No. 83, IAFF, AFL-CIO.

Davis & Kuelthau, S.C., by **Attorney Nancy L. Pirkey**, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-6613, appearing on behalf of the City of Beloit.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On May 6, 1999, Complainant filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Beloit had committed prohibited practices in violation of the Municipal Employment Relations Act. Hearing was held in Beloit, Wisconsin, on November 17, 1999. The hearing was transcribed. The record was closed on January 21, 2000, upon receipt of a transcript and post-hearing written argument.

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

FINDINGS OF FACT

1. Beloit City Hall and Related Employees Union, Local 2537, AFSCME, AFL-CIO; Beloit DPW Employees Union, Local 643, AFSCME, AFL-CIO and Firefighter Local Union No. 583, IAFF, AFL-CIO, hereafter Complainants, are labor organizations. For the purposes of this proceeding, all of the Complainants are represented by Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO. Each of the Complainants represents a collective bargaining unit of employes of the City of Beloit. The Complainant AFSCME Locals have offices at 1734 Arrowhead Drive, Beloit, Wisconsin 53511 and the Complainant IAFF Local has offices at 524 Pleasant Street, Beloit, Wisconsin 53511.

2. The City of Beloit, hereafter City or Respondent, is a municipal employer and maintains its offices at the Beloit City Hall, 100 State Street, Beloit, Wisconsin. The City's principal representative and agent for the purposes of labor relations matters is Mr. Alan Tollefson, Personnel and Labor Relations Director. Ms. Jane Wood is the City Manager and acts on behalf of the City of Beloit.

3. On or about June 23, 1998, Wisconsin Council 40 Staff Representative Thomas Larsen sent the following letter to Personnel and Labor Relations Director Tollefson:

> **Re: Notice of Intent**
>
> This letter will serve as written notice to you that the Union wishes to negotiate changes in wages, hours and conditions of employment for employees of the DPW unit, represented by this Union. Such changes to become effective 1 January 1999. We suggest the following "ground rules" for the conduct of these negotiations:
>
> 1. The parties meet in open session at a mutually agreeable time, date and place, at which time both parties will exchange their initial bargaining proposals.
>
> 2. Thereafter, the parties will meet at mutually agreeable times, dates and places in closed session for collective bargaining in an attempt to reach a mutual understanding on all issues.
>
> 3. The parties agree that all releases to the press will be made mutually, until the parties reach a settlement or impasse.
>
> 4. That the terms of the current collective bargaining agreement will continue to be adhered to until an agreement is reached between the parties in accordance with Wisconsin Statute Chapter 111.70.

> In order to prepare for such negotiations, the Union requests the following information:
>
> - A listing of all employees in the bargaining unit, indicating the classification, date of hire, hours worked per week, health insurance status (single/family) and present rate of pay for each and;
>
> - The monthly premiums, both for family and single, for health and other insurance plans, made available to the employee through the employer, indicating the number of employees with single and with family plans.
>
> Please contact the writer as soon as possible in order to determine a date, time and place for the initial meeting between the parties.

On or about July 29, 1998, City Personnel and Labor Relations Director Tollefson sent the following letter to Staff Representative Larsen:

> The City stands ready to set dates for negotiations. We offer the following dates for your consideration:
>
> **Thursday, September 3, 1998**
> **Wednesday, September 9, 1998 or**
> **Wednesday, September 30**
>
> I trust you have received the information you requested in your letter of June 23. In terms of the ground rules you proposed in that letter, the City agrees with your numbers 1, 2, and 3. As to your number 4, the City is interested in successfully completing negotiations in a timely fashion. Given the improved climate in our negotiations the last few years and the foundation for a more positive long-term relationship, the City is hopeful we will succeed in that effort. The City will certainly consider an extension of terms after 12-31-98 as that date approaches.
>
> In addition, the City offers its standard reservations, which also constitute ground rules. A copy of the City's cover sheet for its initial and subsequent proposals is enclosed.
>
> The City has retained the law firm of Davis & Kuelthau to assist in negotiations. Attorney Nancy Pirkey will serve as the City's spokesperson.

I will be on vacation until August 17, but please call Pam and indicate your choice of a date or provide alternatives. I look forward to hearing from you.

The above letter was accompanied by the following enclosure:

CITY OF BELOIT
PROPOSALS TO
AFSCME LOCAL #643
GENERAL RESERVATIONS IN THIS AND
ALL SUBSEQUENT PROPOSALS
WHETHER STATED AT THE TIME OR NOT

The City hereby serves notice of its desire to terminate and renegotiate the Labor Agreement and side bar agreements between the parties.

We wish to make it clear that:

(1) The City reserves the right to add, modify and withdraw any and all proposals made.

(2) Any partial agreements in the course of negotiations made by the City Bargaining Team are tentative in nature and subject to total agreement.

(3) Any proposal or agreement made by the City is subject to ratification by its proper principals.

(4) Some of the City's proposals merely reiterate rights not reserved to the City by contract, or reserved to the City by law. In the interest of fair play, the City will not preclude discussions of such subjects with the Union.

State law recognizes classifications of demands by the parties as mandatory, permissive, or prohibited subjects of bargaining. The City will observe the distinctions and reserves the right to raise the appropriate classification issue at any time in its discussions with the Union.

Discussion by the City of a permissive subject of bargaining shall not convert such subject to a mandatory subject of bargaining, and the City reserves the right despite any discussion to remove at any time the permissive subject from its offer, and to make objection to its consideration by a third party, whether a mediator or an arbitrator.

The City Manager is not a member of the team that negotiates labor contracts on behalf of the City and does not represent the City for purposes of negotiating labor contracts. Personnel and Labor Relations Director Tollefson, a member of the team that negotiates labor contracts on behalf of the City, attended all negotiation sessions in 1998 and 1999 involving AFSCME Locals 2537 and 643 and IAFF Local 583. Prior to the commencement of these negotiations, Personnel and Labor Relations Director Tollefson received parameters from the City Council and the City Manager. Under these parameters, Personnel and Labor Relations Director Tollefson could not settle at more than 2.25% on 1999 wages without going back to the City Manager and City Council. Personnel and Labor Relations Director Tollefson did not have to go back to the City Council and the City Manager because all of the unions settled at 2.25% for 1999. On April 22, 1998, AFSCME Local 2537 and the City reached a contract settlement. This contract was executed on May 29, 1998. AFSCME Local 643 and the City began contract negotiations on September 30, 1998 and, on July 2, 1999, reached a settlement on their 1999-2000 contract. IAFF Local 583 and the City began contract negotiations on September 17, 1998, and reached a contract settlement on October 29, 1998. During their first bargaining session, IAFF Local 583 and the City agreed not to move anything to the press until the parties got to the point where they needed to go to mediation or arbitration. The "ground rules" agreed upon by the City and AFSCME Local 643 and the City and IAFF Local 583 were intended to regulate press releases concerning labor contract negotiations. On October 28, 1998, representatives of the Complainants met with the City Manager at a quarterly meeting of the City Manager and Union leadership. At that time, the City Manager and representatives of the various City bargaining units met regularly at "quarterly meetings" to discuss labor-management issues. At that time, the City Manager met quarterly with City employes, on a voluntary basis, and discussed City matters, including financial matters. Pat Helms and Dawn DeuVall, representatives of AFSCME Local 2537; Mel Wells, representative of WPPA; Tom Fearn, representative of the Police Supervisors Association; Ron Hanson, Bud West, Gary Zimmermann and Ken Bordner, representatives of AFSCME Local 643; Terry Hurm, representative of IAFF Local 583; and Alan Tollefson attended this meeting. At this meeting, the parties discussed various issues that had been carried over from the August 19, 1998 meeting, as well as new issues. At the close of the meeting, various union representatives objected to the fact that the 2.25% wage increase in the budget had been reported by the Beloit Daily News and suggested that this was bargaining in bad faith. It was then discussed that the budget is an open document. The City Manager commented that, if one bargaining unit settled at 2.25% and another unit went to arbitration and won, any layoffs required would come from the unit that received the higher wage settlement. The City Council did not instruct the City Manager to make such a comment. The City Manager had a good faith belief that any required layoffs would occur in the collective bargaining unit that achieved a 1999 wage increase in excess of 2.25%. After the meeting, various union representatives met to discuss the City Manager's comments. Dawn DeuVall, whose bargaining unit had settled for a 2.25% wage increase in 1999, concluded that the City Manager's comments were a threat. Ronald Hanson, whose bargaining unit had not yet settled their 1999 contract, concluded that the City Manager's comments were a threat to retaliate if AFSCME Local 643 went to arbitration on their contract. Prior to the meeting of October 28, 1998, Personnel and

Labor Relations Director Tollefson told the City Manager that he had had a discussion with the Public Works Director in which the Public Works Director stated that members of AFSCME Local 643 were concerned that, if they settled for 2.25% and another unit went to arbitration and received more than 2.25%, that there would be layoffs in AFSCME Local 643. After the City and AFSCME Local 643 had settled their 1999-2000 contract, but prior to the time that the parties executed this contract, the City requested that the 2000 settlement be modified to include a wage freeze for Transit Department employes. During discussions on the City's request to modify the 2000 settlement, the City notified AFSCME Local 643 that three or four Bus Driver positions would be laid off effective January 1, 2000.

4. In March of 1998, City Department Heads were asked to prepare a Department budget for 1999. Prior to that time, the City Council, in consultation with the City Manager, established budgetary guidelines that provided for a 1999 wage increase of 2.25% for unionized employes, exclusive of step adjustments. This 2.25% wage increase was proposed by the City Manager, after reviewing the City's financial condition, and in response to the City Council's request for strategies to bring the budget under the State revenue cap. The penalty for exceeding the State revenue cap would be a loss in State aids of approximately $500,000. During the budget process, the City Manager discussed with the City Council the consequences of exceeding the budget. In October of 1998, prior to October 28, 1998, the City of Beloit 1999 operating budget that had been developed by the City Manager and the City Finance Director was presented to the City Council for approval. At the time of this presentation, the City Council and members of the public attending the council meeting received explanatory documents that had been prepared by the City Manager and the City Finance Director. An explanatory document prepared by the City Manager included the following:

CITY OF BELOIT
1999 OPERATING BUDGET

It is a pleasure to present my recommendations for the 1999 Operating Budget for the City of Beloit, totaling $28.3 million in general funds and $19.6 million in special funds. On June 15, 1998 the City Council adopted a resolution that established five financial goals for the City's 1999 Operating Budget. The budget I present meets all five.

1. **No increase in the tax rate:** The proposed tax rate of $8.70 is 9% lower than the 1998 tax rate. That's the lowest tax rate for city services in over 15 years and represents a tax savings of $33 for City services on a home with an average assessed value of $54,145.

2. **Maintain essential City services:** The only modification in service provided directly to the citizenry is to refocus on the staff duties for Equal Opportunities.

3. **Offset necessary increased costs with baseline savings:** Increased appropriations are recommended in several key areas: Economic development, Year 2000 compliance, health insurance premiums. These increases were offset by savings that resulted from reorganizations, lower debt service costs and lower contributions for retirement and liability insurance.

4. **Emphasize long term solutions:** Both the priorities for increased spending and the types of savings reflect investments in the future financial viability of our City.

5. **Adopt meaningful performance objectives and indicators:** For the last year, I have been reporting quarterly to Council and the public about what your City government has accomplished. This discipline has encouraged employees throughout the organization to clearly define what will get done and to better document the results of their work.

Preparing a budget consistent with the Council's objectives required a strategic prioritization of resources. These are the major budget highlights.

. . .

Fringe Benefit and Insurance Coverage
The cost of providing fringe benefits and insurance coverage offered a challenge. On the plus side, better hazard management and awareness has brought down the operating costs of worker's compensation and liability insurance, saving $173,000. The cost of health insurance, however, jumped up by 15% adding $500,000. The State retirement fund decreased the percentage contribution into the retirement fund by .8% of payroll which saved $147, 000. However $86,000 of that savings was lost by a 1.1% rate increase for duty disability retirement for Police and Fire. Post employment health plans for the Police and AFSCME #643 added $24,000 and the vision test for members of AFSCME #2537 added $2940.

Salary Increases
Government is a labor intensive business and personnel is our largest expenditure. With an $18 million payroll, even a small salary adjustment translates into a large budget increase. This budget is based on the assumption that across the board salary increases will be negotiated at 2.25%. Since the City is tight against the expenditure restraint cap, exceeding the cap would cause the City to lose $500,000 in state aid. Thus, salary increases over 2.25% cannot be afforded without increasing taxes or significantly reducing services. One represented group, AFSCME #2537, has already settled with the City at

that range for 1999. All the other contracts are currently in negotiation. Although the across the board increase is lower than recent years, that is not the only salary adjustment for employees. Employees also receive periodic step increases for longevity. Exempt employees, who are also budgeted for a 2.25% across the board, have a small merit pool of $32,015 set aside to add an extra 1% for exceptional performance.

. . .

CHALLENGES FOR THE FUTURE

Health Insurance

The City will allocate $3.5 million health insurance premiums in 1999. Family coverage is now $7700 per year. Coverage for retired police and fire employees exceeds $750,000 per year and is growing rapidly. I have asked representatives of the bargaining units to work with me in an examination of the City's health insurance benefits to determine how the plan can be made more affordable without sacrificing critical coverage.

. . .

An explanatory document prepared by the City Finance Director included the following:

Expenditures

General Fund

. . .

Local government is a very labor intensive business. Any effort to control tax rates must address personnel costs. $12.2 million is recommended for salaries plus $6 million for fringe benefit costs in the general fund alone. This is a 3.6% increase over 1998. Personnel costs were contained through a combination of actions:

> Rightsizing decreased the total number of personnel during 1998 and additional reductions are recommended for 1999. Net General Fund savings is $287,200.
>
> Worker's Compensation and Wisconsin Retirement rates dropped, saving $160,000.

> Across the board salary increases are assumed at 2.25%, a lower increase than in previous years.
>
> However, total compensation costs include a 15% increase in health rates, costing $500,000, higher duty disability retirement for Police and Fire at $86,000, other negotiated contract benefits from last year at $26,940 and a merit pool of exempt employes at $32,015.
>
> . . .
>
> Expenditure Restraint
>
> The City faces a major challenge with expenditure restraint for 1999. The state provides $504,000 of revenue to the City if the increase in expenses is contained within the rate of inflation plus growth. While the final percentage is not available, the cap is estimated at 3.6-3.8%. Even with all the Manager's recommended savings, the budget is just under the 3.6% expenditure cap.
>
> It will be very difficult to increase spending for new services and programs or to provide more generous support to existing programs. Basically, a significant new expense would have to be offset with additional savings or the $504,000 of state revenue will be lost. That would cause the tax rate to jump back up to cover the lost revenue as well as the new expense, unless a new alternative revenue source was also found. Therefore, the Manager could not recommend many program enhancements, including some that have considerable merit and address serious concerns in the community.
>
> . . .

Throughout the 1999 budget process, the City Manager maintained the guideline of a 2.25% wage increase for unionized employes. The City Council adopted the 1999 City budget substantially as presented by the City Manager and Finance Director. The adopted 1999 budget allocated 2.25% for unionized employe wage increases. At the time of hearing on the complaint, Jane Wood had been the City Manager for approximately twenty-six months. When she assumed this position, she promised that there would be no layoff of union employes during her first budget. The City Manager kept this promise, but eliminated non-union positions for the purpose of remaining below the expenditure cap. At the open meeting in which the City Council was presented the 1999 budget, slides were shown that illustrated the budgetary impact of exceeding the budgeted 2.25% wage increase and correlated an increase in this budgeted amount to a loss of state aide. City representatives also discussed that there would be layoffs if the wage increase exceeded 2.25%. Following the adoption of the 1999

budget by the City Council, the press reported that the City had budgeted 2.25% for 1999 wage increases and that there would be layoffs if there were increases above 2.25%. The information disclosed to the public at the October, 1998 budget meeting was not disclosed by any member of the City's labor contract negotiating team.

5. City Manager Jane Wood's comments that, if one bargaining unit settled at 2.25% and another unit went to arbitration and won, any layoffs required would come from the unit that received the higher wage settlement were not motivated by hostility toward Complainants or any employe for engaging in concerted, protected activity. At the time that City Manager Jane Wood made the comments, she had a good faith belief that AFSCME Local 643 had raised the question of what would happen if the unions could not settle at 2.25%. City Manager Jane Wood made the comments at the "quarterly meeting" to ensure that all of the bargaining units received the same information and to fully disclose the consequences of receiving more than a 2.25% wage increase for 1999.

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

CONCLUSIONS OF LAW

1. Beloit City Hall and Related Employees Union, Local 2537, AFSCME, AFL-CIO; Beloit DPW Employees Union, Local 643, AFSCME, AFL-CIO and Firefighter Local Union No. 583, IAFF, AFL-CIO, are labor organizations within the meaning of Sec. 111.70(1)(h), Stats.

2. The City of Beloit is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats. At all times material herein, Personnel and Labor Relations Director Alan Tollefson and City Manager Jane Wood have been agents of the City of Beloit.

3. The City of Beloit did not violate Sec. 111.70(3)(a)1, Stats., when, on October 28, 1998, City Manager Jane Wood commented that if one bargaining unit settled at 2.25% and another unit went to arbitration and won, any layoffs required would come from the unit that received the higher wage settlement.

4. The City of Beloit did not violate Sec. 111.70(3)(a)4, Stats., when the City Council, in consultation with City Manager Jane Wood, established a 1999 budgetary guideline of a 2.25% wage increase for unionized employes; maintained this budgetary guideline throughout the budgetary process; and adopted a 1999 budget that allocated a 2.25% wage increase for unionized employes.

5. The City of Beloit did not violate Sec. 111.70(3)(a)4, Stats., when, at the October, 1998 public meeting on the 1999 City budget, the City disclosed that the 1999 budget allocated a 2.25% wage increase for unionized employes.

6. Complainants have not shown, by a clear and satisfactory preponderance of the evidence, that Respondent has violated Sec. 111.70(3)(a)1, Stats., or Sec. 111.70(3)(a)4, Stats., as alleged by Complainants.

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

ORDER

Complainants' complaint against Respondent City of Beloit is hereby dismissed in its entirety.

Dated at Madison, Wisconsin, this 17th day of March, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

CITY OF BELOIT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On May 6, 1999, Complainants filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Beloit had committed prohibited practices in violation of Secs. 111.70(3)(a)1, 3 and 4, Stats., by making a threat of reprisal against the members of collective bargaining units which prevailed in arbitration and by publicly announcing the amount of wage increase prior to any negotiation on the subject. In post-hearing written argument, Complainants abandoned their claim that the City of Beloit had committed prohibited practices in violation of Sec. 111.70(3)(a)3, Stats.

The City of Beloit denies that it has committed the prohibited practices alleged in the complaint. In post-hearing written argument, Respondent abandoned its request for costs, disbursements and reasonable attorneys' fees.

POSITION OF THE COMPLAINANTS

At a quarterly meeting of the City Manager and Union leadership on October 28, 1998, the Beloit City Manager made certain statements, the effect of which would be to interfere with, restrain or coerce municipal employes in the exercise of their rights. Specifically, the City Manager threatened that if any bargaining unit went to arbitration and won a wage increase larger than 2.25%, then layoffs would come from the bargaining unit which received the higher wage increase.

The record demonstrates that the comments of the City Manager were in the form of a threat. Specifically, if one of the Unions dared to defy the amount that the City Manager had predetermined for a raise, then that bargaining unit would be retaliated against in the form of layoffs of members of that bargaining unit.

The City Council, that is responsible for setting policy, had not yet adopted a budget for 1999. The City Manager firmly stated that layoffs would be directed against the offending union, without having such authority from the City Council.

The City of Beloit was not confronted with a budgetary crisis that would have necessitated layoffs to achieve the desired budgetary level. Contrary to the budget presented by the City Manager, the actual projected budgetary surplus for 1999 was nearly one million dollars.

The 2.25% wage increase was determined by the City Manager early in 1998. This figure was maintained throughout the budget process irrespective of the fact that the City subsequently received information that the cost of the Wisconsin retirement system would be reduced to eight tenths of a percent for general government employes.

The parties had not yet reached an agreement on the contract. The status of negotiations is significant in that the parties would have had the opportunity to discuss proposals that could mitigate the impact of any wage increase in excess of 2.25%. Respondent's action further exasperated the situation when it publicly announced its intention to seek a 2.25% wage increase even after agreeing to negotiation ground rules not to make public bargaining positions.

Respondent has violated Sec. 111.70(3)(a)4, Stats., by establishing an arbitrary wage increase and letting it be known that such an amount would not be negotiable. Respondent violated Sec. 111.70(3)(a)1, Stats., by seeking to interfere with, restrain or coerce employes by threatening layoffs if employes sought a larger wage increase than had been offered by the Respondent. Respondent should be ordered to cease and desist from violating its duty to bargain in good faith and to cease and desist from interfering with, restraining or coercing employes from exercising their rights under the Municipal Employment Relations Act.

POSITION OF THE RESPONDENT

The duty to bargain in good faith includes the duty to notify the Union that layoffs could occur depending on the wage increase agreed to at the bargaining table. Thus, the City had an affirmative duty to inform Complainants that, due to budgetary restraints, the City would be forced to lay off employes if wage increases exceeded 2.25% for 1999.

By responding to questions concerning the possibility of layoffs if wage settlements exceeded the 2.25% increase budgeted, the City was simply satisfying its duty to bargain in good faith by providing relevant and reasonably necessary information to the Union. The City has a duty to provide such information to Union bargaining representatives even when the Union has not requested that information.

As the Commission has previously held, parties are generally free to take whatever positions they wish at the collective bargaining table, but cannot expect to be insulated from the consequences of having those proposals adopted. In the present case, fiscal constraints and public policy decisions led the City Council to adopt a budget that funded only a 2.25% wage increase for union and non-union employes. Under the totality of the circumstances, it is clear that the City Manager did not unlawfully threaten the Complainants, but rather, simply provided relevant and necessary information to the Complainants.

The City has the statutory obligation to present the budget at an open session of the City Council and to hold a public hearing on the proposed budget prior to its adoption. The City's bargaining team did not communicate with the press at any time during the negotiations. Complainants' argument that the City violated the ground rules adopted in negotiations fails to distinguish between information provided by the City as part of its statutory duty under Sec. 65.90, Stats., and limitations voluntarily agreed to as the ground rules in the negotiations.

Complainants' allegations of prohibited practices are without merit. The complaint should be dismissed with prejudice.

DISCUSSION

Applicable Legal Standards

Interference:

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

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

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

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

To establish a claim of interference, a complainant must establish by a clear and satisfactory preponderance of the evidence that the respondent's conduct contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain or coerce employes in the exercise of their Section (2) rights. BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84). It is not necessary to demonstrate that the employer intended its conduct to have such effect, or even that there was actual interference; instead, interference may be proven by showing that the conduct has a reasonable tendency to interfere with the exercise of protected rights. CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84). However, employer conduct which may well have a reasonable tendency to interfere with an

employe's exercise of Sec. 111.70(2) rights will generally not be found to violate Sec. 111.70(3)(a)1, Stats., if the employer had valid business reasons for its actions. CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91).

In CITY OF LACROSSE, DEC. NO. 17084-D (WERC, 10/83), the Commission elaborated on concerted and protected activity as follows:

> The MERA does not refer to "protected" activities. Sec. 111.70(2) of the MERA identifies certain rights of municipal employes which, broadly stated, are "to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. . ." The rights thus identified are enforced by Secs. 111.70(3) and 111.70(4) of MERA. Protected activity is, then, a shorthand reference to those lawful and concerted acts identified and enforced by the MERA. Thus, acts which are not lawful or not concerted within the meaning of Sec. 111.70(2) of MERA are not protected.
>
> . . .
>
> It is impossible to define "concerted" acts in the abstract. Analysis of what a concerted act is demands an examination of the facts of each case to determine whether employe behavior involved should be afforded the protection of Sec. 111.70(2) of MERA. At root, this determination demands an evaluation of whether the behavior involved manifests and furthers purely individual or collective concerns.

In CITY OF BELOIT, DEC. NO. 27779-B (WERC, 9/94), the Commission stated as follows:

> . . . it is important to acknowledge certain realities of the collective bargaining process which the facts of this case demonstrate. In our view, it is generally appropriate for one party to advise the other during the collective bargaining process of the potential negative consequences if a proposal or position ultimately is included in the collective bargaining agreement. Thus, for instance, if an employer advises a union that acceptance of the union's wage demands might or would require the layoff of employes <u>and</u> the totality of the circumstances surrounding the employer's statement establish that the employer is not motivated by a desire to threaten employes for the exercise of their right to collectively bargain, that employer is acting in a legal manner consistent with the collective bargaining process. The employer in such circumstances is not seeking to deter

> employes from exercising rights but rather seeking to persuade employes to change the position they are taking at the collective bargaining table when exercising their rights. Simply put, parties are generally free to take whatever positions they wish at the collective bargaining table, but cannot expect to be insulated from any consequences if they are successful in having those proposals become part of the collective bargaining agreement.

In GREEN LAKE COUNTY, DEC. NO. 28792-B (WERC, 12/97), Footnote 1, the Commission stated:

> For instance, in CITY OF BELOIT, DEC. NO. 27779-B (WERC, 9/94), we concluded that the municipal employer did not violate MERA by advising employes of the potential negative consequences which would be produced if the union successfully bargained a contract including the proposal then being sought by the union. Such a comment does not reflect hostility toward the exercise of the <u>right</u> to bargain a contract but rather states the response to a result. So long as the response is based on the employer's understanding of the impact of a <u>result</u> on its operation, and not on hostility toward the exercise of the right to <u>seek</u> the result, no violation of the law is present.

<u>Duty to Bargain</u>

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

> 4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employes in an appropriate bargaining unit does in fact have that support, it may file with the commission a petition requesting an election to that claim. An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission. The violation shall include, though not be limited

thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any collective bargaining agreement shall not exceed 3 years.

The statutory duty to bargain in good faith under MERA includes a requirement that, where appropriate, municipal employers provide the collective bargaining representative of their employes with information that is relevant and reasonably necessary to bargaining a successor contract or administering the terms of an existing agreement. CITY OF MARSHFIELD, WASTEWATER TREATMENT PLANT, DEC. NO. 28937-B (WERC, 3/98). In CITY OF MARSHFIELD, the Commission recognized that information that layoffs would occur if a collective bargaining unit ratified a tentative agreement of a 3% wage increase, but that no layoffs would occur if the tentative agreement were modified to include a 2.75% wage increase, was relevant and reasonably necessary to the bargaining representative's ability to bargain a successor agreement.

Merits of the Complaint

Duty to Bargain

At the commencement of their 1999-2000 contract negotiations, AFSCME Local 643 and the City agreed to certain "ground rules." One of these "ground rules" states that "The parties agree that all releases to the press will be made mutually, until the parties reach a settlement or impasse." Construing this ground rule within the context of the letter from AFSCME Local 643 offering the ground rule and the letter from the City accepting the ground rule, the Examiner is satisfied that the ground rule was intended to regulate press releases concerning labor contract negotiations between the City and AFSCME Local 643.

AFSCME Local 2537 executed their labor contract in May of 1998. Thus, they did not have any operative negotiation ground rules in October of 1998, the month in which the City is alleged to have violated the negotiation ground rules.

The City and IAFF Local 583 did not settle their labor contract until October 29, 1998. IAFF Local 583 negotiations representative Steve Warn recalls that, during the first negotiations meeting, the City and IAFF Local 583 verbally agreed not to move anything to the press until the parties got to the point where they needed to go to mediation or arbitration. As with AFSCME Local 643, the evidence of the agreement between the City and IAFF Local 583 indicates that it was intended to regulate press releases concerning labor contract negotiations.

The Complainants object to the fact that, during the October, 1998 City Council meeting, City representatives disclosed to the public, including the press, that the budget allocated 2.25% for unionized wage increases in 1999. The information disclosed at the October, 1998 City Council meeting was not released by any member of the City negotiations team and did not provide any information concerning contract negotiations between the City and its unions. Rather, City representatives disclosed information on the budget. Specifically, the City made a public announcement of amounts budgeted for wage increases and a public announcement of how the budget would be balanced should wage increases exceed the budgeted amount.

The negotiation "ground rules" do not restrict the City from publicly disclosing the budget amounts allocated for 1999 wage increases. Nor do they restrict the City from publicly discussing strategies for balancing the budget should it become necessary to exceed the budgeted amounts.

Contrary to the argument of the Complainants, the record does not demonstrate that, during the October 1998 City Council meeting, the City violated any negotiations ground rule. Nor does the evidence of the City's public announcements at the October, 1998 budget hearing demonstrate that the City has otherwise violated Sec. 111.70(3)(a)4, Stats.

As the Complainants argue, early in 1998 and throughout 1998, the City Manager was firm in her position that no more than 2.25% would be budgeted for wages. However, contrary to the position taken by Complainants, MERA does not impose upon the City a duty to bargain with Complainants over budget allocations. Thus, Complainants' arguments that the 2.25% increase is an arbitrary figure and that the desired expenditure and revenue levels could be achieved with wage increases of more than 2.25% are irrelevant.

The City Manager was not a member of the City's labor contract negotiating team and did not represent the City for purposes of negotiating the City's labor contracts. It is not evident that the budget allocation of a 2.25% wage increase for unionized employes was established for any reason other than to achieve the expenditure and revenue levels that the City desired. The City Manager did not violate Sec. 111.70(3)(a)4, Stats., when, in early 1998, she established a budgetary guideline that allocated 2.25% for unionized wage increases and maintained that position throughout the budget process.

The City's Personnel and Labor Relations Director, the only member of the City's labor contract negotiating team to testify at hearing, did not testify that the City would not settle a 1999 labor contract for more than 2.25%. Rather, he stated that, prior to the start of negotiations, the City Manager and the City Council gave him certain parameters. Under these parameters, the City team could not settle for more than 2.25% without going back to the City Manager and the City Council. According to the City's Personnel and Labor Relations Director, he did not have to go back to the City Manager and the City Council because all of the unions settled at 2.25% for 1999.

The record does not demonstrate that the Complainants were precluded from making any proposal to the City's negotiating team. Nor does the record demonstrate that the City's negotiating team refused to discuss any proposal brought by Complainants. Notwithstanding Complainants' arguments to the contrary, it is not evident that the Complainants were denied the opportunity to discuss bargaining proposals that could mitigate the impact of any wage increase in excess of 2.25%. Complainants' allegation that the City has violated Sec. 111.70(3)(a)4, Stats., is not proven.

Interference

On October 28, 1998, during a quarterly meeting of union representatives and managerial employes, the City Manager commented that, if one bargaining unit settled at 2.25% and another unit went to arbitration and won, any layoffs required would come from the unit that received the higher wage settlement. At least two of the union representatives considered this comment to be a threat. 1/

1/ AFSCME Local 2537 representative Dawn DeuVall recalls that the City Manager was asked if her comments were a threat or a promise and that the City Manager responded that it was both, that the unions could take it either way. The City Manager does not remember being asked such a question and doubts that she would have used such language.

This recollection of Dawn DeuVall was not corroborated by the testimony of any other witness, nor by the notes of the meeting taken by Personnel and Labor Relations Director Tollefson. Moreover, AFSCME Local 643 representative Ronald Hanson recalls that the comments concerning whether or not the City Manager had made a threat were not made during the meeting with the City Manager, but rather, were made after the meeting during a discussion between union representatives. Given the lack of corroboration and the existence of contradictory testimony, the Examiner has not credited Dawn DeuVall's testimony that the City Manager was asked if her comments were a threat or a promise and that the City Manager responded that it was both, that the unions could take it either way.

The City Manager states that she did not intend the comments to be a threat, but rather, she intended to present a factual statement. The City Manager claims that she made the comments for two reasons. The first of these reasons is that AFSCME Local 643, through the Personnel and Labor Relations Director, had raised the question of what would happen if the unions could not settle at 2.25% and she wanted to ensure that all bargaining units received the same message.

The Personnel and Labor Relations Director confirms that, prior to the October 28, 1998 meeting, he relayed to the City Manager a conversation that he had had with the Director of Public Works. The conversation relayed to the City Manager was that members of

AFSCME Local 643 were concerned that they would settle for a 2.25% raise; that another unit would receive a higher amount in interest arbitration; and that AFSCME Local 643 would experience layoffs even though they had settled for 2.25%.

Given the corroborating testimony of the Personnel and Labor Relations Director and the lack of any contradictory evidence, the Examiner is persuaded that the City Manager had a good faith belief that AFSCME Local 643 had raised the question of what would happen if the unions could not settle at 2.25%. The Examiner is further persuaded that the City Manager's comments were a response to that query and were intended to ensure that all of the bargaining units received the same information.

The City Manager also states that she wanted to fully disclose the consequences of receiving more than a 2.25% wage increase in 1999. According to the City Manager, full disclosure was not only necessary because of the importance of having open communications with the unions, but also, because, of the commitment in her first budget to not lay off any union employes.

At the time of the October 28, 1998 meeting, the City Manager and representatives of the City's bargaining units had regularly attended "quarterly meeting" for the purpose of discussing management-labor issues. The City Manager also met quarterly with employes, on a voluntary basis, to provide information, such as the state of City finances. Thus, the record supports the conclusion that the City Manager considered "open communications" to be important.

It is undisputed that, during her first budget, the City Manager promised that no unionized employe would be laid off. Given this commitment, it was reasonable for the City Manager to notify union representatives that their unit employes were no longer shielded from layoff. Indeed, AFSCME Local 643 representative Ronald Hanson confirmed at hearing that, until the City Manager made her comments, he had not been concerned that there would be layoffs in his unit.

The record does not demonstrate that the City Manager's comments were motivated by hostility toward Complainants, or any employe for engaging in activity protected by MERA. Nor does the record provide a reasonable basis to conclude that the City Manager's comments were motivated by any factor other than those claimed by the City Manager. The Examiner is satisfied that the City Manager's comments were motivated by management and public policy concerns.

Complainants question the legitimacy of these management and public policy concerns. Complainants assert that the 1999 budget was not adopted as of October 28, 1998. Complainants further assert that it is the City Council, and not the City Manager, which has the authority to lay off employes.

The record does not demonstrate whether or not the 1999 budget was adopted at the time of the October 28, 1998 meeting. It is evident, however, that the City Manager did not establish the budget allocation of a 2.25% wage increase in a vacuum. Rather, the 2.25% figure was established by City Council early in 1998, in consultation with the City Manager, after reviewing the City's financial condition and was devised as a "strategy" to stay below the expenditure cap.

The documents distributed at the October, 1998 budget meeting of the City Council confirm that the City Manager held the opinion that "salary increases over 2.25% cannot be afforded without increasing taxes or significantly reducing services." These documents demonstrate that the City Finance Director was also of the opinion that budget amounts could not be exceeded by any significant amount without increasing taxes or reducing services. These documents also demonstrate that the City Finance Director shared the City Manager's opinion that to exceed the budget amounts would be to jeopardize state aids.

The City Manager acknowledges that the City Council had requested the City Manager to meet with them prior to any layoff of employes for the purpose of balancing the budget. The record, however, provides no reasonable basis to discredit the City Manager's testimony that she had discussed with the City Council the consequences of exceeding the budget and that she had authority to make the comments of October 28, 1998.

It is true that the City Council did not instruct the City Manager to make her comments of October 28, 1998. Nonetheless, the undersigned is satisfied that, on October 28, 1998, the City Manager had a good faith belief that any required layoffs would occur in the collective bargaining unit that achieved a 1999 wage increase in excess of 2.25%.

Complainants may consider a budget that allocates unionized employes a 2.25% wage increase to be hostile toward unionized employes. The record, however, does not demonstrate that the figure of 2.25% was selected for any reason other than management's determination that this amount could be funded without exceeding expenditure caps. Notwithstanding Complainants' position to the contrary, the record supports the conclusion that the City Manager's comments were motivated by legitimate management and public policy concerns.

The City Manager's comments were not made at a negotiations session. However, the remarks were made in the presence of representatives of collective bargaining units that were currently negotiating contracts with the City. The comments were made shortly after the City Council had been presented with a 1999 budget that allocated 2.25% for 1999 wage increases. At the time that the City Manager made the comments, she had a good faith belief that one of the unions had raised the question of what would happen if the unions could not settle at 2.25%.

AFSCME Local 643 representative Ronald Hanson considered the City Manager's comments to contain a threat of retaliation if his collective bargaining unit went to interest arbitration. The City Manager, however, did not state that layoffs would occur in any collective

bargaining unit that arbitrated a contract. Rather, the City Manager indicated that any required layoffs would occur in the collective bargaining unit that won a wage increase in excess of 2.25%.

The City Manager's comments, on their face, do not exhibit hostility toward a protected process, i.e., interest arbitration, but rather, state a response to the result of the exercise of a protected right. By advising unions that were currently negotiating a labor contract of the potential negative consequences of receiving an interest arbitration award on wages that exceeded 2.25%, the City Manager was providing the unions with information that was relevant and reasonably necessary to bargaining a successor contract.

Summary

On October 28, 1998, during a quarterly meeting of union representatives and managerial employes, the City Manager commented that, if one bargaining unit settled at 2.25% and another unit went to arbitration and won, any layoffs required would come from the unit that received the higher wage settlement. These comments of the City Manager express her understanding of the impact of achieving an arbitrated 1999 wage increase in excess of 2.25%.

While these comments would inevitably chill the inclination of the Complainants/ employes to use the interest arbitration process, the comments were not motivated by hostility toward Complainants/employes' use of the interest arbitration process, nor by hostility toward the exercise of any other activity protected by MERA. Under the principles enunciated in CITY OF BELOIT and GREEN LAKE COUNTY, supra, the City Manager's comments of October 28, 1998 do not violate Sec. 111.70(3)(a)1, Stats.

Conclusion

Complainants have not demonstrated, by a clear and satisfactory preponderance of the evidence, that Respondent has violated either Sec. 111.70(3)(a)1, Stats., or Sec. 111.70(3)(a)4, Stats., as alleged by Complainants. Accordingly, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin, this 17th day of March, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/
Coleen A. Burns, Examiner

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