STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DAVID W. ERICKSON and
CITY OF OSHKOSH, Complainants,

vs.

OSHKOSH PROFESSIONAL POLICE
OFFICERS' ASSOCIATION, Respondent.

Case 313
No. 58095
MP-3563

Decision No. 29792-A

Appearances:

Davis & Kuelthau, S.C., by **Mr. William G. Bracken**, Employment Relations Services Coordinator, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, on behalf of Complainants David W. Erickson and City of Oshkosh.

Frederick J. Mohr S.C., Attorney at Law, by **Attorney Frederick J. Mohr**, 414 East Walnut Street, Suite 261, Green Bay, Wisconsin 54305-1015, on behalf of Respondent Oshkosh Professional Police Officers' Association.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Oshkosh Professional Police Officers' Association, on September 10, 1999, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission alleging that David W. Erickson and the City of Oshkosh had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2, 3, 4 and 5, Stats. (Case 308). On October 19, 1999, David W. Erickson and the City of Oshkosh filed an answer and also filed a cross-complaint of prohibited practices with the Commission alleging that the City of Oshkosh Professional Police Officers' Association had committed prohibited practices within the meaning of Secs. 111.70(3)(b), 1, 2 and 4, and Sec. 111.70(3)(c), Stats. (Case 313). The Commission ordered the matters consolidated for purposes of hearing and appointed David E.

Shaw, a member of its staff, as Examiner to make and issue Findings of Fact, Conclusions of Law and Orders in the matters. Hearing was held in the matters before the Examiner on February 8 and May 24, 2000 in Oshkosh, Wisconsin. A stenographic transcript was made of the hearing and the parties completed the submission of post-hearing briefs by July 31, 2000. The Examiner issued his decision in Case 308 on November 3, 2000.

Having examined the evidence and the arguments of the parties, the Examiner now makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Respondent Oshkosh Professional Police Officers' Association, hereinafter the Association, is a labor organization with its principal offices located in c/o Frederick J. Mohr, S.C., 414 East Walnut Street, Suite 261, Green Bay, Wisconsin 54305-1015. At all times material herein, the Association has been the recognized exclusive collective bargaining representative of all non-supervisory, non-confidential, sworn officers employed by the City of Oshkosh Police Department. At all times material herein, Steven Kaiser, Tom Lichtfuss, Michael Novotny, Brian Schuldes and Cyndi Thaldorf have been members of the Association's Executive Board.

2. The Complainant City of Oshkosh, hereinafter the City, is a municipal employer with its principal offices located at 215 Church Avenue, Oshkosh, Wisconsin 54901. Complainant David W. Erickson has, at all times material herein, held the position of Chief of the City of Oshkosh Police Department, hereinafter the Department.

3. The Association and the City have been parties to a collective bargaining agreement at least since the 1970's, and are currently party to a collective bargaining agreement effective the first pay period of 1998 through December 31, 2000. Said Agreement contains the following provisions, in relevant part:

AGREEMENT

> THIS AGREEMENT is entered into by and between the CITY OF OSHKOSH, Wisconsin, party of the first part hereinafter referred to as the Employer, and the **OSHKOSH PROFESSIONAL POLICE OFFICERS ASSOCIATION**, party of the second part hereinafter referred to as the Association.
>
> IN ORDER TO INCREASE GENERAL EFFICIENCY, to maintain the existing harmonious relations between the Employer and its employees, to promote the morale, well being and security of said employees, to maintain a uniform minimum scale of wages, hours, and conditions of employment among the

employees and to promote orderly procedures for the processing of any grievance between the employer and the employees, the following Employment Contract is made.

ARTICLE I

MANAGEMENT RIGHTS

Except to the extent expressly abridged by a specific provision of this Agreement, the City reserves and retains, solely and exclusively, all of its Common Law, statutory and inherent rights to manage its own affairs, as such rights existed prior to the execution of this or any other previous Agreement with the Association. Nothing herein contained shall divest the Association from any of its rights under Wis. Stats. Sec. 111.70.

ARTICLE II

WORK WEEK

The normal work day shall consist of eight (8) hours, and consist of the following schedule:

Five (5) days on duty and two (2) days off and

Five (5) days on duty with three (3) days off.

Officers shall be paid in accordance with the rates listed in Schedule A. These rates include a ten dollar ($10.00) Bi-Weekly briefing pay allowance. Those officers working the 5-2, 5-2 schedule shall be provided with 16 additional days to be taken as time off during the calendar year. Any days not taken off by December 31st shall be forfeited by the employee.

. . .

ARTICLE IV

COMPENSATORY TIME

Work done in excess of the normally scheduled work day or work week shall be compensated at the rate of time and one-half in either compensatory time or cash as the officer may choose. All compensatory time will be recorded and may be used during the month in which it accrues subject to the approval of the

department head. Employees may maintain a compensatory time balance of no more than one hundred sixty (160) hours. Unused balances of compensatory time or time accumulated in excess of one hundred sixty (160) hours shall be paid on the first pay period following the quarter in which it was accrued at the effective rate of pay when such time was earned. Officers shall not be allowed to carry over more than eighty (80) hours from year to year. The formula for computing the hourly rate shall be: Bi-weekly rate + educational divided by 77.2 hours.

. . .

ARTICLE X

PREVIOUS BENEFITS

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

. . .

ARTICLE XIII

RULES & EVALUATION REPORTS

The Association recognizes that the employer may adopt and publish rules from time to time, however, the employer shall submit such rules to the Association for its information prior to the effective date.

For this purpose, rules shall be defined as any rules, regulations, policies, directives, and postings published by the Department or the city affecting the department. Such rules shall be submitted to the Wage Board Chairman and the Association President and shall also be posted for knowledge and record. All such rules shall bear the signature of the Chief of Police or his designee. In the event of a dispute to such rules, the Association shall have fifteen (15) days after inception to dispute such rules through the grievance procedure.

. . .

In addition, the parties' current Agreement contains a provision for final and binding arbitration of grievances.

4. At least since the early 1980's, there has been a practice of utilizing "payback days" in scheduling voluntary training an officer wishes to attend and which is scheduled to take place on what otherwise would have been the officer's off day(s) and more than four hours in duration. The practice consists of an officer going to his/her shift commander and expressing an interest in attending training and if that training is scheduled to take place on what would otherwise be the officer's off day(s), the officer and shift commander attempt to work out a mutually-agreeable rescheduling of the off day(s) within 28 days of that day. The Association is not consulted or advised in this regard. In instances where the officer wishes to reschedule the off day to a particular date which would conflict with Department staffing needs, the officer must either choose a different day where there is no conflict, or forget about the training, unless the Department decides the training is of sufficient value to the officer and the Department to incur the overtime cost. The latter rarely occurs and is at management's discretion. When an officer's off day(s) have been rescheduled and he/she attends the training on what otherwise would have been the officer's day(s) off, the officer is paid his/her regular pay on a straight-time basis and the payback days are on a straight-time basis as well.

The Department's "Policies and Procedures" manual contains the following policies issued in January of 1992 regarding training, in relevant part:

125.03 DEFINITIONS

Mandatory Training –Training an employee is required to attend.
Voluntary Training – Training that the employee has the option of attending.

. . .

125.06 TRAVEL AND COMPENSATION

Mandatory Training

Mandatory training on off-duty days shall be compensated as outlined in the labor contract, including time spent in transit between the safety building and the training site. Officers attending mandatory training on normal work days will have their hours changed, with proper notice, to conform to the training schedule, and will be compensated for time spent in excess of the normal work day, including travel time. Travel time will be included in any business time given and not be paid as overtime. If business is concluded and employees are able to return to the safety building before an eight hour shift is completed, they will contact the shift commander for duties to finish a full shift.

Voluntary Training

Employees attending voluntary training will have work schedules adjusted to conform to the training dates. Time spent in excess of normal work days, including travel time is not compensated.

Business Time

Employees scheduled to attend any business or training session of four or more hours shall not work during the eight hours preceding the scheduled departure. For mandatory training or when off day schedules cannot be adjusted to the shift before the school, the employee will be relieved from duty on business time for the portion of a scheduled shift falling within 8 hours before the time the employee would depart from the Department for the training. Additional arrange-ments for business travel time may be made by the training section.

. . .

5. The Association has not made any proposals in bargaining in at least the past nine years to alter the practice of scheduling payback days for voluntary training occurring on an officer's off days. Association officials, including its Board members and President, have utilized the practice in the past, and were aware of, and acquiesced in, the practice.

6. On or about June 1, 1999, Chief Erickson received the following memorandum from the Association:

TO: Chief Erickson and His Staff

FROM: All OPPA Board Members

REF: Payback Days

The OPPA Board is requesting that days off commonly referred to as payback days, cease as of midnight June 30th, 1999. It is our understanding that payback days may be a violation of Federal Labor Laws.

A more in depth letter from OPPA attorney Fred Mohr will follow. If after midnight on 6-30-99 any OPPA members are granted payback days the OPPA Board will have no other recourse than to grieve the matter.

We have decided to allow the Department to grant payback days until the end of June to make it fair to all involved.

Thank you

OPPA Board Members

Steve Kaiser /s/
Steve Kaiser

Mike Novotny

Tom Lichtfuss

Gary Sagmeister

Cyndi Thaldorf

Brian Schuldes

The Association's legal counsel subsequently further explained the Association's position by a letter of June 3, 1999 to Chief Erickson, including reiterating the Association's position that the practice of utilizing "payback days" for training on off days violates the parties' labor agreement and that the Association would no longer recognize the practice after June 30, 1999. Neither the Association's memorandum of June 1, 1999, nor its legal counsel's letter of June 3, 1999, constituted a demand to bargain.

7. Despite the Association's continued objection, and at Chief Erickson's direction, the Department has continued the practice of scheduling payback days with individual officers for voluntary training that is scheduled to take place on what would otherwise be the requesting officer's off days, instead of giving the officer the option of receiving overtime pay or compensatory time off at the rate of time and one-half for attending such training.

8. The parties' Collective Bargaining Agreement does not specifically refer to payback days or their use, and with the exception of a Memorandum of Understanding regarding mandatory in-service training, it is silent as to the scheduling of, and compensation for, attending mandatory or voluntary training. The practice of scheduling payback days with regard to voluntary training occurring on what would have been an officer's off day(s) is a benefit, policy and/or procedure related to wages, hours and conditions of employment and is a mandatory subject of bargaining within the meaning of Article X of the parties' Agreement.

9. By announcing that the Department would continue the practice of scheduling payback days for voluntary training that fell on what would have been an officer's off day(s), and continuing said practice after being notified that the Association objected to its continuation, Chief Erickson and the City did not violate the parties' Collective Bargaining Agreement, and did not engage in individual bargaining with the officers who requested to attend voluntary training on their off day(s)

10. On July 30, 1999, the City's labor relations consultant, William Bracken, sent the Association's legal counsel, Frederick Mohr, a letter which read, in relevant part, as follows:

> RE: Police Specialists Grievance and
> FLSA Issues
>
> Dear Fred:
>
> This letter will confirm our meeting with you on Thursday, September 2, 1999, at 1:00 p.m. in the Oshkosh Police Department offices. The purpose of this meeting will be to discuss the grievance surrounding Police Specialists.
>
> Also, you indicated that once you have a chance to obtain information on specific incidents where you believe the City violated the Fair Labor Standards Act, you will foward that information to me.
>
> We look forward to seeing you on September 2, 1999 in an attempt to resolve the Police Specialists grievance.
>
> Very truly yours,
>
> GODFREY & KAHN, S.C.
>
> William G. Bracken /s/
> William G. Bracken
> Coordinator of Collective Bargaining Services

The Association has not subsequently forwarded to the City or its representatives information as to specific incidents that it alleges the City was in violation of the federal Fair Labor Standards Act.

11. The Association's Executive Board promulgated the minutes of its August 11, 1999 meeting to its members and to management, which minutes, in relevant part, read as follows:

> On 8-11-99 the OPPA Board had a meeting to discuss the following current issues. . .GRIEVANCES, PUTTING IN FOR OFF DAYS, DETERMINING WHO GETS TO GO TO SCHOOLS, AND PAYBACK DAYS.
>
> . . .
>
> PAYBACK DAYS
>
> It is still the boards (sic) feeling that no one should take payback days at straight time. Gary Sagmeister and I spoke to The Chief and Captain after our meeting. We were informed that the administrations (sic) stance on payback days is that there has been a past practice established because people have done it in the past and we stood by and did nothing. As we all know, we have been trying to get people to quit taking straight time payback days for months. As recent grievances show, we believe that the administration is violating our contract. (see grievances on board for details). I guess an arbitrator will ultimately have to solve this issue. The board knows that this issue has made it difficult for all of us. Bottom line is we have a contract, and the contract needs to be abided by. . .by all the OPPA members. It is not appropriate for some of you to pick and choose what portions of the contract you are willing to abide by and which ones you choose to ignore. Especially when the main reason you decide to violate the contract is for your own personal gain. Some of you who are now on these special teams are only on them because others took a stance and decided they would no longer allow the administration to strong arm them. I think I speak for numerous people who are offended that we took a stance to make things better for all and ended up being replaced by others. There is only one thing I can guarantee all of you. Eventually you will get sick of giving and giving and giving and the administration taking more and more. Once you reach this point and decide to take a stance and someone else does what some of you are doing now, you too will be offended and probably pissed off. As the last grievance by Tom Lichtfuss states, the OPPA is the sole bargaining unit for all and we are not to bargain for ourselves as individuals. If you want to change something that you don't like about our contract, then attend the meetings or speak to your rep and the issue will be addressed. One of the purposes of a union is to bargain issues that benefit as many members as possible. When the minority begin to individually bargain for things that are only beneficial to them as individuals it erodes away at the unions (sic) ability to function beneficially for the majority. And believe me, the administration loves it. When all the

smoke clears and an arbitrator decides this issue, whether he/she sides with us or not, we will move on and decide what course of action to pursue. Until then the board again requests that you do NOT take straight time payback days. If you do we will continue to file grievances on the issue and post them.

Lastly, a copy of this is going to be sent to the Chief, the Captain of Patrol and all 3 shift commanders. Until this matter is resolved we are requesting that they cease their unprofessional conduct by telling people they are required to violate the contract by taking straight time payback days to attend schools or they will not be allowed to go.

Thank You

Steve Kaiser /s/
Steve Kaiser
OPPA President

12. By the following letter to Chief Erickson, the Association reiterated its objection to the continuation of the practice regarding payback days:

August 26, 1999

Dear Chief Erickson,

It has been brought to my attention that despite recent grievances filed by the O.P.P.A. opposing straight time pay back days being offered to officers who are willing to accept them for working on their off days, the Oshkosh Police Department has continued this practice.

This letter is to inform you that even though the O.P.P.A. may not file a separate grievance each and every time this happens, we will request that all officers who have accepted straight time pay back days for working on their off days be compensated at the contractual rate of time and one half if we prevail in the grievances that we have filed.

While the O.P.P.A. Board of Directors cannot force individual members of the O.P.P.A. to abide by the contract in regard to this issue as long as the Oshkosh Police Department continues to provide and encourage the opportunity to violate

the contract, the Board of Directors strongly feels that it is in the best interests of all of our members to insist that the contract be strictly adhered to regarding this matter.

Sincerely,

Tom Lichtfuss, O.P.P.A. Board Member

13. By the following memorandum of September 10, 1999, the Association's Executive Board notified its members that it would post the names of those individuals who have continued to schedule payback days:

9-10-99

The majority of the OPPA board has decided that in the future we are going to post the names of all members who feel that it is necessary to take straight time payback days.

We feel that those of you who do this are individually bargaining with the city and according to our legal counsel this is illegal.

This is one of those issues that we all need to realize that everyone needs to stand together on. We urge all members to discontinue this illegal activity of individual bargaining immediately until the prohibitive (sic) practice we filed is resolved.

Thanks

OPPA Board

Subsequent to the issuance of that memorandum, the Association's Executive Board caused to be posted on a number of occasions on the bulletin board in the Department's resume room notices with the names of some individuals who had scheduled payback days, such as follows:

THE FOLLOWING

UNION MEMBERS

ARE SCHDULED (sic) FOR

PAYBACK DAYS DURING

THE WEEK OF:

September 12th Thru 18th

CYNDI THALDORF 1 Day

KARI LINGNOFSKI 3 Days

ONCE AGAIN THE OPPA BOARD ASKS THOSE OF YOU STILL TAKING PAYBACK DAYS TO PLEASE WAIT UNTIL THIS MATTER IS RESOLVED.

THX

14. Sergeant Kevin Konrad sent Chief Erickson a memorandum on September 28, 1999 wherein he indicated an officer had approached him to complain that the Association's posting of names of those that continued to use payback days was to "coerce other employees" to comply with the Association's position. Sgt. Konrad then inquired whether the posting violated the Department's anti-harassment policy. No action was taken by the Chief or the City against the Association in that regard.

15. The Association filed grievances regarding the scheduling of payback days when an officer is scheduled to attend voluntary training on what otherwise would be the officer's off day, rather than giving the officer the option of being paid overtime or receiving compensatory time off, at the rate of time and one-half for that time.

On September 10, 1999, the Association filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission wherein it alleged that the City and Chief Erickson violated Secs. 111.70(3)(a)1, 2, 3, 4 and 5, Stats., by refusing to end the practice of scheduling "payback days" where an officer requests to attend voluntary training on what would otherwise have been his/her off day(s), rather than giving the officers the option of receiving compensatory time off or paying overtime at the rate of time and one-half for such

attendance, by refusing to approve requests for voluntary training on an officer's off day(s) where the officer requested the option of receiving compensatory time off or overtime pay at time and one-half, and by announcing that the practice regarding payback days would continue, all of which occurred after the Association had notified the City and the Chief that it objected to continuation of the practice, and by advising employees that the Department's training would be cut if the Association prevailed in its litigation.

On October 19, 1999, the City and Chief Erickson filed the instant cross-complaint with the Commission alleging that the Association had by its actions committed prohibited practices within the meaning of Secs. 111.70(3)(b)1, 2, 3, 4 and (3)(c), Stats.

16. There has been, and is, a difference of opinion among the Association's membership as to whether or not the Association should be seeking to end the practice of scheduling payback days with regard to voluntary training officers request to attend on what would otherwise be their off days.

17. To the extent there is underlying information regarding specific incidents where the Association believes the City violated the federal Fair Labor Standards Act, it is obtainable by the City from its own records.

18. The Association's posting of the names of individual members who disregarded the Association Board's request to cease accepting the scheduling of straight time payback days instead of demanding overtime pay or compensatory time off at the rate of time and one-half for attending voluntary training on what otherwise would be their off days, was a concerted activity intended to dissuade members from utilizing the practice of scheduling of payback days at straight time in order to further the collective interest of the Association and its members, and did not have a reasonable tendency to coerce or intimidate those individuals listed or the other members of the Association in the exercise of their rights under Sec. 111.70(2), Stats.

19. The actions of the Association, its officers and agents, in making known to the City and Chief Erickson its objection to the continuation of the practice of scheduling straight time payback days for attending voluntary training scheduled on the requesting officer's off day(s) instead of offering that officer the option of receiving compensatory time off or overtime pay at the rate of time and one-half, as a violation of the Agreement, its assertion that the mutual scheduling of such payback days by the officer and his/her supervisor constituted illegal individual bargaining, its filing of a grievance alleging the practice violated the parties' Agreement, filing of a notice of claim with the City of Oshkosh Clerk and a circuit court action based upon alleged violations of the Fair Labor Standards Act, and its efforts to dissuade its members and management from continuing the practice of scheduling such payback days, did not coerce or intimidate or induce the City or its officers and agents, to violate the parties' Agreement or to interfere with the rights of the City's employees in the enjoyment of their rights under Sec. (2) and did not violate the parties' Collective Bargaining Agreement.

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

CONCLUSIONS OF LAW

1. The Complainant City of Oshkosh is a party in interest within the meaning of Sec. 111.07(2)(a), Stats., and has standing to file this complaint.

2. The actions of Respondent Oshkosh Professional Police Association, its officers and agents, in posting the names of some individual members who disregarded the request of the Association's Board to cease accepting the scheduling of straight time payback days for attending voluntary training on what otherwise have been their off day(s) was lawful, concerted activity within the meaning of Sec. 111.70(2), Stats., and did not coerce or intimidate municipal employees in the enjoyment of those rights protected by Sec. (2) in violation of Sec. 111.70(3)(b)1, Stats.

3. The actions of Respondent Oshkosh Professional Police Officers' Association, its officers and agents, in making known to the Complainants City of Oshkosh and Chief Erickson its objection to the continuation of the practice of scheduling straight time payback days for attending voluntary training scheduled on the requesting officer's off day(s) instead of offering that officer the option of receiving compensatory time off or overtime pay at the rate of time and one-half, as a violation of the Agreement, its assertion that the mutual scheduling of such payback days by the officer and his/her supervisor constituted illegal individual bargaining, its filing of a grievance alleging the practice violated the parties' Agreement, its filing of a notice of claim with the City of Oshkosh Clerk and a circuit court action based upon alleged violations of the federal Fair Labor Standards Act, and its general efforts to dissuade the Complainants from continuing the practice of scheduling such payback days, constituted lawful, concerted activity within the meaning of Sec. 111.70(2), Stats., and did not coerce or intimidate or induce the Complainants, or their officers and agents, to violate the parties' Agreement or to interfere with the rights of Complainant City's employees in the enjoyment of their rights under Sec. (2) in violation of Secs. 111.70(3)(b)2, or (3)(c), Stats., and did not constitute a violation of the parties' Collective Bargaining Agreement within the meaning of Sec. 111.70(3)(b)4, Stats.

4. The Complainants have failed to establish by a clear and satisfactory preponderance of the evidence that the Respondent Association, its officers or agents, refused to provide information Complainant City of Oshkosh had requested that was relevant and reasonably necessary to its ability to fulfill its responsibilities as relates to the City's collective bargaining relationship with the Association. Therefore, there is no finding of a violation of Sec. 111.70(3)(b)3, Stats., in that regard.

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

ORDER

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

Dated at Madison, Wisconsin this 18th day of December, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/

David E. Shaw, Examiner

CITY OF OSHKOSH (POLICE DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complainants in this case filed a cross-complaint of prohibited practices alleging: (1) That the Association had violated its duty to bargain under Sec. 111.70(3)(b)3, Stats., by refusing to provide the City with information regarding specific incidents that the Association alleged the City had violated the Fair Labor Standards Act (FLSA); (2) that the Association attempted to intimidate and coerce the City's employees from exercising their rights under Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(b)1, Stats., by issuing a notice to its members stating it would post the names of its members who continued the practice of scheduling payback days to accommodate training and by taking the action of posting the names of such individuals; (3) that the Association, by its actions in attempting to end the practice of scheduling payback days to accommodate training and have the City and the Association's members accede to its position in that regard, violated the parties' collective bargaining agreement and attempted to intimidate and coerce the City's agents to violate the parties' collective bargaining agreement, in violation of Secs. 111.70(3)(b)2 and 4, Stats.; and that the Association violated Sec. 111.70(3)(c), Stats., by filing actions in multiple forums against the Complainants, which actions were commenced in bad faith and for the purpose of harassing the Complainants in an attempt to influence the outcome of the Association's prohibited practice complaint (Case 308).

The Association admitted it has not responded with regard to the information the City requested and that it had issued a notice to its members that it would post the names of individuals who continued to schedule payback days to accommodate training and that it did post such names, but denied that any of its actions violated the Municipal Employment Relations Act (MERA).

The Examiner previously issued his decision in Case 308 wherein it was concluded that the City's actions in continuing the practice regarding payback days did not violate the parties' Agreement or MERA.

City

The City alleges that the Association has violated Sections 111.70(3)(b)1, 2, 3 and 4, and (c), Stats.

The City asserts that the Association violated (3)(b)1, Stats., when its Board distributed a memorandum to officers threatening to post the names of all bargaining unit members who received "payback days", and then on three to six separate occasions posted the names of

individual bargaining unit members who did schedule "payback days" during particular weeks. The language of the memorandum is clearly an attempt at coercing and intimidating an officer's rights to partake of the benefit of utilizing payback days with regard to training. Section 111.70(2), Stats., grants municipal employees the right to "form, join or assist labor organizations. . .", and also provides that "Such employees shall have the right to refrain from any and all such activities. . ." Employees who wish to partake in the benefit of training and follow the 20-year practice that has existed are being coerced and intimidated by the Association into foregoing that benefit. This clearly interferes with their rights under the statute. The City cites the testimony of Lt. Wilkinson, a former officer in the Association, and currently a supervisor, who testified that when he saw the posting of the names of employees who had utilized payback days, he felt the Association was coercing its own membership. The City also cites the testimony of Sergeant Konrad, a member of the bargaining unit, who testified that officers were being singled out for choosing to utilize payback days, and that they were being intimidated because they were not complying with the Association's position. Konrad felt strongly enough to write a memorandum to Chief Erickson reporting what he felt to be discrimination and harassment. Chief Erickson similarly testified that he viewed the Association's posting of names as an attempt to intimidate the membership into not participating in payback days. No witnesses were presented to refute the testimony of Wilkinson, Konrad or Erickson. By posting employees' names on the bulletin board who took advantage of payback days, the Association was clearly sending a message to employees not to do so. It is patently clear that the Association is attempting to coerce and intimidate individuals into not taking payback days, in violation of 111.70(3)(b)1, Stats.

The City also asserts that the Association violated Sec. 111.70(3)(b)2, Stats. when it sought to discontinue the practice concerning payback days during the term of an existing collective bargaining agreement. On June 1, 1999, the Association notified Chief Erickson that it objected to the practice of granting payback days. On June 3, 1999, the Association wrote Chief Erickson in an attempt to cease the past practice as of midnight, June 30, 1999. While the Association is entitled to its opinion regarding interpretations of contract language, the appropriate forum to resolve such a dispute is grievance arbitration. By its actions in attempting to coerce and intimidate management representatives into changing the *status quo* during the terms of the existing collective bargaining agreement, the Association interfered with the City's right to maintain the *status quo,* as interpreted through a 20-year practice and in light of Articles X and XIII of the parties' Agreement. The evidence makes clear that the Association was attempting to coerce and intimidate the City's representatives in carrying out their responsibilities under the terms of the collective bargaining agreement. Further, the Association's coercive tactics in posting employees' names also violates this provision.

The Association also violated Sec. 111.70(3)(b)3, Stats., by failing to provide information of specific incidents that it alleged the City had violated the Fair Labor Standards Act. On July 30, 1999, the City requested information of the specific incidents that the Association was alleging were in violation of the Fair Labor Standards Act. The Association

has not responded to that request, and therefore, has violated its duty to bargain by failing to provide information the City needs relative to contract administration. The Commission has held that a union is entitled to certain information necessary to negotiate contracts, as well as to administer collective bargaining agreements. In this case, the Commission should hold the Association to the same standards expected of an employer in those cases. Since the Association failed to provide the information, it violated MERA.

The Association also violated Sec. 111.70(3)(b)4, Stats., by seeking to cease the 20-year practice during the term of an existing collective bargaining agreement. The Association sought to have the City cease the practice concerning payback days as of July 1, 1999. Had the City done so, it would have violated the *status quo* (20-year past practice) and Articles X and XIII of the parties' Agreement. Further, by posting the names of employees who took advantage of payback days, the Association violated the Preamble to the parties' Agreement. That provision states:

> IN ORDER TO INCREASE GENERAL EFFICIENCY, to maintain the existing harmonious relations between the Employer and its employees, to promote the morale, well-being and security of said employees, to maintain a uniform minimum scale of wages, hours and conditions of employment among the employees and to promote orderly procedures for the processing of any grievance between the employer and the employees, the following Employment Contract is made.

By intimidating and coercing employees in the exercise of their rights to partake of the payback days, the Association interfered with the general efficiency of the Department and also drove a wedge into the relationship between the City and its employees and the Association. By engaging in divisive actions in the workplace, the Association hurt morale, the well-being and the security of Department employees. Thus, the Association is in violation of the Preamble. Until it is concluded by an arbitrator or an examiner that the City has violated the Agreement, the Association should obey the principle, "Work now, grieve later". By attempting to force its views on its members and the City, the Association committed a prohibited practice.

Finally, the City asserts that the Association is guilty of violating Sec. 111.70(3)(c), Stats. The Association has filed a prohibited practice complaint in an effort to assist it in pursuing identical claims in a grievance filed with the Commission under the parties' Agreement, a lawsuit filed in circuit court, and a notice of claim filed with the City Clerk's office. By filing these actions, the Association has attempted to influence the outcome of its prohibited practice complaint in violation of 111.70(3)(c), Stats.

Association

With regard to the allegation that the posting of employees' names who utilized payback days violated their Section 2 rights, the Association asserts that the City lacks standing to complain on behalf of those employees. The City failed to produce any of those individuals whose names were posted, and has failed to produce any evidence to indicate that they were coerced or intimidated in the exercise of their rights guaranteed under Section 2. Further, there is a total lack of a showing that a right guaranteed under Section (2) has been infringed upon. The City's brief emphasizes that employees also have the right to refrain from Section 2 activities, and presumably the posting of those names had prevented them from doing so. Section 2 rights include activities of a concerted nature. In other words, affected employees (who were already members of the labor organization) could bargain through their representatives or engage in other lawful, concerted activities. The City fails to show how the posting of names interfered or coerced affected employees in the exercise of their concerted rights.

There is also no evidence to show that the individual employees felt intimidated or were coerced, and even if there were such evidence, intimidation or coercion would not be prohibited in this case. It is lawful for a union to intimidate and coerce its members for the purpose of preventing them from participating in individual bargaining. It is also the duty of a union to ensure that its members comply with the requirements of an existing collective bargaining agreement. Here, the Association would have been remiss in its duties to its members by ignoring the flagrant violation of the clear and unambiguous contract language. The sole reason for posting the names of the individuals who utilized payback days was to inform their fellow union members that they were continuing to bargain individually with management.

With regard to discontinuing the practice of payback days, the practice is in direct violation of the clear contract language and the Association so informed Chief Erickson. The Chief did not testify that he was coerced or intimidated into taking action against individual employees in violation of their concerted rights. To the contrary, the Chief responded by saying he was going to continue this illegal practice regardless of what the Association indicated. The City failed to show which of the protected Section 2 rights could possibly have been infringed upon and the Association's letter to Chief Erickson not only failed to infringe upon those rights, but instead was an exercise of them.

As to the failure to provide information, the City's complaint fails to state a claim upon which relief can be granted. The City produced no evidence to support its claim, and the claim itself is without legal basis. Under the Fair Labor Standards Act, the City is required to maintain the requested records. Chapter 111.70, Stats., does not require the Association to produce the type of information the City now complains of not receiving. Thus, there is no evidence and there is no law upon which to base a finding of a violation.

With regard to the Association's attempting to terminate past practice, the Association's prior failure to enforce the clear and unambiguous language of the contract does not serve as a waiver. The City fails to point out how the Association has violated the parties' Agreement. Conversely, the City's continuation of the payback day practice and the individual bargaining demonstrates the supervisors' and the Chief's contempt for the employees' Section 2 rights.

The City has alleged a violation of Sec. 111.70(3)(c), Stats., by the filing of the prohibited practice complaint, the grievance, the notice of claim and the court action, however, the City has failed to explain the connection between those various pieces of litigation. The notice of claim and court action were filed pursuant to the Fair Labor Standards Act and involve federal issues. The court action predominantly involves the refusal to allow officers to use compensatory time and requests time and one-half pay where the City has failed to pay it in violation of the FLSA. While there may be some instances where payback days are used in the calculation, the core of that complaint is separate and distinct from the prohibited practice complaint. As to the prohibited practice complaint and the grievance, the City has agreed to consolidate the two in this hearing, and thus has no standing to now complain. The Association concludes that the City's prohibited practice complaint is without any basis and requests that it be dismissed.

DISCUSSION

Standing

The Association disputes the City's standing to file a complaint of prohibited practices against the Association alleging violations of its employees' rights under MERA. The Commission has previously held that a municipal employer qualifies in that context as a "party in interest" within the meaning of Sec. 111.07(2)(a), Stats., made applicable by Sec. 111.70(4)(a), Stats., due to the employer-employee relationship. In doing so, the Commission stated:

> There is no provision in MERA which in any way limits the right of a municipal employer to seek to enforce the provisions of MERA, relating to prohibited practices alleged to have been committed by its employes, employe organizations, or by agents of said organizations, where such activities are directed against the municipal employer or against any of its employes. We conclude that the employe-employer relationship between the City and Sutton qualifies the City as a party in interest within the meaning of Sec. 111.07(2)(a), Wis. Stats. The City filed its complaint on behalf of itself and not on behalf of Sutton. The City has no less right to seek to protect the rights of its employes set forth in Sec. 111.70(2) of MERA, than does the Association, or any individual employe of the City.
>
> CITY OF LACROSSE, DEC. NOS. 17076-B, 17084-C (WERC, 4/82), remanded on other grounds, LaCrosse County Cir. Ct. 82 CV 510 (1982).

(3)(b)1

The City alleges that the Association violated Sec. 111.70(3)(b)1, Stats., by threatening to post the names of employes who continued to participate in the scheduling of payback days for training and by subsequently doing so. The Association asserts its actions did not intimidate or coerce employees in the exercise of their rights under Sec. 111.70(2), Stats., and that even if the actions did coerce or intimidate, they were lawful, concerted activities on the part of the Association to prevent members from engaging in individual bargaining and violating the collective bargaining agreement.

MERA provides that,

> (b) It is a prohibited practice for a municipal employe, individually or in concert with others:
>
> 1. To coerce or intimidate a municipal employe in the enjoyment of the employe's legal rights, including those guaranteed in sub. (2).

In this case, the actions were taken by the majority of the Association's executive board on behalf of the Association. The Association is the exclusive collective bargaining representative of the Department's non-supervisory law enforcement employees, and, as such, speaks and acts on their behalf as to collective bargaining matters. While there is disagreement among the Association's members as to whether the Association should attempt to end the practice regarding the use of payback days as it relates to voluntary training, it is apparent from the record that the actions taken by the Association's Board were in furtherance of a collective concern and, therefore, constituted "concerted activity." However, to be "protected activity" under MERA, the activity in issue must be both concerted and lawful. CITY OF LACROSSE, DEC. NO. 17084-D (WERC, 10/83).

If actions are to be considered lawful, they cannot at the same time be likely to coerce or intimidate employees in the exercise of their rights under Sec. 111.70(2), Stats. In determining whether statements of an employee are likely to coerce or intimidate in that regard, the Commission has considered not only the content of the statement, but also the context in which it was made, by whom it was made, and the manner in which it was made. CITY OF LACROSSE, DEC. NO. 17086-B, 17084-C (WERC, 4/82). 1/

1/ While that case involved the statement of one employee to another, the Commission's discussion is instructive in this case.

The statements and actions in issue in this case are those of the employees on the Association's Board. Thus, they would reasonably be construed by employees as the statements and actions of the Association. The specific actions complained of were the issuance of the notice to its members that the Association's Board would post the names of "all members who feel that it is necessary to take straight time payback days" and then subsequently doing so on a number of occasions. The issuance of the notice on September 10, 1999, and the subsequent posting of names of members who had scheduled payback days, were preceded by the distribution to its members and management of the minutes of the Board's August 11, 1999 meeting. Those minutes stated the Board's position that scheduling straight time payback days to attend training violated the collective bargaining agreement and requested that members not take straight time payback days. It would have been reasonably clear to the employees that the subsequent issuance of the notice and the posting of names of those who took payback days occurred in the context of a dispute between the Association and the City as to whether the practice regarding payback days violated the parties' Agreement.

The wording of the notice of September 10, 1999 threatens no adverse action against anyone other than posting the names of those members who chose to disregard the Board's request that they not take straight time payback days. The posting listing the names of those who were scheduled to take payback days does not threaten any further action against those individuals. There is no threat of any kind of reprisal whatsoever, against those individuals. While they might feel uncomfortable or embarrassed at being identified as not going along with the Board's request not to accept straight time payback days, such discomfort does not rise to the level of coercion or intimidation. MERA is not intended to insulate municipal employees from such discomfiture or embarrassment, and the Examiner can find nothing in MERA or case law that would prohibit a union from taking reasonable steps to keep its members from "breaking ranks" with regard to a dispute between the union and the municipal employer as to bargaining matters of collective concern. Nor does MERA prohibit a union from taking a position that is more advantageous to some of its members than to others, or with which some of its members disagree. MONONA GROVE SCHOOL DISTRICT, DEC. NO. 20700-G (WERC, 10/86). Those members who chose to disregard the Association's request were not prevented from doing so and to the extent that posting their names made them uncomfortable or embarrassed, it was not likely to coerce or intimidate them in the exercise of their Sec. (2) rights. Thus, the Association's actions are found not to have violated Sec. 111.70(3)(b)1, Stats.

(3)(b)2

The City also alleges that the Association violated Sec. 111.70(3)(b)2, Stats., by attempting to coerce and intimidate members of the City's management into ending the practice of scheduling straight time payback days during the term of the parties' Agreement and thereby violating the Agreement.

Sec. 111.70(3)(b)2, Stats., provides that it is a prohibited practice for a municipal employee, individually or in concert with others

> 2. To coerce, intimidate or induce any officer or agent of a municipal employer to interfere with any of its employes in the enjoyment of their legal rights, including those guaranteed in sub. (2), or to engage in any practice with regard to its employes which would constitute a prohibited practice if undertaken by the officer or agent on the officer's or agent's own initiative.

The only evidence the City has cited to supported its allegations of such a violation are the communications from the Association's Board and its legal counsel to Chief Erickson stating the Association's position that the practice of using straight time payback days may be in violation of federal labor laws and requesting that the practice cease as of June 30, 1999 or the Association would grieve the matter as a violation of the parties' Agreement. Beyond making the conclusory statement that these were attempts to coerce or intimidate management into violating the parties' Agreement, the City offers nothing to support its allegations. On their face, those communications are nothing more than a statement of the Association's position on a contractual dispute, and possibly on a dispute as to the application of the Fair Labor Standards Act to the fact situation. Other than indicating the Association would pursue its recourse under the Agreement, i.e., grieve, there is no "threat" and not anything that could reasonably be perceived as intimidating or coercive. Under the City's theory, it would seem that there would be coercion or intimidation under (3)(b)2 any time a union indicated its view to a municipal employer that a practice or management's actions violated the parties' collective bargaining agreement and stated it would pursue its legal or contractual rights in the appropriate forums. Such is not the conduct that provision was intended to prevent, regardless of whether the union's position was ultimately proved to be erroneous. MONONA GROVE SCHOOL DISTRICT, SUPRA. 2/ Thus, no violation of Sec. 111.70(3)(b)2, Stats., has been found.

2/ In its brief, the City also alleges the posting of names of employees who had scheduled payback days also violated (3)(b)2, however, other than making the allegation, the City does not demonstrate how that would coerce or intimidate management into taking action in violation of MERA.

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(3)(b)3

The City notes that the Commission has consistently held that it is violative of the duty to bargain collectively under MERA for a municipal employer to refuse to provide information to the exclusive collective bargaining representative of its employees that is relevant and reasonably necessary to the bargaining representative's ability to fulfill its functions with regard to collective

bargaining and/or contract administration. The City asserts, correctly in the Examiner's view, that the same obligation exists as to a labor organization's duty to bargain under MERA. 3/

3/ It is noted that in its decision in STATE OF WISCONSIN, DEC. NO. 17115-C (WERC, 3/82), the Commission referenced "a party" in describing the duty to provide information relied upon by that party in bargaining to the other party upon request, and did not limit the duty to an employer.

In this case, the only "evidence" in the record is in the form of the parties' pleadings. The City, in its complaint, alleges that it sent a letter to the Association's legal counsel that included a request for "information of specific incidents alleging the Complainant's (City) violation of the Fair Labor Standards Act", and that the Association has not responded. The Association admitted those allegations in its answer. The letter itself stated, in relevant part, "Also, you indicated that once you have a chance to obtain information on specific incidents where you believe the City violated the Fair Labor Standards Act, you will forward that information to me." It appears from the wording that what the City was requesting was not information in the form of underlying data (information that it would itself possess), but was instead asking the Association to make specific, rather than general, allegations. While that may be informative, it is not "information". It is noted that the City alleges that the Association filed a notice of claim with the City Clerk and an action in circuit court alleging that the City had violated the FLSA. The record is silent as to whether the Association ever has made its allegations in those regards more definite and certain, however, that is a pleadings matter and not "information" that is relevant and reasonably necessary to the City's ability to fulfill its collective bargaining and contract administration functions.

Further, it is evident from the record that the City's representatives were made well aware of the Association's position that the City was in violation of the parties' Agreement, and perhaps the FLSA, in those instances where it scheduled a straight time payback day for an officer who attended training on what would otherwise have been his/her off day, instead of giving the officer the option of receiving overtime pay or compensatory time off at the rate of time and one-half. Thus, seemingly, the City had the ability to identify those situations from its own records.

It has therefore been concluded that the City failed to prove by a clear and satisfactory preponderance of the evidence that the Association failed to provide information that was relevant and reasonably necessary in order for the City to fulfill its collective bargaining and contract administration functions.

(3)(b)4

The City alleges the Association violated Articles X and XIII of the parties' Agreement by attempting to have the City cease the practice concerning payback days and the Agreement Preamble by posting the names of employees who continued to schedule payback days.

Simply put, the evidence does not indicate that the Association's actions were anything more than making its position known to the City in the context of a dispute as to the meaning and application of certain provisions of their Agreement. While the Association's position was ultimately not upheld, neither its attempts to persuade the City to accede to its position, nor its seeking of a determination of its legal and contractual rights, without more, constitute a violation of the parties' collective bargaining agreement.

Regarding the allegation that the Association's posting of the names of members who continued to schedule payback days violated the Preamble to the parties' Agreement, as was previously concluded, that action constituted protected activity. While the Association's tactic may have been somewhat divisive, the general and somewhat vague description of the parties' purposes in entering into their Agreement does not constitute a limitation on the Association's right under MERA to engage in lawful, concerted activity. Therefore, no finding of a violation of (3)(b)4 has been made in this regard.

(3)(c)

Section 111.70(3)(c), Stats., provides that:

> (c) It is a prohibited practice for any person to do or cause to be done on behalf of or in the interest of municipal employers or municipal employes, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by par. (a) or (b).

The City alleges that the Association violated this provision by filing its prohibited practices complaint with the Commission in an effort to assist it "in pursuing identical claims including: (1) a grievance filed with the WERC on September 8, 1999 under the collective bargaining agreement. . .; (2) a lawsuit filed on September 27, 1999 in Circuit Court Branch V, WINNEBAGO COUNTY, CASE NO. 99-CV-849, Case Code 30301. . .and (3) a Notice of Claim filed with the Oshkosh City Clerk on July 6, 1999. . ." and that it did so when it "knew or should have known that its actions are without merit and cannot be supported by any good faith argument for an extension, modification or reversal of existing law." Other than its allegations, however, the City has not offered any evidence that the Association brought any of its actions in bad faith. While the Association's position regarding the parties' Agreement ultimately was not upheld, that is not sufficient to establish "bad faith" on its part. Its premise that clear contract language will prevail over an established practice is an accepted principle of contract interpretation. That its membership was divided on the matter of using payback days also does not establish bad faith on the Association's part in filing its actions. The views of individual members is as likely to be based upon what each perceives to be in his/her best interest, as it is to be based upon an interpretation of the Agreement.

Further, it is noted that the actions alleged to have been filed with the City Clerk and in circuit court involved alleged violations of the federal Fair Labor Standards Act, rather than the parties' collective bargaining agreement. Again, without more, the Association's actions have not been shown to be anything more than the pursuit of the legal rights of its members in the various available forums.

For the foregoing reasons, the City's complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 18th day of December, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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