

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**LYNN KRANZ and LORRIE SCHULTZ**, Complainants,

vs.

**CITY OF NEW LISBON**, Respondent.

Case 14  
No. 58584  
MP-3611

**Decision No. 29885-C**

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Appearances:

**Attorney Sally A. Stix**, 7609 Elmwood Avenue, Suite 202, Middleton, Wisconsin 53562-3134, appearing on behalf of Lynn Kranz and Lorrie Schultz.

Axley Brynerson, LLP, by **Attorney Leslie A. Fiskey**, Manchester Place, Suite 200, 2 East Mifflin Street, P.O. Box 1767, Madison, Wisconsin 53701-1767, appearing on behalf of the Respondent.

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

Lynn Kranz and Lorrie Schultz, hereinafter Complainants, filed a complaint with the Wisconsin Employment Relations Commission, herein Commission, on February 24, 2000, alleging that City of New Lisbon, hereinafter Respondent or City, had committed prohibited practices by interfering with the exercise of their protected rights and by refusing to bargain over Complainants' wages, hours and conditions of work. On February 29, 2000, Respondent filed a letter with the Commission wherein it stated that the complaint "is so indefinite that we cannot respond to it" and wherein it also denied the complaint allegations. On May 9, 2000, hearing was postponed from August 1, 2000, to August 4, 2000, at the request of Complainants' attorney. On June 7, 2000, the parties had a pre-hearing settlement conference. On June 12, 2000, Respondent filed a Motion to Dismiss the complaint; a Motion to Separate

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Complainants and Claims; and a Motion to Discover the Medical Records of Complainants. On June 19, 2000, the hearing was indefinitely postponed. On June 21, 2000, Complainants filed a Motion to Strike. On July 12, 2000, Complainants filed a letter with the Commission wherein Complainants, in relevant part, requested an immediate ruling on Complainants' Motion to Strike. On July 20, 2000, the Examiner denied said request. On August 3, 2000, the Examiner issued an Order Denying Motion to Dismiss Complaint; Denying Motion to Separate Complainants and Claims; Denying Motion to Discover the Medical Records of Complainants; Granting Motion to Make the Complaint More Definite and Certain; and Denying Complainants' Motion to Strike.

On August 17, 2000, Complainants filed an Amended Complaint with the Commission. On August 17, 2000, Respondent also filed with the Juneau County Clerk of Court a Petition for Review of Administrative Decision Regarding Discovery of Medical Records. By letter dated August 23, 2000, Respondent requested "that the hearing in this matter be adjourned indefinitely until the Court rules on this Petition." By letter dated August 30, 2000, Complainants objected to postponement of the matter. By letter dated August 31, 2000, Peter G. Davis, General Counsel for the Commission, informed the parties that "out of respect for the Court, we will hold further proceedings in abeyance pending action by the Court. Therefore, the hearing in the matter is postponed." On October 27, 2000, a Stipulation and Order for Dismissal of Appeal was issued by the Juneau County Circuit Court.

On January 2, 2001, Respondent filed an Answer to Amended Complaint. On January 16, 2001, Respondent filed a Notice and Motion to Dismiss Complainants' Sec. 111.70(3)(a)4, refusal to bargain claim, and a Motion-In-Limine "prohibiting any testimony by Complainants regarding alleged harassment on the basis of sex and/or religion engaged in by Respondent or its agents."

Hearing was held on July 16, 2001, in Mauston, Wisconsin, and continued on February 13 and 14, and March 16, 2001. At the commencement of the hearing on July 16, 2001, the Examiner heard Respondent's Motion to Dismiss, requesting dismissal of Complainants' Sec. 111.70(3)(a)4, Stats., refusal to bargain claim. The Examiner also heard Respondent's Motion-In-Limine, seeking to exclude any evidence concerning alleged discrimination or harassment on the basis of religion and/or gender.

Following the parties' arguments, the Examiner granted Respondent's Motion to Dismiss Complainants' Sec. 111.70(3)(a)4, Stats., claim as well as Respondent's Motion-In-Limine excluding evidence regarding alleged religious and/or gender discrimination. At the same time, based upon representations made by Complainants' counsel, the Examiner also granted Complainants' request to add an allegation under Sec. 111.70(3)(a)3, Stats., to the Amended Complaint, claiming that Respondent discouraged membership in a labor organization by discrimination in regards to hiring, tenure, or other terms or conditions of employment.

The parties completed their briefing schedule on May 23, 2001.

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

### **FINDINGS OF FACT**

1. Lorrie Schultz, hereinafter referred to as Schultz or Complainant Schultz, is an individual whose address is N4648 Johnson Road, Mauston, Wisconsin 53948.

2. Lynn Kranz, hereinafter referred to as Kranz or Complainant Kranz, is an individual whose address is N3915 Goodenough Hill Road, Elroy, Wisconsin 53929. Complainant Kranz is a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

3. The City of New Lisbon is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its offices are located at City Hall, 404 State Street, New Lisbon, Wisconsin 53950.

4. The City and New Lisbon City Employees' Union Local 569-A, District Council #40, AFSCME, AFL-CIO, ("Union") have been parties to a collective bargaining agreement setting forth the wages, hours and conditions of employment for members of the following bargaining unit: all regular full-time and regular part-time employees of the City, including craft employees, but excluding supervisory, managerial, executive, confidential, and professional employees as defined in Sec. 111.70, Stats. The bargaining unit certification is CITY OF NEW LISBON, DECISION NO. 26792-A (WERC, 4/91).

### **Complainants' Job Titles and Duties as Acting Clerk/Treasurer and Utility Clerk**

5. Schultz began employment with the City in August, 1998, as a temporary employee hired through an agency to assist the Utility Clerk position, filled by Complainant Kranz, and the City Clerk/Treasurer position, filled at that time by John Stastny. Her job title was "Receptionist." On March 11, 1999 Schultz assumed a full-time position as acting Clerk/Treasurer at the request of then-Mayor Kenneth Southworth. She replaced Stastny, who had been charged with misconduct in office and embezzlement of City funds. Upon assuming the position, Schultz attended a five-day training conference during July, 1999, and a three-day training conference during August, 1999. Prior to the training course, the City made available city and village clerks from surrounding areas to assist Schultz in organizing files and to answer questions from Schultz regarding her new position.

6. Part of Schultz's duties as acting Clerk/Treasurer included processing employees' time cards. She double-checked the total hours worked for each week and entered the hours, along with the rates of pay, into the computer system each week. Because of her duties in this regard, she had knowledge of each City employee's rate of pay. She also had access to the personnel files of each of the City's employees, including those employees in the AFSCME bargaining unit. She prepared the City's annual budget with instruction and assistance from others. Much of the City's correspondence was addressed to Schultz in the capacity of acting Clerk/Treasurer, including confidential correspondence. She basically ran City Hall.

7. As acting Clerk/Treasurer, Schultz also attended City Council meetings. She was familiar with how items came to be included on the agenda for each meeting, and typed agendas. Schultz attended both regular and closed (special) meetings of the City Council and was responsible for taking minutes during these meetings. She also attended all of the closed sessions of the City Council meetings.

8. However, Schultz never opened any confidential correspondence addressed to the City. Instead, she placed confidential correspondence on the Mayor's desk for his review. She did not draft any confidential correspondence for the City. Schultz also did not have final decision-making authority regarding the budget. In addition, she was normally dismissed from employee-related discussions in the closed sessions of the City Council. While Schultz signed, along with Mayor Southworth, the 1995-1997 collective bargaining agreement between the City and the Union, she never attended a bargaining session as a management representative.

Schultz could have been called on to provide information and data interpretation to representatives of the City for making decisions relating to labor relations and contract negotiations. However, Schultz did not perform such work at any time material herein.

9. Kranz was hired by the City as a temporary employee on November 1, 1995 and became a permanent employee as the City's Utility Clerk on April 1, 1996. Her duties in the Utility Clerk position included preparing weekly and monthly utility reports, disconnect notices and utility bills; answering telephones; taking minutes for the Utility Commission meetings; taking park reservations; acting as the pool secretary; and assisting the City Clerk/Treasurer.

#### **Exclusion of Complainants' Positions From the AFSCME Bargaining Unit**

10. Fred Hollenbeck functioned in the position of Assistant City Attorney for the City during the time period that Complainants worked for the City. His principal function in that position was to assist the City in negotiating and administering the City's collective bargaining agreement with the Union.

11. Attorney Hollenbeck participated in the negotiations for the January 1, 1995 – December 31, 1997 contract. During negotiations for that contract there were discussions pertaining to whether the Utility Clerk position should be included in the bargaining unit. The City proposed to exclude the Utility Clerk position from the bargaining unit while the Union took the position that the position should be included in the unit. The parties were unable to reach a voluntary agreement on the contract and the parties proceeded to interest arbitration. At interest arbitration, the City's position prevailed. Consequently, the Utility Clerk position was excluded from the bargaining unit.

12. The Clerk/Treasurer position was also never part of the bargaining unit represented by the Union. Individuals filling the position, which did not exist at the time the initial contract was negotiated, were originally elected, but thereafter, were appointed by the Mayor and the City Council. The Clerk/Treasurer position was not included in the unit because the position was considered by the City to be an administrative and confidential position.

#### **Events Leading up to and Including Complainants' Wage Increases**

13. Complainants were the only employees working in New Lisbon City Hall after March 1999, with the exception of occasional temporary, part-time help. In June 1999, Respondent began searching for a new city administrator, eventually hiring Jim Filip in December 1999.

14. As a result of Stastny's departure and the resulting extra work load, both Complainants, but particularly Schultz, worked many overtime hours and their work environment became increasingly stressful. Schultz began to come home crying due to her working conditions. This stress over working conditions continued throughout the summer and into the fall and winter months. Schultz testified: there was "tons of work to do" and there "was nobody but basically myself to do the work."

Beginning in June 1999, Mayor Southworth occasionally questioned Schultz about the number of hours shown on her timecard. In July 1999, Kranz complained to City Council member Patrick McNeely about the city finances and a stressful work environment.

15. In July 1999, Schultz reviewed the wage schedule in the collective bargaining agreement and noticed that she and Kranz had not received any wage increases or step increases. After looking at the agreement, she then discussed the wage rates with Kranz and was told that she had not received a step increase that she was due. She then had a conversation with Mayor Southworth in the City Council chambers. While Schultz recalls that the discussion concerned not only Kranz's wages, but also her own, Mayor Southworth recalls only discussing a step increase that may have been missed with regard to Kranz. During the discussion, Mayor Southworth instructed Schultz to:

“ . . . contact the labor attorney, Fred Hollenbeck. He told me that wages is something you do not mess around with, that I need to contact Fred and get it straightened out.”

16. Thereafter, Schultz contacted the office of Attorney Hollenbeck by telephone, and, pursuant to her request, she later received a facsimile from Attorney Hollenbeck's office consisting of the wage scale page from Local 569-A's collective bargaining agreement with the City. The page did not include wages for Utility Clerk or Clerk/Treasurer since those positions were not in the bargaining unit. Schultz again contacted Attorney Hollenbeck for assistance. Schultz testified that Attorney Hollenbeck told her to use the Union's wage scale to figure out an average of a wage increase due her and Kranz. Attorney Hollenbeck testified that he did not instruct Schultz to average the outlined wage step and yearly increases to come to a determination as to a wage increase for herself and for Kranz. Schultz testified that after speaking with Attorney Hollenbeck, she:

“Then I hung up the phone and I looked over the contract and I come up with what I thought was an average since we were dealing with such old wages, and at that time after I thought was a fair amount, I put it into the computer for the payroll.”

17. Schultz, using her best judgement, calculated the pay raises determining that Kranz was due a \$.20/hour raise and she was due for an increase from \$8.24 to \$9.75/hour. Schultz did not talk to anyone else before implementing the wage increase in July 1999 because: “I thought I had already cleared the discussion with the labor attorney.” She informed Kranz that Attorney Hollenbeck also told her to deal with her wages and that she should get a step increase.

18. In October, 1999, the City began its budget process. Schultz worked extensively on preparing the fiscal year 2000 budget during the fall of 1999. She received some assistance from Marti Splitgerber, a retired clerk from the City of Elroy. Kranz also helped out by pulling together the information from the electric, water and sewer departments that needed to be included in the budget. Schultz also received assistance and supervision from Mayor Southworth and the City Council as she prepared the budget for the year 2000.

During her work on the budget, Schultz questioned Council President Earl Bailey and Union Steward Robert Yarroch about possible union representation.

Kranz testified that things were very “hostile” during the budget process. She stated that there were only two employees in City Hall trying to do all the work. She added that if the phone lines were not switched from Mauston to New Lisbon so the calls would ring locally the Police Chief would “yell at us.” She also stated that the Mayor would come in with a lot of rude remarks about their religion, his wife and women in general.

19. The Council approved the Respondent's year 2000 budget including employees' wage increases, in November 1999, shortly before it hired Jim Filip as the new City Administrator. On December 10, 1999, Schultz was going over the budget with Mayor Southworth when she asked him when the new wages approved in the budget should go into effect. Mayor Southworth responded to her question and asked her about her wage rate. Schultz retrieved her and Kranz's files to show Southworth what she had done. When Mayor Southworth realized that Schultz had received a wage increase in July 1999, she recalls that he responded: "I would not authorize a pay increase. That's not my job. He says something like that would have to be approved." Mayor Southworth then proceeded to ask Council President Bailey, who was present during this discussion at City Hall, whether he was aware of any action by the City Council authorizing wage increases. Bailey responded that he was unaware of any such action. Schultz testified that she had "assumed it was approved because of the conversation I had had with him and Attorney Hollenbeck in July."

20. On the same date, December 10, 1999, Police Chief Randall Dunford recalls having a conversation with Kranz and Marti Splitgerber, outside Schultz's presence. According to Police Chief Dunford, during the conversation, Kranz told him and Splitgerber that Schultz had given herself a raise and had also adjusted Kranz's pay. Kranz stated that she felt it was wrong and had told Schultz not to do it. Kranz also stated that Schultz shouldn't have done it.

21. On December 12, 1999, Kranz called Mayor Southworth at his home. Kranz testified that she called Mayor Southworth at his home to reiterate her recollection of the mayor directing Schultz to get instructions from Attorney Hollenbeck as how to handle the wage rate issue. According to Mayor Southworth's recollection of that conversation, Kranz was crying and told him that the pay raises were Schultz's idea and that she had nothing to do with the raises. After receiving the phone call from Kranz, Mayor Southworth contacted Police Chief Dunford and related what Kranz had said to him about the wage increases. He also contacted Attorney Hollenbeck. Mayor Southworth was concerned about the fact that increases were made without City Council approval because the City had recently been through a number of legal situations involving inappropriate use of City funds – situations involving the former Chief of Police, the former City Clerk/Treasurer, and others. He was concerned that the situation involving Schultz and Kranz was yet another such situation.

22. Upon the advice of Attorney Hollenbeck, a fact-finding meeting attended by Mayor Southworth, City Attorney Steve Chiquoine, Police Chief Dunford and City Administrator Filip was held on December 14, 1999, at Chiquoine's New Lisbon office to discuss the issue of the wage increases implemented by Schultz in July, 1999. After Mayor Southworth related the contents of the call he received from Kranz on December 12, 1999, Kranz was also asked to attend the meeting to discuss her knowledge concerning how the wage increases came to be implemented in July, 1999. At the meeting Kranz explained her account

of what occurred in July between Schultz, Mayor Southworth and Attorney Hollenbeck. Mayor Southworth and Police Chief Dunford both testified that Kranz also related at the meeting that she tried to talk Schultz out of implementing the wage increases. Kranz testified that she said that she didn't think that Schultz should have implemented the wage increases because if a problem occurred the Mayor would not stand behind her. Kranz testified that on her way out of the meeting she heard the Mayor accuse Schultz of being a felon.

23. After Kranz was excused from the meeting, Mayor Southworth was also dismissed. Mayor Southworth decided not to be involved in the investigation because Schultz, as acting Clerk/Treasurer was his "right-hand person" in City Hall and he felt it might be intimidating to her if he was involved. A discussion ensued between Police Chief Dunford, Attorney Chiquoine and City Administrator Filip. They determined that, based upon the facts presented, the situation did not appear to be a criminal matter so it was not necessary to have Police Chief Dunford involved in the investigation, as he had been with Stastny, the former City Clerk/Treasurer. It was decided that the investigation into the matter would be handled internally by City Administrator Filip.

24. Kranz left the hour and a half meeting distraught and crying and returned to City Hall where she told Schultz and Bailey, neither of whom were called to Chiquoine's office, about the meeting. Bailey was upset that, as Council President, he was not informed of Southworth's allegations or of the investigation. Schultz became frightened and upset and began to cry after Kranz gave her an account of the meeting. Schultz also said "Good, I can go up and tell my side of the story. I been putting up with this since December 10<sup>th</sup>. I want to tell my side of the story; I'm sick of this." As a result of all the exchanges that were going on at this time, Kranz was very upset and not sleeping.

25. On or about December 15, 1999, Schultz on her own initiative went to City Administrator Filip to explain what occurred with the July 1999 wage increase.

On January 5, 2000, Mayor Southworth came into City Hall upset and angry because he had an opponent in the spring election. When Schultz informed him that she was assisting his opponent "to make sure he got his papers right," the Mayor accused her of being insubordinate and unfaithful to him. Schultz testified that the Mayor was very angry and that she was frantic, scared and upset over the confrontation.

City Administrator Filip's report detailing the results of his investigation was issued January 6, 2000. City Administrator Filip concluded "that the actions taken by Mrs. Schultz were felt by her to be appropriate." Filip also concluded that Schultz committed no intentional wrongdoing and that there were mitigating circumstances surrounding the matter. Filip also acknowledged the additional duties and responsibilities that Schultz was performing at the time the salary change was made. He shared his report with Schultz, at or around the same time



that he submitted his report to the City Council on January 10, 2000. Complainants' wages were discussed at the City Council meeting conducted on January 10, 2000, but no action was taken at that time.

#### **Events Leading up to January 25 – 27, 2000**

26. On January 15, 2000 Angela McDuffee, the owner of a company which does interior space planning and office furniture design, and her work crew went to City Hall to install a computer workstation. When McDuffee arrived, City Administrator Filip and Schultz were there. McDuffee testified that the work environment "was tense." According to McDuffee, it "did not seem as though people wanted us there or to install it, and I couldn't understand that." Chief Dunford "demanded" that McDuffee take the work station down after it was almost completely installed. McDuffee refused. Schultz explained to Chief Dunford that "we've been over this before", and that she was within her allotted space. At the conclusion of the installation, City Administrator Filip "just came unglued," trying to kick McDuffee in the shins as she left. McDuffee observed that Schultz was visibly upset and embarrassed about the confrontation and left City Hall in tears.

27. In the early morning of January 20, 2000, Schultz burned her face prior to work. She went to a clinic, was told to go home, but instead went to work because she had "so much work to do." When she got to City Hall, in pain and with ointment all over her face, Mayor Southworth accused her of not working as much as her time cards showed. Schultz responded that if the Mayor did not want her working that many hours in order to get the work completed that he should get her some qualified help. Kranz, who witnessed this discussion, also overheard a conversation between Administrator Filip, Mayor Southworth, and Bailey during which Filip confirmed that Schultz was working those numbers of hours and that he was of "no help" to her in getting her job done. At or about this same time, Administrator Filip tendered his resignation "because I am unable to carry out the duties and responsibilities of the position." He abruptly left his position.

#### **Events of January 25 – 27, 2000**

28. On January 25, 2000, while Schultz was at a dental appointment, Kranz testified that Mayor Southworth again accused Schultz of wrongdoing in a conversation with Kranz. In particular, the Mayor said Schultz was a felon and belonged in prison. During this conversation, Kranz testified that Mayor Southworth accused her of disloyalty and threatened her. Kranz responded that he held grudges and walked away. Later, Kranz told the Mayor she wasn't afraid of him anymore.

When Schultz returned from the dental appointment, she notice Kranz had been crying and was upset. Complainants discussed Kranz's and Southworth's conversation, their stressful working conditions and decided that they had to bring their complaints to the attention of the City Council.

29. On the evening of January 25, 2000, President Bailey came into City Hall and Complainants requested an opportunity to discuss their working conditions with him. Bailey said he had to leave to do a job, but would return. When Bailey did not return, Complainants decided to not come to work the next day because they could not handle it and in order to call the City Council's attention to their situation. Schultz testified:

The 26<sup>th</sup> I just decided that I was going to take the day off and see if anything would change, you know, after a day of rest, maybe I would have a different outlook and maybe things would improve. And I contacted Lynn and I asked her, do we agree on this, do we both want to do this, and we both decided, yes, this is what needs to be done to get some things straightened out.

30. January is a very busy month at City Hall with citizens paying their taxes and utility bills and it was the Complainants' responsibility to process those payments.

31. Neither Schultz nor Kranz reported their anticipated absence to anyone, or the reason for their absence before failing to report to work on January 26, 2000. Police Chief Dunford was scheduled to be away from City Hall on January 25, 26 and 27, 2000, at a law enforcement conference in Wisconsin Dells. By memorandum dated January 24, 2000, he notified Schultz and Kranz that he would be gone on those days, as well as on January 28, 2000, but that he would be available by pager. He placed a copy of the memorandum on Complainants' respective desks as he normally did when distributing memos. Mayor Southworth had informed Schultz on January 25, 2000, that he too would be away from City Hall on January 26, 2000, to attend an appointment in Madison. Although both Complainants deny receiving Police Chief Dunford's memorandum informing them that he would not be at City Hall on January 26<sup>th</sup>, Kranz acknowledged that Complainants knew that if they were not present at City Hall to receive taxes and utility bills, it was likely no one else would be there to do so.

32. Police Chief Dunford did not become aware of Complainants' absence on January 26, 2000, until approximately 4:30 p.m. that day when he contacted Mayor Southworth's home to ask why no one answered the telephone on his attempts to contact City Hall by telephone earlier that day. Likewise, Mayor Southworth was not aware of their absence until he called home that day. Complainants' absence first came to the attention of City Council President Bailey when he arrived at City Hall to pay his taxes on January 26, 2000, only to be greeted by a reporter from the local radio station questioning why City Hall

was closed. Both Mayor Southworth and Council President Bailey were concerned that City Hall was shutdown at a very busy time of the year when citizens were trying to pay their taxes and utility bills. They felt this was very inconvenient and caused problems for the community. In early evening Kranz spoke to Council member Patrick McNeeley who informed her that there would be an emergency closed session City Council meeting that evening. McNeeley asked Kranz what it would take to get Complainants to return to work.

33. Kranz informed McNeeley that she wanted to be able to bring a tape recorder to work, that she wanted protection from Mayor Southworth, that she wanted union status and that she wanted some contractual protections for her employment.

34. A special meeting of the City Council was convened on the evening of January 26, 2000. Those in attendance at the meeting discussed Complainants' absence on January 26, 2000, noting that no one present had any idea as to why they had not attended work that day. The Council appointed two Council members, Jerry Hemerley and James Bennett, to contact Kranz and Schultz to hear and discuss with them their concerns and bring facts back to the Council. Also, during the meeting, City Council member McNeeley contacted Kranz by telephone and instructed her to return to work the next day, January 27<sup>th</sup>. He also stated to Kranz that the City would seek help for them through the League of Wisconsin Municipalities and asked Kranz and Schultz to given them until the first week of February, 2000, to get some help but to report to work the next day. Later that evening, Schultz was contacted by Council President Bailey, who informed her that he believed it was imperative that the Complainants report to work the next day. Bailey also informed Schultz that members of the City Council would be contacting Complainants to speak with them.

35. Complainants spoke to each other by telephone and decided to return to work the next day.

36. Upon a "request" by Mayor Southworth to confirm the wage increase for Schultz and after discussion on that request and the Utility Clerk's entitlement to a step increase, a motion was passed unanimously by the City Council at the January 26, 2000, meeting to ratify the previous increases retroactively. Although there was discussion as to the legality and appropriateness of how the wage increases had come to be implemented in July, 1999, it was decided that no legal or disciplinary action would be taken against Complainants. Mayor Southworth objected to the Council's action granting Complainants' wage increases but once the action was taken "he accepted it."

37. The following morning, January 27, 2000, Mayor Southworth approached Schultz in her work area soon after she arrived at work around 8:00 a.m. and prior to Kranz's arrival. The Mayor asked to talk to Schultz in his office. She requested another person witness the conversation. Police Chief Dunford was brought into the room and stood on the

opposite side of Schultz from the Mayor. Schultz said she did not like the accusations “that were flying around City Hall” or being called “a felon to everybody that would listen to him.” Schultz admitted that she liked working with Mayor Southworth but did not like “this backstabbing that’s going on.” Schultz also discussed the situation involving her raise and Mayor Southworth informed her that the Council had settled the issue the previous evening. Police Chief Dunford testified that although it was “an upsetting situation” the conversation was positive in nature – it was “a healthy clear-the-air type of conversation.”

38. At about 8:05 a.m. on January 27<sup>th</sup>, Kranz came into City Hall and noticed Schultz crying. Kranz told Mayor Southworth in an angry manner that he was lucky to have dedicated employees that care about the community and walked over to her work area. Upon hearing the comment, Police Chief Dunford closed the door to the discussion that was going on between himself, Mayor Southworth, and Schultz so that the discussion could proceed as it had before – in a positive manner.

39. Mayor Southworth and Police Chief Dunford then began making “accusations” about Kranz to Schultz. Schultz yelled for Kranz to come over and defend herself. Kranz knocked then recalled that she had a key and reopened the door. Kranz said “This door is never shut. We work together, and we don’t keep any secrets and this door remains open.” At that point, Mayor Southworth invited Kranz to join the discussion and Schultz also told Kranz to join them.

40. Kranz pointed at Mayor Southworth and began reiterating a discussion that she had with the Mayor on January 25, 2000. A heated discussion ensued between Mayor Southworth and Kranz during which Kranz said to the Mayor that she had caught him in a lie and became very upset. She said “That’s it, I’m done I’m out of here.” Then, Kranz turned and walked back to her work area.” Police Chief Dunford observed her walk back to her work area and gather some personal items. Dunford testified: she returned to the room where the discussion was taking place with Schultz and stated again, “Lorrie, I’m done.” Then she turned and walked out the door with her coat, boots, the bag she brought to work every day and her work keys. She also took notes regarding her child’s orthodontist appointment and a framed 1970s Christmas photograph. She left at work a personal hygiene bag which included a toothbrush, toothpaste and the like. Kranz testified that she went and got her personal bag; told Schultz that she would have to get the calls for the rest of the day because “I’m going home;” and left.

41. Police Chief Dunford and Mayor Southworth understood Kranz’s actions and words to mean that she quit her employment. When Dunford walked over to her work area after she left, he testified that he noted she took her family picture and that the slippers she wore in the office were gone. Dunford went back to Mayor Southworth and Schultz and announced that “She’s gone. She quit.” Later in the morning, according to Dunford, Schultz

went to him and related that she had tried to contact Kranz to tell her to come back, but Kranz “keeps hanging up on me.” Schultz denied making this statement.

42. Police Chief Dunford testified that this was not the first time that Kranz had indicated a desire to quit her employment. According to Dunford, sometime in December, 1999, after City Administrator Filip began work with the City, Kranz had told him that both she and Schultz were intending to quit in February, 2000. Dunford added that Schultz also indicated to him several weeks prior to January 27, 2000, that she already had prepared a written resignation. Mayor Southworth testified that during the preceding week Kranz had indicated to him that if Lisa Vinz was hired as an employee that she was intending to quit effective February 15 or 16, 2000.

43. Kranz went to the IGA store to call Schultz, then went to the Post Office to inform Schultz’s husband, Mike, what was occurring at City Hall and that she was concerned about Schultz. Mike Schultz left work and went to City Hall.

44. Mike Schultz arrived at City Hall about 9:00 a.m. and saw that his wife had been crying, was nervous and upset. Mayor Southworth was leaning over her desk with both hands on it and Police Chief Dunford was standing in the aisle between the desk and the wall. Council President Bailey was pacing on the other side of the room. Mike Schultz asked what was going on and they (Southworth and Dunford) said nothing. Mike Schultz said there had to be a problem “with the condition that Lynn’s in.” Mayor Southworth told him, “the only problem he could see was that Lynn was mentally ill . . . .” Schultz felt that she could not leave and was concerned if her husband remained, a fight might begin. She told him she was going to stay at work and Mike should “just go” which he did. The discussion concluded and Mayor Southworth, Police Chief Dunford and Schultz proceeded to do their work.

45. Around 12:00 p.m., Mayor Southworth went out and bought lunch for himself and Schultz. McNeely arrived at City Hall and he saw Schultz crying, with Southworth and Dunford on either side of her. He was told Kranz had quit and that Schultz was coming back to work and everything would be fine. After lunch, both Mayor Southworth and Chief Dunford left City Hall.

46. Around 5:00 p.m. when she left City Hall, Schultz was very distressed. After going home, she went to Kranz’s house. They discussed their work situation, cried and agreed they were so stressed out they should both go to the clinic the next day. They also agreed they would jointly seek legal advice and try to get the City Council to take a stand on their situation one way or another.

### **Kranz's Termination**

47. The next day, January 28, 2000, Schultz called Council member McNeely at work and told him she was not going to work. Kranz also did not report to work. Complainants set up a Sunday night meeting with Council member Hemerley. Both Complainants went to the clinic on Friday, January 28, 2000. Both were prescribed medications for sleeping problems and depression. Schultz was also taken off work to be reevaluated in a week.

48. By letter dated January 28, 2000, Mayor Southworth, with the assistance of Assistant City Attorney Hollenbeck, wrote Kranz confirming "our conversation of yesterday that you quit your employment with the City, effective that day." The City Council had not authorized the letter. Kranz received it on January 29<sup>th</sup>.

49. On January 30, 2000, Council members Hemerley and Bennett met with Complainants and their husbands at the Kranz home. Complainants told the Council members that their working conditions were impossible. Hemerley testified that Complainants described "harassment from the Mayor as far as religion and sex, and there was harassment from the police chief as far as e-mails and items of that nature." Kranz stated that she wanted to continue working and had not quit. Complainants proposed conditions on their return including a change in working conditions, no contact with the Mayor. Basically, they said they wanted to work in an environment free of hostility and threats. They also discussed the possibility of becoming part the Union. The Council members understood Schultz was on medical leave. The Council members said they would check into the situation and get back to them.

50. After the meeting, Bennett contacted Council President Bailey to relate that Kranz had indicated a desire to come back to work if she could bring a tape recorder to record everything said at City Hall and if Mayor Southworth was never allowed in the same room with her while working at City Hall. President Bailey responded that he was uncomfortable with the idea of a tape recorder and that if individuals could not get along at work there were likely to be even more problems.

51. On January 31, 2000, McNeely resigned his City Council seat due primarily to Complainants' situation. He believed Complainants' working conditions needed to be aired but based on past practice and council discussion, he felt this would not happen.

52. Also on Monday, January 31, 2000, Bailey, Hemerley and Bennett discussed the January 30 meeting with Complainants. Bennett called Kranz and told her she could report to work the next day. However, early the next morning prior to work, Bailey called Attorney Hollenbeck to ask whether the Complainants should report to work. Attorney Hollenbeck told

Bailey to tell Kranz not to come back to work pending the outcome of the City Council meeting scheduled for February 2, 2000. Bailey then called Kranz and told her not to report to work until after the Council meeting the next day.

53. On February 2, 2000, a special meeting of the City Council was convened for the purpose of discussing Complainants' situation. The Council met first in closed session. Attorney Hollenbeck led the discussion. He asked each City Council member for their input regarding the employment of Kranz. Concerning Kranz, Mayor Southworth told the Council that he and Attorney Hollenbeck had written her a letter accepting her resignation. Council members basically expressed the sentiment that while Kranz had been a good employee of the City for a number of years that by walking off the job as she did, this had undermined their confidence in her ability to continue working for the City. They felt that they could not have an employee they could not count on. Hemerley and Bennett made no report regarding their January 30 meeting with Kranz, Schultz and their husbands.

54. Upon reconvening in open session, "a motion to consider the actions and words of Lynn Kranz on Thursday, January 27, 2000, as quitting and terminating her employment with the City as made by Bailey and seconded by Bennett. The motion passed unanimously with Bennett, Hemerley and Bailey all voting "yea". By motion, Mayor Southworth was authorized to advertise for applicants for the position of Utility Clerk vacated by Kranz.

55. Schultz and Kranz also attended the City Council meeting conducted that evening "to hear what was going on at City Hall." After the City Council reconvened in open session, Complainants made a request to speak and address the City Council. Complainants' request was denied by Attorney Hollenbeck because Complainants were not on the agenda to speak at the meeting. Attorney Hollenbeck opined at hearing that the City Council meeting was not a public hearing and it would not have been appropriate under the Wisconsin Open Meeting Law for anyone to address the Council.

56. At or near the close of the meeting, Complainants handed each City Council member a written statement. Kranz's statement stated that she had been constructively discharged from her position and that the City's working conditions had made it impossible for her to continue working for the City. Schultz's statement indicated that she had been constructively forced on medical leave due to the working conditions. Both notes reflected "that return to work certain agreements would need to be negotiated." These conditions included having a tape recorder at work and no contact with the Mayor. After the meeting, the City Council considered Schultz to be on medical leave.

### **Schultz's Medical Leave**

57. Instead of attending work on January 28, 2000, Schultz made an appointment at the New Lisbon Clinic with Physician Assistant Gloria Nachreiner. She received a medical note stating that she was "off work due to illness" and "will be re-evaluated in clinic in 1 week", which she mailed to the City on Monday, January 31, 2000.

58. Attorney Hollenbeck wrote a letter to Schultz dated February 3, 2000, in response to her letters of January 31, 2000, (regarding a request for leave under the Family and Medical Leave Act) and February 2, 2000 (regarding being "constructively on medical leave"). In his letter, Attorney Hollenbeck attempted to clarify the meaning of Schultz's different requests and also to determine if, and when, Schultz intended to return to work with the City.

Hollenbeck did not receive a specific response to his letter from Schultz. However, on February 4, 2000, Schultz saw her physician who determined that she still should not go back to work and gave Schultz a note that she sent to the City which stated she was "off work" and "will be re-evaluated in 2 weeks."

59. On February 15, 2000, Attorney Hollenbeck again sent a letter to Schultz stating "we presume that you have no intention of returning to your employment with the City" and Respondent would "begin advertising for her position."

60. Schultz mailed to City Hall a third note dated February 18, 2000, stating that she will be "off work" and "will be re-evaluation (sic) in 2 weeks."

61. By letter dated February 22, 2000, Attorney Sally A. Stix wrote Attorney Hollenbeck stating that both Schultz and Kranz were "interested in negotiating a return to work agreement with the City."

62. On or about March 4, 2000, Schultz was released to go back to work. However, Schultz decided not to accept employment with the City upon her release from medical leave. Instead, she decided to wait to return to work until April, when a new mayor had been elected. Schultz did not notify the City that she had indeed been released to return to work. Ultimately, Schultz was permanently replaced in her position sometime in April or May, 2000.

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



### **CONCLUSIONS OF LAW**

1. At all times after March 11, 1999, the position of acting Clerk/Treasurer held by Complainant Schultz was that of a confidential employee and not that of a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

2. Because Complainant Schultz was not a municipal employee at all times after March 11, 1999, Complainant Schultz had no Sec. 111.70(2) rights after that date as regards her employment relationship with Respondent. Respondent therefore did not interfere with, restrain or coerce Complainant Schultz in the exercise of Sec. 111.70(2) rights when it engaged in the actions described in the Findings of Fact, above.

3. Because Complainant Schultz was not a municipal employee after March 11, 1999, she was not entitled to the protection of Sec. 111.70(3)(a)3, Stats., in her employment relationship with Respondent after that date. Accordingly, Respondent has not been shown herein to have discriminated as regards hire, tenure or other terms or conditions of employment for purposes of discouraging membership in AFSCME Local 569-A or any other labor organization within the meaning of Sec. 111.70(3)(a)3 and 1, Stats., when it permanently filled Complainant Schultz's position sometime in April or May, 2000, or when it engaged in any of the other conduct described in the Findings of Fact, above.

4. Respondent by voting on February 2, 2000, to terminate Complainant Kranz's employment with the City after she had informed certain City officials on January 30, 2000, that she wanted to return to work, and after City Council member Bennett told her on January 31, 2000, that she could return to work, and after she then agreed to do so, was motivated in whole or in part by hostility toward the exercise of Complainant Kranz's protected rights, and therefore, Respondent has committed prohibited practices within the meaning of Sec. 111.70(3)(a)3, and derivatively (3)(a)1, Stats.

5. Respondent, by voting on February 2, 2000, to terminate Complainant Kranz's employment with the City, has interfered with, restrained or coerced Complainant Kranz in the exercise of her rights under Sec. 111.70(2), Stats., and therefore, has committed an independent prohibited practice under Sec. 111.70(3)(a)1, Stats.

6. Respondent has not committed a prohibited practice within the meaning of Sec. 111.70(3)(c), Stats., by engaging in any of the conduct described in the Findings of Fact above, and particularly Findings of Fact Nos. 48, 52-54, pertaining to Assistant City Attorney Fred D. Hollenbeck's role in the City's termination of Complainant Kranz.

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

**ORDER**

IT IS ORDERED:

1. That those portions of the amended complaint alleging a violation of Sec. 111.70(3)(a)1 and 3, Stats., by Respondent's actions toward Complainant Schultz are hereby dismissed.

2. That Respondent, City of New Lisbon, its officers and agents, shall immediately:

- a) Cease and desist from interfering with Complainant Kranz in the exercise of her rights guaranteed in Sec. 111.70(2), Stats.;
- b) Cease and desist from discriminating against Complainant Kranz for engaging in protected, concerted activity;
- c) Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

- 1. Immediately offer to reinstate Complainant Kranz to the position of Utility Clerk. Respondent is further ordered to make Complainant Kranz whole for her losses from her termination.
- 2. Notify all employees, by posting in conspicuous places in its office where employees are employed, copies of the Notice attached hereto and marked "Appendix A". This notice shall be signed by the Respondent, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to insure that this Notice is not altered, defaced or covered by other material.

3. Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

Dated at Madison, Wisconsin this 20th day of July, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Dennis P. McGilligan /s/

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Dennis P. McGilligan, Examiner

APPENDIX "A"

**NOTICE TO ALL  
CITY OF NEW LISBON EMPLOYEES**

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employees that:

1. WE WILL NOT discriminate against Lynn Kranz or any other employee because of their union activities.
2. WE WILL offer immediate reinstatement to Lynn Kranz to her position as Utility Clerk, and will make her whole for her losses by virtue of her termination in February of 2000.
3. WE WILL NOT interfere with the rights of municipal employees to engage in protected concerted activity, or with the employees' rights to refrain from engaging in such activity.

**CITY OF NEW LISBON**

By \_\_\_\_\_  
Signature Title

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL

**CITY OF NEW LISBON**

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

**Disputed Status of Complainant Schultz**

Complainants claim that Schultz was a municipal employee entitled to the protections of the Municipal Employment Relations Act ("MERA") following her appointment as Acting Clerk/Treasurer on March 11, 1999 when Respondent is alleged to have violated her MERA rights. Respondent argues that Schultz is not a municipal employee entitled to protection under MERA. The Examiner concludes that she was not a municipal employee, but rather, a confidential employee at all times material herein.

As pointed out in CUDAHY PUBLIC LIBRARY, DEC. NO. 26931-B at 29 (Gratz, 5/92), AFF'D DEC. NO. 26931-C (WERC, 10/92), the Commission's standards for determining whether a position is that of a confidential employee are well established. As reiterated in VILLAGE OF SAUKVILLE, DEC. NO. 26170 (WERC, 9/89), those standards are as follows:

It is well-settled that, for an employee to be held confidential, such employee must have access to, knowledge of, or participation in confidential matters relating to labor relations; for information to be confidential, it must (A), deal with the employer's strategy or position in collective bargaining, contract administration, litigation or other similar matters pertaining to labor relations and grievance handling between the bargaining representative and the employer; and, (B), be information which is not available to the bargaining representative or its agents. 1/

While a de minimis exposure to confidential materials is generally insufficient grounds for exclusion of an employee from a bargaining unit, 2/ we have also sought to protect an employer's right to conduct its labor relations through employees whose interests are aligned with those of management. 3/ Thus, notwithstanding the actual amount of confidential work conducted, but assuming good faith on the part of the employer, an employee may be found to be confidential where the person in question is the only one available to perform legitimate confidential work 4/ and, similarly, where a management employee has significant labor relations responsibility, the clerical employee assigned as her or his secretary may be found to be confidential, even if the actual amount of confidential work is not significant, unless the confidential work can be assigned to another employee without undue disruption of the employer's organization. 5/

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1/ DANE COUNTY, DEC. No. 22976-C (WERC, 9/88).

2/ BOULDER JUNCTION JOINT SCHOOL DISTRICT, DEC. No. 24982 (WERC, 11/87).

3/ COOPERATIVE EDUCATIONAL SERVICE AGENCY No. 9, DEC. No. 23863-A (WERC, 12/86).

4/ TOWN OF GRAND CHUTE, DEC. No. 22934 (WERC, 9/85).

5/ HOWARD-SUAMICO SCHOOL DISTRICT, DEC. No. 22731-A (WERC, 9/88).

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Contrary to Complainants' assertion, the Examiner finds that Complainant Schultz had sufficient access to, knowledge of, and participation in confidential matters relating to labor relations so as to be a confidential employee. The record indicates that Complainant Schultz basically prepared the budget for the City of New Lisbon. (Tr. 61) In this capacity, she spent a considerable amount of time "trying to get the budget ready." (Tr. 62)

In CITY OF STURGEON BAY, DEC. No. 27106 (WERC, 12/91), the Commission determined that the City's Deputy Clerk/Treasurer was a confidential employee based, in part, upon her responsibilities relative to the City budget. The Commission pointed out that a Deputy Clerk/Treasurer who physically puts together a budget necessarily has "access to contemplated wage/ and salary increases for represented employees prior to the conclusion of negotiations." CITY OF STURGEON BAY, SUPRA, at 13. Complainant Schultz had similar access to such information based on her significant responsibilities in preparing the City of New Lisbon's budget and the question that she asked Mayor Southworth on December 10, 1999, shortly after the budget process was complete: "When do we implement the new wages for the city employees? I'm assuming it takes effect January 1<sup>st</sup>." (Tr. 68) The Mayor responded "not necessarily." (Tr. 68)

Complainants argue that CITY OF STURGEON BAY, SUPRA, is distinguishable because Schultz's role in the budget was limited, she was inexperienced, and her knowledge and experience was "clearly superceded" by others in City Hall. It is true that Schultz had assistance from the retired clerk in Elroy in preparing the budget, particularly as it related to legal aspects of the budget. (Tr. 61) It is also true that Schultz had assistance with the budget from the Mayor and City Council in their roles as elected officials. (Tr. 61) However, as noted above, Schultz had the primary responsibility of preparing a budget for the City, notwithstanding the aforesaid assistance. (Tr. 61, 77-79, 82, 440) In addition, while Schultz was relatively inexperienced, there was no one else in City Hall who had the knowledge and experience to perform her duties. Schultz testified that she assisted the Mayor as much as he assisted her in preparing the budget. (Tr. 61) Contrary to Complainants' assertions, Attorney Hollenbeck had no role in the budget and City Council members did little of the actual

construction of the budget except to pass it. (Tr. 441) City Administrator Filip claimed no knowledge of budget or finances and was of little assistance. (Tr. 66) Chief Dunsford was apparently in the dark as to the budget ramifications for his department. (Tr. 441) Based on the foregoing, the Examiner finds that, despite her relative inexperience, Schultz played a substantial lead role in the City's budget process.

Complainants argue that CITY OF STURGEON BAY, SUPRA, fails to provide an analogy to Schultz's position for other reasons. Complainants argue, unlike here, the Deputy Clerk/Treasurer in Sturgeon Bay had additional confidential duties beyond those duties relative to the city budget process. Complainants list those duties as follows: active participation in negotiations by conducting cost budgeting during labor negotiations, extensive experience in her position, knowledge of the budget which her supervisors relied upon in negotiations and administration of the City's payroll. However, as noted below, Schultz also had additional confidential duties and responsibilities beyond those relative to her role in preparing the City of New Lisbon budget.

These additional confidential duties included payroll responsibilities. In this regard, all employees turned their time cards over to Schultz; she added up the hours; and put the data into the computer. (Tr. 46, 202-203) She also signed the employees' paychecks on a weekly basis along with the Mayor. (Tr. 60) In CITY OF RACINE, DEC. NO. 17724 at 7 (WERC, 4/80), the Commission found that the City's Payroll Supervisor was a confidential employee because she regularly prepared confidential information for the City's negotiations, and because she was effectively the only employee who could do so. In the instant case, Schultz was expected to provide information to the City's management team for labor relations purposes that only "the city clerk could provide" as well as "interpretations of data" that management couldn't get from anyone else. (Tr. 522) While it is true that Schultz had not yet provided input to the City's negotiators (Tr. 202), the Examiner is convinced, based on the entire record, that this would have happened over time. (Tr. 522-523, 538, 599) Like the payroll supervisor in CITY OF RACINE, SUPRA, Schultz makes most of the decisions affecting her department. (Tr. 81-82)

Complainants argue that the instant case is distinguishable from CITY OF RACINE. In this regard, Complainants note that the payroll supervisor in CITY OF RACINE was "the regular and usual employee who performed those duties." Complainants add that even if Schultz "did dedicate a small amount of her time on matters that could be considered confidential, at no time did those matters take up a large portion of her time." Complainants conclude: "the matters she did handle were not her regular duties but the duties of others she was forced to cover due to the short staffing of the City Hall."

Complainants' allegations noted above are not supported by the record. Schultz spent many hours on the budget during the budget period, 20 hours a week or more in the fall of 1999. (Tr. 62) Similarly, the payroll supervisor in CITY OF RACINE, SUPRA, spent large portions of her time during actual negotiations costing bargaining proposals for her employer. In addition, there is no persuasive evidence in the record that the duties Complainant Schultz handled were not her regular duties or that the hiring of others would relieve her of these responsibilities and duties.

Finally, there are other confidential duties and responsibilities that Schultz possessed like the Deputy Clerk Treasurer in Sturgeon Bay. She knew each employee's rate of pay (Tr. 157), she had access to the personnel files of each city employee (Tr. 157), she attended most closed sessions of the city council meetings where employee wages were discussed, (Respondent Exhibit No. 11, Tr. 196-197), and much of the City's correspondence was addressed to her attention, including confidential correspondence. (Tr. 157) While Schultz did not open confidential correspondence, she always took it over to the Mayor's desk. (Tr. 616) She also signed, along with the Mayor as representatives of the City, the City's collective bargaining agreement with the Union. (Complainants' Exhibit No. 1, Tr. 198) In conclusion, like the Payroll Supervisor in CITY OF RACINE, Schultz made almost all of the decisions affecting her department. CITY OF RACINE, SUPRA, AT 7.

As pointed out by Respondent, the Commission has looked in other cases to the individual to whom the questioned employee is assigned to work with in conferring confidential status. In VILLAGE OF EAST TROY, DEC. NO. 26553 (WERC, 7/90), the Commission determined that the Clerk/Treasurer, a management employee to whom the Deputy Clerk/Treasurer reported to, had significant labor relations responsibility and there was no other confidential employee to whom the confidential work could be assigned. Consequently, the Deputy Clerk/Treasurer position was excluded from the bargaining unit as a confidential position. In reaching its conclusion, the Commission cited the rationale set forth in VILLAGE OF SAUKVILLE, SUPRA. Likewise in VILLAGE OF HALES CORNERS (LIBRARY), DEC. NO. 27604-A (WERC, 11/93), the Commission concluded that the Secretary and Bookkeeper (one position) was a confidential employee based on the fact that she was the sole clerical employee in the library, that she was the only employee besides the Library Director allowed access to personnel records, and that she was assigned to the Library Director, who was likely to play a significant role in contract negotiations and labor relations with the newly-certified union.

As noted above, Schultz had many confidential duties that were comparable to those performed by the Secretary/Bookkeeper in VILLAGE OF HALES CORNERS, SUPRA, at 7-9, 18-19. In addition, Schultz was the sole clerical employee assigned to the Mayor, who was not only involved in negotiations of the City's collective bargaining agreement with Local 569-A, along with other members of the City Council, but also was involved in processing of



grievances. (Complainant Exhibit No. 1, Respondent Exhibit No. 21 at Article 6, Tr. 198) As noted in SAUKVILLE, SUPRA, management has the right to conduct its labor relations through employees whose interests are aligned with management. Like the Deputy Clerk in STURGEON BAY, SUPRA, at 14, the record does not support a finding that Complainant Schultz's duties could be assigned to someone else capable of performing them.

Complainants argue that not being involved in the negotiations but merely assisting in administration of a collective bargaining agreement is a critical distinction. Complainants cite CITY OF CORNELL, DEC. NO. 24028, DEC. NO. 24029 (WERC, 10/86), where an employee was determined to be non-confidential when her duties included administration of a collective bargaining agreement but did not include bargaining and there were other employees who could perform the confidential tasks as well. Complainants point out that in the limited time Complainant Schultz was Acting Clerk/Treasurer, she was not involved in bargaining.

While it is true that Schultz had not yet been involved in bargaining, it is clear that at some point the Respondent would be asking Schultz for confidential information and interpretation of data relative to its bargaining proposals. (Tr. 522-523) As noted above, Schultz did sign the collective bargaining agreement on behalf of the City. She also had access to information relative to wage increases for union employees not available to other City Hall employees. Unlike CITY OF CORNELL, SUPRA, Complainant Schultz had more than a *de minimis* involvement in confidential labor relations matters.

Moreover, the parties in CITY OF CORNELL, SUPRA, stipulated that the Deputy City Clerk was a confidential employee for purposes of the election. In the instant case, the City always considered the Clerk/Treasurer position confidential; and there is no evidence in the record that the Union ever challenged this determination despite their desire to have the utility clerk in their bargaining unit. (Tr. 520-521)

Based on all of the above, and absent any persuasive evidence to the contrary, the Examiner has therefore concluded that as of at least March 11, 1999, and thereafter Complainant Schultz's position was that of a "confidential employee" and hence not that of a "municipal employee" within the meaning of Sec. 111.70(1)(i), Stats.

It thus follows that Respondent could not have committed any of the alleged prohibited practices as regards Complainant Schultz because her position was not within the "municipal employee" class protected by MERA at any time material to the alleged unlawful conduct of Respondent. CUDAHY PUBLIC LIBRARY, SUPRA.

### **Discrimination and Interference Regarding Complainant Kranz**

Complainants claim that Respondent violated Sec. 111.70(3)(a)1 and 3, Stats., when the City constructively discharged Kranz in part, on the basis of intolerable working conditions at City Hall which caused Kranz to work concertedly to change those working conditions; to stage a one-day job action on January 26, 2000; and to leave work on January 27, 2000.

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

Section 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to “encourage or discourage a membership in any labor organization by discrimination in regard to . . . tenure or other terms or conditions of employment.” To prove a violation of this section, the Complainants must, by a clear and satisfactory preponderance of the evidence, establish that:

1. Complainants were engaged in protected activities; and
2. Respondent was aware of those activities; and
3. Respondent was hostile to those activities; and
4. Respondent’s conduct was motivated, in whole or in part, by hostility toward the protected activities. 6/

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

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Respondent first argues that Complainants have failed to establish that they were engaged in protected activity when they failed to report to work on January 26, 2000, because Complainants' conduct on January 26, 2000 is not the type of behavior that warrants the protection of Sec. 111.70(2), Stats. Respondent points out that in providing guidance as to what constitutes activity protected by MERA, the Commission has noted:

The MERA does not refer to “protected” activities. Sec. 111.70(2) of the MERA identifies certain rights of municipal employees 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 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 the employee 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.

CITY OF LACROSSE, DEC. NO. 17084-D (WERC, 10/83).

Respondent argues that Complainants’ actions do not meet the requirements of lawful or concerted activity. In regard to the latter point, Respondent maintains that it is questionable whether activity engaged in by only two employees, arguably for the purpose of mutual aid and protection of each other, falls within the ambit of concerted activity under MERA when one of the employees involved is not a municipal employee entitled to any protections under the Act.

It is true, as pointed out by Complainants, that Wisconsin law allows for bargaining units to be comprised of only one employee and for that employee to enjoy his/her rights under MERA. Thus, according to Complainants, one employee acting for the purpose of mutual aid and protection of other employees in the workplace, current or future, as well as for herself should not lose the protection of Wisconsin’s labor laws.

The Examiner agrees. While there is no persuasive evidence in the record that Kranz was working on behalf of any other specific municipal employees in the workplace, her efforts to improve working conditions in City Hall would have benefited all such employees, not just herself. Thus, Kranz and Schultz on January 25, 2000, both decided to bring their work problems to the attention of Respondent’s City Council, and they conveyed that message to Bailey on that same day. On the next day, Kranz spoke to City Council member McNeeley and then told him about some of her concerns and what changes had to be made in her working conditions. On January 27, 2000, Kranz participated in a meeting with Schultz, Mayor Southworth and Police Chief Dunsford after Schultz called out for Kranz to defend herself. Thereafter, she engaged in a heated discussion with Mayor Southworth. On January 30, 2000, she and Schultz met with City Council members Hemerley and Bennett, at which time they discussed their working conditions.

Second, Respondent argues that the Commission has made it clear that essentially personal activity unrelated to collective employee interests is not protected conduct. CENTRAL HIGH SCHOOL DISTRICT OF WESTOSHA, DEC. NO. 29671-B (MAWHINNEY, 5/00), AFF'D IN PART AND REVERSED IN PART, DEC. NO. 29671-C (WERC, 8/00). In CENTRAL HIGH SCHOOL DISTRICT OF WESTOSHA, DEC. NO. 29671-B at 16 (MAWHINNEY, 5/00), Examiner Mahwinney determined that the complainant acted in pursuit of purely individual, not collective concerns, when she attempted "to secure several benefits for herself, not others, and benefits that fell outside of the collective bargaining agreement." However, as noted above, the Examiner finds that Kranz's actions in attempting to improve working conditions in City Hall were not purely individual.

In addition, Respondent argues that Kranz's action in failing to report to work on January 26, 2000, so severely disrupted and undermined the City's operations in serving the public, that it does not warrant protection. In support thereof, Respondent cites BETHANY MEDICAL CENTER, 328 NLRB NO. 161 (1999) (noting that employees' rights to engage in concerted activities are not absolute and citing MARSHALL CAR WHEEL AND FOUNDRY Co., 107 NLRB 314 (1953), where the Board held that concerted activity was indefensible where employees failed to take reasonable precautions to protect the employer's business from foreseeable imminent danger due to sudden cessation of work). Respondent adds that this is the reason the Wisconsin legislature has decided it is appropriate to severely restrict the right of municipal employees and their representatives to engage in strikes. Sec. 111.70(4)(L), Stats.

Complainants, on the other hand, argue that mere disruption of operations does not make an activity unprotected. Complainants argue that imminent danger is required. Complainants argue that in MARSHALL, the NLRB held that employees are not protected when walking off the job without notice when imminent damage to the employer's facilities from unattended molten iron was likely. Complainants point out in BETHANY, the NLRB held that employees in a health care facility were protected because the lab services they performed could be delayed and were not so critical as to put the community in jeopardy. Complainants maintain that in the instant case, Complainant Kranz by missing work did not put the City in any type of imminent danger by not collecting citizen's payments.

Here, Complainant Kranz by missing work did not put the City in any type of imminent danger by not collecting citizen's tax payments and she returned to work the next day at the City's request in order that the City's citizens could pay their taxes. (Tr. 316-317) In addition, the record establishes that Kranz was emotionally upset over her working conditions, so much so that she and Schultz both visited their doctors on January 28, 2000, at which time they were both given medications for depression and for sleeping problems. Kranz's absence on January 26, 2000, therefore must be considered within the context of this emotional turmoil.

Hence, it is only necessary to determine why Respondent terminated Kranz's employment on February 2, 2000, after she informed City officials on January 30, 2000, that she wanted to return to work, after Bennett told her on January 31, 2000, that she could return to work on the next day, and after she had agreed to do so. In other words, what truly motivated Respondent's City Council to do what it did?

Respondent offers no plausible answer, as it instead only claims that it had decided to accept Kranz's earlier resignation. But that cannot be true since Kranz effectively rescinded her earlier resignation on January 30, 2000, and since Bennett told Kranz on January 31, 2000, that she could return to work the next day, which she agreed to do. The facts here thus are similar to other cases where it was determined that a resignation had been effectively rescinded. See TRITON COLLEGE, 107 LA 796 (Greco, 1996); SAN FRANCISCO NEWSPAPER PUBLISHERS' ASSN., 27 LA 11 (Miller, 1956); AMERICAN BAKERIES CO., 34 LA 361 (Sembower, 1960); INGALLS SHIPBUILDING CORP., 38 LA 81 (Hebert, 1961); JEWISH CHRONIC DISEASE HOSPITAL, 45 LA 590 (Yagoda, 1968); MUTER CO., 47 LA 332 (DiLeone, 1966); ATLANTIC SOUTHWEST AIRLINES, 102 LA 657 (Feigenbaum, 1994); MINNESOTA POLLUTION CONTROL AGENCY, 97 LA 389 (Daley, 1991). The underlying principle in those cases is applicable here because Respondent here has no posted rules or regulations preventing an employee from rescinding his/her resignation before it is formally accepted by the City Council and because Respondent did not suffer any detriment when Kranz first submitted her resignation and then rescinded it – with Bennett's blessing.

It is true that Mayor Southworth and Chief Dunsford testified that they thought Kranz quit her employment on January 27, 2000. However, there is no claim by Respondent that they did not know that Kranz had rescinded her resignation and that she agreed to return to work on February 1, 2000, when it voted to terminate her on February 2, 2000. Therefore, I find that Respondent's professed explanation is pretextual in nature, and that it has been advanced to hide Respondent's true motivation, i.e. to retaliate against Kranz because she had been trying to improve working conditions.

Based on all of the foregoing, as well as the totality of the circumstances, the Examiner finds that the evidence shows that Respondent's actions toward Complainant Kranz were motivated by hostility and that Respondent's termination of her employment on February 2, 2000, violated Section 111.70(3)(a)3, Stats. Inasmuch as there is a Sec. 111.70(3)(a)3, Stats. violation, there is a derivative Sec. 111.70(3)(a)1, Stats., violation.

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

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

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

(2) RIGHTS OF MUNICIPAL EMPLOYEES. Municipal employees shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

Violations of Sec. 111.70(3)(a)1, Stats., occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Sec. 111.70(2) rights. *WERC v. EVANSVILLE*, 69 WIS.2D 140 (1995). If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employee(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights. *BEAVER DAM UNIFIED SCHOOL DISTRICT*, DEC. NO. 20283-B (WERC, 5/84); *CITY OF BROOKFIELD*, DEC. NO. 20691-A (WERC, 2/84); *JUNEAU COUNTY*, DEC. NO. 12593-B (WERC, 1/77).

Employer conduct which may well have a reasonable tendency to interfere with employee exercise of Sec. 111.70(2) rights will not be found violative of Sec. 111.70(3)(a)1, Stats., if the employer had valid business reasons for its actions. *BLACKHAWK TECHNICAL COLLEGE*, DEC. NO. 28846-A (CROWLEY, 5/97) *AFF'D* DEC. NO. 28846-D (WERC, 12/97). Here, based on all of the foregoing, the Examiner finds conduct by Respondent that would have a reasonable tendency to interfere with Complainant Kranz's exercise of Sec. 111.70(2) rights.

In this regard, the record indicates that there is persuasive evidence that the conduct of the City contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain or coerce municipal employees in the exercise of their Sec. 111.70(2), Stats., rights. *GLENDAL- RIVER HILLS SCHOOL DISTRICT*, DEC. NO. 26045-B (Shaw, 9/91), *aff'd by operation of law*, DEC. NO. 26045-C (WERC, 9/91), citing *BEAVER DAM SCHOOL DISTRICT*, DEC. NO. 20283-B (WERC, 5/84). In the instant case, Kranz engaged in protected activity. As a result, she was constructively terminated from her employment with the City.

Based on all of the above, the Examiner finds a violation of Sec. 111.70(3)(a)1, Stats.

**Violation Of Section 111.70(3)(c), Stats.**

Complainants also claim that Attorney Hollenbeck personally retaliated against Kranz because of her protected, concerted activities. While Attorney Hollenbeck certainly played a key role in the events leading to Kranz's termination, there is no evidence that he bore any union animus against Kranz, and there is no clear picture of what he advised his clients. As a result, I find no merit to this allegation.

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

Dated at Madison, Wisconsin this 20th day of July, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Dennis P. McGilligan /s/

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Dennis P. McGilligan, Examiner

