STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE POLICE SUPERVISORS ORGANIZATION, Complainant.

v.

CITY OF MILWAUKEE, CHIEF ARTHUR L. JONES, AND BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF MILWAUKEE, Respondents.

Case 462
No. 58064
MP-3561

Decision No. 29896-A

Appearances:

Fuchs, Snow, DeStafanis, S.C., by **Attorney John F. Fuchs**, 620 North Mayfair Road, Milwaukee Wisconsin, on behalf of the Labor Organization.

Assistant City Attorney Thomas J. Beamish, 200 East Wells Street, Milwaukee, Wisconsin, on behalf of the Municipal Employer.

FINDINGS OF FACT, CONLCUSIONS OF LAW AND ORDER

On October 8, 1999 the Milwaukee Police Supervisors' Organization ("MPSO") filed with the Wisconsin Employment Relations Commission a complaint alleging that the City of Milwaukee, its Police Chief Arthur L. Jones and its Board of Fire and Police Commissioners had committed prohibited practices in violation of Secs. 111.70(3)(a) 3, 4 and 5, Wis. Stats., by filling the position of Chief's Adjutant with a civilian Staff Assistant Senior rather than with a Captain of Police. The respondents denied they had committed prohibited practices. After efforts at conciliation failed, the Commission on June 22, 2000 appointed Attorney Stuart D. Levitan, a member of its staff, to serve as Examiner in the matter. Hearing was held in

Milwaukee, Wisconsin on June 28, 2000, with a stenographic transcript being made available to the parties by July 21, 2000. The MPSO and respondents filled written arguments on September 5 and 6, 2000, respectively, and reply briefs on October 16, 2000. The Examiner now hereby makes and issues the following

FINDINGS OF FACT

1. The Milwaukee Police Supervisors' Organization ("MPSO," or "the complainant,") is a labor organization with offices at 2900 West Forest Home Avenue, Milwaukee, Wisconsin, certified as the exclusive collective bargaining representative of certain law enforcement employees of the Milwaukee Police Department, including the position of Captain of Police.

2. The City of Milwaukee, a municipal corporation with offices at 200 East Wells Street, Milwaukee, Wisconsin, is a municipal employer of the employees identified in Finding of Fact 1, and signatory to a collective bargaining agreement with the complainant. The City's 1999 and 2000 budgets authorized 24 Captains of Police.

3. Respondent Arthur L. Jones is the Chief of Police of the City of Milwaukee, charged with the duties and powers as set forth under Sec. 62.50(23), Stats., including the responsibility "for the efficiency and general good conduct of the department under (his) control."

4. Respondent Board of Police and Fire Commissioners of the City of Milwaukee is a Fire and Police Commission formed and existing under section 62.50, Wis. Stats., and exercising the powers and duties provided therein.

5. At all times material there has been a collective bargaining agreement between the city and the complainant, setting forth, inter alia, the base salary for the rank of Captain of Police. The collective bargaining agreement does not establish a minimum number of employees at any particular classification, nor require that all positions authorized by the City of Milwaukee be filled. The collective bargaining agreement does not cover a position known as Staff Assistant Senior. The collective bargaining agreement also contains the following provisions:

PREAMBLE

> 2. The parties to this Agreement are desirous of reaching an amicable understanding with respect to the employer-employee relationship which exists between them and to enter into a complete Agreement covering rates of pay, hours of work, and conditions of employment.

3. The parties do hereby acknowledge that this Agreement is the result of the unlimited right and opportunity afforded to each of the parties to make any and all demands and proposals with respect to the subject of rates of pay, hours of work, and conditions of employment and incidental matters respecting them.

ARTICLE I DURATION OF AGREEMENT AND TIMETABLE

3. Any matter which directly or indirectly relates to wages, hours, or conditions of employment, or which relates to other matters, whether the same are specifically covered by this Agreement or not, will not be a subject for bargaining during the term of this Agreement, provided, however, this item is subject to the WAIVER OF FURTHER BARGAINING Article of this Agreement.

. . .

ARTICLE 5 MANAGEMENT RIGHTS

Except as specifically provided otherwise by this Agreement, any and all rights concerning the management and direction of the Police Department and the Police force shall be exclusively the right of the City and the Chief of Police.

2. Specifically, and without limitation by enumeration, the City shall have the following unrestricted rights:

a. The MPSO recognizes the right of the City, the Board of Fire and Police Commissioners and the Chief of Police to operate and manage their affairs in all respects. The MPSO recognizes the exclusive right of the Board of Fire and Police Commissioners and/or the Chief of Police to establish and maintain departmental rules and procedures for the administration of the Police Department during the term of this Agreement, provided that such rules and procedures do not violate any of the specific provisions of this Agreement,

e. The City shall determine work schedules and establish methods processes by which such work is performed.

f The City shall have the right to assign and/or transfer employees within the Police Department.

g. Except as otherwise specifically provided in this Agreement, the City, the Fire and Police Commission and the Chief of Police shall retain all rights and authority to which by law they are entitled.

i. The City shall have the authority, without prior negotiations, to consolidate operations within the Department or to reorganize within the Department.

k. The right of contracting or subcontracting is vested in the City-

. . .

ARTICLE 9 BASE SALARY

The City reserves the right to make classification changes, but said changes shall not operate to reduce the salary of current incumbents.

. . .

ARTICLE 50 WAIVER OF FURTHER BARGAINING

I. The parties agree that each has had full and unrestricted right and opportunity to make, advance and discuss all matters within the province of collective bargaining. This Agreement constitutes the full and complete agreement of the parties and there are no others, oral or written, except as herein contained. Each party for the term of this Agreement specifically waives the right to demand or to petition for changes herein whether or not the subjects were known to the parties at the time of execution hereof as proper subjects of collective bargaining,

6. Since at least the summer of 1985, there has existed within the office of the Chief of the Milwaukee Police Department a position known as "Chief's Adjutant," or "Adjunct to the Chief," with duties of administrative assistant/office manager/chief of staff. From June 16, 1985 to June 13, 1999, the position was held by nine different members of the MPSO; seven held the rank of Captain of Police at the time of their appointment as Adjunct, and two were promoted to that rank during their tenure in that post. The duties of the position do not require the incumbent to be a sworn law enforcement officer.

7. As of the spring of 1999, Capt. Debra Davidoski was the incumbent adjutant, having assumed that position on February 1, 1998. Then, due to a series of retirements and other personnel transactions, a vacancy arose in a captaincy in the Criminal Investigations Bureau; Jones transferred Davidoski to fill that position, effective June 13, 1999.

8. On June 13, 1999, Heidi Hendricks, a Personnel Analyst for the Police Department, began performing the duties that had formerly been performed by Captain Davidoski. On August 30, Chief Jones sent the following letter to Ald. Marvin E. Pratt, Chairman of the Finance and Personnel Committee of the Milwaukee Common Council:

> RE: INTENTION TO FILL VACANT CHIEF'S ADJUTANT POSITION
>
> This correspondence is to inform you of my intention to fill the vacant Chief's Adjutant position previously held by a Police Captain. With the Department's authority to fill this vacant position, I plan to underfill it at the Salary Grade 8 level with the title of Staff Assistant Senior. The pay range for this position is $44,524.23 to 62,331.56. A Captain of Police is paid at pay range 839 ($53,437.28 to $65,011.68). This underfill arrangement allows me to fill this critical position quickly and with minimal disruptions.
>
> With my authority to fill this position, I will recommend to the Fire and Police Commission the promotion of Personnel Analyst Heidi M. Hendricks to the position of Staff Assistant Senior and continue her in her current assignment underfilling the Chief's Adjutant position. Ms. Hendricks has performed all of the duties and responsibilities associated with this position since the June 13, 1999, transfer of Captain Debra Davidoski to the Criminal Investigation Bureau. I found it necessary to transfer Captain Davidoski due to several vacancies in the rank of Captain of Police.
>
> Ms. Hendricks was promoted to the position of Personnel Analyst on May 2, 1999, and assigned to the Personnel Division. Prior to that promotion she had served in the Office of the Chief since February 12, 1989, in a number of positions, receiving several promotions. In her most recent assignment in my office she served as my Administrative Assistant IV, performing these duties exceptionally well. Upon the transfer of Captain Davidoski, Ms. Hendricks accepted the challenge of my Adjutant's position, and I have come to rely on her knowledge and experience. She has managed my office in a very efficient and effective manner. I feel it is in the best interest of the Department for her to remain in this position.

> If approved by the Fire and Police Commission, this would be a civilian position filled by appointment and Ms. Hendricks will hold the position so long as she is assigned to the Office of the Chief. This underfill arrangement is intended to allow the Department to promote a qualified person who is currently performing these duties and responsibilities.

Jones did not notify the MPSO about the situation referenced in this correspondence prior to its issuance.

9. Also on August 30, 1999 Chief Jones sent to the Fire and Police Commission (FPC) a letter nominating and promoting Hendricks to the rank of Staff Assistant Senior, subject to the Commission's approval and contingent upon successful completion of a drug screening. In that letter, Jones wrote as follows:

> The promotion and underfill arrangement outlined is intended to promote a qualified person who is currently performing these duties and responsibilities. Ms. Hendricks will hold the Staff Assistant Senior position so long as she is assigned to the Office of the Chief. If and when she is reassigned to a different work location, she will revert to her previously held position as of the date of such assignment. This condition should apply to all subsequent assignments to this position.

Jones did not notify the MPSO about the situation referenced in this correspondence prior to its issuance.

10. On August 31, 1999, Chief Jones sent FPC Executive Director Joseph Czarnezki a Job Description for the "Requested Title" of "Staff Assistant – Senior," indicating that the position's "Present Title" was Captain of Police, that the position was vacant, that the previous incumbent had been Debra Davidoski, and that the position's immediate supervisor was the Chief of Police. The proposed job description included such tasks as

* Review and prioritize all incoming correspondence and law enforcement related documents, including advising the Chief regarding confidential matters such as internal investigations, use of force and suspensions;

* Supervise and mange 17 personnel assigned to the Office of the Chief, Research and Development, Crime Analysis and the Public Information Office;

* Provide research and policy analysis on memorandums of understanding, grant proposals and legislation;

* Monitor Common Council proceedings and assign Department representatives to appear when necessary;

* Respond to inquiries, complaints and service requests from citizens, city officials and various law enforcement executives.

The position description listed as Qualifications Required a college degree in Business Administration, Public Administration or a related area; knowledge of the Milwaukee Police Department'' rules and procedures; a high degree of administrative ability and confidentiality; computer proficiency, and other skills. The position description did not include status as a sworn law enforcement officer as a necessary or desired qualification.

Along with the proposed Job Description, Jones forwarded a copy of Heidi Hendricks' resume, which included the following:

May 1999	Alverno College Bachelor of Arts Degree with Honors, Business & Management major/Computer Studies minor -
1989-present	Business related training and seminars - list available upon request
1988-1990	Business courses - Milwaukee Area Technical College
1978-1980	Social Welfare courses - University of Wisconsin - Milwaukee,

EMPLOYMENT HISTORY

3/83-present	CITY OF MILWAUKEE POLICE DEPARTMENT
5/99-present	Personnel Analyst, assigned to the Personnel Division
9/98-5/99	Administrative Assistant IV to the Chief of Police
1/96-9/98	Office Assistant IV, assigned to the Office of the Chief
11/89	Clerk Typist III, assigned to the Public Information Office
12/83	Clerk Typist U, assigned to District One & Metropolitan Division

3/83 Hired as Clerk Typist I, assigned to District One

10. The MPSO first learned of Chief Jones' plan on approximately September 1, 1999 when it received a copy of the Notice of Meeting for the September 2, 1999 Regular Meeting of the City of Milwaukee Fire and Police Commission. One of the items on the Regular Meeting Agenda was "promotions to Staff Assistant Senior, Detective, Lead Police Telecommunicator and Administrative Assistant I in the Police Department." MPSO President Jerald Filut telephoned Joseph Czarnecki, Executive Director of the FPC for clarification. MPSO Vice President Fred Shippee appeared at the FPC meeting. On September 2, 1999, Filut submitted to the Fire and Police Commission the following letter:

> The Milwaukee Police Supervisors' Organization (MPSO) is aware that Chief Arthur Jones intends to underfill retired Captain Victor Venus' Captain position with a civilian employee.
>
> The MPSO will go on record as opposing this underfilling request. The MPSO can understand the rationale to place a civilian employee into the position of the adjunct to the Chief of Police. However, the MPSO cannot rationalize doing this at the expense of losing a Captain of Police.
>
> Judge Frank Crivello ruled in an action brought by the Milwaukee Police Association (MPA) that should a vacancy occur in a promoted position and that position is underfilled, the vacancy must be filled through promotion. This ruling was then affirmed by the State Appellate Court.
>
> It is the position of the MPSO that this court decision is controlling in this matter.

11. The minutes of the September 2, 1999 Regular Meeting of the Board of Fire and Police Commissioners indicate that:

> "The Director presented a letter dated August 30, 1999, from Chief Jones, wherein he nominates Personnel Analyst Heidi M. Hendricks to the exempt position of Staff Assistant Senior, an underfill for a vacant Captain of Police (Chief's Adjutant). Pursuant to the Rules of the Board, final action on this nomination was laid over to permit the nominee to be interviewed. Sgt. Fred Shippee, representing the Milwaukee Police Supervisors Organization, spoke in support of the nominee but in opposition to funding the position by underfilling a sworn supervisory position."

On September 16, 1999 the Fire and Police Commission voted to approve the promotion of Hendricks from Personnel Analyst to Staff Assistant Senior.

12. The 1999 city budget authorized 300 positions within the ranks represented by the MPSO. As of September 18, 1999, there were 299 incumbents in said positions. Following the retirement of Captain Victor Venus and the replacement of Captain Davidoski by Hendricks, that number fell to 298. The city's budget also authorized and provided funds for 24 incumbents in the position of Captain of Police. As a result of Hendricks becoming Staff Assistant Senior, assigned as Chief's Adjunct, the department had and continues to have 23 Captains.

On the basis of the above and foregoing Findings of Fact, I hereby make and issue the following

CONCLUSION OF LAW

1. The Respondents, City of Milwaukee et al, are municipal employers, within the meaning of Sec. 111.70(1)(j), Wis. Stats.

2. The Complainant, Milwaukee Police Supervisors' Organization, is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats.

3. By assigning the duties of Chief's Adjunct to a civilian Staff Assistant Senior rather than a Captain of Police, the respondents did not encourage or discourage membership in the MPSO by discrimination with regard to tenure or other terms or conditions of employment, and thus did not violate Sec. 111.70(3)(a)3, Wis. Stats.

4. By the terms of their collective bargaining agreement, the parties have waived bargaining over the decision to transfer certain duties from a position previously held by a Captain of Police to the newly created position of Senior Staff Assistant. The respondents therefore had no duty to bargain collectively with the complainant over said personnel transaction, and thus did not violate Sec. 111.70(3)(a)4, Wis. Stats.

5. By the terms of their collective bargaining agreement, the complainants did not have a right to a certain number of members, nor did the Respondents have the obligation of employing a certain number of Captains of Police. The respondents therefore did not violate the parties' collective bargaining agreement by underfilling the position of Chief's Adjunct and employing only 23 Captains of Police, and thus did not violate Sec. 111.70(3)(a)5, Wis. Stats.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, I hereby make and issue the following

ORDER

That the instant complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 20th day of November, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart Levitan /s/
Stuart Levitan, Examiner

THE CITY OF MILWAUKEE (POLICE DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainant

In support of its complaint that the respondent violated Secs. 111.70(3)(a)3, 4, and 5, Wis. Stats., the complainant asserts and avers as follows:

> The employer failed to collectively bargain, in violation of Sec. 111.70(3)(a)4, Wis. Stats. It is well-settled that municipal employers have a mandatory duty to bargain collectively with their organized employees about wages, hours and conditions of employment. The City's decision to replace the law enforcement position of Chief's Adjutant with the lower-paid civilian position of Staff Senior Assistant did not reflect a choice among alternative social or political goals, or affect the policies and functions of the Milwaukee Police Department; it merely substituted a non-union employee for a union employee, at a financial savings to the employer. Thus, the decision was primarily related to wages and benefits, and bargaining was mandatory.
>
> The employer had no contractual management right to engage in this action. The civilianizing of a traditionally union job while reducing the membership of the union is analagous to replacing a unionized public employee with a private sector employee, which the employer must collectively bargain.
>
> Even if the proposal is primarily related to policy and management concerns and is thus not mandatorily bargainable, the employer must still bargain the impact of the proposal on wages, hours and working conditions. The MPSO did not have an affirmative duty to request the employer to bargain. By nominating and promoting Hendricks without making any effort to even inform the MPSO, much less confer or negotiate with it, the Chief demonstrated that the City was not willing to bargain with the MPSO
>
> The employer also acted to discourage membership in the MPSO by its discrimination in favor of a non-MPSO city employee, in violation of Sec. 111.70(3)(a)3, Stats. The employer's act of discrimination in favor of a non-MPSO member is obvious, in that the civilianizing of this position has an

impact upon all current and potential members of the MPSO. The union lost a job position to this civilian because the employer did not promote another officer to the rank of Captain of Police to replace the retiring Captain Venus. Although such a promotion would have been from within the membership of the MPSO, another officer elsewhere would have been promoted into the ranks which constitute the MPSO.

This discrimination in favor of a civilian and to the detriment of the MPSO further discourages membership in the union, in that officers can no longer aspire to promotion to the prestigious position of Chief's Adjutant. Further, if all the captaincies are underfilled with civilians, there will be nothing left of the captain's position as listed in the collective bargaining agreement.

The employer's action violates the collective bargaining agreement through the impermissible practice of permanent underfilling, in violation of Sec. 111.70(3)(a)5, Stats. Only temporary underfilling is allowed by law. Yet Chief Jones, in his correspondence regarding this position, repeatedly and explicitly referred to the action as "underfilling." The city is seeking to fill a position traditionally held by a Captain with a lower-paid civilian from outside the collective bargaining unit. The promotion of Hendricks is intended to be a permanent underfill, which under Wisconsin case law is illegal.

The employer's action of placing a non-union employer into a position held by an MPSO member and not replacing a retiring MPSO member breached the collective bargaining agreement between the parties, in violation of Sec. 111.70(3)(a)5, Stats.

Although the collective bargaining agreement does not require a specific number of officers to be assigned to specific ranks, the agreement does essentially incorporate by references city ordinances. The 1999 budget of the city, adopted by the Common Council, authorized 300 positions within the ranks represented by MPSO; but by its actions, the city allowed that number to slip first to 299 then to 298. Any past instances which the city cites as justification are not sufficiently similar to this case to support its argument. Nor are any cases which the employer cites sufficient legal authority.

Because the city failed to bargain with the MPSO, discriminated against the MPSO and discouraged membership in the union, and violated the collective bargaining agreement between it and the MPSO, the city's actions are legally void. The city must be required to promote another officer to the ranks represented by the MPSO.

Respondent

In support of its position that it did not commit any prohibited practices, the respondent city asserts and avers as follows:

> As the complainant with the statutory burden of proving its case by a clear and satisfactory preponderance of the evidence, the MPSO has failed to establish a violation of the law in any respect.
>
> To prove a violation of Sec. 111.70(3)(1)3, Stats., the complainant must show an employee was engaged in protected activity; that the employer was aware of such activity; that the employer was hostile to such activity; and that the employer's conduct was motivated, in whole or in part, by hostility to the protected activity. Here, the MPSO has not established the existence of even one of these criteria, let alone the existence of all four. Its claims should be dismissed.
>
> There is no evidence that any employees or the MPSO itself was engaged in any protected activity that prompted the city's actions. No specific employee was eligible to be promoted to captain, and so the decision to have Hendricks assume the duties formerly conducted by a captain could not have been to prevent some identifiable MPSO member active in union affairs from receiving this promotion. There is no guarantee that a particular member of the department will be promoted to captain. And, as the president of the MPSO acknowledged, there is no requirement that a specific number of captains must be allocated or that a vacancy must be filled.
>
> Because the MPSO has failed to establish that there was protected activity occurring by one or more of its members, it has certainly also failed to show the second criteria, namely that the respondents were aware of such activity. Thus, the MPSO cannot show that the city was hostile to what was non-existent activity. Finally, by stipulating that Chief Jones bore no anti-union animus, the MPSO has essentially acknowledged that it has no evidence to support the fourth criteria
>
> Further, the MPSO has failed to establish a violation of Sec. 111.70(3)(a)4, Stats., because the Chief's decision to rely on a civilian senior staff assistant rather than a captain of police to direct his office is not a mandatory subject of bargaining. The Chief of Police is charged by statute with the responsibility for the efficiency and general good conduct of the department; this includes exercising his judgment on a personnel matter that most directly affects his

ability to operate the department. The MPSO's position would be an unwarranted restriction on a managerial prerogative. The Chief's judgment that a civilian should oversee his office rather than an MPSO member does not involve a mandatory subject of bargaining. Further, the decision to allocate funds initially appropriated by the City to the department for salaries of a captain and partially utilize them to pay a senior staff assistant is again a matter in which the managerial prerogatives prevail and there is no mandatory duty to bargain.

The city further has no duty to bargain on this matter because the collective bargaining agreement between the parties covers the subject on which the MPSO seeks to bargain. As the MPSO stipulated at the hearing, it would have had no case if the position had remained vacant; it has no claim to a specific number of captains under the collective bargaining agreement, and it would not complain if the duties of the position were given to a nonsworn, non-unit city employee. This leaves as the heart of the MPSO case a claim that the city could not employ a civilian to perform the duties of the adjunct position funded with money originally appropriated for a captain's position. But there are a number of contractual provisions which address this claim, such that the city has no duty to bargain further during the term of the collective bargaining agreement.

The collective bargaining agreement contains a management rights clause which vests with the city the right to manage and direct the police department, including the rights to establish the methods and process by which its work is performed, to assign and transfer employees, and to contract and subcontract. The collective bargaining agreement also vests with the city the right to make classification changes. Because the actions of the Chief predominantly involve the exercise of his managerial prerogatives and because the Chief exercised his authority on a subject addressed by the parties in their collective bargaining agreement, the MPSO's allegation regarding a violation of Sec. 111.70(30(a)4, must be dismissed.

Further, the MPSO has failed to prove its allegations regarding a purported violation of Sec. 111.70(3)(a)5, Stats. The MPSO has essentially conceded that its members have no contractual right to perform the duties now assigned to the Senior Staff Assistant. The MPSO has not identified a specific provision that it claims to have been violated. This alleged violation, along with all others, must also be dismissed.

Complainant's Reply Brief

Complainant responds as follows:

> The city's unilateral actions during the summer of 1999 which resulted in reducing the membership of the MPSO and in using budgeted funds that would have otherwise been used to pay a member of the MPSO to pay a civilian were prohibited practices.
>
> The circumstantial evidence shows that the complainant has proven there was a violation of Sec. 111.70(3)(a)3, Stats. Because of the impact on the union such that a position formerly held by a union member has become civilianized and no one has been promoted to any rank represented by the MPSO, the only possible inference is that the respondents' actions were taken to discriminate against the MPSO, contrary to Sec. 111.70(3)(a)3, Stats.
>
> The employer also failed to bargain collectively, in violation of Sec. 111.70(3)(a)4, Stats. As noted, this case is most like those involving the privatization of positions held by and/or work performed by unionized public employees; where the only change will be a financial savings for the employer, the decision to subcontract the work has been found to be primarily related to wages, hours and conditions of employment rather than the formulation of public policy, and thus a mandatory subject of bargaining. Here, Chief Jones' letter explaining the personnel transaction admitted the only difference between the position of Adjutant to the Chief and Staff Assistant Senior would be the financial savings to the city from replacing a Captain of Police with a civilian. There is no evidence in the record to show that creating a civilian position will have any effect on the Chief's ability to operate the department. Clearly, the Chief's decision was primarily related to wages, hours and conditions of employment; but even if it is found primarily related to policy and management concerns, the city must still bargain the impact on wages, hours and conditions of employment.
>
> It is undisputed that the city has eliminated a position once held by a member of the MPSO without adding a member to the ranks of the MPSO elsewhere. It is undisputed that the city all characterized the personnel transaction as an "underfilling." Finally, the city has never suggested the replacement of the sworn Adjutant position with the civilian Staff Assistant Senior is not permanent. Because other situations cited by the city are not comparable, and because of the applicability of the Pasko case, the MPSO has established a violation of Sec. 111.70(3)(a)5, Stats.

Finally, the contractual management's rights clause is not a defense, in that the contract is subordinate to State law. It has already been established that the city's actions were in violation of Sec. 111.70(3)(a); as has already been shown respondents' action violated Wisconsin law so they cannot attempt to rely upon the management rights clause of the contract as a defense.

Respondent's Reply Brief

Respondents reply as follows:

The MPSO has not met its burden of proof in showing there was a violation of Sec. 111.70(3)(a)4, Stats. The management rights clause of the collective bargaining agreement between the parties includes the unconditional and unlimited right to contract or subcontract. To the extent that the MPSO argues that the actions herein challenged involve subcontracting, the City had no obligation to bargain on that topic during the terms of the collective bargaining agreement.

The MPSO has also not met its burden of proof in showing that there was a violation of Sec. 111.70(3)(a)3, Stats. Nothing in the record supports the MPSO's claim that the Chief's decision to promote Hendricks had an impact on all current and potential members of the union. Nor is there a shred of testimony that any individual in the Department would refuse a promotion to a supervisory rank because of some theoretical harm posed by this personnel transaction. Further, the MPSO's claim that its members can no longer aspire to the position of Chief's Adjutant is illusory; as MPSO counsel acknowledged, the Chief could have transferred a captain out of that position and either filled it with a civilian or left it vacant. Other than its generalized claim of discrimination against the MPSO, the complainant's brief fails to cite any shred of testimony to suggest that the respondents in any fashion possessed any actual or theoretical hostility toward the MPSO. Nor does the record support any inference of such hostility. Indeed, MPSO counsel stipulated that the MPSO was not claiming that there was any animus underlying the complaint. Because the complainant has failed to prove the existence of an essential element of its claim, the complaint should be dismissed.

Finally, the MPSO has failed to meet its burden of proof in showing that there was a violation of Sec. 111.70(3)(a)5, Stats. The Pasko case the complainant cites does not establish a violation of the MPSO contract, and is indeed irrelevant. The MPSO counsel conceded at hearing that the MPSO has no right to a specified number of captains guaranteed by the collective bargaining

agreement with the city; regardless of the number of positions the city authorized in its 1999 budget, the Chief's determination to promote Hendricks did not constitute a violation of the collective bargaining agreement.

Accordingly, the complaint should be dismissed in its entirety.

DISCUSSION

The complainant, the Milwaukee Police Supervisory Organization, alleges that the respondents committed multiple violations of the Municipal Employment Relations Act (MERA). The MPSO claims that the City failed to bargain collectively with it regarding the filing of the Chief's Adjunct position with a nonsworn employee, in violation of Sec. 111.70(3)(a)4. The MPSO claims that the promotion of an unsworn employee from outside the bargaining unit constituted discrimination in favor of a non-unit employee which illegally discouraged membership in the MPSO in violation of Sec. 111.70(3)(a)3. The MPSO also alleges two violations of Sec. 111.70(3)(a)5 -- that the City violated the collective bargaining agreement between the parties by placing a lower-paid employee from outside the bargaining unit in the position traditionally held by a Captain (an impermissible underfill), and by reducing the number of union jobs to a level below that authorized and funded by the city.

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." It has been well-settled for over thirty years that, to prove a violation of this section the Complainant must, by a clear and satisfactory preponderance of the evidence, establish that:

1. Complainant was engaged in protected activities; and

2. Respondents were aware of those activities; and

3. Respondents were hostile to those activities; and

4. Respondents' conduct was motivated, in whole or in part, by hostility toward the protected activities. 1/

1/ The "in-part" test was applied by the Wisconsin Supreme Court to MERA cases in MUSKEGO-NORWAY C.S.J.S.D. NO. 9 v. WERB, 35 WIS.2D 540 (1967) and is discussed at length in EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985). See also ROCK COUNTY, DEC. NO. 29219-B (WERC, 10/98), and D.C. EVEREST AREA SCHOOL DISTRICT, DEC. NO. 29946-A (Burns, 8/2000).

Evidence of hostility and illegal motive (factors three and four above) may be direct (such as with overt statements of hostility) or, as is more often the case, inferred from the circumstances. TOWN OF MERCER, Dec. No. 14783-A (GRECO, 3/77). If direct evidence of hostility or illegal motive is found lacking, then one must look at the total circumstances surrounding the case. In order to uphold an allegation of a violation, these circumstances must be such as to give rise to an inference of pretext which is reasonably based upon established facts that can logically support such an inference. COOPERATIVE EDUCATION SERVICE AGENCY #4, ET AL., Dec. No. 13100-E (YAFFE, 12/77), *aff'd*, Dec. No. 13100-G (WERC, 5/79).

Regarding the fourth element, it is irrelevant that an employer has legitimate grounds for its action if one of the motivating factors was hostility toward the employe's protected concerted activity. LACROSSE COUNTY (HILLVIEW NURSING HOME), Dec. No. 14704-B (WERC, 7/78). In setting forth the "in-part" test, the State Supreme Court noted that an employer may not subject an employe to adverse consequences when one of the motivating factors is his or her union activities, no matter how many other valid reasons exist for the employer's action. MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 WIS.2D 540, 562 (1967). Although the legitimate bases for an employer's actions may properly be considered in fashioning an appropriate remedy, discrimination against an employe due to concerted activity will not be encouraged or tolerated. EMPLOYMENT RELATIONS DEPT V. WERC, 122 WIS.2D 132, 141 (1985).

Here, the record is absolutely devoid of any evidence at all concerning the critical components three and four above. There is no evidence that the respondents were hostile to the complainant's concerted activities. There is no evidence that the respondents were motivated, in whole or in part, by such hostility. Even looking at the totality of events, the circumstances do not give rise to an inference of pretext which is reasonably based upon established facts that can logically support such an inference. Indeed, the complainant stipulated on the record that Chief Jones had no anti-union animus. Given the total lack of any evidence at all supporting two necessary components – components the complainant must establish by a preponderance of the evidence – I have found no violations of Sec. 111.70(3)(a)3, and have accordingly dismissed those aspects of the complaint

Sec. 111.70(3)(a)4, Stats., makes it a prohibited practice for an employer to "refuse to bargain collectively with a representative of the majority of its employees in an appropriate collective bargaining unit." It is well-settled that the parties' duty to bargain during the term of a contract is limited to (1) mandatory subjects of bargaining which (2) are not already covered by the contract or as to which the right to bargain has not been waived through bargaining history or specific contract language. CITY OF MADISON, DEC. NO. 27757-B (WERC, 10/94); SCHOOL DISTRICT OF CADOTT, DEC. NO. 27775-C (WERC, 6/94); AFF'D CADOTT EDUCATION ASS'N V. WERC, 147 WIS.2D 46 (CTAPP 1995).

It is useful to set forth the general legal framework within which the issues herein must be resolved. In BELOIT EDUCATION ASSOCIATION V. WERC, 73 WIS.2D 43 (1976); UNITED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 WIS.2D 89 (1977); and CITY OF BROOKFIELD V. WERC, 87 WIS. 2D 819 (1979), the Court set forth the definition of mandatory and permissive subjects of bargaining under Sec. 111.70(1)(d), Stats., as matters which primarily relate to "wages, hours, and conditions of employment" or to the "formulation or management of public policy," respectively.

As the Court noted in WEST BEND EDUCATION ASSOCIATION V. WERC, 121 WIS.2D 1, 9 (1984):

> As applied on a case-by-case basis, this primarily related standard is a balancing test which recognizes that the municipal employer, the employees, and the public have significant interests at stake and that their competing interests should be weighed to determine whether a proposed subject for bargaining should be characterized as mandatory. If the employees' legitimate interest in wages, hours, and conditions of employment outweighs the employer's concerns about the restriction on managerial prerogatives or public policy, the proposal is a mandatory subject of bargaining. In contrast, where the management and direction of the school system or the formulation of public policy predominates, the matter is not a mandatory subject of bargaining.

There is no dispute that the Respondents did not offer to bargain collectively with the Complainant over this matter. What remains to be determined is whether the matter was a mandatory subject of bargaining, and whether it was addressed by the existing collective bargaining agreement.

Because it is dispositive of the complaint, I examine first the issue of whether or not the existing collective bargaining agreement addresses this topic. I find that it does.

Article 5, Management Rights, provides that "except as specifically provided otherwise by this Agreement, any and all rights concerning the management and direction of the Police Department and the Police force shall be exclusively the right of the City and the Chief of Police." Specifically and without limitation by enumeration, the Respondent's "unrestricted rights" include the following:

- To establish methods and processed by which is performed (5.2.e)
- To assign and/or transfer employees with the Police Department (5.2.f)
- To transfer any or all of the operations of the Milwaukee Police Department to another unit of government without prior negotiations or consent of the MPSO (5.2.h)

- To consolidate operations of two or more departments, without prior negotiations (5.2.i)
- To consolidate operations within the Department or to reorganize within the Department, without prior negotiations with the MPSO (5.2.j)
- To contract or subcontract (5.2.k)

Thus, whether or not the underlying action constituted a mandatory subject of bargaining, it is clear that the transfer of these duties from a Captain to the newly created position of Staff Assistant Senior was a matter already covered in the collective bargaining agreement. Because the complaint fails to satisfy the second criteria for a valid complaint, I have dismissed the (3)(a)4 charge.

Sec. 111.70(3)(a)5, Stats., makes it a prohibited practice for the employer to "violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment." The MPSO has invoked the Commission's jurisdiction, and the respondents have neither objected nor demanded referral to arbitration. The MPSO alleges that the Respondents have committed two violations of this provision – by assigning lower-ranked personnel rather than filling vacancies with higher-ranked personnel (the "underfilling" claim), and by employing only 23 captains when the city budget process authorized 24.

The MPSO has placed great stock in a prior case in which a different union, the Milwaukee Police Association, successfully challenged the Respondents on a decade-long practice of using lower paid police officers to perform the duties of higher-paid police alarm operators. The court of appeals found this to be a breach of the contract terms setting the applicable pay scale for the performance of the relevant duties. PASKO V. CITY OF MILWAUKEE, 222 WIS. 2ND 274 (CT. APP. 1998)

As the Respondents note, however, there is a significant difference in the factual basis of the two cases. In PASKO, the collective bargaining agreement specifically identified positions with specific duties and specific pay rates; it was the city's long-standing practice of assigning lower-paid positions to perform the duties of higher-paid ones that the court held improper. Here, there is no position in the collective bargaining agreement which is identified as having the duties of Chief's Adjunct. Whether or not the City underfilled the position – and Chief Jones' correspondence certainly indicates that's what the City did – such an action in and of itself is not illegal. The MPSO had no legal right to have the duties performed by the Adjunct be assigned to one of its members; therefore it was not illegal for the city to assign those duties to an employe paid less than a Captain.

Nor did the MPSO have a contractual right to a certain number of members, or to have the City employ certain number of captains. Indeed, MPSO counsel effectively acknowledged this point on the record at hearing.

Accordingly, I have also dismissed the claim of a violation of Sec. 111.70(3)(a)5, Stats.

Dated at Madison, Wisconsin this 20th day of November, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart Levitan /s/
Stuart Levitan, Examiner

SDL/gjc
29896-A.doc