STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 180, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, Complainant,

vs.

CITY OF LA CROSSE, Respondent.

Case 299
No. 57990
MP-3553

Decision No. 29954-C

Appearances:

Davis, Birnbaum, Marcou, Seymour & Colgan, by **Attorney James G. Birnbaum,** 300 North Second Street, Suite 300, P.O. Box 1297, La Crosse, Wisconsin 54602-1297, appearing on behalf of the Complainant.

Attorney Peter Kisken, Deputy City Attorney, City of La Crosse, 400 La Crosse Street, La Crosse, Wisconsin 54601, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 16, 1999, La Crosse City Employees Union Local 180, SEIU, AFL-CIO, CLC, filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of La Crosse had violated Sec. 111.70(3)(a)1, 3, and 5, Stats., in that they had continually and repeatedly violated agreements reached in collective bargaining, interfered with, restrained and coerced employees in the exercise of Sec. 111.70 rights and otherwise discriminated against Union members regarding wages, hours and conditions of employment. Subsequently the Complainant amended its complaint, with the third amended prohibited practice complaint filed on September 19, 2000.

On August 14, 2000, the Commission appointed Coleen A. Burns, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of

Law and Order, as provided for in Secs. 111.07(5) and 111.70(4)(a), Stats. On September 27, 2000, the Respondent filed an answer to the third amended prohibited practice complaint. Hearing on the complaint was held on October 31, 2000, in La Crosse, Wisconsin. The record was closed on January 17, 2001, upon receipt of post hearing written argument.

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

FINDINGS OF FACT

1. La Crosse City Employees Union, Local 180, SEIU, AFL-CIO, CLC, hereinafter Complainant or Union, is a labor organization with its office located at 812 Kane Street, La Crosse, Wisconsin 54603. At all times material hereto, Ken Iverson has been the President of the Union and has served as the Union's agent.

2. City of La Crosse, hereinafter referred to as the Respondent or the City, is a municipal employer with offices located at 400 La Crosse Street, La Crosse, Wisconsin 54601-3496. At all times material hereto, James W. Geissner has been the City's Director of Personnel and has served as the City's agent.

3. The Union is the exclusive collective bargaining representative for all employees of the City of La Crosse exclusive of all department heads, supervisors, professional and confidential employees, members of the La Crosse Professional Police Officers Association, non-supervisory bargaining unit; La Crosse Professional Police Supervisory Bargaining Units; Local #127 of the International Association of Fire Fighters bargaining unit; Amalgamated Transit Union Local # 519 bargaining unit; Airport Fire/Police bargaining unit; all crossing guards, and all temporary, seasonal employees who are employed less than 120 calendar days in a calendar year. The instant Complaint of Prohibited Practices was initially filed on September 16, 1999. Thereafter, the Complaint was amended on three occasions, with the last amendment filed on September 19, 2000.

4. On August 28, 1985 the City and the Union entered into the following:

Agreement

> WHEREAS, a grievance was filed by the Union alleging that the city violated the collective bargaining agreement by permitting a supervisor (James Kramer) to perform duties which are within the Collective Bargaining Agreement;

WHEREAS, the City disputes that the Supervisor (James Kramer) is performing duties of Bargaining Unit members;

Whereas, the parties desire to resolve these differences and to avoid future disputes concerning supervisors doing bargaining unit work. Now Therefore the parties agree as follows:

(1) The City shall reaffirm its position taken on January, 1979 that no supervisor may perform bargaining unit work;

(2) The city shall inform supervisors of this position in writing and provide the union with a copy of this writing;

(3) The union agrees to withdraw this grievance upon the city performing the 2 actions above.

(4) The parties agree that the terms of the agreement shall form the terms of a consent award by the Arbitrator.

Dated at La Crosse, Wisconsin the 28th day of August, 1985.

This Agreement was signed by a representative of the City and by various representatives of the Union, including Kenneth Iverson. The following was placed below the signatures of the parties' representatives:

The parties having voluntarily agreed to the above terms of settlement, I hereby approve the terms of this settlement and enter it as a consent arbitration award.

August 28, 1985 Mary Jo Schiavoni /s/
Arbitrator

The grievance that was the subject of the Consent Award involved a supervisor that routinely worked along side of his bargaining unit crews.

5. The parties' 1998-99 and 2000-01 collective bargaining agreements includes the following:

ARTICLE 2
GRIEVANCE PROCEDURE

Matters involving the interpretation, application or enforcement of this contract shall constitute a grievance under the provisions set forth below:

Step 1. The employee shall meet with and discuss the grievance with their immediate supervisor, with union representative present, within thirty (30) calendar days or by the first regular working day following thirty (30) calendar days, of the date the employee should have known of the grievable matter. If no solution is reached the employee may,

Step 2. Reduce the grievance in detail to writing within seven (7) calendar days following the meeting, using an "Initiation of Grievance Form" and submit it to the supervisor who will forward it to the Director of Personnel, who, with the Department Head, within ten (10) working days (Monday through Friday, excluding holidays) shall attempt to resolve the grievance and answer the grievance in writing. Within those ten (10) working days, representatives of the Union, the grievant, the Personnel Director, the Department Head and the supervisor shall meet to attempt a resolution of the disputed matter.

Step 3. If a satisfactory solution cannot be reached, the Union may, within thirty (30) calendar days of the grievance meeting, appeal to the Wisconsin Employment Relations Commission who will appoint a neutral arbitrator. The Union shall copy the City on all requests for grievance arbitration, the findings of the arbitrator to be final and binding on the parties hereto.

It is understood that the 30 calendar day requirement to file a grievance in Step #1 above shall be interpreted to mean the next regularly schedule working day that both the employee and supervisor are present at work.

The parties may by written agreement extend the time limits contained in the grievance procedure.

The arbitrator shall not add to, or subtract from the terms of this agreement.

The City and the Union agree that the decision of the arbitrator shall be final and binding on both parties.

> The grievance procedures set forth herein shall be the exclusive complaint of any employee as to any matter involving the interpretation or application of this agreement.
>
> All complaints originating in all City departments shall be handled in the manner outlined above and no deviation therefrom will be permitted. Specifically, employees are prohibited from presenting such complaints, formally or informally to officers of the City of La Crosse not included in this procedure.
>
> Members, stewards, officers/or representatives of the Union are permitted to discuss and/or adjust the grievances between an employee and his/her supervisor during or after regular working hours. In carrying out the above duties the parties shall not interfere with the normal and efficient operation of the department. A person(s) acting in the above capacity shall suffer no loss of pay for said action. A grievance shall be adjusted on an individual basis unless otherwise agreed to by the parties. No members, stewards, officers/or representatives of the Union shall be harassed during the performances of their duties in discussing and adjusting grievances.

Various agreements of the parties are attached to the 1998-99 and 2000-01 collective bargaining agreements as a Memorandum of Understanding. The Consent Award issued by Arbitrator Schiavoni is not attached to either of these collective bargaining agreements. Sandra Howe, Mark Graff, Brian Hemp, Doug Garves, Alan Tauscher, and Kenneth Iverson are employees of the City of La Crosse and members of La Crosse City Employees' Union, Local 180, SEIU, AFL-CIO, CLC. Eugene Pfaff, Patrick Bonadurer, Tom Berendes, Mike McCormick, and Sean Hutchison are not members of the Union's collective bargaining unit, but rather, are supervisory employees of the City of La Crosse and, as such, are agents of the City.

6. On or about July 6, 1998, a grievance was filed alleging "Tom Berendes doing Local 180 bargaining unit work." Tom Berendes performed this work on July 6, 1998. This grievance alleged a violation of the recognition clause and Article 10. The desired settlement was "Supervisor Tom Berendes immediately cease doing bargaining unit work." Thereafter, City Director of Personnel Geissner issued the following letter:

July 28, 1998

Mr. Kenneth Iverson, President
SEIU Local #180, AFL-CIO
812 Kane Street
La Crosse, WI 54603

RE: City's Grievance Answer
Grievance #WATER-05-98
Grievant: Mark Graff
Department: Water
Issue: Bargaining Unit Work
Grievance Dated: 7/6/98

Dear Ken:

This correspondence is to confirm the results of the grievance hearing held July 21st on the above captioned case. The grievance meeting was held in the South Conference room of City Hall beginning at 2:30 p.m. A list of those in attendance is attached.

After a thorough discussion of the merits of the grievance, it was obvious that the Union did not have all the facts regarding the procedure that employees and managers use to order parts. In this particular case an employee, Dan Stremcha, actually ordered the part. The Water Superintendent was not aware that employee Stremcha had ordered the part when he conveyed the part to the MSC.

Needless to say, the ordering of parts is something that employees and managers in all City departments do. From our discussions, it was apparent that a better communication system needs to be utilized so that employees, managers and MSC personnel are aware of which parts are ordered and by whom. Pat Caffrey, Director of Public Works who attended the grievance meeting, has agreed to address this issue involving the need for greater interdepartmental communication at his next staff meeting.

On the chisel incident, it appears that Tom Berendes was attempting to show the grievant a more efficient method of performing a task. Tom readily admitted that his idea did not work.

Certainly, the Union would agree that a supervisor should be able to assist an employee when his/her help is requested or when a new or different work method is being checked out.

The above referenced examples were discussed at length and the Union's concern that they could lead to an erosion of their bargaining unit work has been noted. As indicated on the first example, the Director of Public Works will also discuss the subject of bargaining unit work at his next staff meeting.

Hopefully, this correspondence and the discussion held at the grievance hearing has (sic) sensitized both parties to the other's perspective on the issue of bargaining unit work. Based on the above, the City considers this case settled.

I remain

Fraternally yours,

James W. Geissner
Director of Personnel

cc: Pat Caffrey, Director of Public Works
Mark Johnson, Water & Utility Manager
Tom Berendes, Superintendent of Water Utility
Fred Ray, Recording Secretary, SEIU Local #180, AFL-CIO
Mark Graff, Water Department

Union President Iverson responded to the above with the following:

August 6, 1998

Mr. James W. Geissner
Director of Personnel
City of La Crosse City Hall
400 La Crosse Street
La Crosse, WI. 54601-3396

RE: Union's response to City Grievance Answer.
Grievance: WAT-05-98
Grievant: Mark Graff
Department: Water
Issue: Bargaining Unit Work
Grievance Date: 07-06-98

Dear Jim:

After a thorough discussion, Local 180 feels, once again, that the City did not have all the facts regarding the actions of Superintendent, Thomas Berendes, leading up to this grievance.

Local 180 will continue, through the help of it's stewards, to address the issue of Superintendents/Department Heads doing bargaining unit work and we will evaluate each situation and take appropriate action.

In your grievance answer to me dated July 8, 1998, you stated, "that Superintendent Thomas Berendes was attempting to show the grievant a more efficient method of performing a task".

That explanation to this union is totally unacceptable. It also should be pointed out, at this time, that the affected employee, Mark Graff, did not request any help from Thomas Berendes concerning this incident.

What Local 180 will accept is the fact that the Director of Public Works, Mr. Patrick Caffrey, will discuss Local 180's concerns with his Superintendents/Department Heads at his next staff meeting.

Based on the above stated meeting to address Local 180's concerns about Bargaining Unit work, Local 180 will consider this grievance settled.

Thank you.

Sincerely,

LA CROSSE CITY EMPLOYEES UNION
LOCAL 180

MR. KENNETH A. IVERSON
PRESIDENT

CC: Mr. Patrick Caffrey, Director of Public Works
Mr. Mark Johnson – Waste Water and Water Utility Manager
Mr. Thomas Berendes – Superintendent of Water Utility
Mr. Mark Graff – Steward Water Distribution

7. Sandra Howe works in the machine room that is located in the basement of the City Hall and is supervised by Eugene Pfaff, the City's Director of Finance. At approximately

8:30 a.m. on December 30, 1998, Howe telephoned Pfaff to report that her key would not work in the door locks and that she could not get into one of the back rooms. Pfaff came to Howe's work area and tried to unlock the door. Approximately ten to fifteen minutes after Howe telephoned Pfaff, she was able to enter the work area through a second door and unlock the first door from within. Once Howe had unlocked the first door from within, everyone had access to all of the offices. After the first door was opened, Pfaff removed the door handle and lock with a tool that Howe had obtained from the maintenance office. Howe had used this tool to remove door locks when she was the Chief Custodian at City Hall. The tool could only be used on the inside door. Pfaff removed the door handle in less than five minutes. Prior to removing the lock, Pfaff had paged the Chief Custodian, but the Chief Custodian did not return the page. Subsequently, Pfaff transported the lock to a locksmith to have the lock repaired. At the time that Pfaff transported the lock to the locksmith, Pfaff considered it necessary to have the lock repaired by noon so that the area could be secured over the lunch hour. Removing locks from City Hall doors; transporting such locks to and from the locksmith; and replacing repaired locks in the doors of City Hall is the work of custodial/maintenance employees represented by the Union. At the time that Pfaff was removing the door lock, Howe observed the Chief Custodian enter the area, but Pfaff did not observe the Chief Custodian. Normally, other custodian/maintenance employees represented by the Union are available to perform work between the hours of 8:00 a.m. and Noon. On or about December 30, 1998, the Union filed a grievance alleging that "Supervisor in Finance Dept. Gene Pfaff doing Local 180# bargaining unit work in Grounds & Building Dept." This grievance alleged a violation of the recognition clause and 180# contract as a whole. The settlement desired was "Supervisor Gene Pfaff immediately cease doing bargaining unit work." Thereafter, City Director of Personnel Geissner issued the following:

> February 22, 1999
>
> Ken Iverson, President
> 812 Kane Street
> La Crosse, WI 54603
>
> RE: City's Step # 2 Grievance Answer
> Grievance #: Grounds and Buildings – 01-98
> Department: Grounds and Buildings
> Issue: Bargaining unit work
> Grievant: Tim Havlik
>
> Dear Mr. Iverson:
>
> This correspondence shall serve as the City's response to the above captioned case.

At the grievance hearing a full discussion took place regarding the incident leading to the grievance as well as the general subject of supervisors doing bargaining unit work. The grievance states that it wishes Supervisor Gene Pfaff to immediately cease doing bargaining unit work. Mr. Pfaff explained the emergency nature of the incident, i.e. he had to remove a lock from a door in the machine room because the grievant could not be located.

In the future the principle of bargaining work will be respected and supervisors will not be performing tasks normally recognized as bargaining unit work.

Hopefully with the above stated recognition this case can be considered resolved.

Respectfully,

James W. Geissner
Director of Personnel

. . .

cc: Tim Havlik, Grievant
Gene Pfaff, Director of Finance
Tony Hutchens, Assistant Director of Public Works
Fred Ray, Recording Secretary – SEIU Local #180

Thereafter, Union President Iverson responded with the following:

March 9, 1999

Mr. James W. Geissner
Director of Personnel
City of La Crosse City Hall
400 La Crosse Street
La Crosse, WI 54601-3396

RE: Union's response to City grievance answer.
Grievance: Grounds & Buildings, 01-98
Department: Grounds & Buildings
Issue: Bargaining unit work
Grievance Date: 12-30-98

Dear Jim:

In your response to me dated February 22, 1999 concerning the grievance hearing. You stated supervisors will not be performing bargaining unit work in the future.

Based on this answer to Local 180 from you on this matter, Local 180 will consider this grievance settled.

Thank you.

Sincerely,
La Crosse City Employees Union
Local 180

Mr. Kenneth A. Iverson, President

CC: Gene Pfaff, Director of Finance
Tim Havlik, Grievant
Gloria Molzahn, Steward, City Hall

On December 30, 1998, Supervisor Pfaff performed more than a de minimis amount of the Union's bargaining unit work when he removed a door lock and transported the door lock to the locksmith to be repaired. Pfaff's performance of this work was not necessitated by an emergency situation.

8. On February 19, 1999, Pat Bonadurer, the City Forester, demonstrated the use of a new piece of equipment, i.e., the stumper, to Union bargaining unit members. In order to prepare a stump for this demonstration, Bonadurer used a chain saw to clear away two saplings. Using a chain saw to clear away saplings is normally the Union's bargaining unit work. Instructing employees in the use of new equipment is work that is supervisory in nature. By using a chain saw to prepare a stump for a demonstration of a new piece of equipment, the City Forester performed work that was supervisory in nature. On February 19,

1999, the Union filed a grievance alleging "Supervisor Pat Bonadurer doing Local 180# bargaining unit work." The grievance further alleged a violation of the Recognition clause and the contract as a whole. The desired settlement was "Supervisor Pat Bonadurer immediately cease doing bargaining unit work." Subsequently, the City's Director of Personnel issued the following:

March 29, 1999

Ken Iverson, Presdient (sic)
SEIU Local #180, AFL-CIO
812 Kane Street
La Crosse, WI 54603

RE: City's Step #3 Grievance Answer
Grievance #: Park 01-99
Department: Parks
Issue: Bargaining Unit Work
Date: February 19, 1999

Dear Ken;

This correspondence is to confirm the City's response to the above captioned matter. A grievance meeting was held on March 10th, 1999. The meeting took place in the 5th floor conference room of City Hall.

In this case the Union alleges that the City Forester was doing bargaining unit work when he used a chainsaw to cut two saplings or branches from a tree stump.

The facts in this case are not in dispute. The City Forester did in fact use the chainsaw however it should be recognized that it was done within the context of demonstrating a new piece of equipment, i.e. a stump remover.

The City of La Crosse recognizes the importance of good labor management relations and as such has instructed all of its management staff to recognize that bargaining work should be done by bargaining unit members unless for safety reasons exists or training is being conducted. Hopefully, based on the City's letter to its managers, this matter has been resolved.

I remain

Fraternally yours

Jim Geissner
Director of Personnel

Subsequently, the Union President issued the following:

April 8, 1999

Mr. James W. Geisnner (sic)
Director of Personnel
City of La Crosse City Hall
400 La Crosse Street
La Crosse, WI 54601-3396

RE: Union Response to City Answer (Park Grievance 01-99)

Dear Jim,

This letter is to notify you that Local 180 will accept your written answer dated March 29, 1999 as satisfactory in resolving Park Grievance 01-99.

Sincerely,

Kenneth A. Iverson
President of Local 180

Attachments: three (3)

cc: Brian Hemp
Tim Jirsa
Pat Bonadurer
Gar Amunsen

9. On October 18, 1999, a member of the Union's bargaining unit used a forklift to load material onto a vendor's truck. While this employee was securing the load, Mike McCormick, a supervisor, backed-up the forklift for approximately fifty feet and parked the

forklift. McCormick, who moved the forklift to clear an area where City trucks were exiting the building, drove the forklift for approximately thirty seconds. The operation of the forklift is the Union's bargaining unit work. By operating the forklift for approximately thirty seconds, Supervisor McCormick performed bargaining unit work that is de minimis. On October 18, 1999, the Union President issued the following:

> Mr. James Geissner
> Personnel Director
> City Hall
> La Crosse, WI 54601
>
> RE: Supervisor operating forklift
>
> Dear Jim:
>
> This letter is to notify you that Supervisor Mike McCormick was observed operating the MSC forklift on this day, Monday October 18, 1999.
>
> There is no reason that Supervisor McCormick should be doing bargaining unit work.
>
> SEIU Local 180 has a prohibited practice complaint filed with the State of Wisconsin Employment Relations Commission concerning this issue.
>
> Sincerely,
>
> Kenneth A. Iverson, President
> SEIU Local #180
>
> Copies: 3
>
> Tim Jirsa
> Gar Amunson
> Mike McCormick

10. On January 20, 2000, Park Maintenance Supervisor Mike McCormick received a complaint about the condition of the sidewalk at one of the main bus stops. McCormick directed the two-person crew who was responsible for that area to return to that area. The two-person crew included Timothy Jirsa and Lynn Iverson. Jirsa and Iverson are members of

the Union's bargaining unit. Shoveling snow at the main bus stops is the Union's bargaining unit work. When Jirsa and Iverson arrived at the bus stops, they worked together to clear an area. Jirsa and Iverson then separated, with each working an area that was across the street from the other. As Jirsa was shoveling snow, he observed McCormick using a snow shovel at the corner where Iverson was working. Jirsa was not in a position to overhear conversation between Iverson and McCormick. When Jirsa observed McCormick, McCormick was instructing Iverson on the appropriate method of removing ice from the handicap apron and the appropriate width for a wheelchair. Instructing employees in appropriate work methods is supervisory work and the choice of the method of instruction is within the discretion of the supervisor. McCormick's use of the snow shovel was part of the instruction process and, therefore, McCormick performed work that was supervisory in nature when he used the snow shovel on January 20, 2000. On January 24, 2000, the Union President issued the following:

Mr. James W. Geissner
Director of Personnel
400 La Crosse Street
La Crosse, WI 54601

RE: SUPERVISOR DOING BARGAINING UNIT WORK

Dear Jim Geissner:

This letter is to once again give notice to the City that supervisor, Mike Mc Cormick, was observed by the Park Department steward, Tim Jirsa, doing bargaining unit work. Supervisor Mc Cormick was shoveling bus stops and chopping ice on the intersection of Fifth and State Street on January 20, 2000.

SEIU Local #180 has objected to Supervisor Mc Cormick doing bargaining unit work before, in a letter to you, dated October 18, 1999.

SEIU Local #180 has a prohibited practice complaint filed with the State of Wisconsin Employment Relations Commission concerning this issue.

Sincerely,

Kenneth A. Iverson, President
SEIU Local #180

cc: Tim Jirsa
Gar Amunson
Mike Mc Cormick

Subsequently, Park Maintenance Supervisor McCormick issued the following:

February 14, 2000

Mr. Ken Iverson, President
SEIU Local #180

Dear Mr. Iverson,

This letter is in reference and response to the your (sic) letter to me dated January 24, 2000.

On the day I am accused of doing bargaining unit work I received a complaint from a La Crosse citizen complaining that the main bus stop at 5th and State was not "clean". I had a hard time believing this since my crew had already returned from completing their "snow removal mission" for the day. At approximately 1:50 PM I observed Tim Jirsa and Lynn Iverson at the park wall at the back of the shop. I told them about the complaint and said I would meet them at the bus stop.

Upon our arrival, I understood the citizen's complaint. At this time I felt it necessary for me to show Lynn what needed to be done and the reasons are as follows:

1. There was an hour and 10 minutes left in the workday at the time I noticed Tim and Lynn seemed to be "done for the day" and back at the shop.

2. On behalf of the City of La Crosse, I purchased a brand new $500 snow blower to make the job easier and increase the quality of snow and ice removal.

3. Lynn is a new and impressionable employee. I expected my veteran worker, Tim Jirsa, to provide a good example to the Park Department's newest employee, Lynn Iverson. This did not happen on this day. They did not successfully complete their job assignment but they did manage to come into the shop one hour and 10 minutes early.

I do admit to demonstrating how to correctly remove snow and ice from a bus stop and demonstrated some different techniques such as back scraping with a shovel. I also showed Lynn the proper clearance for wheel chairs. Tim was across the street cleaning off another bus stop during the time I demonstrated to

Lynn. The bottom line is that they did not get the job done properly by my standards or by the standards of the citizen who originated the complaint until I went to the job site and did what I thought was appropriate as their supervisor.

Respectfully,

Michael J. McCormick
Park Maintenance Supervisor

cc: James Geissner
Gar Amunson
Tim Jirsa
Lynn Iverson

On February 15, 2000, the Union President issued the following:

Michael J. McCormick
Park Maintenance Supervisor
2000 Marco Drive
La Crosse, WI 54601

Dear Mike,

If the attached letter that you sent to me dated February 14, 2000, makes you feel better so be it.

SEIU Local #180 stands by its charge of you once again doing bargaining unit work.

Sincerely,

Kenneth A. Iverson, President
SEIU Local #180

Attachment: 1

cc: James Geissner
Gar Amunson
Tim Jirsa
Lynn Iverson

11. On February 18, 2000, Public Works Specialist Sean Hutchison received a report that a vehicle had been damaged in the Market Square parking ramp and that spikes protruding from wheel stops had caused the damage. On March 22, 2000, Hutchison received a report that a claims adjuster had found several spikes protruding from wheel stops at the Market Square parking ramp. Hutchison responded to this report by surveying the ramp. During this survey, Hutchison removed two or three spikes that he believed were protruding to such an extent as to present an immediate danger to person and property. The removal of these spikes involved approximately thirty seconds. Hutchison observed other protruding spikes, but did not consider them to be of sufficient height to present an immediate danger. The following morning, Hutchison advised a member of the Union's bargaining unit of the need to remove or reseat the remaining protruding spikes. The maintenance of the wheel stops, including the removal and replacement of spikes, is the Union's bargaining unit work. Hutchison's removal of the spikes on March 22, 2000 was necessitated by an emergency situation. On March 29, 2000, the Union President issued the following:

James W. Geissner
Director of Personnel
400 La Crosse Street
La Crosse, WI 54601

RE: SUPERVISOR DOING BARGAINING UNIT WORK

Dear Jim Geissner:

This letter is to once again give notice to the City that Public Works Specialist, Sean Hutchinson, was doing bargaining unit work.

Sean Hutchinson contacted Al Tauscher on March 22, 2000, to remove pins from car bumps at Market Square Ramp. On March 23, 2000, Al Tauscher went to Market Square to remove the pins as instructed only to find that Sean Hutchinson had already removed them.

SEIU Local #180 strongly objects to the work being done by Public Works Specialist, Sean Hutchinson. SEIU Local #180 has a prohibited practice complaint filed with the State of Wisconsin Employment Relations Commission concerning this issue.

Sincerely,

Kenneth A. Iverson
President, SEIU Local #180

cc: Al Tauscher Gloria Molzahn
Pat Caffrey Tony Hutchens
Sean Hutchinson

On July 5, 2000, Public Works Specialist Sean Hutchison prepared the following work order:

TO Parking Utility

FROM Director of Public Works
City Hall
LA CROSSE, WISCONSIN 54601

SUBJECT: Sign Removal Market Square DATE: 7/5/00

PLEASE remove the following sign in the Market Square Ramp as soon as possible

#358 BRIAN LYND

SIGNED SEAN

Hutchison placed this work order in the office where such work orders normally are placed. Hutchison, who generally uses the term "immediately" when he wants an immediate response to a work order, did not think that it mattered if the sign was removed on July 6 or 7. On July 7, 2000, while performing a routine inspection of the parking ramp, Hutchison observed that the sign had not been removed and removed the sign. The sign contained the name of an individual that had leased the parking space, but who was several months overdue on the rent. The placement and removal of signs for reserved parking is the Union's bargaining unit work. Hutchison's removal of the sign was not necessitated by an emergency situation. By manually ripping the sign off the wall, a procedure that involved approximately thirty seconds, Hutchison performed bargaining unit work that is de minimis. On July 12, 2000, the Union President issued the following:

James W. Geissner
Director of Personnel
400 La Crosse Street
La Crosse, WI 54601

RE: SUPERVISOR DOING BARGAINING UNIT WORK

Dear Jim:

Once again it has been brought to my attention that your Public Work Specialist, Sean Hutchinson, has been doing bargaining unit work.

Not only did he do the work on the attached work order form Public Works dated July 5, 2000, he has also been seen mopping stairwells and picking up trash on the ramps.

SEIU Local #180 is requesting that your office investigate this complaint of a supervisor doing bargaining unit work.

Sincerely,

Kenneth A. Iverson
President, WEIU Local #180

Attachment: (1)

On August 21, 2000, the Union President issued the following:

James W. Geissner
Director of Personnel
400 La Crosse Street
La Crosse, WI 54601

RE: SUPERVISOR DOING BARGAINING UNIT WORK LETTER TO YOU DATED JULY 12, 2000

Dear Jim:

SEIU Local #180 has not received a response from you regarding the status of our request in my letter to you, dated July 12, 2000.

Please contact me as soon as possible concerning this matter.

Sincerely,

Kenneth A. Iverson
President, SEIU Local #180

Attachment: (2)

cc: Pat Caffrey
Sean Hutchinson

12. Complainant's claim that Respondent violated MERA when Supervisor Tom Berendes performed bargaining unit work on July 6, 1998 is based upon conduct that occurred more than one year prior to the date on which Complainant filed its initial complaint.

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

CONCLUSIONS OF LAW

1. Section 111.07(14), Stats., which is made applicable to this proceeding by Sec. 111.70(4)(a), Stats., is a statute of limitations that can be waived when not properly raised by a party as an affirmative defense.

2. Respondent properly raised the statute of limitations as an affirmative defense.

3. Complainant's allegation that Respondent violated MERA when Supervisor Tom Berendes performed bargaining unit work on July 6, 1998 is not timely under Sec. 111.07(14), Stats., and, therefore, the Commission does not have jurisdiction to decide this allegation.

4. Complainant's allegations that Respondent's supervisors violated Sec. 111.70(3)(a)1 and 5, Stats., when they performed bargaining unit work on December 30, 1998; February 19, 1999; October 18, 1999; January 20, 2000; March 22, 2000; and July, 2000 are timely under Sec. 111.07(14), Stats., and, therefore, the Commission does have jurisdiction to decide these allegations.

5. Complainant's claim that Respondent violated a Consent Award when its supervisors performed bargaining unit work is not a grievance that is subject to the final and

binding grievance arbitration provisions of the parties' labor contract and, therefore, the grievance arbitration procedure contained in that labor contract does not constitute Complainant's exclusive remedy.

6. By using the grievance procedure contained in the parties' labor contract to resolve a dispute regarding the interpretation, application or enforcement of the labor contract, the Complainant has not waived its right to pursue its Sec. 111.70(3)(a)5 claim that Respondent has violated the Consent Award issued by Arbitrator Schiavoni.

7. Supervisor Pat Bonadurer did not perform bargaining unit work in violation of the August 28, 1985 Consent Award issued by Arbitrator Schiavoni when he used a chainsaw to cut saplings from a tree stump on February 19, 1999 and, thus, Respondent, by this conduct of its agent Pat Bonadurer, has not violated Section 111.70(3)(a)5, Stats., as alleged by Complainant.

8. Supervisor Mike McCormick did not perform bargaining unit work in violation of the August 28, 1985 Consent Award issued by Arbitrator Schiavoni when he operated a forklift on October 18, 1999 and used a snow shovel on January 20, 2000 and, thus, Respondent, by this conduct of its agent Mike McCormick, has not violated Section 111.70(3)(a)5, Stats.

9. Supervisor Sean Hutchison did not perform bargaining unit work in violation of the August 28, 1985 Consent Award issued by Arbitrator Schiavoni when he removed spikes from a wheel bump on March 22, 2000 and removed a sign on July 7, 2000 and, thus, Respondent, by this conduct of its agent Sean Hutchison, has not violated Section 111.70(3)(a)5, Stats.

10. Supervisor Eugene Pfaff performed bargaining unit work in violation of the August 28, 1985 Consent Award issued by Arbitrator Schiavoni when he removed a door lock and transported this lock to the locksmith on December 30, 1998 and, thus, Respondent, by this conduct of its agent Eugene Pfaff, has violated Sec. 111.70(3)(a)5, Stats., and, derivatively, has violated Sec. 111.70(3)(a)1, Stats.

11. Respondent has not been shown to have committed an independent violation of Sec. 111.70(3)(a)1, Stats.

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

ORDER

IT IS ORDERED that:

1. Complainant's allegation that Respondent violated Sec. 111.70(3)(a)1 and 5, Stats., when Supervisor Tom Berendes performed bargaining unit work on July 6, 1998, is hereby dismissed.

2. Complainant's allegation that Respondent violated Sec. 111.70(3)(a)1 and 5, Stats., when Supervisor Sean Hutchison performed bargaining unit work on March 22, 2000 and in July, 2000, is hereby dismissed.

3. Complainant's allegation that Respondent violated Sec. 111.70(3)(a)1 and 5, Stats., when Supervisor Mike McCormick performed bargaining unit work on October 18, 1999 and January 20, 2000, is hereby dismissed.

4. Complainant's allegation that Respondent violated Sec. 111.70(3)(a)1 and 5, Stats., when Supervisor Pat Bonadurer performed bargaining unit work on February 19, 1999, is hereby dismissed.

5. Respondent's agent, Supervisor Eugene Pfaff, is hereby ordered to cease and desist from performing bargaining unit work in violation of the August 28, 1985 Consent Award issued by Arbitrator Schiavoni.

6. The Respondent shall notify City Hall bargaining unit members, by posting in conspicuous places in the City Hall where such bargaining unit members work, copies of the Notice attached hereto and marked "Appendix A." The Notice shall be signed by a responsible representative of the Respondent and shall be posted immediately upon receipt of a copy of the Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to ensure that this Notice is not altered, defaced or covered by other material.

7. The Respondent shall notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin, this 28th day of June, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

APPENDIX A

NOTICE TO EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, the City of La Crosse hereby notifies its employees that:

> The City will not permit its supervisors to perform bargaining unit work in violation of the Consent Award issued by Arbitrator Schiavoni.

Dated at La Crosse, Wisconsin, this _____ day of _____, 2001.

For the City of La Crosse:_____

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

CITY OF LA CROSSE

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

On September 16, 1999, the Complainant filed a Prohibited Practice Complaint and an Amended Prohibited Practice Complaint. In each of these Complaints, Complainant alleges that Respondent's supervisors have performed bargaining unit work and that, by the performance of this work, Respondent has violated Sec. 111.70(3)(a)1, 3, and 5, Stats.

On August 14, 2000, the Examiner was assigned by the Commission to conduct a hearing on the Complaint, and to make and issue Findings of Fact, Conclusions of Law and Order. On August 17, 2000, Respondent filed a Motion to make the Complaint more definite and certain. On August 31, 2000, the Examiner issued an Order granting this Motion. In response to this Motion, Complainant filed a Second Amended Complaint and a Third Amended Complaint.

At hearing and in brief, Complainant has abandoned it claim that Respondent has violated Sec. 111.70(3)(a)3, Stats. Respondent denies that it has violated either Sec. 111.70(3)(a)1 or 5, Stats., as alleged by Complainant.

POSITIONS OF THE PARTIES

Complainant

A fundamental element of Union job security is assuring that only bargaining unit members perform bargaining unit work. This fundamental element of Union job security is recognized in the Consent Award of Arbitrator Mary Jo Schiavoni.

In the grievance settlement that is the Schiavoni Award, the City guaranteed to members of SEIU Local 180 that the City would not permit supervisors to perform bargaining unit work in the future. Specifically, the Consent Award states, "The City shall reaffirm its position taken in January 1979 that no supervisor may perform bargaining unit work."

A grievance settlement is a collective bargaining agreement within the meaning of the Municipal Employment Relations Act (MERA). Under Commission case law, a municipal employer who violates a grievance settlement also violates Sec. 111.70(3)(a)5, Stats.

The evidence submitted by Complainant establishes that, on seven separate occasions, supervisors have performed bargaining unit work, contrary to the guarantees contained in the Consent Award. This evidence, as well as Respondent's belief that up to 20 percent of the bargaining unit work may be done by supervisors, essentially confusing the standard that the Commission uses for unit clarifications, demonstrates Respondent's flagrant disregard for the Consent Award.

Respondent's repeated violation of the Consent Award has caused, and continues to cause, financial harm to bargaining unit members by reducing available work for members and opportunities for additional compensation, e.g., overtime, recall pay, call out pay, and out of class pay. In some departments where supervisors have been noted to do bargaining unit work, the Respondent has even eliminated bargaining unit positions.

The City attempts to excuse repeated violations of the settlement agreement by claiming that supervisors did just a little bargaining unit work. It is not acceptable, however, under Sec. 111.70(3)(a)(5), Stats., for a party to violate a settlement agreement just a little.

Additionally, the continued and repeated violations, spanning a two-year time period, during which the City was on notice through grievances that the Complainant objected to supervisors performing bargaining unit work, demonstrates Respondent's complete disregard for the settlement agreement. Given the number and frequency of the violations, the bargaining unit work performed by Respondent's supervisors is not de minimis. The number of violations, coupled with the ten different exceptions the City maintains justify the violations, establish that the City has violated and will continue to violate the Settlement Agreement, unless the Commission takes appropriate action.

The July 6, 1998 allegation is part of a continuing violation. Thus, it is not barred by the one-year statute of limitations.

For the foregoing reasons, the Complainant respectfully requests the Examiner to find that the Respondent has engaged in prohibited practices in violation of Sec. 111.70(3)(a)1 and 5, Stats. Additionally, Complainant requests the Examiner to grant such relief as the Examiner deems just and proper.

Respondent

The Complainant makes seven allegations with respect to prohibited practice. The specific dates of the incidents range from July 6, 1998 to July 5, 2000. The July 6, 1998 alleged incident, involving Supervisor Tom Berendes, is barred by the statute of limitations.

It is well settled that, where a collective bargaining agreement provides for final and binding arbitration, the WERC has no jurisdiction and will dismiss that part of a complaint

alleging violations of the agreement. It is undisputed that the collective bargaining agreement provides for final and binding arbitration and that grievances were filed on three of the allegations. Consistent with the case law, to the extent that the complaint alleges a violation of the contract, the WERC has no jurisdiction over such allegations.

The relevant burden of proof is "a clear and satisfactory preponderance of the evidence." Complainant has failed to meet its burden in this case.

Complainant alleges that Respondent has permitted its supervisors and managers to perform bargaining unit work. Previous decisions have emphasized, in varying degrees, certain considerations or justifying circumstances for upholding management action. Included among such considerations or circumstances are the following fact situations:

1. The quantity of work or the nature on the bargaining unit is minor or de minimis in nature.

2. The work is supervisory or managerial in nature.

3. The work assigned is a temporary one for a special purpose or need.

4. The work is not covered by the contract.

5. The work is experimental.

6. Under past practice the work has not been performed exclusively by bargaining unit employees.

7. There is a change in the character of the work.

8. Automation or technological change is involved.

9. An emergency is involved.

10. Some other special situation or need is involved.

Testimony in the case at bar establishes that any work which was performed by supervisors or manager falls within one of the exceptions set forth above. Specifically, the work done was de minimis, an emergency was involved, or some other special situation or need was involved.

The present case is easily distinguishable from the Schiavoni Consent Award in that there are no managers and supervisors actually going out with the crew and performing

bargaining unit work to the extent Mr. Kramer did. Assuming arguendo, that Complainant's version of events is correct, the bargaining unit work allegedly performed by supervisors would amount to 47 minutes over a two-year period.

In summary, the assignment of work outside the bargaining unit was proper because there was good cause, it was de minimis, the work was supervisory in nature, or there was an emergency or some other valid justification. This is not a case where management displayed any anti-union animosity, or engaged in bad faith conduct. Respondent requests that the complaint be dismissed for lack of proof.

DISCUSSION

Statute of Limitations Claim

Complainant alleges that Respondent's supervisors performed bargaining unit work, in violation of MERA, on July 6, 1998; December 30, 1998; February 19, 1999; October 18, 1999; January 20, 2000; March 22, 2000, and in July, 2000. Respondent argues that the events of July 6, 1998 are not actionable because they are barred by Sec. 111.07(14), Stats.

Section 111.07(14), Stats., which is made applicable to this proceeding by Sec. 111.70(4)(a), Stats., provides:

> The right of any person to proceed under this section shall not exceed beyond one year from the date of the specific act or unfair labor practice alleged.

Section 111.07(14), Stats., is a statute of limitations that can be waived when not properly raised by a party as an affirmative defense. STATE OF WISCONSIN, DEC. NO. 28222-C (WERC, 7/98). Affirmative defenses are to be raised in the answer to the complaint. ERC 22.03(4)(b).

In its Answer to the Third Amended Complaint, Respondent raised, as an affirmative defense, the claim that allegations relating to the incident of July 6, 1998 were barred by the statute of limitations. Thus, Respondent has appropriately raised the affirmative defense of statute of limitations.

Complainant claims that Supervisor Tom Berendes performed bargaining unit work on July 6, 1998, in violation of MERA. Inasmuch as Berendes' conduct occurred more than one year prior to the September 16, 1999 date on which the Complaint was filed, this claim is not

timely under Sec. 111.07(14), Stats. While the continuing violation theory may be of relevance in determining the timeliness of a grievance claim, it is not applicable to a statute of limitations claim under Sec. 111.07(14), Stats.

The allegations that Respondent violated MERA when its supervisors performed bargaining unit work on December 30, 1998; February 19, 1999; October 18, 1999; January 20, 2000; March 22, 2000, and in July, 2000, are timely under Sec. 111.07(14), Stats.

Jurisdiction Over Sec. 111.70(3)(a)5, Stats., Claim

Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer

> To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

In the Complaint, as amended, Complainant appears to assert that Respondent has violated grievance settlement agreements in addition to that embodied in the Consent Award issued by Arbitrator Schiavoni. In its brief, however, Complainant limits its argument to the claim that Respondent violated Sec. 111.70(3)(a)5, Stats., when its supervisors performed bargaining unit work in violation of the Consent Award issued by Arbitrator Schiavoni. Accordingly, the Examiner considers the Complainant to have abandoned all Sec. 111.70(3)(a)5 claims, except those alleging a violation of the Consent Award issued by Arbitrator Schiavoni.

The Consent Award issued by Arbitrator Schiavoni embodies a grievance settlement of the parties. A grievance settlement agreement is a collective bargaining agreement within the meaning of MERA. VILLAGE OF KIMBERLY, DEC. NO. 28759-C, 29793-A (BURNS, 11/97); BROWN COUNTY, DEC. NO. 27624-A (NIELSEN, 4/93); ONEIDA COUNTY, DEC. NO. 15374-B (YAEGER, 12/77), AFF'D, DEC. NO. 15374-C (WERC, 6/78).

The Respondent relies upon BELOIT SCHOOL DISTRICT, DEC. NO. 14702-B (DAVIS, 3/77) to argue that the Commission should decline to assert jurisdiction over Complainant's Sec. 111.70(3)(a)5 claim. In BELOIT, the Examiner refused to assert jurisdiction over a Sec. 111.70(3)(a)5 claim that a labor contract had been violated. The basis for this refusal was that the labor contract had a provision for final and binding arbitration of disputes over alleged violations of the labor agreement. In subsequent cases, it has been recognized that the reason

for such a refusal to assert jurisdiction is that the Commission wishes to give full effect to the parties' agreed-upon procedures for resolving disputes. TAYLOR COUNTY, DEC. NO. 29647-B (CROWLEY, 11/99).

The parties' labor contract provides for final and binding arbitration of grievances. In Article 2 of this labor contract, a grievance is defined as "matters involving the interpretation, application or enforcement of this contract." Attached to and, thus, incorporated into this labor contract, are various agreements of the parties. The Consent Award issued by Arbitrator Schiavoni is not one of these agreements.

Complainant's Sec. 111.70(3)(a)5 claim is not a grievance that is subject to the final and binding grievance arbitration provisions of the parties' labor contract. Thus, the grievance arbitration procedure contained in that labor contract does not constitute Complainant's exclusive remedy.

To be sure, the Complainant grieved conduct that is also the subject of Complainant's statutory claim. These grievances, however, alleged a violation of the parties' labor contract. The Complaint before the Examiner presents a different claim, i.e., an alleged violation of the grievance settlement agreement embodied in the Consent Award issued by Arbitrator Schiavoni. By using the grievance procedure contained in the parties' labor contract to resolve a dispute regarding the interpretation, application or enforcement of the labor contract, the Complainant has not waived its right to pursue the Sec. 111.70(3)(a)5 claim presented in this case.

In summary, the Consent Award issued by Arbitrator Schiavoni is a collective bargaining agreement within the meaning of Sec. 111.70(3)(a)5, Stats. It is appropriate for the WERC to assert jurisdiction over the claim that Respondent violated Sec. 111.70(3)(a)5, Stats., when its supervisors performed bargaining unit work in violation of the Consent Award issued by Arbitrator Schiavoni.

Merits of Complainant's Sec. 111.70(3)(a)5 Claim

Respondent argues that there are ten considerations or circumstances in which Arbitrators uphold management's right to assign bargaining unit work to supervisors. However, the arbitration cases relied upon by the Respondent do not contain the specific restriction on the performance of bargaining unit work by supervisors that is contained in the Consent Award issued by Arbitrator Schiavoni. Given this significant factual difference, the cases relied upon by the Respondent are not persuasive.

Where, as here, the relevant "contract" contains a specific restriction against the performance of bargaining unit work by supervisors, there are commonly recognized exceptions to such a restriction. For example, it is commonly recognized that supervisors may

perform bargaining unit work that is de minimis; supervisory in nature; or necessitated by an emergency situation. [See Elkouri and Elkouri, How Arbitration Works, 5th Ed., BNA (1997), p. 762]

The rather sketchy evidence of the circumstances surrounding the Consent Award issued by Arbitrator Schiavoni indicates that the supervisor who was the subject of that grievance routinely worked along side of his bargaining unit crew. Neither this evidence, nor any other record evidence, demonstrates that, when the parties entered into the Consent Award, they did not intend the commonly recognized exceptions to the restriction against supervisors performing bargaining unit to be applicable to the Consent Award.

In determining whether or not work is de minimis, one may look at the amount of time involved in the performance of bargaining unit work, as well as the impact of such work performance upon the bargaining unit. Thus, work that may take only a few moments to perform, may not be found to be de minimis if the performance of that work has a significant impact upon bargaining unit members, e.g., such as causing a loss of overtime or call-in pay.

Additionally, if a supervisor frequently performs small amounts of bargaining unit work, the performance of such work may be considered in the aggregate. Thus, as Complainant argues, what in isolation may be a de minimis amount of bargaining unit work, may, with frequency, be found to be significant.

December 30, 1998

Removing locks from City Hall doors; transporting such locks to the locksmith; and replacing repaired locks in the doors of City Hall is Union bargaining unit work. Thus, when Supervisor Eugene Pfaff removed the door lock and transported the lock to the locksmith, Pfaff performed bargaining unit work of the Union.

As the testimony of Sandra Howe demonstrates, as soon as she had opened the locked door from the inside, all areas of the office were accessible. Thus, once Howe had opened the locked door, there was not an emergency need to remove the broken lock.

Eugene Pfaff, as a supervisory employee, had the right to decide that he wanted the lock fixed prior to the lunch hour, so that the room could be secured over the lunch hour. It is true that the Chief Custodian did not respond to his page in a timely manner. The record, however, fails to demonstrate that other custodial/maintenance bargaining unit members could not have removed the lock; taken the lock to the locksmith for repair and replaced the lock prior to the lunch hour. Notwithstanding Respondent's assertion to the contrary, the record fails to demonstrate that Supervisor Pfaff's performance of bargaining unit work was necessitated by an emergency situation.

It may be, as Pfaff testified, that he removed the lock in less than two minutes. Pfaff, however, not only removed the lock, but also transported the lock to the locksmith. Notwithstanding Respondent's argument to the contrary, the Examiner does not consider Pfaff's performance of bargaining unit work on December 30, 1998 to be de minimis. As Complainant argues, Pfaff's performance of bargaining unit work on December 30, 1998 violates the Consent Award issued by Arbitrator Schiavoni.

February 19, 1999

On February 19, 1999, the City Forester, a supervisory employee, demonstrated the use of a new piece of equipment, i.e., the stumper, to Union bargaining unit members. In order to prepare a stump for this demonstration, the City Forester used a chain saw to clear away two small saplings.

Using a chain saw to clear away saplings is normally bargaining unit work. However, instructing employees in the use of new equipment is supervisory work. By using the chain saw to prepare the stump for a demonstration of a new piece of equipment, the City Forester performed work that was supervisory in nature. Thus, the City Forester's use of the chain saw on February 19, 1999 does not violate the Consent Award issued by Arbitrator Schiavoni.

October 18, 1999

On October 18, 1999, a member of the Union's bargaining unit used a forklift to load material onto a vendor's truck. While this employee was securing the load, Mike McCormick, a supervisor, backed-up the forklift for approximately fifty feet and parked the forklift. McCormick, who moved the forklift to clear an area where City trucks were exiting the building, drove the forklift for approximately thirty seconds.

The operation of the forklift is the Union's bargaining unit work. It is not evident, however, that any bargaining unit member lost any pay as a result of the performance of this work. Nor is it evident that the performance of this work had any other significant impact upon the bargaining unit. By operating the forklift for approximately thirty seconds, Supervisor McCormick performed bargaining unit work that is de minimis. Thus, Supervisor McCormick's operation of the forklift on October 18, 1999 does not violate the Consent Award issued by Arbitrator Schiavoni.

January 20, 2000

On January 20, 2000, Park Maintenance Supervisor Mike McCormick received a complaint about the condition of the sidewalk at one of the main bus stops. McCormick directed the two-person crew who was responsible for that area to return to that area. The two-person crew included Timothy Jirsa and Lynn Iverson.

Jirsa and Iverson are members of the Union's bargaining unit. Shoveling snow at the main bus stops is the Union's bargaining unit work.

When Jirsa and Iverson arrived at the bus stops, they worked together to clear an area. Jirsa and Iverson then separated, with each working an area that was across the street from the other. As Jirsa was shoveling snow, he observed McCormick using a snow shovel at the corner where Iverson was working.

McCormick acknowledges that he used a snow shovel. According to McCormick, he was instructing Iverson on the appropriate method of removing ice from the handicap apron and the appropriate width for a wheelchair.

Jirsa was not able to overhear conversation between Iverson and McCormick. Iverson did not testify at hearing. The record provides no reasonable basis to discredit McCormick's claim that he was instructing Iverson in appropriate snow and ice removal methods.

Instructing employees in appropriate work methods is supervisory work. While it may be that McCormick could have instructed Iverson verbally, the choice of the method of instruction is within the discretion of the supervisor. Inasmuch as McCormick's snow shoveling was part of the instruction process, this shoveling was supervisory in nature. Thus, Supervisor McCormick's use of the snow shovel on January 20, 2000 does not violate the Consent Award issued by Arbitrator Schiavoni.

March 22, 2000

On February 18, 2000, Public Works Specialist Sean Hutchison received a report that a vehicle had been damaged in the Market Square parking ramp and that spikes protruding from wheel stops had caused the damage. On March 22, 2000, Hutchison received a report that a claims adjuster had found several spikes protruding from wheel stops at the Market Square parking ramp. Hutchison responded to this report by surveying the ramp. During this survey, Hutchison removed two or three spikes that he believed were protruding to such an extent as to present an immediate danger to person and property. The removal of these spikes involved approximately thirty seconds.

Hutchison observed other protruding spikes, but did not consider them to be of sufficient height to present an immediate danger. The following morning, Hutchison advised a member of the Union's bargaining unit of the need to remove or reseat the remaining protruding spikes.

The maintenance of the wheel stops, including the removal and replacement of spikes, is the Union's bargaining unit work. The record, however, provides no reasonable basis to conclude that the spikes removed by Hutchison did not present an immediate danger to person and property. Accordingly, Hutchison's removal of the spikes was necessitated by an emergency situation. Thus, Supervisor Hutchison's removal of the spikes on March 22, 2000 does not violate the Consent Award issued by Arbitrator Schiavoni.

July 7, 2000

In the afternoon of July 5, 2000, Hutchison prepared a work order and placed this work order in the office where such work orders are normally placed. This work order directed employees of the Public Utility to remove a sign in the reserved parking area.

On July 7, 2000, while performing a routine inspection of the parking ramp, Hutchison observed that the sign had not been removed and removed the sign. The sign contained the name of an individual that had leased the parking space, but who was several months overdue on the rent.

The placement and removal of signs for reserved parking is the Union's bargaining unit work. Hutchison does not claim, and the record does not demonstrate, that the sign needed to be removed at that time. Hutchison's removal of the sign was not necessitated by an emergency situation.

It is not evident, however, that any bargaining unit member lost any pay as a result of the performance of this work. Nor is it evident that the performance of this work had any other significant impact upon the bargaining unit. By manually ripping the sign off the wall, a procedure that involved approximately thirty seconds, Hutchison performed bargaining unit work that is de minimis. Thus, Supervisor Hutchison's removal of the sign on July 7, 2000 does not violate the Consent Award issued by Arbitrator Schiavoni.

In its Third Amended Complaint, Complainant alleges that, on July 5, 2000, Supervisor Hutchison mopped stairwells and picked up trash in violation of MERA. Complainant, however, did not introduce any evidence to support this claim and, thus, the Examiner considers the Complainant to have abandoned this claim.

Conclusion

Section 111.07(3), which is made applicable to this proceeding by Sec. 111.70(4)(a), Stats., provides that "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence." Complainant has shown, by a clear and satisfactory preponderance of the evidence, that Supervisor Eugene Pfaff performed bargaining unit work on December 30, 1998 in violation of the Schiavoni Consent Award and, thus, Respondent, by its agent Supervisor Eugene Pfaff, has violated Sec. 111.70(3)(a)5, Stats.

By violating Sec. 111.70(3)(a)5, Stats., Respondent has derivatively violated Sec. 111.70(3)(a)1, Stats. Complainant, however, has not shown, by a clear and satisfactory preponderance of the evidence, that Respondent has committed any independent violation of Sec. 111.70(3)(a)1, Stats.

The record does not demonstrate that the performance of bargaining unit work by a supervisor has deprived any bargaining unit member of any wage or benefit. It may be, as Union President Iverson believes, that there has been a loss of bargaining unit positions. The record, however, does not demonstrate that the performance of bargaining unit work by supervisors has caused any loss of bargaining unit positions.

Notwithstanding Complainant's arguments to the contrary, the record does not demonstrate that Respondent's supervisors have frequently and repeatedly performed bargaining unit work in violation of the Schiavoni Consent Award. Nor is it evident that the Respondent has, or that it intends to have, supervisors perform up to twenty percent of the bargaining unit work. Given the one established violation in a two year period, the appropriate remedy is to order Supervisor Eugene Pfaff to cease and desist from performing bargaining unit work in violation of the Consent Award issued by Arbitrator Schiavoni and to order the Respondent to post a Notice advising the Union's bargaining unit members employed at City Hall, where the violation occurred, that it will not permit supervisors to perform bargaining unit work in violation of the Consent Award issued by Arbitrator Schiavoni.

As discussed above, the bargaining unit work performed by Pat Bonadurer, Mike McCormick and Sean Hutchinson is either supervisory in nature, de minimis or necessitated by an emergency situation. Inasmuch as the performance of such work does not violate the Schiavoni Consent Award, the Examiner has concluded that the Respondent did not violate Sec. 111.70(3)(a)5, Stats., when Pat Bonadurer used a chainsaw on February 19, 1999; when Mike McCormick operated a forklift on October 18, 1999 and used a snow shovel on

January 20, 2000; and when Sean Hutchison removed spikes from wheel stops on March 22, 2000 and removed a sign on July 7, 2000. Accordingly, the Complaint allegations involving Pat Bonadurer, Mike McCormick, and Sean Hutchison have been dismissed in their entirety.

Dated at Madison, Wisconsin, this 28th day of June, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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