STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 236, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, Complainant.

vs.

THE CITY OF MADISON and LARRY D. NELSON, Respondents.

Case 227
No. 58784
MP-3639

Decision No. 30028-A

Appearances:

Shneidman, Hawks & Ehlke, S.C., P.O. Box 2155, 217 South Hamilton Street, Madison, Wisconsin 53701-2155, by **Attorney Bruce F. Ehlke**, appearing on behalf of Laborers Local 236.

Mr. Larry W. O'Brien, Assistant City Attorney, Office of the City Attorney, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53709, appearing on behalf of the City of Madison.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On April 18, 2000, Local 236, Laborers International Union of North America, AFL-CIO, filed a Complaint, which was amended on June 6, 2000, with the Wisconsin Employment Relations Commission alleging that the City of Madison and Larry D. Nelson had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3, and 4 and 111.70(3)(c), Stats. On January 8, 2001, the Commission appointed Coleen A. Burns, a member of its staff, to act as Examiner and make Findings of Fact, Conclusions of Law and Order, as provided in Secs. 111.07(5) and 111.07(4)(a), Stats. Hearing on the Complaint, as

amended, was held on March 19, 2001, in Madison, Wisconsin. The record was closed on July 6, 2001, upon receipt of post-hearing written arguments.

Based upon the record and the arguments of the parties, the Examiner makes the following Findings of Fact, Conclusions of Law and Order.

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

FINDINGS OF FACT

1. City Employees Local No. 236, Laborers International Union of North America, AFL-CIO, hereafter Union or Complainant, has offices at 2021 Atwood Avenue, Madison, Wisconsin 53704 and is represented by Business Agent Michael O'Brien. The Union represents employees of the City for purposes of collective bargaining, including certain employees in the Operations Section and Construction Section of the City's Engineering Division.

2. The City of Madison, hereafter the City or Respondent, has offices located at 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53709-0001 and its City Engineer is Larry D. Nelson

3. The Union and the City are parties to a collective bargaining agreement that, by its terms, is "effective and retroactive to January 1, 1998 and shall remain in full force and effect until its expiration date of December 31, 1999." At the time of hearing, the parties were in interest arbitration on the terms and conditions of the successor collective bargaining agreement. The 1998-99 collective bargaining agreement includes the following:

ARTICLE 6

MANAGEMENT RIGHTS

6.1 The Union recognizes the prerogatives of the City to operate and manage its affairs in all respects in accordance with its responsibility and the powers or authority which the City has not officially abridged, delegated, or modified by this Agreement and such powers or authority are retained by the City.

These Management Rights include, but are not limited to, the following:

A. To utilize personnel, methods, and means in the most appropriate and efficient manner possible; to hire, to manage, and direct the employees of the City.

B. To schedule, promote, transfer, assign, train, or retrain employees in positions within the City, in accordance with the provisions of this Agreement.

C. To suspend, demote, discharge, or take other appropriate disciplinary action for just cause.

D. To determine the size and composition of the work force, to eliminate or discontinue any job or classification and to lay off employees.

E. To determine the mission of the City and the methods and means necessary to efficiently fulfill that mission including: the transfer, alteration, curtailment, or discontinuance of any goods or services; the purchase and utilization of equipment for the production of goods or the performance of services; the utilization of students, and/or temporary, provisional, limited-term, emergency, part-time, seasonal, or military leave replacement employees.

F. The City has the right to schedule all overtime.

G. It is further understood and agreed that all expenditures or compensation to be paid employees in accordance with this Agreement must first meet the requirements and procedures required by law and the provisions of the Madison General Ordinances and the Wisconsin Statutes.

H. It is understood by the parties that every incidental duty connected with operation enumerated by job descriptions is not always specifically described. Nevertheless, it is intended that all such duties for the jobs within the bargaining unit shall be performed by the employee. This definition shall apply to the term “Related Duties” as used in the job description.

I. Contracting and Subcontracting: The Union recognizes that the City has statutory and charter rights and obligations in contracting for matters relating to municipal operations. The right of contracting or subcontracting is vested in the City including the exercise of said contracting and subcontracting rights.

J. The obligations of the City as expressed or intended by the Wisconsin Statutes dealing with adoption of the municipal budget. The obligations and jurisdiction of the City, its officers, boards, committees or commissions.

K. In addition to all other exceptions, disputes or differences regarding reclassification of positions, promotions of employees and elimination of positions are expressly not subject to arbitration of any kind notwithstanding any other provision herein contained.

L. The City retains the right to establish reasonable work rules and rules of conduct. Any dispute with respect to these work rules shall not in any way be subject to arbitration of any kind, but any dispute with respect to reasonableness of the application of said rules may be subject to the grievance procedure as set forth in Article 7 of this Agreement.

The parties' collective bargaining agreement also includes the following:

ARTICLE 7

GRIEVANCE AND ARBITRATION PROCEDURE

7.1 GRIEVANCE PROCEDURE:

A. Only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance under the provisions set forth below.

B. General Grievances – Union grievances involving the general interpretation, application, or compliance with this Agreement may be initiated with Step One of this procedure.

On or about October 18, 1999, Union Steward Allan Dash filed a "General Grievance" alleging a violation of "Article 13.1, 17.5, and all other relevant articles of the contract" because "Employees of the Engineering Division are not being paid in accordance with the Fair Labor Standards Acts, including, but not limited to being denied compensation for overtime and being awop'd by the minute for being tardy." The head of the Engineering Division, City Engineer Nelson, is not specifically referenced in this grievance. The relief sought in this grievance is that "All affected employees should receive back pay for any and all compensation to which they are entitled to by our contract or the Fair Labor Standards Act and be made whole." On or about October 26, 1999, Public Works General Foreperson Richardson issued the first step response to the grievance, stating inter alia:

> All Local 236 employees are compensated for overtime when authorized and any deduction for employee's (sic) of Local 236 for being late are handled fairly and consistently in accordance with all State and Federal Regulations.
>
> The grievance is denied. No contract violation exists.

On November 8, 1999, City Engineer Larry Nelson responded at Step Two of this grievance. This Step Two response was addressed to Union Business Agent Michael O'Brien and states, inter alia:

> Attached is a Step Two grievance filed by Mr. Dash with regards to payment of Fair Labor Standards for the Operations Section Employees of the Engineering Division. I reviewed this situation with our Supervisors at the Step 1 level. We were unable to find any situations in which, overtime authorized by a supervisor, was not fairly compensated. Furthermore, discussions with our supervisors – all of whom are former 236 employees – leads me to believe that such a situation is incompatible with the Engineering Division culture.
>
> In order to complete our review of this matter, we shall need specific dates, times, and employees who were not paid in accordance with the Fair Labor Standards Act. Obviously, we regard this allegation as extremely serious and we intend to investigate it in its fullest. If on the other hand, this grievance is not anchored in fact, we would expect a timely withdrawal of the document.

Union Business Agent O'Brien did not respond to Nelson's request for more specific information. In a letter dated September 29, 2000, and addressed to Union Business Agent O'Brien, Labor Relations Analyst Brad Wirtz states, inter alia, as follows:

RE: **Information requested about a Step Two grievance regarding compensation in accordance with the Fair Labor Standards Act**

Dear Mike:

Attached is a letter, dated November 8, 1999, sent by Larry Nelson requesting information regarding a Step 2 grievance filed by Allan Dash. To date, Mr. Nelson has not received any of the information referred to in the letter and has responded to the grievance accordingly. If the Union wishes to pursue this grievance and move to arbitration the City will need the information as requested by Mr. Nelson. This information includes specific dates, times, employees involved, etc. If you have any questions regarding this request please feel free to contact me for clarification.

Thank you for your cooperation in this matter.

During the processing of this grievance, Union President Ron Loresch verbally advised Nelson that the Union's concern was that supervisors were "pinking out" time sheets in the Operations Section of the Engineering Division, thereby disallowing overtime that had been worked by employees. Loresch also told Nelson that, if Nelson reviewed the time sheets, then Nelson would know which employees were being paid incorrectly.

4. On February 18, 2000, the Union and the City were parties to an arbitration hearing on a grievance that was filed in 1999, involving Engineering Division employees. This grievance arbitration hearing was transcribed. The issue decided by the grievance Arbitrator was as follows:

> Did the City breach Section 13.2, the overtime reporting pay provision of the parties' Collective Bargaining Agreement, when it paid Walter Dyer for the work he did on February 7, 1999?

Section 13.2 provides as follows:

OVERTIME REPORTING PAY

> Employees who are called in or scheduled for overtime work and report for such work, and whose assignments are subsequently canceled either at the start of the work period or during the first two (2) hours of the work period, shall be granted a minimum of two (2) hours call-in pay.

> However, should employees be called to work between the hours of midnight and 6:00 a.m., the minimum shall be three (3) hours time. Employees reporting for call-in assignments shall commence to accrue overtime twenty (20) minutes before they report, such time shall be included in the two (2) or three (3) hour call-in minimum, provided the employee reports for duty within one (1) hour from the time of the call-in.

The grievance involved a dispute with respect to the two (2) hour call-in minimum. During the hearing, a dispute arose concerning the payment of the three (3) hour call-in minimum. Prior to and after February 18, 2000, the City utilized the same call-in procedure with respect to the three-hour minimum provided for in Sec. 13.2, OVERTIME REPORTING PAY, of the parties' collective bargaining agreement. Under this procedure, an employee that was called in after midnight but prior to 6:00 a.m. would perform the work for which the employee was called in and then the employee would punch out. When this work was completed in less than three (3) hours, the employee was not required to remain at work for three hours in order to collect the three-hour minimum overtime reporting pay. City Engineer Nelson, Union Steward Allan Dash, Union Business Agent Michael O'Brien, and Union President Ron Loresch were present at the hearing of February 18, 2000. During this hearing, Union witnesses testified that, under the three-hour minimum overtime reporting pay practice, you reported to work; performed the work for which you were called in; and then you punched out and left. Nelson's testimony at the grievance arbitration of February 18, 2000, was consistent with that of these Union witnesses. During the hearing, Nelson was visibly agitated. Loresch, who is employed by the City as a Construction Inspector in the Engineering Division, testified on behalf of the Union at the arbitration hearing. On May 11, 2000, Arbitrator James L. Stern issued his Award on this grievance, stating as follows:

> After full consideration of the testimony, exhibits and arguments of the City and the Union, the arbitrator finds for the reasons given above that the Company did not violate the Agreement in its computation of the call-back pay due Walter Dyer for his work on February 7, 1999.
>
> The arbitrator therefore denies the Grievance and orders that it be dismissed.

On January 16, 2001, Judge John C. Albert, Circuit Court, Branch 3, Dane County, Wisconsin, issued a Memorandum Decision and Order on the Union's motion to vacate the arbitration award of May 11, 2000, and the City's motion to confirm this arbitration award. Judge Albert denied the Union's motion and granted the City's motion.

5. On February 18, 2000, shortly after the conclusion of the arbitration hearing, Nelson had a discussion with Dennis Treinen. Treinen is a Street and Sewer Maintenance Worker III in the Engineering Division and, as such, is represented by the Union for purposes

of collective bargaining. On February 18, 2000, Treinen was the employee who was first on-call to receive the three-hour minimum overtime reporting pay. Treinen first saw Nelson as Nelson was driving on Emil Street towards Fish Hatchery. After Nelson passed Treinen, Nelson did a y-turn and drove to the Emil Street building where he met Treinen in the garage. Nelson excitedly told Treinen that "the calls after 12 o'clock, you would have to stay the full three hours. If you got done early, you will stay the full three hours." Treinen considered this requirement to be inconsistent with the current practice and haggled with Nelson over the fact that this had not been done in the past. When Treinen first saw Nelson, fellow employee John Cotter was following Treinen in another truck. When Cotter came into the Emil Street building, he noticed that Nelson called, or motioned, for Treinen to come to Nelson, but Cotter did not overhear any of the conversation between Treinen and Nelson. On February 18, 2000, Nelson knew that employees that "got done early" were not required to stay the full three hours in order to receive the three-hour minimum call-in pay.

6. On February 15, 2000, representatives of the City met with a representative of the Federal Department of Labor (DOL) in response to a complaint that had been filed against the City by the Union involving an allegation that the City was not in compliance with the Fair Labor Standards Act (FLSA). On February 17, 2000, Pat Skaleski, a CPA in the City's Comptroller's office sent the following e-mail to Kathleen Rideout, an Administrative Clerk I in the Engineering Division. On that same day, Rideout responded to this e-mail. The original e-mail and response states as follows:

> The City is being audited by a representative from the Department of Labor. We need you to answer the following questions as soon as possible. If you treat different bargaining units differently, please tell us that. Thank you for your help.
> THE ONLY TIME WE TREAT EMPLOYEES DIFFERENTLY IN PAY OR BENEFITS IS WHEN IT IS CONTRACTUAL
>
> 1. Does your agency pay to the minute or round to the quarter hour or some other method? If you round, how is it done?
> WE PAY TO THE MINUTE
> 2. If an employee punches in or, when there isn't a timeclock, reports to work before the start of the scheduled shift, when does s/he start working? When do you start paying him/her?
> WE DO NOT PAY EMPLOYEES BEFORE THEIR NORMAL START TIME UNLESS APPROVED BY THEIR SUPERVISOR.
> 3. If an employee punches out, or when there isn't a timeclock, leaves after the end of the scheduled shift, when does s/he stop working?

> THE EMPLOYEE IS PAID THEIR NORMAL HOURS UNLESS APPROVED BY THEIR SUPERVISOR FOR OVERTIME. THEY STOP WORKING WHEN THEY LEAVE.
> 4. If an employee punches out early or reports leaving early, how do you know when s/he stopped working? When do you stop paying him/her?
> WE GO ACCORDING TO THEIR TIMESHEET WHICH THE EMPLOYEE AND SUPERVISOR HAS SIGNED, AND HAS START TIME AND END TIME ON IT AND ANY LEAVE BENEFITS USED TO MAKE A WHOLE DAY
> 5. If an employee punches out late or report (sic) leaving late, how do you know when s/he stopped working? When do you stop paying him/her?
> TIMESHEET, HONESTY.

City Engineer Nelson was cc'd on this e-mail and received this e-mail on February 17, 2000. In an e-mail dated "Sat, Feb 19, 2000 3:48 AM," City Engineer Nelson states as follows:

> Please see the attached table of pros and cons regarding the reporting to work for our construction inspectors. Please consider this a draft.
>
> I'd appreciate your comments.

The attached table states as follows:

Proposition

Should All Construction Section Employees Begin and End Each Day At the Engineering Service Building?

Should the Represented Construction Section Employees Record Their Time With the Use of the Time Clock?

Pro	Con
Generally the Construction Inspectors visit the Service Building once each day, often twice.	Such a procedure may increase the amount of overtime paid and reduce the amount of inspection time.
The Construction Inspectors and Field Aides are represented by Local 236. All members of Local 236, excepting the Construction Inspectors and Field Aids report to specific work sites and punch time clocks.	The past practice has been for Construction Inspectors to report to field job sites. (However, the Construction Inspector I involved with utilities has reported to the Service Building as do the survey crews.)

Management has an affirmative duty to verify that employees time is accounted for and that the Federal Fair Labor Standards act is being enforced. The present system does not enable supervisors to confirm that employees are beginning work on time or that employees are not working outside the scheduled and compensated hours.	Construction Inspectors have a more flexible work day and are generally less accountable. The proposal may impact their job satisfaction.
Complaints have been filed with the Federal Department of Labor that the City is not conforming with the Federal Fair Labor Standards Act.	We do not have specific details with regards to the complaint filed.
Construction Inspectors may be working outside their authorized hours without the knowledge of their supervisors.	Although the risk is reduced, Construction Inspectors could still work outside their assigned hours without the knowledge of their supervisors.
Local 236 has filed a grievance against the Engineering Division that employees are not being compensated in accordance with the Federal Fair Labor Standards Act. (Local 236 also filed complaints against the Engineering Division with the State Department of Transportation regarding vehicle weights and the Federal Department of Transportation.)	The grievance filed by Local 236 was vague. The Union did not respond to a request for clarification.
As computers are issued to Construction Inspectors, the risk of working outside compensated hours increases.	
Beginning work and ending work at the Service Building enables better communication between the Construction Inspectors and Supervisors. Construction Inspectors can drop off material tickets and review their e-mail. In the future, it is anticipated that Construction Inspectors will be down loading their computers.	Contractors may take advantage of their knowledge that the Inspector will be reporting to the Service Building in the morning.
Operation Section Employees, who are represented by Local 236, have complained that they are held to a higher standard for prompt attendance than the Construction Inspectors.	It has been reported that Operations Section employees have been told by Construction Inspectors to “mind their own business.”

Construction Inspectors who are union officers are not informing their supervisors of their union activity. This would alleviate the problem to some degree.	While this may reduce the problem, it would not eliminate it.

Nelson's e-mail was sent to "en fahrney d, en cryan, en hanson, en phillips, hr oaks, hr deiters." "en fahrney d" is Don Fahrney, Principal Civil Engineer and a supervisor. "hr deiters" is the City's Labor Relations Manager, Michael Dieters. "hr Oaks" is the City's Human Resources Compensation Manager, Larry Oaks. On February 19, 2000, Construction Inspection and Survey employees represented by the Union did not use a time clock to record their work hours, but rather, recorded their work time on a time sheet, which time sheet was subsequently reviewed and approved by their supervisor. The other Engineering Division employees represented by the Union were required to punch in and out of work using a time clock and also recorded their work time on a time sheet. These latter employees were paid off their time sheets and the time clock was used as a "tattler." Prior to March 7, 2000, during the construction season, which normally runs from April through November, Construction Inspection and Survey employees represented by the Union normally reported to work at a construction site; ended their workday at a construction site and worked the hours of the contractor. These Construction Inspection and Survey employees routinely worked outside the hours of, and the presence of, their supervisors. Other Engineering Division employees represented by the Union also worked outside the hours of, and the presence of, supervisors. The impact of the two proposals upon inspection time, overtime, communication between employees and supervisors, and employee morale are legitimate business considerations. City Engineer Larry D. Nelson has a valid business reason for placing the statement "Local 236 has filed a grievance against the Engineering Division that employees are not being compensated in accordance with the Federal Fair Labor Standards Act" in the "Pro" column of the e-mail of February 19, 2000. In an e-mail dated "2/21/00 3:36 p.m.," Skip Hanson responded to Nelson's e-mail as follows:

> Subject: Re: Construction Inspectors, Reporting to Work
>
> Pro. #1...If the inspectors punch-in, they have to punch-out. That adds up to twice.
> Con. #1...Hopefully, will not effect (sic) inspection time.
>
> Pro. #2...Do not understand (except Inspectors and Field Aides)?
>
> Con. #3...The time clock does nothing as far as an employee's accountability between "punc-in" (sic) and "punch-out".

Pro. #4...How can this be considered a "Pro"?

Pro. #5...The Inspectors are turning in time sheets to indicate hours worked. Management is also being called when an employee is working O.T.

Con. #5...How can this happen if they are not calling to report working O.T.

Pro. #6...The complaint not generated by Inspection Section.

Pro. #7...If computers aren't thought of as a time saver, why issue them?

Pro. #8...Refer to Pro. #7.

Con. #8...Only if Insp. doesn't report on job by 7:00.

Pro. #9...Operation Section Employees are being harassed.

Con. #9...And the (sic) should

Pro. #10...Union Officers should be limiting this activity during working hours.

In an e-mail dated "Mon, Feb 21, 2000 8:08 AM" Larry Oaks responded to Nelson's e-mail as follows:

LARRY,

I AGREE WITH ALL YOUR BASIC PREMISES. HOWEVER, ALTHOUGH VERY PROBABLE IT HAS NEVER BEEN CONFIRMED (TO MY KNOWLEDGE) THAT THE DOL RECEIVED A SPECIFIC COMPLAINT ON FLSA VIOLATIONS.

In an e-mail dated "Sat, Feb 26, 2000 3:47 PM" with the subject "Engineering Work Rule Changes," City Engineer Nelson stated as follows:

I'd appreciate your comments on the attached work change rules. This past week, Mr. Loresch, President of Local 236 stated to Mike that this action was retaliatory on my part because of Local 236's complaint to the U.S. Department of Labor.

That is not the case. I believe that this action is reasonable, logical, and necessary.

My staff is concerned that this action may diminish actual inspection time. However, one of our four Construction Inspector II's picks up a City vehicle each morning at our Service Building, and the two other Construction Inspector II's reside in Sun Prairie and Stoughton, respectively.

Again, your comments would be appreciated.

This e-mail was sent to "Deiters, Mike; O'Brien, Larry; Stalcup, Mary Ann." Larry O'Brien is an Assistant City Attorney. Attached to this e-mail was a letter on Engineering Division letterhead that states as follows:

Date: February 26, 2000

To: Engineering Employees

From: Larry D. Nelson, City Engineer

Subject: Work Rule Modification

Attached are revised pages 7 and 7A of the City Engineering Division work (sic) Rules, Engineering Administrative Procedure No. 2.03.01. Please remove the current page 7 and the two revised pages.

The purpose of these changes is to establish the Engineering Service Building as work station at the beginning and end of each day for the employees of the Construction & Survey Section. Represented employees of that section are to record their start time and their finish time using the time clock.

This work rule modification is necessitated by recent events that are of great concern.

- On October 18, 1999, Local 236 filed a grievance alleging that "Employees of the Engineering Division are not being paid in accordance with the Fair Labor Standards Act. . ."

- On November 8, 1999, I sent a letter to Michael O'Brien, Business Agent with Local 236 requesting more specific information regarding this grievance. I have not received a response.

- Early this month, the Comptroller was informed that the United States Department of Labor would be auditing the payroll records of the City for compliance with the Fair Labor Standards Act.

- This past week, the Business Agent of Local 236 faxed an article to a Public Works Department Manager that recently appeared in the Wisconsin State Journal. That article described a decision by the Federal Court that would allow employees to sue managers regarding compliance with the Fair Labor Standards Act.

We are of the belief that engineering employees are being compensated fairly. However, after considering these events carefully, we determined that it was necessary to evaluate the risk that employees are working without compensation. We concluded that the greatest risk lies in our Construction & Survey Section as it is the only section where a number of represented employees often begin and end their day at various job sites throughout the City without supervision. Beginning their day at our Emil Street Service Building and recording their time should eliminate any concern that our employees are not being compensated fairly.

Larry D. Nelson
Larry D. Nelson, P.E. /s/
City Engineer

cc- Michael Deiters, Labor Relations Manager
Mary Ann Stalcup, Human Resources Manager
Gale Dushack, Comptroller

The revised work rule was attached to this letter. Mary Ann Stalcup responded with an e-mail dated "Wed, Mar 1, 2000 12:07 PM" which stated:

> Larry – your letter and revisions look fine to me. FYI. Local 236 has asked to meet with the mayor to complain about you. You may want to get to her first.

On March 7, 2000, City Engineer Nelson issued a letter that includes the following:

TO: Engineering Employees

FROM: Larry D. Nelson, City Engineer

SUBJECT: Work Rule Modification

Attached is revised page 7 of the City Engineering Division Work Rules, Engineering Administrative Procedure No 2.03.01. Please remove the current page 7 and insert the revised page 7.

The purpose of these changes is to establish the Engineering Service Building as a work station at the beginning and end of each day for the employees of the Construction & Survey Section. Represented employees of that section are to record their start time and their finish time using the time clock. This will become effective as soon (sic) practicable.

This work rule modification is necessitated by recent events that are of great concern.

- On October 18, 1999, Local 236 filed a grievance alleging that "Employees of the Engineering Division are not being paid in accordance with the Fair Labor Standards Act. . ."

- On November 8, 1999, I sent a letter to Michael O'Brien, Business Agent with Local 236 requesting more specific information regarding this grievance. I have not received a response.

- Early in February, the Comptroller was informed that the United States Department of Labor would be auditing the payroll records of the City for compliance with the Fair Labor Standards Act.

- Two weeks ago, the Business Agent of Local 236 faxed an article to a Public Works Department Manager that recently appeared in the Wisconsin State Journal. That article described a decision by the Federal Court that would allow employees to sue managers regarding compliance with the Fair Labor Standards Act.

> We are of the belief that Engineering employees are being compensated fairly. However, after considering these events carefully, we determined that it was necessary to evaluate the risk that employees are working without compensation. We concluded that the greatest risk lies in our Construction & Survey Section as it is the only section where a number of represented employees often begin and end their day at various job sites throughout the City without supervision. Beginning and ending their day at our Emil Street Service Building and recording their time should eliminate any concern that our employees are not being compensated fairly.

As a result of the Work Rules revisions of March 7, 2000, approximately one dozen employees in the Engineering Division's Construction Section were required to report to work and to leave from work at the Engineering Service Building located on Emil Street and to punch a time clock. Additionally, one employee represented by Local 60 was required to punch a time clock. Prior to, and after March 7, 2000, Operations Section employees represented by the Union were subject to Sec. 9.1.4. of the Work Rules, entitled "Operations Section Time Clock Rules," and were required to punch a time clock. Following the publication of these Work Rules revisions, Nelson issued the following e-mail:

> **From:** Larry Nelson
>
> **To:** Loresch, Ron
>
> **Date:** 3/14/00 6:31AM
>
> **Subject:** Re: time clock
>
> Your attached memorandum and my response follows:
>
> ---
>
> Date: March 13, 2000
>
> TO: Larry D. Nelson, City Engineer
>
> FROM: Ronald E. Loresch, President Local 236
>
> SUBJECT: Time Clock

The Union understands that punching a time clock, by employees in the Construction and Survey section, is a change in condition of employment that the city has failed to bargain. Again, I ask you to cease and desist from implementing this until it is bargained.

What are your intentions with bargaining unit employees in the Construction and Survey sections who fail to punch the time clock?

I need your immediate response to these issues.

Date: March 13, 2000

To: Ronald E. Loresch, President Local 236

From: Larry D. Nelson, City Engineer

Use of the time clock to document working hours is required. Failure to use the time clock can result in discipline.

The use of the time clock is, in our opinion a reasonable work rule and governed by the terms of our contract. I understand that you asked the Labor Relations Director a couple of weeks ago to bargain the impact. I trust that you will follow up on that.

In the end, the critical element (sic) to protect both the employee and the City regarding compliance with the applicable laws regarding compensation. I am sure that the Union and City are in agreement in this regard and I look forward to your cooperation and leadership.

Larry.

CC: Deiters, Mike; Fahrney, Don; Stalcup, Mary Ann

Sometime between February 19, 2000 and March 7, 2000, City Engineer Nelson observed that a newspaper article was posted on an Engineering Service Building bulletin board that was reserved for Union business. This newspaper article states as follows:

Green light given to sue bosses

Judge rules in prison guard case that state employees can sue their managers.

Associated Press

State employees can sue their managers as individuals for alleged violations of the Fair Labor Standards Act, a federal judge has ruled.

U.S. District Judge Barbara Crabb said Monday that even though the U.S. Supreme Court ruled last year that states could not be sued for violations of the federal labor act, a group of Wisconsin guards may sue their supervisors in a dispute on overtime pay.

"This is a significant decision and it will have national implications if it is upheld."

Lester Pines

attorney for the prison guards

"Plaintiffs have alleged that defendants altered time sheets knowingly and willfully and otherwise required plaintiffs to perform essential job duties without compensation," Crabb wrote. "This alleged violation of the Fair Labor Standards Act strips defendants of their official capacity immunity and subjects them to individual liability."

Lawyers on both sides of the dispute say Crabb's decision and the eventual outcome of the suit will be watched closely.

"This is a significant decision and it will have national implications if it is upheld," said Lester Pines, who represents the prison guards. "It is probably the first involving state employees in which a court said managers are not immune (from lawsuits)."

> The suit contends that guards were required for three years to perform job duties – such as reading briefings, checking in equipment and communicating with prior-shift staff members – without being compensated.
>
> Assistant Attorney General Richard Moriarty, who represents the state on the case, said the state has not decided what to do next.

Nelson also received a copy of this article, via fax, prior to March 7, 2000. Upon reading the article, Nelson became concerned about his personal financial liability in a suit regarding compliance with the FLSA. Nelson interprets the parties' collective bargaining agreement to require the payment of authorized overtime and the FLSA to require the payment of any overtime worked, whether authorized or not. Nelson interprets the FLSA as providing the employer with one recourse when an employee works unauthorized overtime, i.e., to discipline the employee.

7. On March 16, 2000, the Union and the City were parties to an arbitration hearing involving a grievance that was filed by the Union on May 27, 1999. This grievance alleged that the City had violated the collective bargaining agreement by failing to pay Stewart Mael and Steve Sonntag at the Construction Inspector II rate. On June 30, 2000, Arbitrator Solomon B. Levine issued an Award denying this grievance. On March 15, 2001, Dane County Circuit Judge David T. Flanagan issued a Memorandum Decision and Order on the Union's motion to vacate and the City's motion to confirm the Award issued by Arbitrator Levine on June 30, 2000. In this decision, Judge Flanagan granted the Union's motion and denied the City's motion.

8. Prior to May 24, 2000, Construction inspection employees were permitted to work the hours of the contractor, except that Construction inspection employees were not permitted to work overtime to watch seed and mulch go down. Supervisors approved all overtime hours that resulted from working these hours. On May 24, 2000, representatives of the Union and representatives of the City participated in a labor-management meeting. During this labor-management meeting, the Construction Engineer took the position that, henceforth, Construction Inspectors would have a duty to contact a supervisor and receive supervisory approval prior to working overtime. Union Representative O'Brien responded that it was the supervisor's responsibility to contact the employee to work overtime and that it was not the employee's responsibility to contact the supervisor to work overtime. The discussion of this issue was heated. Union Representative O'Brien suggested that the Union did not have to kiss management's ass to work overtime. O'Brien was also concerned that it would be difficult for the Construction Section employee to locate a supervisor, with the result that the employee would end up speaking into an answering machine, or with a secretary, neither of which could authorize overtime. O'Brien was concerned that if this happened, and the employee worked the overtime, then the employee would be risking discipline. During the meeting, Union

representatives expressed these concerns to management. At the conclusion of the meeting, Nelson agreed to the Union's request to have a supervisor call the employees regarding the need for overtime. Following this meeting, there were times in which supervisors forgot to call Construction Section employees to determine the need for overtime and the employees returned to the Engineering Service Building to punch out, even though contractors were continuing to work at the job site. One such occasion triggered the following e-mail, dated "05/26/00 10:09 AM," from Construction Inspector Gregory Wendt to Nelson:

> FYI according to the new work hour rules and policies installed by Management on 5-24-00, I did not receive a call on 5-24-00 by the time period of 2:00 – 2:30 PM as agreed by Management to see if I had any ongoing work. At the time of 2:30 PM, I had three utility street patches being performed. Unfortunately, because of the new rules policies, I had to drop everything and leave my post.
>
> I will not be able to answer any questions of quality or workmanship at these three sites:
>
> 1. 2049 Winnebago performed by Ampe Construction
> 2. 322 N. Henry performed by McCullough Plumbing.
> 3. Approx. 2301 Winnebago by Williams Comm./Intercon Construction.
>
> I believe that I'm a City employee in good standing trying my utmost to follow work rules and policies but I am saddened by the fact that these new work hour rules and policies will not enable me to perform complete duties as a Public Works Utility Inspector. Ultimately, I feel that our community will suffer because of this.
>
> Please note: Any on going or future utility patch complaints or inquiries should go thru my immediate Supervisors who are Don Fahrney or John Fahrney.
>
> Thank you.

John Fahrney is an Assistant Construction Engineer. Larry Nelson responded with the following e-mail:

> **To:** EN GROUP; Wendt, Gregory
>
> **Date:** 5/26/00 4:03PM
>
> **Subject:** Re: Utility Inspection and New Work rules (sic) Policies

> Greg...Your union informed me on 5/24/00 that they would have their members refuse to inform the Construction Engineer the status of the job and the necessity of overtime. Your union wanted you to be called by the Construction Supervisor.
>
> These are not new work rules or policies established by management. Repeat, these are not new work rules or policies established by management.
>
> Hopefully, this situation will be resolved in time.

On May 24, 2000, Union representatives did not tell Nelson that they would have their members refuse to inform the Construction Engineer of the status of the job and the necessity of overtime.

9. On or about April 13, 2000, Union Steward Allan Dash filed a "General Grievance" alleging that the City had violated the collective bargaining agreement when Don Fahrney denied compensation to Ron Loresch for hours worked for the pay period ending April 1, 2000, by refusing to correct Loresch's time card when Loresch forgot to punch-in. The grievance stated, inter alia, that the Union considered this action towards Loresch to be discrimination based on Union affiliation. On or about April 13, 2000, Union Steward Dash filed a "General Grievance" alleging that on or about March 20, 2000, employees of the Construction Inspection and Survey Section were required by City Engineer Nelson to use the time clock to record their work time; that this work rule modification was inconsistent with the established past practice; and that the Union considered the work rule modification to be retaliatory in nature because of recent events initiated by Local 236 as listed in Nelson's letter of March 7, 2000. This grievance requested the City to cease and desist from requiring these employees to use the time clock to record their work time and to be made whole. On or about April 13, 2000, Union Steward Dash filed a "General Grievance" alleging:

> Employees of the Engineering Division/Construction Inspection are being denied compensation for overtime by Don Fahrney. Attached as examples are copies of timesheets showing specific dates, times and employees who were not paid in accordance with the Fair Labor Standards Act. Also attached is a copy of the U.S. Department of Labor/Wage and Hour Division publication 1325 that specifically addresses this issue. This action by Don Fahrney violates Article 13.1, 17.5, and all other relevant articles of the contract.

This grievance sought the following relief:

> All affected employees should receive back pay for any and all compensation to which they are entitled to by our contract or the Fair Labor Standards Act and be made whole.

On July 25, 2000, Union Steward Dash filed a "General Grievance" alleging that:

> On July 7, 2000 Don Fahrney informed Ron Loresch that progressive discipline would be administered to any employee working unauthorized overtime. Don then gave Ron a verbal warning for working unauthorized overtime prior to July 7, 2000. Enforcing a new schedule of discipline prior to notifying employees is an unreasonable application of a work rule. This violates Article 6.1(C), 6.1(L), and all other relevant articles of the contract.

The grievance requested that "Ron's verbal warning be removed from his file and that he be made whole." This grievance was filed at Step Two on August 8, 2000. On October 21, 2000, Nelson issued the following to Loresch:

> Subject: Grievance Filed Allan D. Dash on Your Behalf
> on August 8, 2000 (Step 2)
>
> On August 8, 2000, Allan D. Dash filed a Grievance regarding the issuance of a verbal warning on July 7, 2000 issued by Donald Fahrney on or about that date regarding working unauthorized overtime. The Union requested that your verbal warning be removed from your personnel file and that you be made whole.
>
> I am rescinding the verbal warning. I have reviewed your personnel file and there is nothing regarding the incident contained within the file.

On or about September 29, 2000, Union Steward Allan Dash filed a "General Grievance" alleging that the City had violated the labor contract by verbally warning S. W. and by denying S. W. the minimum two (2) hours of call-in pay. In denying the grievance at the City's First Step response, the Principal Civil Engineer stated, inter alia, that ". . .(S.W.) was neither called by nor scheduled by a supervisor to report for work. . . . the City agreed in a previous employee grievance (attached) that overtime assignments will be made by management. . . . in accordance with Federal labor standards, if an employee works unauthorized overtime the employer is obligated to pay that employee for the overtime worked. However, the employer may discipline the employee for unauthorized work in accordance with the discipline procedures in the union contract." In a letter dated November 11, 2000, Nelson stated, inter alia:

> It does appear that (S.W.) was on the site for about two hours. He will be credited with 0.5 hours of pay. Why (S.W.) was so much in error regarding the time is unknown. However, it certainly supports the need for the time clock to substantiate the time worked.

> (S.W.) will be compensated for two hours in accordance with the FLSA. But the provisions of the contract regarding overtime or call in pay are not relevant because the work was not authorized.
>
> (S.W.'s) verbal warning by his supervisor regarding unauthorized overtime was justified.

On October 13, 2000 and December 6, 2000, Union Steward Dash filed a "General Grievance." In the former grievance, the Union alleged that the City had violated the labor contract by verbally warning employee "W" for not properly requesting overtime. In the latter grievance, the Union alleged that the City had violated the labor contract by not paying an employee premium time. The City denied the former grievance at the First and Second Step on the basis that the employee had not obtained pre-authorization for overtime. In denying the grievance at the First Step, Principal Civil Engineer Donald Fahrney stated, inter alia, that "According to a recent ruling by the National Labor Relations Representatives, if an employee works unauthorized overtime, the City is obligated to pay the employee. However, the employee can be disciplined for such action. This is what occurred in Mr. (W's) case." The City denied the latter grievance at the First and Second Step on the basis that the work was unauthorized and that the FLSA does not require an employer to pay premium pay. On November 1, 2000, Civil Action 30703 was filed against the City in Dane County Circuit Court. The Plaintiffs in this Civil Action are employees of the City and are members of the Union's collective bargaining unit. The allegations contained in the Complaint that was filed in this Civil Action include the following:

> 3. The City of Madison is an employer subject to Secs. 103.01-103.03, 109.03 and 109.11, Wis. Stat., Ch. 274, Wis. Admin. Code, the Federal Labor Standards Act, 29 U.S.C. Sec. 201 et sequiter, and 29 CFR Part 553. Among other things, said statutes and administrative code provisions require that employees shall be paid one and one-half times their regular hourly rate of pay for all hours worked in excess of 40 hours per week; or one and one-half times their regular hourly rate of pay for all hours worked in excess of 80 hours in two weeks, if there is a written agreement providing for said fourteen-day work period.
>
> 4. During the three-year period preceding the commencement of the above entitled action, the City of Madison employed the Plaintiffs for more than 40 hours per week or for more than 80 hours per two-week period, but, acting by its supervisory employees and managers, failed to pay the Plaintiffs at the rate of one and one-half times their regular hourly rate of pay for said excess hours of work, all in violation of Section 103.025(1) and Section 109.03, Wis. Stats., and 29 U.S.C. Section 207. Said violations were willful within the meaning of 29 U.S.C. Section 255.

> 5. The number of hours that each Plaintiff worked in excess of 40 hours per week or in excess of 80 hours per two-week period was known, condoned and encouraged by the City of Madison, acting by its supervisors and managers. The records relating to said work hours are not regularly made available to the Plaintiffs and their representatives, and the Plaintiffs do not presently know the exact number of such excess hours that each of them worked.

The Complaint that was filed in this Civil Action also stated:

> WHEREFORE, It Is Prayed That This Circuit Court exercise its jurisdiction pursuant to Sec. 801.05, Wis. Stat., and 29 U.S.C. Sec. 216 and enter its order and judgment awarding to each of the individual Plaintiffs the back wages owed to him or her as provided for at Sec. 103.025(1), Wis. Stat., and 29 U.S.C. Sec. 207, and the penalty provided for at Section 109.11(2), Wis. Stat.; directing the City of Madison to cease and desist from failing to pay the employees who provide services on behalf of the City their wages at the rate of one and one-half times their regular hourly rate of pay for all hours worked in excess of 40 hours per week or, where appropriate, in excess of 80 hours in two weeks; awarding to the Plaintiffs and against the City their attorney fees and costs relating to this action; and granting such other and further relief as may be appropriate.

10. A requirement that Construction Inspection and Survey employees represented by the Union begin and end their work day at the Engineering Service Building and a requirement that these same employees punch in and out of work using a time clock are likely to enhance the ability of supervisors to verify the work hours of these employees. These two requirements are reasonable attempts to reduce the risk that the Engineering Division is not complying with the FLSA. Compliance with the FLSA is a legitimate business interest of the City.

11. The placement of the statement "Local 236 has filed a grievance against the Engineering Division that employees are not being compensated in accordance with the Federal Fair Labor Standards Act" in the "Pro" column of the e-mail of February 19, 2000, reasonably implies that the two proposals contained in the e-mail are in response to this grievance. The two proposals are reasonable attempts to ensure that misconduct alleged in this grievance does not occur in the future. Ensuring that misconduct alleged in this grievance does not occur in the future is a legitimate business interest of the City.

12. By including the statement (Local 236 also filed complaints against the Engineering Division with the State Department of Transportation regarding vehicle weights and the Federal Department of Transportation) in the "Pro" column of the e-mail of

February 19, 2000, City Engineer Larry D. Nelson, acting as an agent of the City, engaged in conduct that, evaluated under all the circumstances, reasonably implies that a working condition would be altered in a manner that is adverse to employees represented by the Union because the Union had filed complaints with the Federal and State Departments of Transportation.

13. By telling City employee Dennis Treinen on February 18, 2000, that "the calls after 12 o'clock, you would have to stay the full three hours. If you got done early, you will stay the full three hours," City Engineer Larry D. Nelson, acting as an agent of the City, engaged in conduct that, evaluated under all the circumstances, reasonably implies that a working condition would be altered in a manner that is adverse to an employee because that working condition had become an issue at a grievance arbitration hearing.

14. By stating "Your union informed me on 5/24/00 that they would have their members refuse to inform the Construction Engineer the status of the job and the necessity of overtime" in his e-mail of May 26, 2000, City Engineer Larry D. Nelson, acting as an agent of the City, made a misstatement of fact which, evaluated under all the circumstances, has a reasonable tendency to undermine the Union and interfere with a bargaining unit employee's relationship to his union.

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

CONCLUSIONS OF LAW

1. The Respondent, City of Madison, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and City Engineer Larry D. Nelson is an agent of the Respondent.

2. The Complainant, Local 236, Laborers International Union of North America, AFL-CIO, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and the Engineering Division employees represented by the Complainant are municipal employees within the meaning of Sec. 111.70(1)(i), Stats.

3. By filing and arbitrating grievances, and by filing complaints with the Federal and State Departments of Transportation regarding vehicle weights, Complainant has exercised rights guaranteed in Sec. 111.70(2), Stats., and engaged in lawful concerted activity within the meaning of the Municipal Employment Relations Act.

4. By participating in the grievance arbitration hearing of February 18, 2000, Union President Ron Loresch has exercised rights guaranteed in Sec. 111.70(2), Stats., and engaged in lawful concerted activity within the meaning of the Municipal Employment Relations Act.

5. The clear and satisfactory preponderance of the evidence does not establish that City Engineer Larry D. Nelson's February 19, 2000 proposals to change the location where Construction and Survey Section employees represented by Complainant begin and end their work day and to require these employees to use a time clock were motivated, in any part, by hostility toward the Union's, or any employee's, lawful concerted activity.

6. City Engineer Larry D. Nelson did not violate Respondent's statutory duty to bargain with Complainant when he implemented the Work Rules revisions of March 7, 2000, that require Construction and Survey Section employees represented by Complainant to begin and end their work day at the Engineering Service Building and to use a time clock.

7. The clear and satisfactory preponderance of the evidence does not establish that City Engineer Larry D. Nelson's decision to implement the March 7, 2000 Work Rules revisions requiring Construction and Survey Section employees represented by the Complainant to begin and end their work day at the Engineering Service Building and to use a time clock was motivated, in any part, by hostility toward the Union's, or any employee's, lawful concerted activity.

8. The clear and satisfactory preponderance of the evidence does not demonstrate that City Engineer Larry D. Nelson changed the practice regarding overtime reporting pay in violation of the City's statutory duty to bargain or in retaliation for the Union's, or any employee's, lawful concerted activity.

9. By engaging in the conduct described in Findings of Fact Twelve, Thirteen and Fourteen, supra, City Engineer Larry D. Nelson, acting as an agent of the City, has interfered with, restrained or coerced municipal employees in the exercise of rights guaranteed in Sec. 111.70(2), Stats., and, thus, Respondent has violated Sec. 111.70(3)(a)1, Stats.

10. Respondent has not unilaterally changed a mandatory subject of bargaining in violation of the Municipal Employment Relations Act as alleged by the Complainant.

11. Respondent has not retaliated against the Complainant, or any municipal employee, for engaging in lawful concerted activity in violation of the Municipal Employment Relations Act as alleged by the Complainant.

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

ORDER

1. **IT IS ORDERED** that the Respondent, City of Madison, will immediately:

   a. Cease and desist from interfering with, restraining or coercing employees represented by Local 236, Laborers International Union of North America, AFL-CIO, in the exercise of their rights guaranteed by Sec. 111.70(2), Stats., by reasonably implying that a working condition would be altered in a manner that is adverse to an employee because that working condition had become an issue at a grievance arbitration hearing.

   b. Cease and desist from interfering with, restraining or coercing employees represented by Local 236, Laborers International Union of North America, AFL-CIO, in the exercise of their rights guaranteed by Sec. 111.70(2), Stats., by reasonably implying that a working condition would be altered in a manner that is adverse to an employee because the Union had filed complaints with the Federal and State Departments of Transportation.

   c. Cease and desist from interfering with, restraining or coercing employees represented by Local 236, Laborers International Union of North America, AFL-CIO, in the exercise of their rights guaranteed by Sec. 111.70(2), Stats., by making a misstatement of fact which has a reasonable tendency to undermine the Union and interfere with a bargaining unit employee's relationship to the Union.

2. Take the following affirmative action that will effectuate the purposes of the Municipal Employment Relations Act:

   a. Notify all Engineering Division employees, by posting in conspicuous places in its offices and buildings where Engineering Division employees are employed, copies of the Notice attached hereto and marked "Appendix A." This notice shall be signed by the Respondent's City Engineer, Larry D. Nelson, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of thirty days thereafter. Reasonable steps shall be taken by the Respondent to insure that this Notice is not altered, defaced or covered by other material.

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

3. Complainant's allegations that the City of Madison and Larry D. Nelson retaliated against the Complainant, or employees, for engaging in lawful concerted activity are hereby dismissed.

4. Complainant's allegations that the City of Madison and Larry D. Nelson have violated the City's statutory duty to bargain are hereby dismissed.

Dated at Madison, Wisconsin, this 26th day of March, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

APPENDIX A

NOTICE TO ALL CITY OF MADISON ENGINEERING DIVISION EMPLOYEES

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

CITY ENGINEER LARRY D. NELSON WILL NOT interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in Sec. 111.70(2), Stats., by:

a) engaging in conduct that reasonably implies that a working condition will be altered in a manner that is adverse to an employee because Local 236, Laborers International Union of North America, AFL-CIO (Union), or a municipal employee, engaged in lawful concerted activity.

b) making a misstatement of fact concerning Union conduct which has a reasonable tendency to undermine the Union and interfere with a bargaining unit employee's relationship to the Union.

CITY OF MADISON

_____

By Larry D. Nelson, City Engineer

THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES IN THE ENGINEERING DIVISION FOR A PERIOD OF THIRTY (30) DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED OR OBSCURED IN ANY WAY.

CITY OF MADISON

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On April 18, 2000, the Union filed a Complaint with the Wisconsin Employment Relations Commission alleging that the City of Madison and Larry D. Nelson have committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3, and 4 or 111.70(3)(c), Stats., by announcing a change in an existing practice on call-in pay; requiring certain bargaining unit employees to punch a time clock; and by advising that employees who failed to punch a time clock would be subject to discipline. On June 6, 2000, the Union filed an amended Complaint alleging that the City and Nelson had committed additional prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3, and 4 or 111.70(3)(c), Stats., by falsely representing to a bargaining unit employee that the Union was to blame for a directive that required the employee to stop working at a time that the privately contracted project he was inspecting was in progress. The City denies that it has committed the prohibited practices alleged by the Union.

POSITIONS OF THE PARTIES

Complainant

Larry Nelson, in his role as City Engineer for the City of Madison, has methodically and systematically attempted to intimidate the members of Laborers Local 236 through direct and aggressive confrontations with employees. This Commission has expressed its concern regarding the chilling effect that results from the confrontation of employees about their Union activities. Such confrontation is a violation of Sec. 111.70(3)(a)1, Stats., because it has a tendency to make it less likely that employees will exercise protected rights for fear that they will be treated less favorably, if they do so.

Nelson has unilaterally instituted rules and procedures that are mandatory subjects of bargaining without bargaining with the Union and created new conditions of employment for represented employees in retaliation for the Union's pursuit of grievances. This case involves a failure to bargain and retaliation, but not a failure to bargain impact.

In the wake of grievances being brought against him and without bargaining, Nelson instituted changes to the location where Construction Inspectors would start and end their day and required Construction Inspectors to punch a time clock. Nelson also instituted a policy in which bargaining unit employees called in after midnight must "stay the full three hours" even if the task could be finished more quickly. Nelson's unilateral adoption of these changes constitutes an unlawful failure to bargain.

Nelson's actions occurred after the Union and its members filed grievances against Nelson and after a grievance arbitration hearing in which Nelson was quite agitated. On the same day of the hearing, Nelson angrily chased down Dennis Treinen; confronted Treinen in front of other employees and demanded that henceforth all employees would be subject to new rules regarding overtime reporting call-in pay.

Later that evening, agitated over the arbitration of a grievance filed by the Union and still responding to having been contradicted at the hearing earlier that day, Nelson continued to develop new ways to harass bargaining unit employees for having challenged him. Nelson sent an e-mail to other non-bargaining unit employees suggesting two more changes to the terms and conditions of employment, i.e., the change in the location where Construction Inspectors would start and end their day and a requirement that Construction Inspectors punch a time clock.

In the e-mail, Nelson outlined the pros and cons of making the policy changes. Under the heading "Pro," Nelson stated:

> Local 236 has filed a grievance against the Engineering Division that employees are not being compensated in accordance with the Federal Fair Labor Standards Act. (Local 236 also filed complaints against the Engineering Division with the State Department of Transportation regarding vehicle weights and the Federal Department of Transportation.)

The proposed requirement that employees punch a time clock cannot possibly serve the legitimate purpose of bringing the Engineering Division in line with the requirements of the Department of Transportation. Thus, Nelson's listing of this as a reason for adopting such a measure unquestionably indicates malevolent intent towards the Union and its members.

Nelson's change in policies was not done in good faith for the furtherance of legitimate purposes. Rather, the adoption of the new policies was in response to employees exercising their legal rights.

Although the City would like to apply the "Wright Line" test, this is not the law in Wisconsin. Under well-established Commission law, a decision based in any part, no matter how small, on anti-union animus is unlawful.

In CITY OF MILWAUKEE, DEC. NO. 29896-A (LEVITAN, 11/00), it was recognized that if an instituted policy has both valid and invalid reasons, then the policy is invalid. If the change in policies were not mandatory subjects of bargaining and if the policies served legitimate purposes (neither of which is the case here), Nelson's actions are prohibited because of their retaliatory nature.

Upon notification to Construction Inspectors that they would be required to leave the job site unless given prior approval to continue the job, at least one employee expressed concern that this directive would require him to stop working at times in which private contractors were still working. Nelson responded by blaming the Union. This representation by Nelson is absolutely false, and is revelatory of Nelson's animus toward Laborers Local 236.

Nelson promulgated each new policy unilaterally and in the wake of the Union's and its members' lawful exercise of rights protected by MERA. The Wisconsin Employment Relations Commission should order Nelson and the City of Madison to cease and desist from his retaliatory and coercive conduct immediately and forthwith.

Respondent

In order to establish a claim of interference, a complainant must show by the clear and satisfactory preponderance of the evidence that a respondent's conduct contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain or coerce employees in the exercise of their protected rights or to undermine the union. Complainant has not done so.

Under Wisconsin law, if the management and direction of the agency or the formulation of public policy predominates, the matter is not a mandatory subject of bargaining. The work rule requiring employees to report to Emil Street to begin and end their workday has no impact upon the affected employees' wages, hours or conditions of employment. Neither the time-clock requirement, nor the location-reporting requirement, is a mandatory subject of bargaining.

Through the bargaining process, the parties have agreed "that the City retains the right to establish reasonable work rules and rules of conduct." Thus, if the rules could be argued to be mandatory subjects of bargaining, then the Union has through its agreement waived any right to bargain them. The Union has not established that the work rules had to be bargained and, therefore, it has not established any violation.

In order to establish a claim of retaliation, complainant must show that the employer was motivated, at least in part, by anti-union animus. Therefore, proof that the action taken was for legitimate reason is relevant in determining the employer's motive.

Under FLSA regulations, management cannot verify actual work time solely from the time sheets. Not only is the City responsible for verifying work times, but if it fails to do so, and does not pay employees for actual time worked, the City may face additional penalties under the FLSA.

The Union has failed to acknowledge Nelson's undisputed testimony that he began being concerned about the accuracy of timekeeping well in advance of the February hearing. The institution of the subject work rules was a reasonable and necessary response to the Union's grievance and the concerns raised by the Union relating to the Fair Labor Standards Act.

Treinen's commentary notwithstanding, Nelson did not establish any such rule after the February grievance arbitration hearing. Nelson's uncontradicted testimony establishes that the practice for doing call-in work was the same, prior to and after, the arbitration hearing.

The Union's assertion that Nelson established the stay at Emil Street rule to match his testimony at a previous hearing is incorrect. Assuming arguendo, that Treinen and Nelson had a confrontation, what was being retaliated against?

While it is clear that Treinen and Nelson had a conversation, there is no "clear and satisfactory preponderance of the evidence" that this conversation involved the alleged rule change. The Union has failed to prove that the alleged confrontation with Treinen constituted unlawful retaliation.

The Union's claim of retaliation or interference with Union activity based on the e-mail between Wendt and Nelson is not established. O'Brien conceded that he "could have" made the "refuse" statement. It is more likely than not that O'Brien did say what Nelson attributed to him. It is equally true that "your union" did indeed successfully insist that the supervisor call the employees. In short, all of Nelson's statements in the Wendt e-mail are factually based, and accurate. Therefore, there is no interference with Union activity and no retaliation.

None of Nelson's actions demonstrate anti-union animus. The Management Rights clause of the labor agreement authorized Nelson to institute the subject work rules; Nelson did not say what the Union attributed to him in the February hearing; Nelson did not institute any rule change regarding call-in pay and his statements to Wendt are all true.

The Union has the burden to prove its claims of interference, retaliation, and failure to bargain. It has not met this burden. The complaint is without merit and must be dismissed in its entirety.

DISCUSSION

In its Complaint, and amended Complaint, the Union alleges that City Engineer Nelson and the City of Madison have committed prohibited practices within the meaning of Secs 111.70(3)(a)1, 3, and 4, Stats., and Sec. 111.70(3)(c), Stats. In post-hearing written argument, the Union alleges only a violation of Sec. 111.70(3)(a)1, Stats. Thus, the Examiner

considers the Union to have abandoned its allegations that Nelson and the City have violated Secs. 111.70(3)(a)3 and 4, Stats., and Sec. 111.70(3)(c), Stats.

However, as a review of the Union's arguments reveals, several of the Union's alleged violations of Sec. 111.70(3)(a)1, Stats., are premised upon the claim that Nelson has either unilaterally established rules and procedures that are mandatory subjects of bargaining or that Nelson has retaliated against the Union, or employees, for engaging in lawful concerted activity. The former claim is established by proving a violation of Sec. 111.70(3)(a)4, Stats., and the latter claim is established by proving a violation of Sec. 111.70(3)(a)3, Stats.

A violation of Sec. 111.70(3)(a)4, Stats., derivatively gives rise to a violation of Sec. 111.70(3)(a)1, Stats., as does a violation of Sec. 111.70(3)(a)3, Stats. Thus, to prevail upon its claim that Nelson has violated Sec. 111.70(3)(a)1, Stats., by unilaterally establishing rules and procedures that are mandatory subjects of bargaining, the Union must first prove that Nelson has violated Sec. 111.70(3)(a)4, Stats. Similarly, to prove that Nelson has retaliated against the Union, or employees, for engaging in lawful concerted activity, the Union must first prove a violation of Sec. 111.70(3)(a)3, Stats.

Applicable Statutes and Law

Sec. 111.70(3)(a)1

Section 111.70(3)(a)1, Stats., provides that it is a prohibited practice for a municipal employer individually or in concert with others:

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

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

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

An independent violation of Sec. 111.70(3)(a)1, Stats., occurs when employer conduct has a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Sec. 111.70(2) rights. WERC v. EVANSVILLE, 69 WIS. 2D 140 (1975). Section 111.07(3), Stats., 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."

If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct has a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and no employee felt coerced or was, in fact, deterred from exercising Sec. 111.70(2) rights. BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84); JUNEAU COUNTY, DEC. NO. 12593-B (WERC, 1/77). However, employer conduct which may well have a reasonable tendency to interfere with employee exercise of Sec. 111.70(2) rights will generally not violate Sec. 111.70(3)(a)1, Stats., if the employer had a valid business reason for its actions. BROWN COUNTY, DEC. NO. 28158-F (WERC, 12/96); CITY OF OCONTO, DEC. NO. 28650-A (CROWLEY, 10/96), AFF'D BY OPERATION OF LAW, 28650-B (11/96); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 27867-B (WERC, 5/95).

Sec. 111.70(3)(a)3

Section 111.70(3)(a)3, Stats., provides that it is a prohibited practice for a municipal employer:

> 3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; but the prohibition shall not apply to a fair-share agreement.

A violation of Sec. 111.70(3)(a)3, Stats., results in a derivative violation of Sec. 111.70(3)(a)1, Stats.

To establish a violation of Sec. 111.70(3)(a)3, Stats., the complainant must establish, by a clear and satisfactory preponderance of the evidence: (1) that a municipal employee engaged in lawful concerted activity; (2) that the municipal employer, by its officers or agents, was aware of said activity and hostile thereto; and (3) that the municipal employer took action against the municipal employee based at least in part upon said hostility. GREEN BAY AREA PUBLIC SCHOOL DISTRICT, DEC. NO. 28871-B (WERC, 4/98); EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985); MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 WIS. 2D 540 (1967).

Sec. 111.70(3)(a)4

Section 111.70(3)(a)4, Stats., states, in relevant part, that it is a prohibited practice for a municipal employer:

> To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit. . . .

A violation of Sec. 111.70(3)(a)4, Stats., results in a derivative violation of Sec. 111.70(3)(a)1, Stats. Section 111.07(3), Stats., 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."

Generally speaking, a municipal employer has a Sec. 111.70(3)(a)4 duty to bargain with the bargaining representative of its employees with respect to mandatory subjects of bargaining. Mandatory subjects of bargaining are those which "primarily relate" to wages, hours and conditions of employment, as opposed to those subjects of bargaining which "primarily relate" to the formulation and choice of public policy. CITY OF BROOKFIELD V. WERC, 87 WIS.2D 819 (1979); UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 WIS.2D 89 (1977); and BELOIT EDUCATION ASSOCIATION V. WERC, 73 WIS.2D 43 (1976).

A municipal employer's statutory duty to bargain with a union during the term of a collective bargaining agreement extends to all mandatory subjects of bargaining except those which are covered by the agreement, or to those which the union has clearly and unmistakably waived its right to bargain. SCHOOL DISTRICT OF CADOTT, DEC. NO. 27775-C (WERC, 6/94); CITY OF RICHLAND CENTER, DEC. NO. 22912-B (WERC, 8/86); BROWN COUNTY, DEC. NO. 20623 (WERC, 5/83); and RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 18848-A (WERC, 6/82). As Examiner Raleigh Jones stated in ROCK COUNTY, DEC. NO. 29970-A (1/01):

> . . . an employer may not normally make a unilateral change during the term of a contract to a mandatory subject of bargaining without first bargaining on the proposed change with the collective bargaining representative. 6/ Absent a valid defense then, a unilateral change to a mandatory subject of bargaining is a *per se* violation of the MERA duty to bargain. 7/ Unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because each of those actions undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. 8/ The duty to bargain incorporates a duty to maintain the *status quo* with regard to most mandatory subjects of bargaining even after the collective bargaining agreement has expired, unless the duty to bargain has been discharged by negotiating to the point of impasse. 9/

6/ CITY OF MADISON, DEC. NO. 15095 (WERC, 12/76) AT 18 CITING MADISON JT. SCHOOL DIST. NO. 8, DEC. NO. 12610 (WERC, 4/74); CITY OF OAK CREEK, DEC. NO. 12105-A, B (WERC, 7/74); and CITY OF MENOMONIE, DEC. NO. 12564-A, B (WERC, 10/74).

7/ SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85).

8/ CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84) AT 12 and GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/94) AT 18-19.

9/ GREENFIELD SCHOOL DISTRICT, DEC. NO. 14026-B (WERC, 1977).

It is well settled that during a contract hiatus period, absent a valid defense, a municipal employer violates Sec. 111.70(3)(a)4, Stats., if it takes unilateral action as to mandatory subjects of bargaining in a manner inconsistent with its rights under the dynamic status quo. MAYVILLE SCHOOL DISTRICT V. WERC, 192 WIS. 2D 379 (1995), AFFIRMING DEC. NO. 25144-D (WERC, 5/92); ST. CROIX FALLS SCHOOL DIST. V. WERC, 186 WIS.2D 671 (1994) AFFIRMING DEC. NO. 27215-D (WERC, 7/93). If the municipal employer makes a change in mandatory subjects of bargaining which is consistent with its rights under the dynamic status quo, it does not violate Sec. 111.70(3)(a)4, Stats. ST. CROIX, SUPRA; MAYVILLE, SUPRA; RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 26817-C (WERC, 3/93). The dynamic status quo is defined by relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). As the Commission stated in VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96):

> The status quo doctrine does no more than continue the allocation of rights and opportunities reflected by the terms of the expired contract while the parties bargain a successor agreement. . . . The dynamic status quo allows parties to exercise rights which they have acquired through the collective bargaining process.

Nelson's Conduct on February 18, 2000

The Union alleges that, on February 18, 2000, City Engineer Nelson angrily chased down Dennis Treinen, a City employee represented by the Union; confronted Treinen in front of other employees, and demanded that, henceforth, all employees would be subject to new rules regarding overtime reporting pay. The Union argues that this "confrontation" with Treinen constitutes interference in violation of Sec. 111.70(3)(a)1, Stats. The Union further alleges that, during this "confrontation," Nelson unilaterally imposed new rules regarding overtime reporting pay in violation of the City's statutory duty to bargain and in retaliation for the Union's engaging in lawful concerted activity.

As the Union argues, prior to February 18, 2000, the Union had filed grievances. These grievances included a 1999 grievance on overtime reporting pay, a 1999 grievance alleging that employees were not being paid in accordance with the FLSA, and a 1999

grievance alleging that two employees should be paid at the Construction Inspector II rate. By filing these grievances, the Union engaged in lawful concerted activity.

Nelson is head of the Engineering Division and the grievances described above involved Engineering Division employees. It is not evident, however, that these grievances challenged specific conduct of Nelson, or, in fact, made any reference to Nelson. Thus, it is not reasonable to conclude that these grievances were filed "against" Nelson.

The evidence that the Union filed the 1999 grievances does not reasonably give rise to an inference that Nelson is hostile toward the Union. Nor is it otherwise evident that, prior to February 18, 2000, Nelson exhibited hostility toward the Union, or any employee, for engaging in lawful concerted activity.

At all times prior to and after February 18, 2000, the City had utilized the same call-in procedure with respect to the three-hour minimum provided for in Sec. 13.2, OVERTIME REPORTING PAY, of the parties' collective bargaining agreement. Under this procedure, an employee that was called in after midnight but prior to 6:00 a.m. would perform the work for which the employee was called in and then the employee would punch out. When this work was completed in less than three (3) hours, the employee was not required to remain at work for three hours in order to collect the three-hour minimum overtime reporting pay.

On February 18, 2000, the Union and the City were parties to an arbitration hearing involving an overtime reporting pay grievance. This grievance involved the two-hour minimum overtime reporting pay provided for in Sec. 13.2 of the labor agreement, rather than the three-hour minimum overtime reporting pay.

City Engineer Nelson, Union Steward Allan Dash, Union Business Agent Michael O'Brien, and Union President Ron Loresch were present at this hearing. It is undisputed that, at the arbitration hearing of February 18, 2000, Nelson gave testimony concerning call-in procedures. In dispute is the nature of this testimony.

Loresch's testimony on this point is contained in the following exchange:

Q: And in the course of this hearing, did a dispute arise concerning how long the employees were supposed to work when they were called in outside of their normal shift?

A: Yes, it did.

Q: And would you describe for us how the dispute occurred?

A: It was under Larry's testimony that he had said that when employees are called in to work overtime, basically this was basically a three-hour minimum, that they couldn't leave until they were relieved by their supervisor. (T, 62-63.)

According to Loresch, other witnesses contradicted this testimony of Nelson by stating that this was not the practice and that the practice was, in fact, that you reported to work; performed the work for which you were called-in; and then punched out and left. (T, 64)

Union Representative O'Brien recalls that, during the arbitration hearing of February 18, 2000, an issue developed with respect to the length of time that called-in employees actually spent on the job. (T, 16) O'Brien recalls that Nelson testified that employees had to work the full two-hour or three-hour minimum in order to get paid and that other witnesses testified that the called-in employee performed the work for which they were called-in and then went home. (T, 17)

Nelson's testimony on this point is included in the following exchanges:

Q: Was there any requirement prior to February 18 that the employee, even if done with the assignment in less than three hours, would have to sit around the Emil Street building or anyplace else other than going home?

A: No, it wasn't really a requirement or the practice and that's - -

Q: I'm sorry. Go ahead, I didn't mean to interrupt. Were you done?

A: And that's what I testified to on that February 18th arbitration. (T, 168)

The best evidence of what Nelson said at the arbitration hearing of February 18, 2000, is the transcript of that hearing. The portions of that transcript that were read into this record demonstrate that, when Nelson was discussing calls that came after midnight, Nelson stated that, if the employee is able to conclude the work in less that three hours, the practice has been that the employee returns to the service building, punches out and goes home. (T, 175-176).

Contrary to the recollection of Loresch and O'Brien, Nelson's testimony at the arbitration hearing of February 18, 2000, was consistent with that of the other witnesses. The fact that Nelson also stated that "If an employee was called into work, then we would expect to see the employee work through the minimum period and in fact, your employment may be extended through quite a number of hours" does not require a contrary conclusion.

At hearing, Dash and Loresch gave testimony concerning Nelson's conduct and demeanor at the arbitration hearing of February 18, 2000. This testimony demonstrates that, during the hearing, Nelson was visibly agitated. However, neither this testimony nor any other record evidence, provides a reasonable basis to conclude that Nelson's agitation was in response to being contradicted by Union witnesses, or to the Union's, or any employee's, lawful concerted activity. Notwithstanding the Union's argument to the contrary, the evidence of Nelson's conduct and demeanor at hearing does not demonstrate that Nelson was hostile toward the Union's, or any employee's, lawful concerted activity.

On February 18, 2000, shortly after the conclusion of the arbitration hearing, Nelson had a discussion with Dennis Treinen. Treinen is a Street and Sewer Maintenance Worker III and, as such, is represented by the Union for purposes of collective bargaining. On the date of this discussion, Treinen was the employee who was first on-call to receive the three-hour minimum overtime reporting pay.

According to Treinen, he first saw Nelson as Nelson was driving on Emil Street towards Fish Hatchery. Treinen recalls the following: Nelson passed Treinen, Nelson did a y-turn and drove to the Emil Street building; Nelson met Treinen in the garage; Nelson was excited; and that Nelson told him "the calls after 12 o'clock, you would have to stay the full three hours. If you got done early, you will stay the full three hours." (T, 128) Treinen, who considered this requirement to be inconsistent with the current practice, further recalls that he and Nelson "kind of haggled" over the fact that this had not been done in the past. Nelson acknowledges that he talked to Treinen on February 18, 2000, but does not recall the specifics of the conversation. (T, 169)

When Treinen first saw Nelson, fellow employee John Cotter was following Treinen in another truck. When Cotter came into the Emil Street building, he noticed that Nelson called, or motioned, for Treinen to come to Nelson, but Cotter did not overhear any of the conversation between Treinen and Nelson. Nor is it evident that any other individual overheard the conversation between Treinen and Nelson.

Nelson did not deny making the statements recalled by Treinen and the record provides no reasonable basis to conclude that Treinen is not a credible witness. Accordingly, the Examiner is satisfied that, following the arbitration hearing of February 18, 2000, Nelson initiated a conversation with Treinen, during which Nelson excitedly told Treinen that "the calls after 12 o'clock, you would have to stay the full three hours. If you got done early, you will stay the full three hours."

The record does not demonstrate that Nelson's comments were directed to, or involved, any employee other than Treinen. Thus, notwithstanding the Union's arguments to the contrary, the statements made by Nelson to Treinen do not demonstrate that, henceforth, all

employees would be subject to new rules regarding overtime-reporting call-in pay. Rather, the most reasonable construction of Nelson's statements to Treinen is that, in the future, when Treinen was called in after midnight, then Treinen would be required to stay for three hours, regardless of whether or not Treinen was able to complete his work in less than three hours.

Nelson's statements to Treinen were made shortly after a grievance arbitration hearing in which the three-hour minimum call-in pay procedure was an issue. When making these statements, Nelson provided no explanation as to why Nelson was discussing the call-in procedure with Treinen or why Treinen would need to stay the full three hours. The statements were made at a time in which Nelson knew that employees that "got done early" were not required to stay the full three hours in order to receive the three-hour minimum call-in pay.

In summary, Nelson did not "confront" Treinen regarding Treinen's, or any other employee's, union activity. Nelson, however, made statements to Treinen that, evaluated under all the circumstances, reasonably imply that Nelson was requiring Treinen to stay the full three hours because the three-hour minimum call-in pay had become an issue in the February 18, 2000 grievance arbitration hearing.

By reasonably implying that a working condition would be altered in a manner that is adverse to an employee because that working condition had become an issue at a grievance arbitration hearing, Nelson engaged in conduct that has a reasonable tendency to deter the Union and employees from pursuing grievances to arbitration. Nelson's statements to Treinen would reasonably tend to interfere with, restrain or coerce employees in the exercise of rights guaranteed in Sec. 111.70(2), Stats., and, thus, violate Sec. 111.70(3)(a)1, Stats.

As discussed above, to prove that the City has violated Sec. 111.70(3)(a)1, Stats., by unilaterally changing a condition of employment that is a mandatory subject of bargaining, the Union must first prove that the City has violated Sec. 111.70(3)(a)4, Stats. Thus, the Examiner turns to the analysis of whether or not Nelson's conduct on February 18, 2000, has violated Sec. 111.70(3)(a)4, Stats.

It is not evident that, following his discussion with Nelson, Treinen was ever called in after midnight and made to stay for three full hours. Rather, Nelson's testimony demonstrates that the overtime reporting pay procedure that was in existence prior to February 18, 2000, continued in existence after February 18, 2000. (T, 168)

Assuming arguendo, that the overtime reporting pay procedure is a mandatory subject of bargaining, Nelson's conduct on February 18, 2000, did not effectuate any change in this procedure. Notwithstanding the Union's argument to the contrary, Nelson did not unilaterally impose new rules regarding overtime reporting pay in violation of the City's statutory duty to bargain.

The Union also argues that, on February 18, 2000, Nelson violated Sec. 111.70(3)(a)1, Stats., by imposing new rules regarding overtime reporting pay in retaliation for the Union's, or an employee's, lawful concerted activity. To prove this retaliation claim, the Union must establish, by a clear and satisfactory preponderance of the evidence, all of the elements of a Sec. 111.70(3)(a)3, Stats., claim. One of these elements is that the municipal employer took action against the municipal employee based at least in part upon hostility toward lawful concerted activity.

Nelson's conduct toward Treinen reasonably gives rise to an inference that Nelson is hostile toward the Union for arbitrating the overtime reporting pay grievance. However, for the reasons discussed above, it is not evident that Nelson's conduct on February 18, 2000 resulted in any change in the overtime reporting pay procedure. Thus, it is not evident that Nelson took the action against a municipal employee that is claimed by the Union. The Union's allegation that Nelson imposed new rules regarding overtime reporting pay in retaliation for the Union's lawful concerted activity is without merit.

Nelson's Conduct on February 19, 2000

On February 19, 2000, Nelson sent an e-mail to various managerial and supervisory personnel, requesting comments on his proposal that Construction Section employees represented by the Union begin and end each workday at the Engineering Services Building and record their time with the use of a time clock. The Union alleges that the timing of, and the content of, this e-mail demonstrate that Nelson is hostile toward the Union's lawful concerted activity. The Union further alleges that this hostility, as well as the hostility exhibited by Nelson prior to February 19, 2000, was a motivating factor in Nelson's decision to make the two proposals contained in the e-mail.

Timing

The e-mail of February 19, 2000, states that it was sent at 3:48 a.m. on Saturday. Having no reasonable basis to conclude that the computer clock was inaccurate, this evidence of the date and time of the e-mail is determinative of the date and time that the e-mail was sent. However, this evidence does not establish when the e-mail was prepared.

The fact that the e-mail was sent at 3:48 a.m. on Saturday, February 19, 2000, does not reasonably give rise to an inference that Nelson was up all night stewing about the grievance arbitration of February 18, 2000. Nor does it reasonably give rise to an inference that Nelson was hostile toward the Union's, or any employee's, lawful concerted activity.

As discussed above, Nelson's conduct toward Treinen on February 18, 2000, reasonably gives rise to an inference that Nelson was hostile toward the Union for arbitrating the overtime reporting pay grievance on February 18, 2000. Union President Ron Loresch is employed in the Engineering Division as a Construction Inspector and was a Union witness at the grievance arbitration hearing of February 18, 2000. The e-mail of February 19, 2000, contains proposals that, if adopted, would adversely affect the working conditions of employees represented by the Union, including Loresch. Given these linkages, the timing of the February 19, 2000 e-mail reasonably gives rise to an inference that the e-mail was motivated by hostility toward the Union's and Loresch's lawful concerted activity of February 18, 2000.

Nelson, however, offers another explanation for the timing of the e-mail of February 19, 2000. According to Nelson, he was considering a change in timekeeping methods prior to February 18, 2000 (T, 144) and that the two proposals set forth in the February 19, 2000 e-mail were triggered by a DOL FLSA complaint. (T, 151; 179-80)

On February 15, 2000, City representatives met with Department of Labor auditors in response to a complaint regarding compliance with the FLSA that had been filed by the Union. Nelson was informed of this audit in Pat Skaleski's e-mail of February 17, 2000. In her e-mail, Skaleski requested certain information on Engineering Division payroll and time record practices, including information on procedures for recording the time of employees who do not punch a time clock. The evidence of these events gives support to Nelson's claim that he was considering a change in timekeeping methods prior to February 18, 2000, and that the two proposals set forth in the February 19, 2000 e-mail were triggered by the DOL FLSA complaint.

In summary, the timing of the February 19, 2000 e-mail reasonably gives rise to an inference that Nelson is hostile toward the Union's and Loresch's lawful concerted activity and that such hostility motivated Nelson to make the two proposals contained in this e-mail. However, these are not the only reasonable inferences to be drawn from the evidence. Nelson has offered other, lawful explanations for the timing of this e-mail and these explanations are credible.

Content

The e-mail of February 19, 2000, does not reference either the grievance arbitration hearing of February 18, 2000, or the overtime reporting pay that was at issue in this hearing. Thus, there is no direct connection between the hostility exhibited by Nelson on February 18, 2000, and the content of the February 19, 2000 e-mail.

The e-mail of February 19, 2000 contains two proposals that, if adopted, would adversely affect the working conditions of employees represented by the Union, including Union President Loresch. Loresch and the Union were participants in the grievance arbitration hearing of February 18, 2000. Thus, the impact of the two proposals upon Loresch and other bargaining unit employees represented by the Union reasonably gives rise to the inferences that Nelson is hostile toward the Union's and Loresch's lawful concerted activity and that the two proposals were motivated by hostility towards this activity.

In his e-mail of February 19, 2000, Nelson stated:

> Please see the attached table of pros and cons regarding the reporting to work for our construction inspectors. Please consider this a draft.
> I'd appreciate your comments.

The attached table had one column entitled "Pro" and one column entitled "Con." The majority of the "pros" addresses such valid business concerns as the impact of the proposals upon inspection time, overtime, communication between employees and supervisors, and employee morale.

The Union argues, however, that Nelson made statements in the e-mail of February 19, 2000, that evidence hostility toward the Union's lawful concerted activity and demonstrate that the two proposals were motivated by such hostility. Specifically, the Union takes issue with the following statement contained in the "Pro" column:

> Local 236 has filed a grievance against the Engineering Division that employees are not being compensated in accordance with the Federal Fair Labor Standards Act. (Local 236 also filed complaints against the Engineering Division with the State Department of Transportation regarding vehicle weights and the Federal Department of Transportation.)

By placing the statement "Local 236 has filed a grievance against the Engineering Division that employees are not being compensated in accordance with the Federal Fair Labor Standards Act" in the "Pro" column of the e-mail of February 19, 2000, Nelson is indicating that a working condition may be changed in a manner that is adverse to an employee because the Union filed a grievance. As discussed above, employer conduct which may well have a reasonable tendency to interfere with employee exercise of Sec. 111.70(2) rights will generally not violate Sec. 111.70(3)(a)1, Stats., if the employer had a valid business reason for its conduct.

At some point prior to February 19, 2000, Union President Loresch advised Nelson that the Union's concern was that supervisors were "pinking out" time sheets in the Operations Section, thereby disallowing overtime that had been worked by employees. (T, 71-72)

However, the grievance, on its face, is not limited to this claim, but rather, raises the general claim that "Employees of the Engineering Division are not being paid in accordance with the Fair Labor Standards Act." Given this general claim and Nelson's recent notification of the DOL audit, it would be reasonable for Nelson to independently evaluate the Engineering Division's risk for noncompliance with the FLSA.

In the e-mail of February 19, 2000, and in his testimony at hearing, Nelson claims that, under the FLSA, management has an affirmative duty to verify an employee's work time to ensure that the employee is not working beyond the hours for which the employee is being compensated. (T, 141-2) The record provides no reasonable basis to conclude that this claim is not correct.

Nelson claims that he targeted the Construction Inspection and Survey employees represented by the Union because he considered these employees to be most at risk for noncompliance with the FLSA. According to Nelson, this risk resulted from the fact that these employees routinely began their work day before supervisors arrived at work and ended their work day after supervisors left for the day and, thus, it was difficult for supervisors to verify when these employees began and ended their work day. (T, 142) Nelson's testimony on these points is consistent with statements that he made in his e-mail of February 19, 2000.

On February 19, 2000, Construction Inspection and Survey employees recorded their work time on a time sheet, which time sheet was subsequently reviewed and approved by their supervisor. During the construction season, which normally runs from April through November, Construction Inspection and Survey employees routinely work outside the hours of, and the presence of, their supervisors.

It is evident that other Engineering Division employees represented by the Union also work outside the hours of, and the presence of, supervisors. It is not evident, however, that these other Engineering Division employees perform such work as regularly, or in the amount, performed by Construction Inspection and Survey employees represented by the Union. Nelson's claim that the Construction Section employees were the Engineering Division employees that were most at risk for noncompliance with the FLSA is not rebutted by other record evidence.

The proposals that the Construction Inspection and Survey employees represented by the Union begin and end their work day at the Engineering Service Building and punch in and out of work using a time clock are likely to enhance the ability of supervisors to verify the work hours of these employees. Thus, these proposals are reasonable attempts to reduce the risk that the Engineering Division is not complying with the Fair Labor Standards Act and, as such, are reasonable attempts to ensure that the misconduct alleged in the grievance does not occur.

In summary, Nelson has a valid business reason for indicating that the two proposals are being made, in part, in response to a Union grievance. Thus, evaluated under all the circumstances, the placement of the statement "Local 236 has filed a grievance against the Engineering Division that employees are not being compensated in accordance with the Federal Fair Labor Standards Act" in the "Pro" column of the e-mail of February 19, 2000, does not constitute interference in violation of Sec. 111.70(3)(a)1, Stats. Nor does it reasonably give rise to an inference that Nelson is hostile toward the Union's, or any employee's, lawful concerted activity.

The Union takes exception to the statement: (Local 236 also filed complaints against the Engineering Division with the State Department of Transportation regarding vehicle weights and the Federal Department of Transportation). Nelson offered no explanation as to why he referenced the DOT complaints under the "Pro" column. Nor, is it evident that either proposal serves the legitimate purpose of attempting to correct, or avoid, the misconduct that is alleged in the DOT complaints.

The placement of the sentence "(Local 236 also filed complaints against the Engineering Division with the State Department of Transportation regarding vehicle weights and the Federal Department of Transportation)" in the "Pro" column, reasonably gives rise to an inference that Nelson made the two proposals, in part, because the Union had filed the DOT complaints. As stated above, the two proposals, if adopted, would adversely impact upon the working conditions of employees represented by the Union. Thus, this conduct of Nelson's reasonably implies that, when the Union files complaints with Federal and State agencies, then the working conditions of employees represented by the Union will be altered in a manner that is adverse to these employees.

By placing the sentence "(Local 236 also filed complaints against the Engineering Division with the State Department of Transportation regarding vehicle weights and the Federal Department of Transportation)" in the "Pro" column, Nelson engaged in conduct that has a reasonable tendency to deter the Union from filing complaints with Federal and State agencies. Thus, Nelson's conduct would reasonably tend to interfere with, restrain or coerce employees in the exercise of rights guaranteed by Sec. 111.70(2), Stats. Given the absence of a valid business reason, Nelson's placement of the sentence "(Local 236 also filed complaints against the Engineering Division with the State Department of Transportation regarding vehicle weights and the Federal Department of Transportation)" in the "Pro" column is a violation of Sec. 111.70(3)(a)1, Stats.

As discussed above, Nelson offered no explanation as to why he referenced the DOT complaints. The sentence "(Local 236 also filed complaints against the Engineering Division with the State Department of Transportation regarding vehicle weights and the Federal Department of Transportation)" is the only sentence in the "Pro" column that is offset by

parentheses. Thus, on its face, the most reasonable construction of this sentence is that it was not offered as rationale for making the two proposals, but rather, was offered as an "aside." Thus, notwithstanding the Union's argument to the contrary, the placement of the sentence "(Local 236 also filed complaints against the Engineering Division with the State Department of Transportation regarding vehicle weights and the Federal Department of Transportation)" in the "Pro" column does not demonstrate that Nelson is hostile toward the Union for engaging in this lawful concerted activity. Nor does it demonstrate that the two proposals contained in the e-mail of February 19, 2000, were motivated, in any part, by hostility toward such lawful concerted activity.

In summary, the content of the e-mail of February 19, 2000, reasonably gives rise to the inferences that Nelson was hostile towards the Union and Loresch for engaging in lawful concerted activity and that Nelson took action against municipal employees based at least in part on such hostility. However, these are not the only reasonable inferences to be drawn from such evidence. One may also reasonably infer from the content of the e-mail of February 19, 2000, that the proposals contained in the e-mail were made, as Nelson testified at hearing, for legitimate business reasons. (T, 151-53)

Nelson's Conduct on March 7, 2000

On March 7, 2000, Nelson revised the Engineering Division Work Rules. The effect of this revision was to require approximately one dozen employees in the City's Construction Inspection and Survey section that were represented by the Union to report to work and to leave from work at the Engineering Service Building located on Emil Street and to punch a time clock. Additionally, this Work Rule revision required one employee represented by another union, i.e., Local 60, to punch a time clock. The Union argues that, by requiring these Construction Inspection and Survey employees to report to work and leave from work at the Engineering Service Building and to punch a time clock, the City has violated Sec. 111.70(3)(a)1, Stats., by unilaterally changing a condition of employment that is a mandatory subject of bargaining.

To prove that the City has violated Sec. 111.70(3)(a)1, Stats., by unilaterally changing a condition of employment that is a mandatory subject of bargaining, the Union must first prove that the City has violated Sec. 111.70(3)(a)4, Stats. Thus, the Examiner turns to the analysis of whether or not the March 7, 2000 revision in the Work Rules has violated Sec. 111.70(3)(a)4, Stats.

The March 7, 2000 revisions occurred after the expiration of the parties' 1998-99 collective bargaining agreement, but prior to the settlement of the successor collective bargaining agreement. As discussed above, during this contract hiatus period, the dynamic status quo doctrine allows the City to exercise rights that it has acquired through the collective bargaining process.

The City argues that, if the time clock and location-reporting requirement are mandatory subjects of bargaining, then the Union waived its right to bargain the establishment of such requirements when the Union agreed to the language of Article 6, Management Rights. Given the absence of any persuasive evidence of past practice or bargaining history to the contrary, the Examiner is persuaded that one of the rights that the City has acquired through the collective bargaining process is reflected in the plain language of Article 6(L). This provision states as follows:

> The City retains the right to establish reasonable work rules and rules of conduct. Any dispute with respect to these work rules shall not in any way be subject to arbitration of any kind, but any dispute with respect to reasonableness of the application of said rules may be subject to the grievance procedure as set forth in Article 7 of this Agreement.

The City retains the right to establish reasonable work rules and rules of conduct during the contract hiatus period so long as they do not conflict with or negate another status quo right.

Article 6(L) provides the City with a discretionary right to establish reasonable work rules and rules of conduct. By not exercising a discretionary right in a certain manner in the past, the City is not precluded from exercising that discretionary right in a different manner in the future. Accordingly, neither the fact that Construction Inspection and Survey employees were previously permitted to report to and leave from their field location, nor the fact that these employees were not previously required to punch a time clock, establishes a past practice that continues as a status quo right.

In summary, it is not evident that the language of the expired collective bargaining agreement, as historically applied or clarified by bargaining history, provides Construction Inspection and Survey employees represented by the Union with a status quo right to report to work and leave from work at their field location or to not punch a time clock. Inasmuch as the Work Rules revisions of March 7, 2000, do not conflict with or negate another status quo right, the undersigned turns to the issue of whether or not the Work Rule revisions of March 7, 2000 are reasonable.

According to Nelson, his decision to implement the Work Rules revisions of March 7, 2000, was an attempt to protect against claims that the City was not paying employees in accordance with the FLSA. (T, 173). This claim is consistent with the rationale that Nelson provided in his letters of February 26, 2000 and March 7, 2000. The City has a legitimate business interest in protecting against claims that it is not complying with the FLSA.

The requirement that Construction Inspection and Survey employees represented by the Union report to work and leave from work at the Engineering Service Building and the requirement that these employees punch a time clock are likely to enhance the ability of supervisors to verify the work hours of these employees. Thus, each requirement serves the legitimate business purpose of protecting against the claim that the City is not complying with the FLSA.

Prior to March 7, 2000, all of the Engineering Division Operations Section employees represented by the Union, approximately 30 employees, punched a time clock (T, 84) and were subject to Work Rule 9.1.4, "Operations Section Time Clock Rules." Thus, the Work Rule revisions, on their face, do not discriminate against the Construction Inspection and Survey employees represented by the Union.

According to Union Business Representative O'Brien, employees in other Divisions have work situations that are similar to the Construction Inspectors and are not required to punch a time clock. (T, 25) It is not evident, however, that these other employees are under the jurisdiction of Nelson. Thus, this evidence of disparate treatment does not warrant the conclusion that the Work Rule revisions of March 7 are unreasonable.

In summary, the Work Rule revisions of March 7, 2000, are reasonable as written, and do not conflict with, or negate, any other status quo right. If, as the Union argues, these Work Rule revisions are mandatory subjects of bargaining, the City has the dynamic status quo right to make these revisions.

The Examiner turns to the issue of whether or not Nelson's decision to implement these Work Rule revisions was motivated, in part, by hostility toward the Union's, or employee's, lawful concerted activity. Prior to addressing this issue, the Examiner must first address the conduct that occurred after March 7, 2000.

Nelson's Conduct On March 14, 2000

In an e-mail dated March 13, 2000, Loresch asked Nelson "What are your intentions with bargaining unit employees in the Construction and Survey sections who fail to punch the time clock?" Nelson responded to this e-mail on March 14, 2000, as follows:

> Use of the time clock to document working hours is required. Failure to use the time clock can result in discipline.
>
> The use of the time clock is, in our opinion a reasonable work rule and governed by the terms of our contract. I understand that you asked the Labor Relations Director a couple of weeks ago to bargain the impact. I trust that you will follow up on that.

> In the end, the critical element to protect both the employee and the City regarding compliance with the applicable laws regarding compensation. I am sure that the Union and City are in agreement in this regard and I look forward to your cooperation and leadership.

As a review of the above discloses, Nelson was advising Loresch that Nelson considered the time clock requirement to be a reasonable work rule and that failure to follow a reasonable work rule could result in discipline. Nelson's response to Loresch's question, including Nelson's statement that "Failure to use the time clock can result in discipline" does not reasonably give rise to an inference that Nelson is hostile toward the Union, or any employee, for engaging in lawful concerted activity.

Article 6, C, of the parties' collective bargaining agreement provides the City with a dynamic status quo right to discipline employees for just cause. Thus, on March 14, 2000, the City did not have a statutory duty to bargain the right to discipline employees for failure to follow a reasonable work rule. The Union, of course, retained the right to grieve the imposition of such discipline and did subsequently grieve the imposition of such discipline. Nelson's response to Loresch is consistent with Nelson's testimony that the time clock requirement was intended to protect against claims that the City was not complying with the FLSA.

Nelson's Conduct on May 26, 2000

By e-mail dated "05/26/00 10:09 AM," Construction Inspector Gregory Wendt advised Larry Nelson of the following:

> FYI according to the new work hour rules and policies installed by Management on 5-24-00, I did not receive a call on 5-24-00 by the time period of 2:00 – 2:30 PM as agreed by Management to see if I had any ongoing work. At the time of 2:30 PM, I had three utility street patches being performed. Unfortunately, because of the new rules policies, I had to drop everything and leave my post.
>
> I will not be able to answer any questions of quality or workmanship at these three sites:
>
> 1. 2049 Winnebago performed by Ampe Construction
> 2. 322 N. Henry performed by McCullough Plumbing.
> 3. Approx. 2301 Winnebago by Williams Comm./Intercon Construction.

> I believe that I'm a City employee in good standing trying my utmost to follow work rules and policies but I am saddened by the fact that these new work hour rules and policies will not enable me to perform complete duties as a Public Works Utility Inspector. Ultimately, I feel that our community will suffer because of this.
>
> Please note: Any on going or future utility patch complaints or inquiries should go thru my immediate Supervisors who are Don Fahrney or John Fahrney.
>
> Thank you.

Nelson responded with the following e-mail:

> **To:** EN GROUP; Wendt, Gregory
>
> **Date:** 5/26/00 4:03PM
>
> **Subject:** Re: Utility Inspection and New Work rules (sic) Policies
>
> Greg…Your union informed me on 5/24/00 that they would have their members refuse to inform the Construction Engineer the status of the job and the necessity of overtime. Your union wanted you to be called by the Construction Supervisor.
>
> These are not new work rules or policies established by management. Repeat, these are not new work rules or policies established by management.
>
> Hopefully, this situation will be resolved in time.

The Union maintains that it never encouraged any of its members to withhold information. The Union argues, therefore, that the statement "Your union informed me on 5/24/00 that they would have their members refuse to inform the Construction Engineer the status of the job and the necessity of overtime" is false and indicative of Nelson's hostility to the Union.

Notwithstanding the Union's assertion to the contrary, Nelson does not, in fact, claim that the Union encouraged any of its members to withhold information. Rather, Nelson claims that the Union made certain statements to Nelson regarding what the Union intended to do, i.e., have their members refuse to inform the Construction Engineer of the job status and the necessity of overtime.

According to Nelson, the Union made such statements at a labor-management meeting. Nelson's e-mail indicates that the statements were made on May 24, 2000, and the record does not demonstrate otherwise.

During this labor-management meeting, the Construction Engineer took the position that, henceforth, Construction Inspectors would have a duty to contact a supervisor and receive supervisory approval prior to working overtime. (T, 45; T, 162) Union Representative O'Brien took the position that it was the supervisor's responsibility to contact the employee to work overtime and that it was not the employee's responsibility to contact the supervisor to work overtime. (T, 39-40; T, 162)

This discussion was heated. (T, 99) Union Representative O'Brien suggested that the Union did not have to kiss management's ass to work overtime. (T, 38-39). O'Brien, however, had another concern about management's position. Specifically, O'Brien was concerned that it would be difficult for the Construction Section employee to locate a supervisor, with the result that the employee would end up speaking into an answering machine, or with a secretary, neither of which could authorize overtime. O'Brien was further concerned that if this happened, and the employee worked the overtime, then the employee would be risking discipline. (T, 45-46) During the meeting, Union representatives expressed these concerns to management. (T, 77)

At the conclusion of the meeting, Nelson agreed to the Union's request to have a supervisor call the employees regarding the need for overtime. (T, 162) Following this meeting, there were times in which supervisors forgot to call Construction Section employees to determine the need for overtime and employees returned to the Engineering Service Building to punch out, even though outside contractors were continuing to work. One such occasion triggered the e-mail sent by Wendt.

When asked to explain the comment "Your union informed me on 5/24/00 that they would have their members refuse to inform the Construction Engineer the status of the job and the necessity of overtime," Nelson responded that he was trying to get across the fact that he did not establish a new work rule or policy, but rather had acceded to a request by the Union. (T, 165) Nelson, however, did not confirm that anyone from the Union, in fact, made the statement that they would have their members refuse to inform the Construction Engineer of the status of the job and the necessity of overtime.

Loresch's testimony regarding the labor-management meeting contains the following exchange:

> Q: Now, I'm going to ask you a couple of questions about that meeting. First, at that meeting did any of the union representatives, including yourself, in any way indicate that the union would advise its members to refuse to call in and to report the status of the job, the inspectors in particular, the jobs they were working on and whether overtime was required?
>
> A: No. (T, 75)

O'Brien does not recall saying that he would instruct anyone to refuse to provide information regarding the status of a job. (T, 51) O'Brien, however, acknowledges that it was possible that someone from the Union made such a statement. (T, 54-55)

Neither O'Brien's testimony, nor Nelson's testimony, is sufficient to rebut Loresch's testimony. Accordingly, the Examiner concludes that, on May 24, 2000, Union representatives did not tell Nelson that the Union would have their members refuse to inform the Construction Engineer of the status of the job and the necessity of overtime.

In summary, Nelson's statement "Your union informed me on 5/24/00 that they would have their members refuse to inform the Construction Engineer the status of the job and the necessity of overtime" is a misstatement of a fact. This misstatement of fact is an attempt to solely blame the Union for a working condition that Wendt considers disagreeable. This misstatement of fact was made at a time in which Nelson knew that the working condition was the result of an agreement between the Union and Nelson. Nelson's misstatement of fact, evaluated under all the circumstances, reasonably gives rise to the inference that Nelson is hostile toward the Union. Nelson's misstatement of fact also has a reasonable tendency to interfere with, and be coercive of, Wendt's relationship to his Union. By stating "Your union informed me on 5/24/00 that they would have their members refuse to inform the Construction Engineer the status of the job and the necessity of overtime," Nelson has violated Sec. 111.70(3)(a)1, Stats. STATE OF WISCONSIN, DEC. NO. 28937-A (GRECO, 9/97); AFF'D BY OPERATION OF LAW, DEC. NO. 28937-B (WERC, 11/99); CEDAR GROVE-BELGIUM SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91).

Concuct Occurring after May 26, 2000

It is evident that, after Nelson implemented the Work Rule revisions of March 7, 2000, the Union filed a series of grievances that alleged that employees, including Loresch, had not been appropriately compensated and/or had been disciplined inappropriately. It is not evident, however, that following May 26, 2000, that Nelson engaged in any conduct that reasonably gives rise to an inference that Nelson was hostile toward the Union's, or any employee's, lawful concerted activity, or that Nelson retaliated against the Union, or any employee, for engaging in lawful concerted activity.

Summary

To prevail upon its claim of unlawful retaliation, the Union must establish by a clear and satisfactory preponderance of the evidence: (1) that a municipal employee engaged in lawful concerted activity; (2) that the municipal employer, by its officers or agents, was aware of said activity and hostile thereto; and (3) that the municipal employer took action against the municipal employee based at least in part upon said hostility. As Examiner Mawhinney states in CITY OF OSHKOSH, DEC. NO. 28971-A (8/97):

> Evidence of hostility and illegal motive (factors three and four above) may be direct (such as with overt statements of hostility) or, as is usually the case, inferred from the circumstances. 10/ 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. 11/ 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. 12/ 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. 13/ 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. 14/

10/ Thus, in Town of Mercer, Dec. No. 14783-A (Greco, 3/77), the Examiner stated that:

> ". . . it is well established that the search for motive at times is very difficult, since oftentimes, direct evidence is not available. For, as noted in a leading case on this subject, Shattuck Denn Mining Corp. v. N.L.R.B., 362 F.2d 466 (CA-9, 1966):

> Actual motive, a state of mind being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise, no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book."

11/ Cooperative Education Service Agency #4, et al., Dec. No. 13100-E (Yaffe, 12/77), aff'd, Dec. No. 13100-G (WERC, 5/79).

12/ LaCrosse County (Hillview Nursing Home), Dec. No. 14704-B (WERC, 7/78).

13/ Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis.2d 540, 562 (1967).

14/ Employment Relations Dept. v. WERC, 122 Wis.2d 132, 141 (1985).

As discussed above, the Union engaged in lawful concerted activity when the Union arbitrated the grievances of February 18, 2000. Loresch engaged in lawful concerted activity when he participated in the grievance arbitration hearing of February 18, 2000. As discussed above, Nelson engaged in conduct that reasonably gives rise to an inference that Nelson is hostile toward this lawful concerted activity.

The earliest evidence of such hostility occurred on February 18, 2000, when Nelson told Treinen "the calls after 12 o'clock, you would have to stay the full three hours. If you got done early, you will stay the full three hours." The inference of hostility arises because the record does not suggest any explanation for Nelson's conduct other than that Nelson was reacting to the fact that overtime reporting pay had been an issue in an arbitration hearing that had been held earlier that day.

It is not evident that Nelson, in fact, made Treinen, or any other employee, stay the full three hours. Thus, the evidence that gives rise to the inference that Nelson is hostile towards the Union's lawful concerted activity is an intemperate remark, rather than retaliatory conduct.

As discussed above, there is no direct connection between the hostility exhibited by Nelson on February 18, 2000, and the content of the February 19, 2000 e-mail. However, the two proposals contained in the e-mail of February 19, 2000, adversely impact the working conditions of Loresch and other members of the Union's bargaining unit. Thus, indirectly, the

timing and the content of the February 19, 2000 e-mail, give rise to an inference that the hostility exhibited by Nelson on February 18, 2000, was a motivating factor in Nelson's decision to make the two proposals. Such an inference, however, is countered by other credible evidence that indicates that the e-mail of February 19, 2000, was in response to events other than the lawful concerted activity engaged in on February 18, 2000, and that the proposals contained therein were made for legitimate business reasons.

The March 7, 2000, Work Rule revisions implemented the two proposals that Nelson had made in his e-mail of February 19, 2000. As discussed above, the impact of these proposals upon the working conditions of Loresch and other employees represented by the Union reasonably gives rise to the inference that Nelson is hostile toward the lawful concerted activity engaged in by the Union and Loresch on February 18, 2000. However, as also discussed above, the inference of unlawful motive is countered by other credible evidence that indicates that the two proposals were implemented in response to events other than this lawful concerted activity and for legitimate business reasons.

On May 26, 2000, more than two months after Nelson implemented the Work Rule revisions of March 7, 2000, Nelson engaged in conduct that reasonably gives rise to an inference that Nelson is hostile toward the Union. The record, however, does not establish a nexus between this hostility and Nelson's earlier conduct in proposing and then adopting the requirements that Construction Inspection and Survey employees represented by the Union report to work and leave from work at the Engineering Service Building and punch a time clock.

At hearing, Nelson consistently maintained that the requirements that Construction Inspection and Survey employees represented by the Union report to work and leave from work at the Engineering Service Building and punch a time clock were made for legitimate business reasons. The primary business reason offered by Nelson was to protect against claims that the City was not paying employees in accordance with the FLSA. Nelson's testimony regarding motive is consistent with statements made by Nelson in his e-mail of February 19, 2000; his letter of February 26, 2000; his letter of March 7, 2000; and his e-mail of March 13, 2000.

The record evidence fails to demonstrate that the legitimate business reasons offered by Nelson are pretextual. Notwithstanding the Union's argument to the contrary, the clear and satisfactory preponderance of the evidence does not establish that Nelson's decision to implement the Work Rule revisions of March 7, 2000, was motivated, in any part, by hostility toward the Union's or any employee's lawful concerted activity.

Conclusion

The Union alleges that the City has violated its statutory duty to bargain, in violation of Sec. 111.70(3)(a)1, Stats., by unilaterally changing the practice regarding overtime reporting pay; by unilaterally changing the location where Construction Section employees begin and end their work day; and by unilaterally adopting the use of a time clock for Construction Section employees. The clear and satisfactory preponderance of the record evidence fails to establish that the City has violated its statutory duty to bargain, as alleged by the Union. Accordingly, these allegations of the Union are without merit.

The Union alleges that the City has retaliated against the Union's, or employee's, lawful concerted activity, in violation of Sec. 111.70(3)(a)1, Stats., by unilaterally changing the practice regarding overtime reporting pay; by unilaterally changing the location where Construction Section employees begin and end their work day; and by unilaterally adopting the use of a time clock for Construction Section employees. The clear and satisfactory preponderance of the record evidence fails to establish that the City has retaliated against the Union's, or employee's, lawful concerted activity as alleged by the Union. Accordingly, these allegations of the Union are without merit.

As discussed above, Nelson, acting as an agent of the City, has engaged in other conduct that violates Sec. 111.70(3)(a)1, Stats. The appropriate remedy for these violations of Sec. 111.70(3)(a)1, Stats., is to order the City to cease and desist from such conduct and to order the City to post an appropriate notice.

Dated at Madison, Wisconsin, this 26th day of March, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

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