STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL UNION NO. 695, Complainant,

vs.

TOWN OF BROOKFIELD (FIRE DEPARTMENT), Respondent.

Case 7
No. 59215
MP-3682

Decision No. 30033-A

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 N. RiverCenter Drive, Milwaukee, Wisconsin, 53212, by **Atty. Jill M. Hartley** for the labor organization.

Cramer, Multhauf & Hammes, LLP, 1601 East Racine Avenue, Waukesha, Wisconsin, 53186, by **Atty. James C. Hammes,** for the municipal employer

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On September 25, 2000, Teamsters Local Union No. 695 filed a complaint with the Wisconsin Employment Relations Commission alleging that the Town of Brookfield had committee prohibited practices in violation of Sec. 111.70(3)(a)3, 5 and 7, Wis. Stats., by its manner of assigning shifts and paying overtime under a collective bargaining agreement implemented pursuant to an interest arbitration award. The Town denied that it had committed prohibited practices. Following an unsuccessful attempt at conciliation, the Commission authorized Stuart D. Levitan, an examiner on its staff, to conduct a hearing on said complaint with authority to issue findings of fact, conclusions of law and appropriate orders. On January 12, 2001, a hearing on the matter was scheduled for February 2, 2001. On January 29, 2001, the union filed an Amended Complaint alleging that the town had also committed prohibited practices in violation of Sec. 111.07(3)(a)1, Stats. At hearing, following an objection by the town, the union withdrew the paragraphs in its amended complaint relating

to the supplemental charges. A transcript of the hearing was made available to the parties by February 14, 2001. The parties submitted written arguments and replies, the last of which was received on April 2, 2001. The undersigned now and hereby issues the following

FINDINGS OF FACT

1. Teamsters Local Union No. 695, "the union," is a labor organization with offices at 1314 North Stoughton Road, Madison, Wisconsin.

2. The Town of Brookfield, "the town," is a municipal employer with offices at 645 North Janacek Road, Brookfield, Wisconsin. At all times relevant Richard Schultz was the Town Administrator and Sidney "Skip" Sharpe was the Fire Chief.

3. In 1997 the union was certified as the exclusive collective bargaining agent for all regular full-time and regular part-time fire fighters of the Town of Brookfield Fire Department.

4. In seeking an initial collective bargaining agreement, the parties reached a tentative agreement which the union ratified but which the town rejected. Thereafter, following a petition for mediation/arbitration and an investigation by the staff of the Wisconsin Employment Relations Commission, the dispute was submitted to interest arbitrator James L. Stern. On February 11, 2000, Arbitrator Stern issued his award, which is attached as Appendix A.

5. Among the provisions in the collective bargaining agreement in effect pursuant to the Stern Award were the following:

. . .

> **16.04 Selection of Personnel.** Selection of personnel for "in-house staffing" shall be by bid on a monthly basis. The monthly bid shall proceed in order of seniority within classification first then as to any vacant position not selected by bid at the close of the bidding process shall be filled/offered in order of overall seniority pursuant to this Agreement. Personnel can only select (bid) positions the employee is otherwise qualified to hold, i.e., all certified firefighters shall be allowed to submit bid requests for firefighter positions on this schedule, all certified driver/operators who have been certified as HEO's will be allowed to submit bid requests for HEO positions on the schedule, all department officers will be allowed to submit bid requests for officer positions on

the schedule, provided, however, regular officers will have first priority for schedule requests while acting officers will have second priority for schedule requests.

Personnel who wish to fill "in-house staffing" positions will submit a written request to schedule manager on forms provided for such purpose by the Fire Department. Such written requests must be submitted to the Fire Department Schedule Manager no later than 6:00 p.m. on the 18th of the month.

In the event, there is insufficient staffing by virtue of this Section, the Town retains the right to assign employees to fill the vacancy(s).

16.05 Schedule Manager. The Fire Chief will designate a department member as "schedule manager" who will manage the "in-house staffing" schedule. Management of the schedule shall be an extra duty. The schedule will be kept in the Day Book on forms provided by the Fire Department and on a calendar which will be posted in a public area of the fire station. In case of a discrepancy between the Day Book and the schedule calendar, the Day Book shall prevail.

The schedule manager will assign shifts from the bids submitted. Where two (2) or more eligible personnel request the same position on the same shift, the member who is higher on the seniority list will prevail.

The Fire Department seniority list shall be maintained and provided by the Fire Chief. The list shall rank all members of the fire department according to their hire date and shall be kept posted next to the schedule calendar.

16.06 Schedule/Schedule Changes. Fire Department member personnel may only request positions they intend to otherwise fill themselves on a monthly basis. Member personnel may not reserve, give away, cash trade, or sell schedule positions to other department members. However, members are free to trade posted schedule positions, with the concurrence of the schedule manager, who shall make an appropriate entry in the Day Book and thereon the schedule calendar, as long as each member is qualified to fill the position traded for.

The Fire Department recognizes that there will be situations where a department member will not be able to work a scheduled period. In such circumstance, the employee will contact the shift officer as soon as practical, the shift officer will then proceed to contact the schedule manager who will then proceed to fill the vacancy for said period or such term as may otherwise be appropriate with the next senior, qualified member, in accordance with this Agreement.

16.07 Open Positions. Any position in the shift not assigned on or after the 18th of the month will be considered open. An open position may be filled at any time by a qualified department member, in accordance with this Agreement.

Any qualified member may request any open position verbally or in writing to the schedule manager. In the absence of the schedule manager, any shift officer may approve a shift request. Whenever a request to fill an open position is approved by a shift officer, the shift officer approving the request will write the name of the member requesting the position into the appropriate place in the Day Book and the schedule calendar.

16.08 Open Shift Officer Positions. In the instance and for such occurrence where a shift starts, and no qualified employee member has bid or otherwise has been assigned as the shift officer, the member who is most senior will be designated as the shift officer and will assume the responsibilities and benefits of the shift officer.

16.09 Day Book. The shift officer will keep an accurate record of the personnel working "in-house" within the Day Book. The names of the members actually working, the time the employee started and ended work, the position(s) they filled and any other pertinent information will be recorded.

16.10 Workweek. The workweek shall commence at 0800 hours Sunday and end at 0759 hours the following Sunday.

16.11 Shift Requests. Bargaining unit personnel may bid as few or as many shifts as desired; provided, however, all requests must be for full shifts. Split shifts will not be allowed. The bid process closes at 6:00 p.m. on the 18th of the month. Once closed and the schedule drawn and fully posted, any open hours may be thereafter filled on a first come first serve basis. Employee requests to work partial shifts will be, at this point, accepted and allowed.

All remaining employee(s) not on schedule will be assigned to a duty crew (on call crew) Monday through Thursday. The makeup of which shall be a minimum of four (4) employees who shall hold themselves as available as per past practice provided however each employee shall receive two (2) hours pay (pager pay) at the employees applicable hourly rate of pay per day served in addition to all hours worked and, when applicable, pay received under Section 16.15 of this Agreement.

. . .

16.14 Overtime. All work in excess of scheduled bid shift hours and all work in excess of forty (40) hours per week shall be paid at the rate of time and one-half (1-1/2) the employee's applicable hourly rate of pay.

16.15 Call Back Pay / Call In Pay. Any employee who responds to calls outside of their regular schedule will be paid a minimum of two (2) hours pay.

6. Upon the parties being notified of the substance of the Stern award, Sharpe informed various union officials that the town would be meeting to decide how to implement the new collective bargaining agreement. Thereafter, on or about March 1, 2000, the Town unilaterally issued a document entitled "Union Contract Implementation" (UCI), which is attached as Appendix B. Among its provisions relevant to this proceeding were the following:

3.0 **Bidding For Shifts**

3-1 The bid closing for March shifts will be extend (sic) to 8:00 A.M. on February 25, 2000.

3-2 Bids for shifts for future months will close at 6:00 P.M. on the 18th of the previous month (Section 16.04 – Union Contract)

3-3 Members may bid for up to 40 hours each workweek.

3-3.1 "Bargaining unit personnel may bid as few or as many shifts as desired. Section 16.11 of Union contract means up to 40 hours per workweek.

3-3.2 The 40 hours includes any scheduled work including:

3-3.2.1 All in-house hours.

3-3.2.2 Scheduled training, including Monday night training.

3-3.2.3 Two hours of pager pay (for those evening when on duty crew)

3-4 Members may bid only for full shifts (Section 16.11 – Union Contract)

3-4.1 Members may not bid for a shift if their total hours for the workweek will exceed 40 hours during the shift.

3-4.2 Members may not bid for a shift if any part of that shift would be unpaid time.

3-4.3 Members shall work the shifts they are assigned through the bid process.

3-4.3.1.1 A member may give away a shift assigned by the Chief. The member taking the shift:

3-4.3.1.1 Must have at least equal qualifications to the person giving it away.

3-4.3.1.2 Must not go over 40 hours by taking the shift.

3-4.3.1.3 Have approval from the Chief, schedule manager or shift commander.

3-5 Members may bid only for shift positions they are qualified to hold. "Qualified" means firefighters may bid for firefighter positions, HEOs may bid for HEO positions and officers may bid for officer positions (Section 16.04 – Union Contract)

3-6 Filling Vacant Positions

3-6.1 The schedule manager will produce a schedule for the following month based on the bid process (Section 16.05 – Union Contract)

3-6.2 Members may fill vacant positions on the schedule as long as they are qualified for the position they want to fill (Section 16.07 – Union Contact)

3-6.2.1A firefighter may not fill an open officer spot on the schedule because they are not qualified by virtue of promotion.

7. Those provisions of the Union Contract Implementation document which prevent Fire Department employees from bidding for a shift if their total hours for the workweek would exceed 40 hours during the shift, including sections 3-3 and 3-4, violate section 16.11 of the collective bargaining agreement currently in force between the parties.

8. Those provisions of the Union Contract Implementation document, including section 3-3.2.2, and any other practice of the employer which do not compensate employees at time and one-half for hours actually worked while on call-back status and/or for training activities when an employee would not otherwise be on duty violate section 16.14 of the collective bargaining agreement currently in force between the parties.

9. There is no evidence that the town sought to encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment by its issuance of the Union Contract Implementation document.

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

CONCLUSIONS OF LAW

1. By promulgating section 3-4.1, Union Contract Implementation, the Town violated the collective bargaining agreement and therefore committed a violation of Sec. 111.70(3)(a) 5, Wis. Stats.

2. By not paying time and one-half for training activities undertaken by employees who were not otherwise scheduled to work, and by not paying time and one-half for hours actually worked while in call-back status, the Town violated the collective bargaining agreement and therefore committed a violation of Sec. 111.70(3)(a) 5, Wis. Stats.

3. By paying pager pay at straight time, the Town did not violate the collective bargaining agreement and therefore did not commit a violation of Sec. 111.70(3)(a) 5, Wis. Stats.

4. By issuing the Union Contract Implementation document, the Town did not violate Sec. 111.07(3)(a) 3 or 7, Wis. Stats.

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

ORDER

1. The Town of Brookfield shall immediately cease and desist from enforcing those terms in the Union Contract Implementation document which set a 40-hour per workweek maximum as the limit for which employees of its Fire Department may bid and receive shifts.

2. The Town shall pay employees time and one-half for hours actually worked while on call-back status and for training activities undertaken when an employee would not otherwise be on duty.

3. The Town shall make employees whole by paying them the amount it improperly withheld by the violation noted in Conclusion of Law 2, retroactive to January 1, 1998, plus twelve percent (12%) interest as specified in Sec. 804.14(4), Stats

4. The Town shall post in the place where employee notices are customarily kept the attached Notice, maintaining such notice for not less than 30 days.

5. The complaint as to violations of Sec. 111.70(3)(a) 3 and 7, Wis. Stats., are dismissed.

6. I shall retain jurisdiction in this matter to resolve any disputes that may arise over the application of the remedies contained in this order, such jurisdiction to lapse on August 1, 20001, unless prior to that time either party requests in writing that I continue to retain jurisdiction.

Dated at Madison, Wisconsin this 1st day of June, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart Levitan /s/

Stuart Levitan, Examiner

TOWN OF BROOKFIELD (FIRE DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

In support of its complaint, the union asserts and avers as follows:

The Town's "Union Contract Implementation" (UCI) directly conflicts with arbitrator Stern's award and the parties' collective bargaining agreement, and therefore constitutes a violation of secs. 111.70(3)(a) 5 and 7. In particular, sections 3-3 and 3-4 of the UIC contradict the clear language of section 16.11 of the collective bargaining agreement in their restriction upon bargaining unit members of bidding for no more than 40 hours each workweek, contrary to the contract's provision that "bargaining unit personnel may bid as few or as many shifts as desired." By restricting the number of hours bargaining unit personnel may bid to 40, the Town has ignored and modified the clear language of the parties' agreement and thereby committed a prohibited practice within the meaning of sec. 111.70(3)(a) 5.

The Town has also violated the agreement by including in the 40-hour maximum hours spent in scheduled training or on pager pay for those evenings when an employee is on the duty crew; nothing in the agreement permits the Town to include these hours in the bid-maximum. As there is no limit on the number of hours an employee can bid, there can be no requirement that pager pay or training hours be included in some unilaterally implemented maximum.

The plain and unambiguous language of the agreement places no limit on the number of hours an employee may bid to work. To the extent that the UCI contradicts the clear language of the collective bargaining agreement, it constitutes a prohibited practice in violation of Sec. 111.70(3)(a)5, Stats.

Further, the Town is attempted to unilaterally implement its final offer at interest arbitration which was rejected by the arbitrator. Except for the change from 38 hours to 40 hours, the Town's final offer at interest arbitration is identical to section 3-3.2 of the UCI. It is well established that a party cannot gain at arbitration what it could not secure in bargaining, and the Town should not be allowed to obtain through its unilateral implementation of the UCI what it could not secure in arbitration.

The Town was unsuccessful in bargaining and arbitration both in limiting the number of hours an employee may bid each week and in counting two hours pager pay and all training time towards such a limit. To implement these restrictions contrary to the arbitration award and implementation of the collective bargaining agreement constitutes a prohibited practice in violation of sec. 111.70(3)(a) 5 and 7, Wis. Stats.

Further, the management rights article does not grant the Town the tight to modify the agreement, in that the management rights clause is limited by the express terms of the agreement. As those terms of the agreement make clear, the Town has no right to set a cap on the number of hours an employee may bid, nor to define what constitutes such hours, nor define how overtime is paid on hours outside the normal bid shift hours. The Town's failure to abide by the express terms of the agreement constituted a prohibited practice.

The Town is also violating sec. 111.70(3)(a)5, Wis. Stats., by failing to pay overtime on all hours in excess of the scheduled bid shift hours. The collective bargaining agreement clearly states that all work "in excess of scheduled bid shift hours" and all work in excess of forty hours per week are paid at the rate of time and one-half. Yet the Town has only paid overtime for hours in excess of forty hours per week and all hours *after the end of an employee's shift*, not all hours *in excess* of the shift. Under the collective bargaining agreement, any hours which fall outside the employee's scheduled bid shift hours, including training and call-backs, are hours which are compensated at time and one-half. The Town clearly recognized this, and argued against it at the interest arbitration proceeding specifically on those grounds; Arbitrator Stern, also understanding the ramifications, ruled against the Town's position. The Town may not now refuse to abide by the clear language of the collective bargaining agreement and the arbitration award simply because it is unhappy with the language.

By its consistent refusal to abide by the clear language of the collective bargaining agreement and the arbitration award, the Town of Brookfield has committed prohibited practices in violation of Secs. 111.70(3)(a) 5 and 7, Wis. Stats. The examiner should find such violations, order the Town to cease and desist from further violations, and order the Town to immediately implement Arbitrator Stern's award. The Examiner should also order that all affected bargaining unit members be made whole for the Town's failure and refusal to pay overtime on all hours worked in excess of scheduled bid shift hours.

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

> Under the provisions of the collective bargaining agreement, it is clear that a scheduled bid shift is either a day shift or a night shift for which the employee has submitted a bid to work on a monthly basis. If the scheduling manager assigns the employee to work the shift for which the bid was submitted, taking into account the requirement to assign employees based on a seniority basis, the resulting assignment is a "scheduled bid shift." The employer's obligation to pay overtime, as required by section 16.14 of the agreement, is also clear, and covers all work "in excess of" scheduled bid shift hours, and all work in excess of 40 hours per week.
>
> The phrase "in excess of" scheduled bid shift hours clearly and unequivocally refers to those hours immediately preceding, or immediately following, a scheduled bid shift. That is, an employee who bid on, received and worked a night shift whose tour of duty ended at 8:00 a.m. and who responded to a call at 7:30 a.m. and continued to work until 10:00 a.m. would receive time and one-half for the two hours in excess of the scheduled bid shift hours, namely from 8:00 to 10:00. Applying the plain and unambiguous language of the contract, there can be no other conclusion.
>
> Further, the Town has the right to control overtime hours. While there is no question but that the contract obligates the employer to assign bids on a seniority basis, the Town has the right, by virtue of the contractual management rights clause, to control the amount of overtime work by employees. Specifically, the contract provides that the employer's management rights include, but are not limited to, the right to "establish work rules and schedules of work," and to "direct the employees, assign work and overtime." These rights are not limited or otherwise restricted by any other contract provision; while an employee may submit a request for shifts pursuant to the bidding process, there is no contract provision which obligates the Town to accept those bids. Indeed, the only contractual commitment of the Town with respect to the assignment of requested shifts is that the seniority basis by followed when two or more employees have requested, or submitted bids, for the same shift.

This interpretation is supported by the provision which grants the Fire Chief the authority to designate a "Schedule Manager" to manage the in-house staffing schedule and "assign shifts from the bids submitted." The delegation to the Schedule Manager to assign shifts indicates that the Town has retained the discretion to fill the bid request, subject only to the commitment to honor the seniority clause of the contract when that clause is applicable.

The language of the contract clearly and unequivocally substantiates the Town's interpretation of the contract. Overtime is required to be paid for those hours "in excess of" scheduled bid hours, but not "for those hours other than" scheduled bid shift hours, as was argued by the Complainant at hearing. Further, the Town's right to assign work and control overtime is not restricted, and the Town is not obligated to fill the bid shift request where the request, if approved, would violate a legitimately enacted work policy established by the Town Board for the purpose of controlling Department overtime payments.

In response, the union posits further as follows:

The Town's interpretation of the provisions of the collective bargaining agreement regarding overtime ignores the clear language and has no merit. The clear language supports the interpretation that overtime must be paid for *any* work that is not part of the employee's scheduled bid shift, regardless of when the work occurs. The plain language grants overtime for all work in excess of scheduled bid shift hours, not simply work which follows the end of a scheduled bid shift.

Even if the language is found ambiguous, the Union interpretation must still prevail because bargaining history supports its position. As the record of the interest arbitration shows, the Town argued that the Union proposal would force it to pay overtime routinely. This bargaining history illustrates that both parties understood that the language now in the collective bargaining agreement would entitle employees to overtime for all work outside of scheduled bid shift hours, including training and pager pay.

Further, the Town must not be allowed to implement its final interest arbitration award under the guise of management rights. Except for the change from 38 hours to 40 hours, what the Town is seeking to implement through its UCI is exactly what it sought, unsuccessfully, in its final offer at interest arbitration. This attempt at unilateral implementation violates MERA and cannot be sustained. The terms the Town is attempting to impose were never agreed to and were not incorporated into the parties' final agreement.

Accordingly, the Union's complaint must be sustained and the Town ordered to cease and desist from its unlawful practices and make whole all employees unjustly affected.

In its response, the Town posits further as follows:

The Union's brief indicates that it has "flip-flopped" on a central issue, and has now taken the position that it is the prior arbitration award that controls; at hearing, it took the position that it was the collective bargaining agreement that controlled. Simply stated, this position has no merit, in that the arbitration award did not address the issue of whether the Town could, by exercise of its management rights, limit the amount of overtime work. In his award, the arbitrator specifically declined to decide this issue. Contrary to the Union's position, the award did not resolve the issue of whether the Town could establish working hours and limits its overtime payments. Moreover, the clear and unambiguous language of the collective bargaining agreement allows the Town to establish working and overtime conditions, which it did through the proper exercise of its management rights.

Further, the Union errs in seeking to have the examiner rewrite the contract so as to require the Town to pay overtime for any hours "other than" scheduled bid shift hours. The collective bargaining agreement, however, provides only that the Town pay overtime for any hours "in excess of" scheduled bid shift hours.

The Union's argument is wrought with inconsistencies and contradictory interpretations which should be rejected. Scheduled bid shift hours are full shifts which run from 8:00 a.m. to 6:00 p.m. and 6:00 p.m. to 8:00 a.m.

DISCUSSION

In its complaint, the union alleged that the town committed five prohibited practices – that the town's failure and refusal to pay proper backpay according to the Stern award constituted a prohibited practice under Sec. 111.07(3)(a)7, Wis. Stats., and that the town's use of the Union Contract Implementation plan, its unilateral change to the workweek 1/, its refusal to pay employees time and one-half for all work in excess of scheduled bid shift hours, and its policy of counting training hours toward the maximum of forty (40) bid shift hours all constituted prohibited practices under Sec. 111.07(3)(a) 3 and 5, Wis. Stats.

1/ The issue of unilateral change to the workweek was resolved by hearing and not further pursued by the union.

The complaint as to Sec. 111.07(3)(a)3

Section 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to "encourage or discourage a membership in any labor organization by discrimination in regard to . . . tenure or other terms or conditions of employment." It has been well-settled for over thirty years that, to prove a violation of this section the Complainant must, by a clear and satisfactory preponderance of the evidence, establish that:

1. Complainant was engaged in protected activities; and

2. Respondents were aware of those activities; and

3. Respondents were hostile to those activities; and

4. Respondents' conduct was motivated, in whole or in part, by hostility toward the protected activities. 2/

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

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

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

will not be encouraged or tolerated. EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS. 2D. 132, 141 (1985).

Here, the record is absolutely devoid of any evidence at all concerning the critical components three and four above. There was no testimonial or documentary evidence that the respondents were hostile to the complainant's concerted activities. There is no evidence that the respondents were motivated, in whole or in part, by such hostility. Indeed, after including this allegation in its complaint, the union seems to have abandoned this theory, and presented no argument on this point in its brief. Given the total lack of any evidence at all supporting two necessary components – components the complainant must establish by a preponderance of the evidence – I have found no violations of Sec. 111.70(3)(a)3, and have accordingly dismissed those aspects of the complaint.

The complaint as to Sec. 111.70(3)(a)5, Wis. Stats.

Pursuant to sec. 111.70(3)(a)5, Wis. Stats., it is a prohibited practice for a municipal employer to "violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment" affecting municipal employees. While grievance arbitration is the generally accepted way to evaluate claims that an employer has violated terms of a collective bargaining agreement, the Union has here invoked the Commission's jurisdiction and the employer has neither objected not demanded referral to arbitration. CITY OF MILWAUKEE (POLICE SUPERVISORS), (Levitan, 11/2000); GREEN BAY POLICE, (Neilsen, 7/1999). Accordingly, I will evaluate the complaint on its merits.

Evaluating a (3)(a)5 complaint requires that I review the employer's actions as a grievance arbitrator would, to determine whether the employer violated the terms and conditions of the collective bargaining agreement.

By adopting section 3-4.1 of the Union Contract Implementation (UCI), the Town has ordained that employees "may not bid for a shift if their total hours for the workweek will exceed 40 hours during the shift." The union contends this violates section 16.11 of the collective bargaining agreement, which states that bargaining unit personnel "may bid as few or as many shifts as desired," provided the shift requests are for full shifts.

The Town's primary defense is that it has the right, pursuant to the management rights clause of Article 4, to control the overtime work of employees. It also argues that the Schedule Manager has the discretion to fill (or reject) bid requests, subject only to the commitment to honor seniority "where that clause is applicable." The town's attorney made clear at hearing why the town adopted 3-4.1 and the related clauses – "to establish a policy which essentially controls overtime that the fire fighters can work."

The employer is correct that it has the residual right, pursuant to sec. 4.01(5) to "direct the employees, assign work and overtime." However, as the employer acknowledges, that right is limited "to the extent such functions and rights are restricted by the terms of this Agreement."

One of the terms of the agreement is Section 16.11. That clause empowers employees to bid "as few or as many shifts as desired…." I find no way that the phrase "as many shifts as desired" can coexist with the employer's unilateral imposition of the 40-hour cap. When a residual management right directly conflicts with an explicit term in the agreement, the explicit term prevails.

I also reject the employer's contention that the schedule manager has the authority to decline to assign a shift where such an assignment would generate overtime. Pursuant to Sec. 16.05, the schedule manager "will assign shifts *from the bids submitted."*(emphasis added).

The employer has described the bidding process as the means by which an employee "may submit a request for shifts," and maintains that "there is no contractual language which obligates the Town to accept those bids."

The employer exposes the flaw in its own analysis, however, by acknowledging that the Town *does* have a contractual requirement to follow seniority "when two or more employees have requested, or submitted bids, for the same shift."

The provisions for assigning shifts are neither complex nor difficult to discern, and give a far different understanding of what it means to "bid" on a shift than that which the employer asserts.

Everything about Section 16.04, Selection of Personnel, speaks to the bidding process as being far more than just a process by which an employee, as the employer puts it, "may submit a request for shifts." The paragraph begins by stating unambiguously that "selection of personnel for 'in-house staffing' *shall be by bid* on a monthly basis" (emphasis added). It states that "the monthly bid shall proceed in order of seniority," and provides that any vacant position "*not selected by bid at the close of the bidding process"* shall be filled/offered in seniority order. (emphasis added). It even defines "bid" as meaning "select," in the provision that personnel "can only select (bid)" positions they are otherwise qualified to hold.

Section 16.05 describes the duties and powers of the schedule manager, who "will assign shifts *from the bids submitted."* (emphasis added). It is hard to see how this thought – bids are the basis of shift assignments – could be expressed with any greater clarity. There is nothing in the text of this section which authorizes the shift manager to reject a bid for any reason other than it is for a shift on which a more senior employee has bid.

The clear and unambiguous meaning of Section 16.04, then, is that to "bid" on a shift is to lay claim on that shift, subject only to the conditions that bids must be for full shifts, that split shifts are not allowed, and that, in the case of multiple requests for a particular shift, the employee with greater seniority prevails.

To summarize – staffing "shall be by bid," a monthly process which proceeds by seniority. The schedule manager assigns shifts "from the bids submitted." To "bid" has the same meaning as to "select."

The employer may well feel it is unworkable, even absurd, to have a system where an employee has the right to what is essentially self-generated overtime. Certainly, from the perspective of efficient and economical scheduling, one can sympathize with the town's position. But that is not the issue before me. The issue before me is not which system would be more efficient and economical. The issue before me is whether the terms of the Union Contract Implementation document, section 3-4.1, violates the terms of the collective bargaining agreement by its unilateral imposition of a rule that prevents employees from bidding on a shift if their total hours for the workweek would exceed 40 hours during that shift. It does.

The union further complains that the town committed a prohibited practice by promulgating sections 3-3.2.2 and 3-3.2.2.1 of the UCI, which purport to include in the 40 hours of weekly work for which an employee may bid those hours which are for scheduled training and pager pay. The union argues that if the 40-hour limit itself is a violation of the collective bargaining agreement, then any other element of the UCI further defining and interpreting that 40-hour limit also violates the agreement.

The union is correct in this analysis. Since the 40-hour limit itself violates the collective bargaining agreement, those provisions of the UCI which further define and interpret that limit also do so contrary to the terms of the agreement. As such, their implementation constitutes another prohibited practice.

The union further alleges that the town has committed a prohibited practice by failing to pay time and one-half for time employees spend at training, when they are on the on-call crew (pager pay), and when they are called to respond outside their regular schedule. The union

contends these policies violate the terms of Section 16.14 of the collective bargaining agreement, which provides:

> All work in excess of schedule bid shift hours and all work in excess of forty (40) hours per week shall be paid at the rate of time and one-half (1-1/2) of the employee's applicable hourly rate of pay.

The parties agree that hours spent on-duty which are an extension of a shift gets time and one-half for those additional hours. That is, when an employee whose shift ends at 6:00 a.m. works till 9:00 a.m. because of a fire call, those additional three hours are at time and one-half. Where the parties disagree is the treatment of pager pay, training hours outside of bid shift hours and call-backs. The union says these hours are also at the overtime rate; the employer asserts that they are at straight time (except that all hours worked at more than 40 hours per week are at the overtime rate of time and one-half).

The collective bargaining agreement contains explicit provisions on two of these aspects. Section 16.11 provides that employees "shall hold themselves available" for work as per past practice "provided however that each employee shall receive two (2) hours pay (pager pay) *at the employees (sic) applicable hourly rate of pay per day served in addition to all hours worked* and, when applicable, pay received" under Section 16.15 of the agreement. (emphasis added). Section 16.15 provides that "any employee who responds to calls outside of their regular schedule will be paid a minimum of two (2) hours pay." There are no terms in the agreement specifically addressing the issue of training.

At hearing and in its brief, the town put great emphasis on the fact that the union on occasion referred to hours as being "outside" the scheduled bid shift hours, when in fact the collective bargaining agreement (sec. 16.14) provides for overtime for all work "in excess" of scheduled bid shift hours. Frankly, this seems a difference without a distinction, and for the purposes of this analysis, I find that "outside" the scheduled bid shift hours is the functional equivalent of "in excess" of the scheduled bid shift hours.

The town frequently provides training on Monday evenings, requiring personnel who would not otherwise be on duty to be present and participate. For those employees who are not otherwise on duty at that time, such training activities constitute "work in excess of scheduled bid shift hours." Pursuant to Section 16.14, these hours are to be compensated at time and one-half.

At times of exigent or emergency situations, personnel working "in-house" may be supplemented by two other sets of employees – those who are assigned to a duty crew (on crew call) may be mandated to report to assist, while those who are not on-call may be asked to report if they are available. For either group, section 16.15 provides a minimum of two hours

pay, regardless of how much time is actually worked. Because any time actually worked while in call-back status constitutes "work in excess of scheduled bid shift hours," the terms of Section 16.14 require that all time actually worked while in call-back status be compensated at time and one-half.

As noted, the text of Section 16.14 shows that the parties were able to specify the pay rate under certain circumstances as time and one-half. That makes it very telling that the text of Section 16.11 pegs pager pay at the employee's "applicable hourly rate of pay," meaning straight time. The fact that the collective bargaining agreement includes the specific detail of the rate of pay for such work, but pointedly does not set it at time and one-half, leads me to conclude that the parties intended this activity to be compensated at straight time. Given that the drafters have been shown to be familiar with the concept and phrase "time and one-half" for certain situations, their explicit use of the phrase "applicable hourly rate of pay" must mean that they did not mean for the activity of being on the duty crew, in and of itself, as triggering the overtime provisions.

As to remedy, I have ordered the town to make whole, with interest, the employees who did not receive the rate of time and one-half for training activities when they were not otherwise scheduled to work and/or for hours actually worked while in call-back status. This calculation is to be retroactive to the first day of the collective bargaining agreement, January 1, 1998.

I have not ordered an economic remedy for the town's past violation of the terms of the collective bargaining agreement relating to the number of shifts for which an employee may bid. Given the general nature of scheduling for protective services, and the specifics of this controversy, I do not believe it is possible to determine an accurate assessment of the economic impact of the town's past violation. This evaluation, however, does not excuse the town from future economic liability in the event of recurring violations of the collective bargaining agreement.

The complaint as to Sec. 111.70(3)(a)7, Wis. Stats.

The union has also alleged that the town's various acts were undertaken in violation of Sec. 111.70(3)(a)7, Wis. Stats., which makes it is a prohibited practice for a municipal employer to "refuse or otherwise fail to implement an arbitration decision lawfully made under sub. (4)(cm)."

The town, however, has not refused or failed to implement the Stern award. The fact that the UCI constituted an *improper* means of implementing the Stern award is far different from finding that the town *refused* to implement the award. The town has implemented the

Stern award, albeit in an improper manner. That is why I have found that the town violated Section (3)(a)5, and dismissed the complaint as to (3)(a)7.

Dated at Madison, Wisconsin this 1st day of June, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart Levitan /s/

Stuart Levitan, Examiner

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NOTICE TO ALL EMPLOYEES

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

1. WE WILL NOT violate the terms of the collective bargaining agreement currently in force between the Town and Teamsters Local Union 695.

2. WE WILL NOT enforce those terms in the Union Contact Implementation document which set a 40-hour per workweek maximum as the limit for which employees of the Fire Department may bid and receive shifts.

3. WE WILL pay employees time and one-half for hours actually worked while on call-back status and for training activities undertaken when an employee would not otherwise be on duty. Payments for time already worked are retroactive to January 1, 1998, plus interest at twelve percent (12%) annually.