

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO,
AND ITS AFFILIATED LOCAL 882, Complainant**

vs.

MILWAUKEE COUNTY, Respondent

Case 505
No. 59924
MP-3735

Decision No. 30179-B

Appearances:

Mr. Kenneth J. Murray, Podell, Ugent & Haney, S.C., Attorneys at Law, 611 North Broadway, Suite 200, Milwaukee, Wisconsin 53202-5004, for the Complainant.

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, for the Respondent.

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

On May 7, 2001, Local 882, affiliated with the Milwaukee District Council 48, AFSCME, AFL-CIO (“the Union”) filed a complaint with the Wisconsin Employment Relations Commission alleging that Milwaukee County (“the County”) had violated Sections 111.70(3)(a) 1, 2 and 5, Wis. Stats., and committed various prohibited practices in its administration of certain leave and vacation policies affecting maintenance workers at General Mitchell International Airport. The County denied the allegations. Hearing in the matter was held in Milwaukee, Wisconsin on July 25, 2001, before Hearing Examiner Stuart D. Levitan, a member of the Commission’s staff. At that time, I ruled that, due to the availability of grievance arbitration in the parties’ collective bargaining agreement, the Commission did not have jurisdiction over those elements of the complaint that alleged a violation of the collective

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bargaining agreement and thus did not have the authority to provide the relief sought under paragraph E1 of the complaint. Following ancillary litigation concerning certain evidentiary matters, the Union and County filed written arguments on December 3 and 4, 2002, respectively. The Union filed a reply brief, while the County on January 27, 2003 waived its right to file the same. On April 8, 2003, I wrote the parties to pose three specific questions concerning the pleadings and other substantive matters. That letter went unanswered, as did my correspondence dated June 30 and July 29. On September 9, 2003, on behalf of himself and Atty. Murray. Atty. Schoewe wrote to inform me that "it is the view of both counsels that the major, primary underlying issue is ripe for determination without further briefing." Based on the record evidence and the arguments of the parties, the undersigned hereby issues the following

FINDINGS OF FACT

1. Local 882, affiliated with Milwaukee District Council 48, AFSCME, AFL-CIO, is a labor organization with offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin.

2. Milwaukee County is a municipal employer with offices at 901 North Ninth Street, Milwaukee, Wisconsin.

3. Among its general government activities, the County operates General Mitchell International Airport (GMIA). Among the ranking County supervisors and managerial personnel at GMIA are James Kerr, Deputy Airport Director for Operations and Maintenance; Mark Winkelmann, Airport Maintenance Manager; Scott Kreiter, Airport Maintenance Assistant Superintendent; Christopher Lukas, Airport Maintenance Supervisor and John Sifuentes, Airport Assistant Maintenance Supervisor. The County and the several airlines at GMIA have entered into contracts which establish the rates and amounts the airlines pay and the services the County provides. By these contracts, the airlines effectively hold significant authority over both the operating and capital GMIA budgets. Due to recent losses, the airlines have refused to allow the airport to raise rates of charges, and Kerr has declined to formally propose new positions requested by Winkelmann because he was convinced the airlines would not approve them.

4. Because of the exigencies of maintaining an airport in a northern climate, the County has promulgated work rules which differentiate between winter and non-winter months in setting the number of maintenance personnel who can be on authorized vacation and leave. Duly promulgated work rules provide that during the period Nov. 1 to April 1, only one person per crew will be permitted to be off on any authorized time during any 24 hour period, with additional leaves subject to approval by a management designee. The work rules also provide that during the remainder of the year, a maximum of ten employees per week may take

vacation time, with management reserving the right to limit additional unscheduled leave to seven workers per shift. Notwithstanding the work rule limit that only one maintenance employee per shift would be permitted leave during the November-April winter maintenance season, the County had routinely, over an extended period of time, exercised its discretion to allow leave for additional personnel per shift. Airport maintenance workers who sought time off on less than 30 days notice during the winter season (November 1-April 1) would submit requests to Lukas for "unscheduled" leave, which Lukas would consider and act upon on a day-to-day basis, based primarily on weather and workload. Testimony differed on the number of personnel granted "unscheduled" leave during the winter season; Union witnesses testified that as many as 17 employees per shift were routinely allowed off; County witnesses said the number may on occasion have hit double figures, but that generally no more than a handful were off, if that many. No documents or other evidence beyond witness testimony was put into the record on this point. Notwithstanding the usual practice of allowing additional personnel off on "unscheduled leave," Lukas had already restricted unscheduled leave to one worker per crew on several occasions during the 2000-2001 winter season, including instances when he canceled all vacations and ordered off-duty workers to report, in order to meet workload demand. Lukas was also aware that earlier in the winter, Department of Public Works human resources manager Doris Harmon had written to Winkelmann to express concerns that employees were carrying over an excessive amount of vacation from the summer into the winter season.

5. On October 27, 1998, the then-Director of Labor Relations for Milwaukee County, Henry H. Zielinski, wrote to Mr. Stu Swessel, President of Local 882, as follows:

As a result of the conversation we had on 10/26/98, I agreed that the proposed Airport Collateral Agreement could be further amended by striking the following sentence contained in the GMIA Work Rules, Exhibit C, II. The sentence to be struck is, "All policies and practices in the employee workrules are subject to change, and the workrules should not be taken as a contractual agreement."

In addition, I agreed that one year from ratification of this agreement by the parties, the parties could sit down and review the impact of the Attendance Policy as it relates to the Airport Maintenance Workers contained in Exhibit C. In addition, the union is free to raise it during negotiations for a successor agreement.

The above reflects the agreements made by yourself and me on 10/26/98. If you disagree, please advise.

6. On December 16, 1998, Zielinski sent the executed collateral agreement between the County and Local 882 to several management officials at GMIA, with the directive to “take the necessary action(s) to implement said agreement.” As transmitted, the collateral agreement contained the sentence which Zielinski informed Swessel was being stricken in his letter of October 27. On January 7, 1999, Airport Maintenance Manager Mark Winkleman distributed to Airport Maintenance Workers and Airport Maintenance Workers, In-Charge a new work rule booklet, with the changes resulting from the Collateral Agreement effective December 27, 1998. The workers were directed to complete, sign and return an acknowledgement of receipt of the document by the close of business on January 15.

The Work Rules contain the following provisions:

VACATION, ACCRUED COMP, ACCRUED HOLIDAY TIME

1. Vacations shall be granted according to the memorandum of agreement.

...

- B. All employees are required to take their vacations between April 1 and November 1, because of winter maintenance requirements.
- C. After October 5, management reserves the right to schedule unused vacation for the remainder of the year.
- D. During the airport winter maintenance season, Nov. 1 to April 1, only one person per crew will be permitted to be off on any authorized time during any 24 hour period. However, additional employees may be granted time off with approval of the Maintenance Superintendent, or management designee.

...

2. Management will regularly allow preference for vacation dates on each crew based on bargaining unit seniority in the following manner:
 - A. All vacation request forms must be submitted no later than April 1.

- B. A maximum of 10 employees per ddweek may take vacation time (requested before April 1st) from April 1 – November 1.
- C. Vacation requests submitted after April 1 for unused vacation may be granted in order of the date received.

WINTER MAINTENANCE SHIFT ARRANGEMENT

...

CONDITIONS

- A. Employees are required to have a properly operating telephone at their home (at their expense) so they can be reached and told to report for emergency work during off hours.
- B. During the winter maintenance season, each Airport Maintenance Division employee working in winter maintenance crews is expected to be available for work. If the employee is not going to be at home for an extended period of time he/she must inform his supervisor, or the Operations Department, and leave a properly operating telephone number where he/she can be reached. It is expected that each employee will report for work when called in for winter maintenance work.
- C. Each employee shall call his/her supervisor or Airport Operations be(sic) 7:30 AM for the day shift and 11:00 PM for the night shift on regular work days if he/she cannot report for work because of illness or any other reason, or the employee may be marked absent for the day. Failure to call may subject the employee to progressive steps on discipline up to and including discharge.

7. Between March 12 and March 15, 2001, the Union filed five grievances alleging that the County was violating the terms of the parties' collective bargaining agreement by failing to offer overtime opportunities to employees who were on vacation at the time the need arose. Those grievances were processed in accordance with the terms of the collective bargaining agreement between the parties, which provides for final and binding arbitration of disputes arising thereunder. The ranking GMIA supervisors and managers identified in

Finding of Fact 3 were aware of the grievances upon their filing, or in the immediate aftermath.

8. There was measurable snowfall essentially every day from December 10 to December 31, 2000, placing the airport maintenance crews in almost continuous snow-removal duties. Due to the greater-than-normal need for personnel to be assigned to snow removal, the County was unable to attend to all general and special maintenance activities. In mid-March, Lukas conveyed his own increasing concerns over staffing and scheduling to Winkelmann, who on March 15 directed him to adhere strictly to the "one man off" policy for the rest of the winter season. Winkelmann neither provided Lukas a memorandum nor any other written correspondence expressing the new policy, nor provided a memo for his distribution to the Union and employees. Effective the remainder of the winter maintenance season, namely March 16 to April 1, Lukas followed Winkelmann's directive and only released one maintenance worker per crew for unscheduled leave. Lukas also conveyed that directive to supervisory staff working under him.

9. Around noon on the 15th, Lukas went to the small equipment shop to tell Charles Staszewski, steward for Local 882, about the new policy. Lukas told Staszewski he had been directed by Winkelmann to operate on the "one man off" per shift policy through the remaining two weeks of the winter maintenance season. Lukas did not provide to Staszewski any written correspondence or memo, either from himself or other airport officials, stating and explaining the new policy. Lukas and Staszewski gave conflicting sworn testimony about their exchange. Staszewski testified that Lukas said, ". . .because of all these grievances about this overtime issue and because of what I'm getting from my bosses, I'm going to have to . . .invoke the policy as written in the work rules (of) . . .one man off per crew per day." Lukas affirmatively denied he had made any such statement, testifying that, "I explained to him (Staszewski) that due to staffing problems that I've encountered through the winter, discussions I had with Mr. Winkelmann on the topic, other influences, factors that had fallen in and the difficult I had when I did cut back to one person, and the jobs on the forefront that I was intending and. . . discussions with Mr. Winkelmann that we would go strictly with the one approved only for the duration of the following two weeks." There is no evidence Lukas told Staszewski he expected him to communicate the new policy to the rest of the work force, and Staszewski did not do so.

10. On March 16 and 30, 2001, Staszewski submitted requests to use 4.5 hours of vacation and compensatory time off, respectively. Pursuant to the directive from Winkelmann, the respective requests were denied by Sifuentes on March 19 and Lukas on March 28.

11. For the period March 5-March 16, 2001, there were 28 workers on the first shift (21 Monday-Friday, the rest Thursday-Monday). Out of over 250 separate work

assignments, fewer than ten dealt with conveyor maintenance. Starting on March 19, four employees were assigned to conveyor maintenance each day for two weeks, for 40 separate assignments.

12. The sudden and unexpected imposition of the new “manage-to-rule” policy caused significant disruption to several members of the bargaining unit, who had already scheduled important and time-sensitive personal activities for leave that had already been approved, or which they could reasonably expect would be approved. Workers so affected found out about the new policy on a sporadic basis over the next several days.

13. On March 19, Kerr, Winkelmann, Kreiter, Lukas, Staszewski and Union president Tim Allen met to discuss workload, scheduling and cost issues, including the new policy of managing-to-rule the vacation policy March 16-April 1 and the potential impact of the many grievances then outstanding. No minutes were made of this meeting. At this meeting Kerr commented on the potential economic impact of the grievances, especially the higher operating costs that would result if the union prevailed on the overtime grievances. At no time either in preparation for that meeting, at that meeting, or subsequent to that meeting, has the County provided the Union and workforce any written statement regarding the nature and explanation of the new policy of managing vacation policy to rule March 16-April 1.

14. At the time of hearing, the workload situations that arose out of the weather conditions in December 2000 had been addressed, and the discretion to grant unscheduled vacations in a manner consistent with the permissive practice that had been in place prior to Winkelman’s decision to manage the vacation policy to rule from March 16-April 1, 2001 had been returned to Lukas, so that Winkelman anticipated that, barring emergency, more than one worker would be able to get off on any particular day during the coming winter maintenance seasons.

15. The County’s decision to manage the vacation policy to rule March 16-April 1, 2001 had a reasonable tendency to interfere with the employee’s exercise of their statutory rights to join, form and/or assist a labor organization.

16. The County had a valid business reason for managing the vacation policy to rule March 16-April 1, 2001.

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

CONCLUSION OF LAW

Because it had a valid business reason to limit unscheduled vacation to one employee per shift from March 16-April 1 2001, the County did not interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sec. 111.70(3)(a)2, Wis. Stats., and thus did not violate either that statute or sec. 111.70(3)(a)1, Stats.

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

ORDER

That the complaint filed in the instant matter be dismissed in its entirety.

Dated at Madison, Wisconsin, this 3rd day of November, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart Levitan /s/

Stuart Levitan, Examiner

MILWAUKEE COUNTY

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

POSITIONS OF THE PARTIES

In support of its position that the complaint should be sustained, the Union asserts and avers as follows:

The ultimate issue is whether management's decision to impose a one-man per crew rule when considering requests for unscheduled, but earned time-off was intended to coerce the union into abandoning five grievances which had been filed in the four days prior to management's adoption of the new policy.

The circumstances of employee requests for unscheduled days off and the unprecedented rejection of their requests were imposed regardless of staffing requirements. They also testified to statements made by various members of management relating the rigid imposition of the rule to the filing of the five grievances. Predictably enough, management uniformly denies that any of the statements allegedly made by them had ever been uttered.

Contrary to management's assertions, there was no urgent carousel repair work performed during the time in question; no work orders were produced carrying management's burden to show that the impact of high priority demands on staffing precluded permitting any exception to the one-man per shift rule.

In denying time off, management relied on a work rule that expressly provides that "only one person per crew will be permitted to be off...However, additional employees may be granted time off ..." Implicit in the authorization to grant additional employees off is that discretion would be exercised. An arbitrary decision based on a rigid, self-serving interpretation of what was intended as a flexible standard is not the exercise of discretion, but an abuse of discretion. Such an abuse of discretion is a violation of the implicit right of the employee to rely on a reasonable exercise of the power management reserved for itself.

Certainly, the rule literally applied, as limited to one-man per crew, was not intended to provide management with a weapon to compel its employees to yield to management demands and forego the contract right they have to file grievances.

Management's arbitrary imposition of the one-man per shift rule made routine housekeeping assignments a staffing imperative. Their pious declarations in this regard does not meet the smell test, and poisons efforts to establish and maintain good labor relations between the parties.

The complainant has met its burden in establishing that the alleged prohibited practice occurred. There was the extraordinary coincidence of the filing of the grievances in the several days prior to the summary and rigid implementation of the one-man rule; the history of the application of the work rule; the stark contrast between management's official position in their answer and the meandering obfuscation they placed on the record in a failed attempt to rationalize their action; and the failure to support their position with documentation at the hearing and the inexplicable post-hearing assertion that the subpoenaed records did not exist when their sworn testimony asserted that the records in question were kept by management and catalogued.

In support of its position that the complaint should be dismissed, the County asserts and avers as follows:

By stating that the question at hand was whether management used coercive and intimidating tactics to discourage the union members from filing grievances, the union has restricted its complaint and effectively abandoned the claims of contract violation and/or union domination.

The Union complaint attributes certain statements to Chris Lukas. But the fact is those comments did not even occur. The record is clear. There is no evidence of any such statement imputed to Lukas. The entirety of the claim hinges upon connecting the Lukas statement with the supposed change in practice. Since one thing did not happen, there can be no cause and effect. Further, the second part of the equation, change in practice did not happen either. The claims fails.

The Union has asserted that a long standing past practice was somehow vitiated. This bears no relevance to the charges at bar, nor is it true. The labor agreement controls. The alleged past practice here is not one that meets the common definition. And even if there were a past practice, it cannot contradict the clear language of the agreement or interfere with the county's carrying out its responsibilities. The labor contract reserves to the county the right to assign, schedule and mobilize the work force appropriate to the task. There was no past practice.

The Union further claims that unidentified employees were denied requested liquidation of vacation time when no weather or other emergency facts were evident. If true, this is of no moment. The scheduling of time off is governed by work rules. The work rules and their legitimacy are not and have not been challenged in this or any other forum. These rule provide the basis for considering of time off – driven not only by weather but also chiefly by departmental workload. Management merely applied the work rules as agreed to in the collateral and reserved to it in the collective bargaining agreement.

The Union alleges that certain statements attributed to Jim Kerr somehow had a chilling effect on filing grievances. The Union presented no evidence as to the number of grievances filed before or after this purported statement. Further, no witness ever claimed any chilling effect.

The Union alleges that John Sifuentes made to statement to Mark Genske. The facts prove otherwise, namely that Genske himself made the statement.

The Union case fades in the clear light of the record. The Union's own witnesses contradict the allegations of the complaint.

The argument as to past practice is just that – argument which has nowhere been proved up. The evidence is that past practices were abolished by the union agreement to the collateral agreement and subsequent work rules.

There is no evidence in the record that any action was retaliatory as to any protected conduct. Scheduling went on as before. No change in staffing is claimed or shown except as dictated by weather and staffing requirements.

Even Union witnesses could not confirm with clarity the supposed statements by Kerr regarding the so-called chilling effect.

In response, the Union posits further as follows:

The County's statement of the case is substantially flawed, in that the county witnesses themselves testified that the union was not notified of the change. Also, the collateral agreement contains the "smoking gun" in this matter.

The Union based its complaint on the coincidence of the filing of five grievances regarding overtime and seniority issues and the resulting response of the County

to terminate a past practice that permitted more than one-man-per crew to use available off-days in the absence of inclement weather or emergency factors.

The work rules transmitted to union members did not contain a provision abolishing past practices as a limitation on the County's right to schedule work. However, the work rules as distributed to the Union did not include the modification made by the county's labor relations director in a letter incorporated into the final, executed collateral agreement.

Failure to follow the established past practice or request bargaining to make a change was, by itself, a prohibited practice. Had the local been aware of the amendment and its implications, their complaint would/could have included it as a specific allegation.

The County argues that a past practice has not been established. Based on the extensive record, this is a specious argument.

The County argues that there is no proof that the implementation of the one-man-per-crew rule was in retaliation for the filing of the multiple grievances in the several days before management adopted that portion of the rule as an inflexible mandate. This is a fact-based question and will turn largely on the credibility of the witnesses and the circumstantial evidence, such as timing, absence of documentary proof of emergency factors, etc. These considerations are the exclusive province of the examiner.

The County baldly asserts that the sworn testimony of union witness Staszewski does not support the allegation because the statement imputed to management official Lukas could not have been made as alleged by Staszewski. The County's assertion is based on a misreading or a deliberate distortion of the testimony, in that Lukas was indeed at work on the day the alleged statements were said to have been made.

The County's reliance on the collateral agreement as a bar to the complaint is a chimerical supposition in light of the amendment by the labor relations director. The testimony clearly established the past practice applied to the on-man-per-crew rule and the County did not deny either the policy or the practice. It acknowledged both, but claimed an exception not grounded in the collateral agreement or the work rules.

DISCUSSION

On March 15, 2001, management at the General Mitchell International Airport (GMIA) changed an established policy of allowing more than one airport maintenance workers to be off on unscheduled leave, decreeing that until the end of the winter maintenance season on April 1 it would enforce the existing work rule of allowing only one such leave per day. By this action, the Union alleges, the County violated Sections 111.70(3)(a) 1, 2 and 5, Wis. Stats. The County denies the allegation.

Analysis of 111.70(3)(a)5 Complaint

Section 111.70(3)(a)5, Wis. Stats., makes it a prohibited practice for an employer to:

To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement. . . .

The Commission has had a long-standing policy of refusing to assert jurisdiction to determine the merits of breach of contract allegations where the parties' labor contract provides for final and binding arbitration of such disputes and where that arbitration procedure has not been exhausted. JT. SCHOOL DIST. NO. 1, CITY OF GREEN BAY ET AL., DEC. NO. 16753-A, B (WERC, 12/79); BOARD OF SCHOOL DIRECTORS OF MILWAUKEE, DEC. NO. 18525-B, C (WERC, 6/79); OOSTBURG JT. SCHOOL DISTRICT, DEC. NO. 11196-A, B (WERC, 12/79). Given that policy, the availability of grievance arbitration, and the fact that the Union filed grievances relating to the use of paid vacation and compensatory time-off benefits, I dismissed at hearing that part of the complaint alleging violations of Sec. 111.70(3)(a)5, Stats.

Analysis of Alleged Violation of Sec. 111.70(3)(a)1, Stats.

Section 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer:

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

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

(2) RIGHTS OF MUNICIPAL EMPLOYEES. Municipal employes 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.

The statutes thus protect the rights of employees and their union to file and prosecute grievances alleging violations of the collective bargaining agreement.

To establish a claim of interference, a complainant must establish by a clear and satisfactory preponderance of the evidence that the 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 section (2) rights. WERC v. EVANSVILLE, 69 WIS.2D 140 (1975); JUNEAU COUNTY, DEC. NO. 12593-B, (WERC, 1/77). It is not necessary to demonstrate that the employer intended its conduct to have such effect, or even that there was actual interference; instead, interference may be proven by showing that the conduct has a reasonable tendency to interfere with the exercise of protected rights. CITY OF BROOKFIELD, DEC. NO. 20691-A, (WERC, 2/84). If the conduct in question 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 an employee's exercise of Sec. 111.70(2) rights will generally not be found to violate Sec. 111.70(3)(a)1 if the employer had valid business reasons for its actions. D.C. EVEREST AREA SCHOOL DISTRICT, DEC. NO. 29946-L (Burns, 8/03); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84); CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91); CENTRAL HIGH, DEC. NO. 29671-B (Mahwinney, 5/00); 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, DEC. NO. 28650-B (11/96); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 27867-B (WERC, 5/95).

As to the disputed facts, the Union is right on several key points.

As the Union alleges, the record establishes that over an extended period of time, the county applied the duly promulgated work rules to permit several maintenance workers to be off each shift during the winter maintenance season. While the record does not support the union's claim that a full 17 were routinely off, the testimony of three airport managers supports a finding of permissive application of the staffing rules. Winkelmann himself testified

that this episode was the first time in his tenure of about 6 years that he had told Lukas to deny all leave beyond one per crew for the remainder of the winter maintenance season. It was this understanding of the work rules and collateral – the routine approval of daily, unscheduled vacations -- that the parties mutually endorsed on December 27, 1998.

As the Union alleges, the record further establishes that in the immediate aftermath of the union filing five overtime and related grievances, the County unexpectedly and unilaterally adopted a new policy of managing-to-rule and thereafter allowed only one worker off per shift for the remaining two weeks of the winter maintenance season.

As the Union alleges, the record further establishes that County managers and supervisors gave oral presentations to the Union which included references to potential costs attendant on the grievances and other workload and staffing concerns.

Finding these facts does not, however, inexorably lead to the conclusion of law that the County committed prohibited practices.

I believe that management's suspension of an established leave policy in the immediate aftermath of the union filing a series of grievances over hours of work and overtime would have a reasonable tendency to interfere with an employee's exercise of statutory rights. That is, when the Union files five grievances between March 12 and March 15, and management suddenly decrees it will "manage to rule" and deny the kinds of leaves previously granted, it would be reasonable for an employee to infer that management was reacting to the grievances.

Thus, the question now turns to the legitimacy of the employer's "business reason" defense.

The valid business reason defense "is not a complete shield to liability, and the mere ability to articulate a legitimate business reason for an action does not defeat a claim" of interference. STATE OF WISCONSIN (CORRECTIONS), DEC. NO. 30340-A (Nielsen, 8/03). As the Commission has noted in another case involving state employees under a companion statute, it is "clear that the identification of the legitimate business interest in conflict reduction needs to be balanced against the intrusion into statutory rights when we determine whether a statutory violation has occurred." DEPARTMENT OF CORRECTIONS, DEC. NO. 29448-C (WERC, 8/00). The traditional mode of analyzing whether a violation has occurred has involved "a balancing of the interests at stake of the affected municipal employees and of the municipal employer to determine whether, under the circumstances, application of the protections of the interference and restraint prohibitions would serve the underlying purposes of the act. ID. at 22-23. See also, KENOSHA BOARD OF EDUCATION, DEC. NO. 6986-C (WERC, 2/66); RACINE UNIFIED SCHOOLS, DEC. NO. 29074-B (Gratz, 4/98), AFF'D DEC. NO. 29074-C (WERC, 7/98) at pps. 14-15.

In undertaking to weigh the balance as the Commission has called for, I find it useful to first assess the degree of the employer's culpability. That is, the more egregious the employer's interference, the higher its burden of establishing a valid business defense.

At hearing and in its written arguments, the Union has used highly colorful language to describe what it sees as the malicious and malevolent county action. It based its analysis on both the coincidence of timing (the change in scheduling policy took place immediately after the filing of five grievances) and what it said were contemporaneous admissions by county managers. While the facts of the grievances and the change in scheduling policy are easily established on the record, an understanding of the non-written evidence is more difficult to attain.

The Union's complaint highlights three instances in which it alleges that County managers and supervisors made incriminating comments. Because John Sifuentes was not involved in setting the new scheduling policy, and his conversation with Local 882 member Genske took place after the winter maintenance season had ended, I do not consider the Union's allegation concerning his comments to be dispositive. The comments purportedly made by Lukas and Kerr, however, are of high importance, as is the testimony of Winkelman, the actual author of the new policy.

I have discussed the Lukas/Staszewski meeting in Finding of Fact 9, and therein note the underlying conflict in their testimony about that event. The essential question between the Union and County interpretation of this meeting is that between correlation and causation. As recalled by Staszewski and interpreted by the union, Lukas gave a *causal* interpretation of the relationship between the grievances and the new policy. Staszewski testified that Lukas said he was being told to impose the new leave policy "*because* of all these grievances about this overtime issue," testimony which corresponds roughly to paragraph C-1 of the complaint. Lukas denied making the statement in the complaint, but testified that, "I explained to him (Staszewski) that due to staffing problems that I've encountered through the winter, discussions I had with Mr. Winkelmann on the topic, other influences, factors that had fallen in and the difficulty I had when I did cut back to one person, and the jobs on the forefront that I was intending and ... discussions with Mr. Winkelmann that we would go strictly with the one approved only for the duration of the following two weeks." While denying causality, Lukas *does* describe a correlation between the events. Thus, it is not difficult to find that both Lukas and Staszewski testified truthfully.

Nor is it hard to see how Kerr's testimony corresponds to an allegation in the Union's complaint. At paragraph C-3, the Union alleges that at the meeting of the 19th, Kerr said that "because of the potential economic impact of paying of the overtime grievance we have to eliminate any possibility of this ever happening again." Kerr denied making the statement as

alleged but confirmed its essence by testifying that the “reference to potential economic impact” was “reasonably correct.” Kerr testified that cost control was “of very great concern,” and that the “conversation concerning the overall impact issue on the table” included the “economic impact ... of maintaining a lot of people (on) time off,” which could “result in greater overtime cost, operating expense to the airport.” That, Kerr testified, “was one part of the concern here.”

The fatal flaw in the Union’s case here is that even Kerr’s statement as alleged in the complaint is not necessarily violative of MERA. The statement as alleged simply reflects that management is taking the grievances seriously and projecting cost and staffing considerations in case it loses. The Union had just filed five grievances concerning the relationship of vacations to overtime opportunities, all with several make whole and prospective remedies, all of which it presumably felt were meritorious. It was entirely appropriate for management to calculate a potential economic impact if it lost any or all of the grievances, and to plan for that possibility. Indeed, knowing of the potential liability of losing the grievances, the County would have failed in its duty to manage the enterprise if it had not undertaken such planning. Further, Union success on the grievances would have led to higher costs due to the need to pay overtime to employees who had been on vacation when the need arose. Faced with the prospect of unexpectedly higher overtime costs, and knowing the futility of seeking sufficient revenue from the airlines, the County was within its rights to seek to minimize that impact by limiting, to the extent allowable under the collective bargaining agreement, use of unscheduled vacation for the remainder of the winter maintenance season. I express no opinion, of course, on the question of whether the County’s action was or was not consistent with the collective bargaining agreement.

Finally, there was the testimony of Winkelmann, the manager who actually made the decision to manage to rule the last two weeks of the winter maintenance season. He testified that he made this decision at that time because that was when Lukas brought the workload concerns to his attention, and the Union offered no convincing evidence to rebut that assertion.

Thus, while the County’s *action* in managing to rule March 16-April 1 had the effect of interfering with protected rights, the Union has not established by a preponderance of the evidence that it was the County’s *intent* to do so. This understanding informs my evaluation of the County’s business necessity defense.

As to this defense, the County claims that the excessive snows of December had left a lingering load of work orders. County managers and supervisors Winkelmann, Kerr, Lukas and Sifuentes all testified as to the heavy workload, and the need for a full complement of workers on all shifts. Kerr and Winkelmann further testified to the particular expectations of the airlines, and the difficulty the County faced in assessing higher rates and hiring more

workers. The airport management staff had also been alerted by DPW Human Resources to watch the extent to which employees were carrying vacation over into the winter months.

In further explaining the County's necessity defense for its Friday abrogation, Lukas cited the tear-down and repair of a baggage carousel, which he claimed was scheduled for the following Monday.

Following protracted litigation, the record includes a substantial pile of unit work assignment records. Since neither party has seen fit to offer any assistance in analyzing these raw documents, I can only apply my own understandings.

As I review the documents, I find that for the period March 5-March 16, there were 28 workers on the first shift (21 Monday-Friday, the rest Thursday-Monday). Out of over 250 separate work assignments, fewer than ten dealt with conveyor maintenance.

Starting on March 19, however, four employees were assigned to conveyor maintenance each day for two weeks, for 40 separate assignments. Surely, a 300% increase in a particular workload represents such a significant reallocation of resources as to establish, at a minimum, that the employer's necessity defense is not subterfuge.

The winter had brought substantial snowfall. The airlines were not allocating funds for additional personnel. Lukas has already cancelled unscheduled vacations and leaves to address heavy workload. A major project was looming. For the ensuing winter maintenance seasons, Winkelman testified under oath that discretion would be returned to Lukas to grant unscheduled vacations under the prior permissive policy, subject to weather and other exigent circumstances. On balance, I find this accumulation of supporting indicia is sufficient to establish that the County had a valid business reason for "managing-to-rule" the last two weeks of the 2000-2001 winter maintenance season. Accordingly, I have dismissed the Union's complaint alleging interference, restraint and/or coercion under Sec. 111.70(3)(a)1, Stats.

In its presentation at hearing and written arguments, the Union repeatedly and animatedly raised the specter of retaliation as motivating the employer's actions. However, while asserting that retaliation was at the heart of the County's actions, the Union declined to allege a violation of sec. 111.70(3)(A)3, the appropriate statute for addressing such a purported prohibited practice. I thus decline to examine whether a violation of that statute occurred.

Nor can I address the Union's implicit assertion of a violation of 111.70(3)(a)4, Stats., precisely because it is only implied.

It is well-established that the employer has a duty to provide information for both collective bargaining and contract administration. The statutory duty to bargain in good faith under MERA includes a requirement that, where appropriate, municipal employers provide the collective bargaining representative of their employees with information that is relevant and reasonably necessary to bargaining a successor contract or *administering the terms of an existing agreement*. (emphasis added). CITY OF MARSHFIELD, WASTEWATER TREATMENT PLANT, DEC. NO. 28937-B (WERC, 3/98); MORAINÉ PARK VTAE, DEC. NO. 26859-B (WERC, 8/93). The “applicable standard for relevancy is a very liberal one.” MADISON SCHOOL DISTRICT, DEC. NO. 28832-B (WERC, 9/98). While the legal questions in a complaint alleging a violation of (3)(a)4 and (3)(a) 1 are 2 are different, the policy in play in a (3)(a)4 complaint – to provide the employees and union with sufficient information “necessary ... to administering the terms of an existing agreement” is also implicitly present in complaints alleging violations of Secs. (3)(a) 1 and 2.

The County puts such stock in the work rules that it requires the employees to give signed receipts. The work rules which the members of Local 882 signed for in January 1999 incorporated an understanding that the policy on unscheduled leave during the winter months allowed for several employees to be off on any shift, pending weather or exigent circumstances. On March 15, 2000, Winkelmann changed that policy, but failed to notify the recipients of the original work rules of their *de facto* amendment, either individually or through union leadership.

As part of the remedy identified in its complaint, the Union sought orders directing the county to “cease and desist changing of past practices without notification” to the leadership of District Council 48 and “cease and desist bypassing authorized representatives” of the Union by “negotiating hours and working conditions and attempting to coerce withdrawal of grievances with individual Union members.” While I did not dismiss these aspects of the complaint at hearing, I did note in my letter of April 8, 2003, that these were remedies a remedy most normally associated with a violation of sec. 111.70(3)(A)4, and I invited the parties to comment on the question of whether “the pleadings in this proceeding should be amended to allege a violation” of that statute. The Union never responded in any meaningful manner to my letters of April, June, July and September, 2003, however, and declined to allege a violation of this provision. Accordingly, because the Union’s failure to allege a violation of Sec. 111.70(3)(A)4 prevents me from finding a violation thereof, I cannot order the relief such a violation would occasion. I thus leave unanswered the question of Winkelman’s duty, if any, to notify union leadership of his decision to manage the unscheduled vacation to rule. I do note, however, that the considerable dissension and confusion that ensued from Winkelman’s decision to manage the vacation policy to rule could have been avoided if the County had communicated with the workforce in a more orderly and

comprehensive manner. That is, rather than relying on hit-and-miss shop floor conversations, a simple memorandum from Winkelman and Lukas, explaining what the County was doing and why, would have made things easier for everybody. To paraphrase the adage, an ounce of explanation is worth a pound of litigation.

Dated at Madison, Wisconsin, this 3rd day of November, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart Levitan /s/

Stuart Levitan, Examiner