

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PETER CRIVELLO, Complainant,

and

WEST ALLIS-WEST MILWAUKEE SCHOOL DISTRICT, Respondent.

Case 82
No. 58740
MP-3634

Decision No. 30259-B

Appearances:

Cross Law Firm, S.C., by **Attorney Nola Hitchcock Cross**, 845 North 11th Street, Milwaukee, WI 53233, appearing on behalf of the Complainant.

Davis & Kuelthau, S.C., by **Attorney Nancy L. Pirkey**, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202-6613, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel Nielsen, Examiner: The above-named Complainant, Peter Crivello, having on April 4, 2000, filed with the Commission a complaint, alleging that the above-named Respondent, West Allis-West Milwaukee School District, violated the provisions of Chapter 111.70, MERA, by refusing to promote the Complainant to the position of Recreation Programmer/Instructor for reasons of his union activities; and the Respondent having, on May 3, 2000, filed a Motion to Dismiss; and the matter have been held in abeyance pending the arbitration of the promotional dispute before Arbitrator Dichter; and Arbitrator Dichter having, on April 16, 2001, issued an Award denying the grievance; and the Commission having on January 14, 2002, determined that there was no basis for finding that the complaint had been deferred to arbitration, rather than merely held in abeyance, and accordingly denied the Respondent's motion to dismiss; and the Commission having appointed Daniel Nielsen, an Examiner on its staff to conduct a hearing and to make Findings of Fact and Conclusions of Law, and to issue appropriate Orders; and a hearing having been on held on the complaint on March 19, 2002, in West Allis, Wisconsin, at which time the matter was tentatively resolved; and the tentative agreement having not been finally

Dec. No. 30259-B

agreed upon, a second hearing having been held in West Allis on January 16, 2003, at which time all parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute; and the parties having submitted post-hearing briefs and reply briefs the last of which was received on April 15, 2003; and the Examiner being fully advised in the premises, now makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Complainant, Peter Crivello, hereinafter referred to as either Crivello or the Complainant, is a municipal employee who works for the West Allis-West Milwaukee School District. He has been employed by the District since 1979 as a Recreational Instructor.

2. The Respondent, West Allis-West Milwaukee School District, hereinafter referred to as either the Respondent or the District, is a municipal employer providing general educational services to the people of West Allis and West Milwaukee in southeastern Wisconsin. The District maintains its principal offices at 2450 South 68th Street, West Allis, Wisconsin. Among the services provided is the operation of the Recreation Department in which the Complainant is employed. As of 1999, the Department had three administrators - Director of Recreation Douglas Johnson, Recreation Specialist Skip Mazurek, and Supervisor of Recreation Gary Polczynski - three and a half clerical positions, and six full-time instructors. Over the course of any given year, the Department also employs between 150 and 200 part-time instructors.

3. The non-exempt full-time employees of the Recreation Department are represented by Local 80, an affiliated local union of District Council 48, AFSCME, AFL-CIO that represents several units in the District. The bargaining unit was the subject of an organizing campaign by AFSCME beginning in 1980, and after a series of representations votes, was certified in late 1985 or early 1986. The Complainant was one of the principal organizers in the representation drive, along with Greg Radtke and Tim Wade, two members of Local 80's custodial bargaining unit at the District, and Kathy Wendorf and Jack Simon, two recreation instructors.

4. Director of Recreation Douglas Johnson opposed the organizing campaigns in the 1980's and made it clear to the members of the bargaining unit that he was opposed. He discussed the possible downside risks of organizing, and among other things, he suggested that a union for the full-time employees would lead to the elimination of full-time jobs and expanded use of part-time positions. Johnson and Radtke had several sharp exchanges during the organizing drive, including Johnson's statement that he would never forget the organizers.

5. In 1983, the District posted the position of Programmer, an administrative job responsible for assisting in the staffing and coordination of the recreation programs. The Complainant applied for the position, but it was instead awarded to Jeri Franz. After the selection, someone told him that a master's degree was a practical necessity for becoming an administrator. Franz had no degree beyond high school.

6. In the 1984-85 school year, Crivello requested and received a one year leave of absence to complete work on his master's degree in Recreational Administration. He was awarded the degree in 1985.

7. After the Union was certified, the Union brought a prohibited practice complaint resulting in an Order to bargain in good faith.

8. Crivello served as Steward from the certification of the Union in 1986 until 1991, when John Fazen took over as steward. He and Fazen were both members of the bargaining team for the initial contract. As steward, he had a contentious relationship with Johnson, and experienced difficulty in setting up meetings with management at the first and second steps.

9. In the summer of 1998, Franz resigned her position (which had in the interim been retitled Recreation Specialist and been reduced to 50%) to accept a teaching job. Douglas Johnson initially decided not to fill the position, and instead distributed its duties among three administrators – himself, Recreation Specialist Skip Mazurek, and Supervisor of Recreation Gary Polczynski. That proved unworkable, and Johnson decided that a replacement for Franz would be needed. He approached the Union about posting the job as a leadworker bargaining unit position (50% administrator and 50% instructor) but conditioned his proposal on being allowed to fill the job based upon qualifications and an agreement that his decision about whom to hire would not be grieved. The membership of the bargaining unit voted 8-1 in favor of the idea, with Crivello casting the negative vote. He voted “no” because he believed that a masters’ degree was required for an administrative job, and believed he would be the only qualified candidate if the job was not placed within the bargaining unit and opened for posting.

10. Because the Union would not promise that no grievance would be filed, Johnson withdrew his proposal and instead posted the position under the existing language of Article VII:

. . .

Section 4. Voluntary or involuntary transfers to another job classification within the bargaining unit shall be determined on the basis of qualifications, work performance necessary for the position. All things being near equal, seniority shall prevail.

Whenever there may be a transfer to fill a new position in the bargaining unit, the Board will post such position for a period of ten (10) days. Posting shall consist of written notification to all employees of the unit. Any employees interested in applying for the job shall notify the Recreation Office in writing within the time limits established. Any subsequent bulletin advertising a position as a result of an opening resulting from a transfer shall be posted for five (5) days.

. . .

The job posting went up in April, with a closing date of April 15th. The posting did not list any particular qualifications, but eligibility was limited to current recreation instructors and instructor/groundskeepers, and the posting listed a statement of the hours, salary range, and general work responsibilities.

11. Five employees posted for the job:

Peter Crivello – Seniority date: 1979
Paul Dooley – Seniority date: 1995
Ramona Kaiser – Seniority date: 1996
Michael Sperka – Seniority date: 1984
Michelle Strasser – Seniority date: 1994

Each was advised that there would be a two-part process, beginning with interviews with Polczynski, Mazurek and Manager of Maintenance and Operations Joe Ales. Two or three candidates would be selected from that pool for a final interview with Johnson and two other administrators.

12. Johnson did not direct any of the initial interviewers to select or bypass any particular candidate.

13. Each of the applicants was asked the same 12 questions:

1. Why are you applying for this position and what is your interpretation of this position?
2. Explain your experience in Arts and Crafts programs. How would you implement the Recreation Department's Summer Craft Program?
3. What are your top three strengths and weaknesses; and how would they relate to this job?
4. If you had to reduce a service area in our Department, what is the first area you would impact and why?
5. Recreation registration has three sessions: fall, winter and summer. Explain the procedure you would use for the registration sessions.
6. What qualities do you look for in an individual when hiring employees?
7. How would you deal with employees' complaints and with patrons' complaints?
8. The Dance Program includes children's lessons and recital; adult aerobic and exercise classes; camps which include pom pon and dance camp. Explain your background and experience in dealing with these areas.
9. Writing skills are a very important part of this position. You will have a maximum of five minutes to write your thoughts on the question: What is your philosophy of Recreation?

10. A major part of the Recreation Programmer position deals with programming. How would you monitor the existing program? What new programs would you develop for this Department?
 11. The Recreation Department has three holiday parties: Easter, Christmas and Halloween. Do you feel any changes or improvements are needed in these parties? If so, what would they be?
 12. As a current employee of the WA-WM Recreation Department, what has distinguished you from the other candidates applying for this position?
14. In response to these questions, Crivello answered:
1. Why are you applying for this position and what is your interpretation of this position?

Answer: Crivello stated that he viewed the position as a stepping stone to a supervisory or administrative position with the District.
 2. Explain your experience in Arts and Crafts programs. How would you implement the Recreation Department's Summer Craft Program?

Answer: Crivello stated that he had been in charge of an arts and crafts in-service program some years before. He suggested implementing more challenging craft programs suitable to older children.
 3. What are your top three strengths and weaknesses; and how would they relate to this job?

Answer: Crivello listed his strengths as being that he lived in West Allis and grew up in the program, had experience with it as a participant and a worker, and had witnessed the changes in the program over time. He listed his weaknesses as being bull-headed at times, becoming irritated at having to give instructions to the younger workers, and tending to look backwards at how things had been done in the past.
 4. If you had to reduce a service area in our Department, what is the first area you would impact and why?

Answer: Crivello said he look at reducing sponsorship of affiliated groups in areas such a the swim club, because they diverted time and money from other programming.

5. Recreation registration has three sessions: fall, winter and summer. Explain the procedure you would use for the registration sessions.

Answer: Crivello said he would see what was available, and suggested on-site registration using a computer.

6. What qualities do you look for in an individual when hiring employees?

Answer: Crivello said he would assess kids based on whether they were problems when they were in the program, on the theory that if they could not play well with others, they could not work well with others. He said he would give preference to those whose sisters and brothers had worked for him, and would judge other applicants based on their education, experience and presentation skills.

7. How would you deal with employees' complaints and with patrons' complaints?

Answer: Crivello said he would listen to employees to decide whether their complaints were logical. As for patron complaints, he said he would explain the "why" of a decision or action to them.

8. The Dance Program includes children's lessons and recital; adult aerobic and exercise classes; camps which include pom pon and dance camp. Explain your background and experience in dealing with these areas.

Answer: Crivello said he would hire specialists for the program and place his faith in them.

9. Writing skills are a very important part of this position. You will have a maximum of five minutes to write your thoughts on the question: What is your philosophy of Recreation?

Answer: "My philosophy of recreation is that you can't look at your own philosophy, because recreation is different for everyone. Recreation philosophy for some could revolve around sports - recreation is playing softball basketball being active. For others recreation is sitting in the backyard reading a book. I guess my own philosophy would be if its enjoyable to you and it doesn't injury others that's recreation."

10. A major part of the Recreation Programmer position deals with programming. How would you monitor the existing program? What new programs would you develop for this Department?

Answer: In monitoring the program, he said he would stop in at sessions to observe how the program was running and whether it was filling out. Crivello said he would add a father-child weekend outing program.

11. The Recreation Department has three holiday parties: Easter, Christmas and Halloween. Do you feel any changes or improvements are needed in these parties? If so, what would they be?

Answer: Crivello said the Halloween Party was good as it was, though a parade could be added. He suggested possibly adding carnivals.

12. As a current employee of the WA-WM Recreation Department, what has distinguished you from the other candidates applying for this position?

Answer: Crivello said the main things that separated him were his desire to get into administration and become a supervisor, and his masters degree. 1/

1/ The answers listed here are paraphrases of the notes kept by Polczynski and Mazurek - Respondent's Exhibits 3 and 7 - and the Complainant's written statement - Respondent's Exhibit 4.

15. In response to the questions, Michael Sperka answered:

1. Why are you applying for this position and what is your interpretation of this position?

Answer: Sperka said his reason for applying was to gain responsibility and to grow as an employee. His interpretation of the position was as an overseer of the programs, giving and receiving input and using group ideas to improve the workshops.

2. Explain your experience in Arts and Crafts programs. How would you implement the Recreation Department's Summer Craft Program?

Answer: Sperka said that he had 15 years of experience with planning, implementing and supervising the Arts and Craft program. He said he would implement the Summer program by soliciting positive ideas from recreation staff and other District personnel.

3. What are your top three strengths and weaknesses; and how would they relate to this job?

Answer: Sperka identified his strengths as being a good promoter who gets along well with the public and the participants, being committed to improving the program, and giving a good effort. He said his weaknesses were taking things too much to heart and taking work problems home with him.

4. If you had to reduce a service area in our Department, what is the first area you would impact and why?

Answer: Sperka said he would decide service cuts by seeking community input, and weighing how the cuts would impact the programs and the community over the long run.

5. Recreation registration has three sessions: fall, winter and summer. Explain the procedure you would use for the registration sessions.

Answer: Sperka said he would use a lottery system as the fairest means of registering people for programs. He said that the programs should be more heavily promoted through mailings, on cable television channels and in the schools.

6. What qualities do you look for in an individual when hiring employees?

Answer: Sperka said he would be guided by the person's interest in the programs, their experience in the programs, their ability to relate to and communicate with the participants, and their willingness to offer ideas to improve the programs.

7. How would you deal with employees' complaints and with patrons' complaints?

Answer: Sperka said he would meet monthly with all of the employees to improve communications. He said he would deal with patron complaints by listening well, and showing concern for their complaints, while keeping the overall goals of the program in mind.

8. The Dance Program includes children's lessons and recital; adult aerobic and exercise classes; camps which include pom pon and dance camp. Explain your background and experience in dealing with these areas.

Answer: Sperka said he had been responsible for an in-service on the dance program in 1985-86, had planned and supervised dance recitals, and had involvement in adding a manual for the dance program. He discussed the background of the program.

9. Writing skills are a very important part of this position. You will have a maximum of five minutes to write your thoughts on the question: What is your philosophy of Recreation?

Answer: "My philosophy of recreation is to provide programs that benefit the participant socially, physically and cognitively in a wholesome manner.

For example, our youth dance program enables the youth to interact positively with instructors as well as other children in the program. Through loco-motor movement, they also benefit physically, through muscle endurance and skill. Finally, each program should incorporate a teaching process to enable each participant to gain in knowledge."

10. A major part of the Recreation Programmer position deals with programming. How would you monitor the existing program? What new programs would you develop for this Department?

Answer: Sperka said he would personally observe the programs to see whether they could be improved and to offer positive reinforcement to the staff, and would engage in continuing in-service programs with the instructors. He suggested soliciting input from parents at the end of each program. Sperka proposed a greater stress on lifelong involvement in recreation, and the addition of new shop and computer courses.

11. The Recreation Department has three holiday parties: Easter, Christmas and Halloween. Do you feel any changes or improvements are needed in these parties? If so, what would they be?

Answer: Sperka suggested that the Christmas party add a magician, and incorporate additional program areas and activities.

12. As a current employee of the WA-WM Recreation Department, what has distinguished you from the other candidates applying for this position?

Answer: Sperka opined that he was involved in the community and known as a positive person throughout the community. He said his programs were run on a very professional basis, and that he had the ability to be a very positive promoter of the programs. 2/

2/ The answers listed here are paraphrases of the notes kept by Polczynski and Mazurek - Respondent's Exhibits 3 and 7 - and Sperka's written statement - Respondent's Exhibit 4.

16. Polczynski, Mazurek and Ales kept notes as the interviews proceeded and individually assigned numerical scores to the answers, using a one to ten scale. They did not use any objective criteria for scoring, and the numbers reflected each interviewer's subjective impressions of the candidates' responses.

17. The scores assigned to the candidates in the first round of interviews were:

CANDIDATE	GARY POLCZYNSKI'S SCORES (Rank)	SKIP MAZEREK'S SCORES	JOE ALES' SCORES	TOTAL SCORES
Michael Sperka	110 (1)	99 (2)	107 (1)	316
Michelle Strasser	108 (2)	105 (1)	88 (3)	301
Paul Dooley	81 (3)	86 (3)	96 (2)	263
Peter Crivello	70 (4)	74 (4)	73 (5)	217
Ramona Kaiser	60 (5)	71 (5)	78 (4)	209

18. After assigning individual scores, the interviewers discussed the applicants and agreed that the three top candidates were Sperka, Strasser and Dooley.

19. Sperka, Strasser and Dooley were advanced to the second round of interviews, and Crivello and Kaiser were eliminated. Michael Sperka was ultimately selected for the vacancy.

20. Crivello sought to grieve the selection of Sperka, but was told by Local Union President John Fazen that the Union would not process his grievance. He appealed within the Union's structure, and a grievance was processed on his behalf, asserting that the choice of Sperka over him was a violation of Article VII. The grievance was advanced to arbitration, and Arbitrator Fred Dichter denied it on timeliness grounds.

21. The instant complaint was also filed, asserting that the decision to bypass Crivello was based, at least in part, on his involvement in organizing the Union in the 1980's.

22. The activities of Crivello in organizing and serving as a steward for the Union were protected, concerted activity.

23. The School District, and its agent Douglas Johnson, were aware of Crivello's protected, concerted activity.

24. In the early to mid-1980's, Douglas Johnson was hostile to Crivello's protected, concerted activity.

25. Douglas Johnson's hostility to Crivello's protected, concerted activity did not manifest itself in any adverse employment action between 1980 and 1999.

26. The 1999 decision of the interview panel comprised of Ales, Polczynski and Mazurek was rationally based on their subjective impressions of the answers given to them by the candidates, and was not based in part on hostility to Crivello's protected, concerted activity.

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

CONCLUSIONS OF LAW

1. The Complainant, Peter Crivello, is a "municipal employee" within the meaning of Sec. 111.70(1)i, MERA.

2. The Respondent, West Allis-West Milwaukee School District, is an "employer" within the meaning of Sec. 111.70(1)j, MERA.

3. By the acts described in the above and foregoing Findings of Fact, specifically by bypassing the Complainant for the promotion to Programmer, the Respondent Employer did not discriminate against him on the basis, in whole or in part, of his exercise of protected MERA rights.

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

ORDER

It is ORDERED that the instant complaint be, and the same hereby is, dismissed.

Dated at Racine, Wisconsin, this 4th day of December, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/

Daniel Nielsen, Examiner

WEST ALLIS – WEST MILWAUKEE SCHOOLS

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

ARGUMENTS OF THE PARTIES

The Primary Brief of the Complainant

The Complainant asserts that the decision to bypass Crivello for the Programmer position was motivated by hostility to his activities in organizing the Recreation Department employees, and is therefore an act of discrimination in violation of Section 111.70(3)(a)3, MERA. Crivello led the effort to bring a union to the workplace in the early 1980's. This brought about the end of his previous cordial working relationship with Doug Johnson, who was bitterly opposed to the organizing drive. Johnson delivered anti-union diatribes at staff meetings, suggested to employees that a union would mean a loss of jobs, and told Greg Radtke that he would never forget who organized the union and that Crivello would never go anywhere in the Department. When the Union was certified and Crivello became the steward, Johnson resisted his efforts to grieve on behalf of other employees, and generally continued the contentious relationship.

Although nearly 15 years passed between the certification of the union and the promotional decision, the Examiner must realize that this was the first chance for advancement since the drive. Johnson's efforts to rig the selection process demonstrate that he still harbored animus from Crivello's successful effort to bring the union to the Department. He waited for nearly a year to fill the position, giving himself time to make a deal to bypass seniority in return for making this a lead position in the Union. Thus, he eliminated Crivello's advantage in seniority. He posted the job with no educational requirements, thus eliminating Crivello's advantage in having a master's degree. He designed a completely subjective interview process to ensure that Crivello's greater qualifications would not be brought to bear. Viewing the process as a whole, the only reasonable conclusion is that it was specifically intended to enable Johnson to retaliate against Crivello, and to disguise that retaliation. He was the most senior candidate. He was the only candidate with a master's degree. He was the most experienced instructor. He had the greatest administrative experience. Yet, he was not even one of the three finalists. No rational, even handed process could yield such a result. The clear and convincing preponderance of the record evidence allows only one conclusion – that the District bided its time, and took the first opportunity for revenge against the man who organized the Union.

The Arguments of the Respondent 3/

The Respondent argues that there is no basis for the claim of discrimination. Certainly, there was some history of tension during the years between 1980 when the Union began its organizing efforts and 1986 when the Union finally won an election and was certified. The

District knew that Crivello was involved in the organizing efforts, which are plainly protected concerted activity. However, there is no evidence that 14 years later, those activities played any role in the selection of the new Programmer.

3/ For purposes of clarity in the narrative flow, this section incorporates both the arguments made in the District's initial brief and those made in its reply brief.

The Complainant claims that Johnson was hostile to Crivello's activities and threatened that he would get back at him. It bases this on Greg Radtke's unsupported and incredible testimony. Johnson forthrightly denied making any such comments. However, even if he did make these comments sometime in the early to mid-1980's, the fact is that Johnson was not the decision maker in eliminating Crivello from the running for this promotion. Johnson participated the final selection, but Crivello was not a finalist for the job. He was eliminated in the interview and screening process by a team of three administrators, none of whom had a history of hostility to Crivello and all of whom denied receiving any marching orders from Johnson. Two of these interviewers rated him 4th out of 5 candidates, and the third rated him dead last. These ratings were based on his very poor performance in the interview, answering the same array of questions asked of all of the other candidates. While he obviously disagrees with the assessment of these three administrators, he cannot show that their judgment of his qualifications was in any way influenced by his organizing activities in the 1980's.

The Complainant's theory of this case is that the District waited for 14 years. On its face, that is implausible. The Complainant's explanation is that this was the first opportunity the District had to retaliate. That is simply not the case. If the District had intended to illegally go after Crivello, it could presumably have taken action against him at any time. Moreover, this same position came open in 1983, at the height of Crivello's union activities. He applied for it, and was not awarded it. If there was an opportunity to make out a case of discrimination, it would have been then. He did not make any such claim. It is preposterous to think that this promotion was a better venue for revenge, or that Johnson's hostility somehow intensified with the passage of a decade and a half.

In reply to the Complainant's claim that the selection process was an elaborate sham to deny Crivello this job, the District argues that this is an interesting but wholly incorrect theory. The Complainant believes his advantage in seniority and his master's degree entitled him to receive the job and that his failure can only be the result of bad faith and illegal motives. That ignores the fact that seniority is only a tie breaker under the contract, and that subjective judgments about qualifications are the principle determinant. It also ignores the fact that no one, other than Crivello, ever said that a master's degree was a prerequisite for an administrative position. The person who received this job over Crivello in 1983 did not even have a bachelor's degree. Two of the top administrators in the Department, both members of

the interview panel, do not hold master's degrees. There is no evidence that a enhances the performance of a person holding this job. The only plausible reason for requiring a master's degree would be to guarantee Crivello the job. While he may believe that is a proper criterion, there is no reason for the District to adopt that view. The fact is that the selection process was intended to allow all current employees to fairly compete for the position and to result in the selection of the best qualified person. That is what happened, and Mr. Crivello's unhappiness at the result does not somehow transform this neutral process into a conspiracy to deny him his legal rights.

The Complainant's Rebuttal Argument

The Complainant dismisses the Respondent's arguments as nonsense and without merit. The Respondent claims that Crivello was not qualified. On its face that is absurd. The process Johnson put in place was designed to exclude qualifications from consideration. Specifically, the interviewers gave no weight to educational background, experience or performance. Instead, the process was completely dependent upon interviewing skills. No one can seriously contend that a process designed to turn on something so subjective is intended to measure qualifications. Such a process is well suited to allowing Johnson to take revenge on Crivello for his protected activity.

The District makes much of the fact that Crivello did not contest the selection of Franz for this job in 1983, arguing that this somehow proves he knew there was no animus against him. That is a non-sequitur. Crivello had only four years of experience at that time, and he was given to understand that it was his lack of a master's degree that led to his not being chosen in 1983. In 1999, he was the senior applicant, and the only one with a master's degree. It may be that the decision in 1983 was based on animus, and perhaps the Complainant should have sued at that time. The fact that he did not does not have any bearing on the merits of this suit.

The District also claimed that it could have retaliated against the Complainant at any time, suggesting that the passage of 14 years without adverse employment actions proves its lack of animus. That is simply illogical. This claim is based on the adverse action taken against him in 1999, and the proof that he was denied the promotion because of his history with the Union. The fact that the District has not been caught in any illegal actions in the intervening time in no way lessens the force of the evidence that, in this case, they have.

DISCUSSION

The complaint in this case is that District refused to select the Complainant for the Programmer job in 1999 as retaliation for his work in organizing the Recreation Department employees in the 1980's. If proved, this constitutes discrimination in violation of

Section 111.70(3)(a)3, MERA. In order to succeed on a claim of unlawful discrimination, a complainant must show by a clear and satisfactory preponderance of the evidence that:

- (1) the employee has engaged in protected, concerted activity;
- (2) the employer was aware of such activity;
- (3) the employer was hostile to such activity; and
- (4) the employer's complained of conduct was motivated at least in part by such hostility. 4/

4/ MUSKEGO-NORWAY C.S.J.S.D. No. 9 v. WERB, 35 Wis.2d 540, 151 N.W.2d 617 (1967), hereinafter referred to as "MUSKEGO-NORWAY"; COOPERATIVE EDUCATION SERVICE AGENCY #4, ET AL., DEC. NO. 13100-E (YAFFE, 12/77), AFF'D, DEC. NO. 13100-G (WERC, 5/79), hereinafter "CESA #4".

Protected Concerted Activity and Employer Knowledge

There is no dispute about the Complainant's protected activity, or the District's knowledge of the activity. He was the lead Union organizer within the Recreation Department and served as the first steward once the Union was certified. The argument instead is whether there is proof of hostility and, if so, whether it has been proved that the promotion here was influenced by that hostility.

Hostility

There is evidence of opposition by Johnson to the organizing campaigns in the 1980's and Johnson does not really deny that. Management opposition to organizing is not necessarily the same as hostility to the opponents, but there is also some evidence that the depth of feeling went beyond merely believing the employees should not vote to be represented. Greg Radtke testified that he and Johnson regularly took steps to antagonize one another, and Johnson was quite bitter at the outcome of the final representation vote. Radtke also testified that Johnson told him he would never forget the organizers, and that Crivello would never go anywhere in the Department. I have made a finding that the former statement probably was made. That finding is based on it being a plausible statement in the context of the bitter organizing campaign. I have not made a finding as to the second statement, directed at Crivello personally. Johnson denied making it, and Crivello gave no testimony regarding the statement, even though one would expect that Radtke

would have mentioned it at the time. However, whether the statement was made or not, I believe the record is sufficient to find, and I have found, that Johnson was hostile to the efforts of Crivello and the others in the early to mid-1980's. 5/

5/ In finding hostility, I have attached no weight to Crivello's testimony concerning a chilling of his personal relationship with Douglas Johnson. Crivello cited the fact that the two had roomed together at some conferences in the late 1970's, had played cards together, and had seen each other on some social occasions, and that these activities ceased when the organizing campaign started. The rooming together was at Crivello's request because he wanted to save money, and there is no evidence either that he made subsequent requests that were refused, or that this represented some sort of personal friendship. The card games were organized by other persons, and neither Crivello nor Johnson were responsible for inviting the other. They ended before any organizing activities took place. The record shows that there have been sporadic social contacts between the two since, though they are not personal friends, and all contacts were in the form of work-related gatherings such as Christmas parties, employee outings and the like.

Motivation

In general, a finding that an adverse employment action was preceded by protected activity, employer knowledge and employer hostility will lend itself to the inference that the adverse action was motivated at least in part by the hostility. Here, however, there is a lapse of 15 years between the evidence of hostility and the adverse action, with no intervening evidence of any sort of retaliation or individual expression of the hostility against Crivello as an employee.

The Complainant's theory of this case is that revenge is a dish best eaten cold, and that while the lack of promotional opportunities forced Johnson to wait, he took his first opportunity to retaliate against Crivello. This conclusion is drawn from the fact that the selection process gave him no credit for his seniority, no credit for his masters' degree, and was scored on an entirely subjective basis. In short, the Complainant views the process as not reasonably designed to select the best qualified candidate, and asserts that it must therefore have been intended to allow for retaliation against him. There are several flaws with this theory.

The failure of the selection process to give Crivello an advantage based upon seniority is not a failure at all. It is a reflection of the negotiated contract language. Article VII provides for selection based upon qualifications and work performance, with seniority as a tie breaker. The seniority factor would presumably have weighed in Crivello's favor if he had been judged relatively equal to Sperka on qualifications for the job. In any event, the failure of the District to give him credit for his 20 years versus Sperka's 15 years cannot stand as evidence that the selection process is rigged, because seniority is by contract not one of the initial selection criteria.

Crivello's greatest emphasis is on the District's refusal to set educational criteria for the job, thereby discounting his masters' degree. He believes that administrative positions within the District require a masters' degree, but that belief is based on what some unidentified person told him in 1983 when he failed to get the Programmer job in the first place. This belief is, in and of itself, somewhat odd, since it is clearly not true. Franz, the candidate who beat him out in 1983, did not have a college degree of any type. Two of the administrators who interviewed him for the Programmer job in 1999 do not hold masters' degrees. No witness, including Crivello himself, was able to articulate why a masters' degree would benefit the District in this particular job. The Complainant argues that an advanced degree is generally an indicator of greater accomplishment in a professional field, and it is true that this is a broadly accepted notion. It is not, however, so obviously relevant to this position that failure to include it is evidence of an illegal motive. The District's witnesses testified that they set the qualifications for this job at a level that would allow all current instructors to compete for the opening. Given the nature of the position, the very limited promotional opportunities in the unit, and the fact that a masters' degree has never been needed in order to do programming in the past, that is a reasonable goal.

Crivello's complaint that the selection process discounted experience in favor of interviewing skills is somewhat difficult to assess. Certainly, the process did turn on the interviews, as had past hiring processes in the Department. However, this is a small Department and the interviewers were familiar with the work histories and experience of all of the candidates. All current instructors were judged to be minimally qualified. Sperka, who was ultimately chosen, has fifteen years of experience. While there is a clear difference between 15 years and 20 years when seniority is the criterion, the difference is not nearly so clear-cut if the more general "experience" criterion is used. There is a point at which both candidates would have generally the same base of experiences with the day to day situations that would arise and with the issues confronting the recreation programs. If the less experienced candidate has a decade and a half on the job, it does not necessarily follow that an additional five years on the same job makes someone else a materially more qualified candidate. Crivello did not point to anything other than his greater seniority and his masters' degree as proof that he had superior work experience to Sperka.

The use of a subjective system of evaluating candidates always leaves open the possibility that illegal motives are among the subjective criteria being applied. Here, the process was not wholly subjective. All candidates were asked the same questions, by the same interviewers, each of whom individually graded their responses and arrived at grades broadly agreeing with one another. The questions asked were plainly relevant to the position. That said, the scoring of the answers was a purely subjective evaluation. Crivello argues for a set of objective criteria such as education and seniority, principally because both would insure that he got the job. As discussed above, seniority is addressed in the contract, and educational levels are not necessarily a valid criterion if the cost of using them is to exclude all but one of the bargaining unit members. An objectively graded test could be employed, although those systems carry with them separate issues concerning validity in test design and evaluation, and

are usually better suited to technical jobs rather than administrative or professional positions. A degree of subjectivity is inherent in most promotional processes for administrative jobs, and the fact that this process was subjective does not prove that it was illegitimate.

The question is not whether the evaluation of the candidates' was subjective. It is instead whether a reasonable administrator, in the same position as the members of the interview panel, could have reasonably concluded that Sperka was the better candidate, so that Crivello's greater seniority would not come into play. Put another way, in reviewing their answers, can it be said that animus is the most probable explanation for favoring Sperka over Crivello? 6/ Just as with the initial grading, this is itself a subjective judgment.

6/ I draw the comparison between Sperka and Crivello because, even though three other candidates were rated higher than Crivello, it is Sperka who was awarded the position. Finding that Crivello was a better candidate than Strasser or Dooley, the other two finalists, would be an empty exercise. If he was not at least equal to Sperka, no meaningful relief is available to him.

In reviewing the notes of the interviews, and the interviewers' explanations of their impressions, I do not agree that Crivello spoke only in generalities, though some of Sperka's responses are more detailed than his and can be read as showing a broader view of the program and a greater emphasis on innovation than is expressed in Crivello's answers. I do find, however, that Crivello's repeated emphasis on securing the job because of his desire to become a supervisor, rather than mentioning his goals for the program itself, would have given most interviewers pause. Personal ambition is not a negative factor in seeking a promotion – most applicants can be expected to be motivated by ambition. However, from the viewpoint of a management selection committee, expressing a desire to improve the program and advance the goals of the employer is a far more desirable response. Failing to mention those factors would be a matter of great concern, particularly in answer to the very first question asked by the interviewers, which specifically invited the applicant to articulate a vision of the position. Crivello merely replied that he was seeking to move up. Both Polczynski and Mazurek cited these answers as factors in downgrading Crivello's application.

In evaluating interviews, the presentation skills of the individual obviously are an important element, and those do not come through on the reading of interview notes. The verbal and promotional skills required for a good interview are not wholly irrelevant to a job such as this, given the amount of interaction required with instructors, participants and the general public. Both interviewers who testified said that Sperka's interview was exceptional, while Crivello's was unimpressive. Obviously, that is a very subjective judgment. However, the notes of the interviews – on their face – do show a reasonable basis on which the interviewers could have concluded that Sperka was the better candidate. Given the long time lapse between the protected activity and the promotion, the lack of any evidence of continuing

expressions of hostility to Crivello, and the legitimate bases for selecting Sperka over him for this opening, I find that animus is not the most plausible reason for the District's decision not to award Crivello the Programmer position. 7/ Accordingly, I have dismissed the complaint in its entirety. 8/

7/ In concluding that the grading of the applications was not tainted by animus, I have considered, but have not given conclusive weight to, the fact that there is no evidence of animus by the three interviewers. Using a neutral evaluator might break the chain between hostility and motivation, but this is a small department. Both Polczynski and Matusek testified that they were aware of Crivello's protected concerted activity. If there was otherwise compelling proof that Johnson harbored active hostility to Crivello in 1999, it might still be reasonably inferred that his wishes would be known to his chosen interview panel, whether he directly expressed them or not.

8/ Given the dismissal of the complaint, I have not found it necessary to address the Respondent's argument that damages should be tolled for the period between the hearing scheduled in September of 2002, and the January hearing date.

Dated at Racine, Wisconsin, this 4th day of December, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/

Daniel Nielsen, Examiner