

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**PETER CRIVELLO**, Complainant,

vs.

**WEST ALLIS-WEST MILWAUKEE SCHOOL DISTRICT**, Respondent.

Case 82  
No. 58740  
MP-3634

**Decision No. 30259-C**

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**Appearances:**

**Nola J. Hitchcock Cross** and **Julia H. Powell**, Cross Law Firm, S.C., Attorneys at Law, 845 North 11th Street, Milwaukee, Wisconsin 53233, appearing on behalf of Peter Crivello.

**Nancy L. Pirkey**, Davis & Kuelthau, S.C., Attorneys at Law, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-6613, appearing on behalf of West Allis-West Milwaukee School District.

**ORDER ON REVIEW OF EXAMINER'S DECISION**

On December 4, 2003, Examiner Daniel Nielsen issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he determined that Respondent West Allis-West Milwaukee School District (School District) had not violated Sec. 111.70(3)(a)3, Stats., by refusing to promote the Complainant Peter Crivello (Mr. Crivello) to the position of Recreation Programmer/Instructor.

Mr. Crivello timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties filed written arguments, the last of which was received on March 1, 2004.

Dec. No. 30259-C

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

**ORDER**

- A. The Examiner's Findings of Fact 1 through 26 are affirmed.
- B. We make the following additional Finding of Fact:

27. The interview process utilized by the District was designed to identify the applicant for the position of Recreation Programmer/Instructor who best demonstrated leadership, creativity, and innovation; it was not designed to undermine Mr. Crivello's candidacy.

- C. The Examiner's Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 2nd day of June, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

**West Allis-West Milwaukee School District**

**MEMORANDUM ACCOMPANYING ORDER**

The issue in this case is whether the School District violated Sec. 111.70(3)(a)3 of the Municipal Employment Relations Act (MERA) by failing to promote Mr. Crivello to the position of Recreation Programmer/Instructor in April 1999 in alleged retaliation for his lawful concerted activity in organizing the bargaining unit and processing grievances between 1980 and 1991. For the reasons set forth below, we affirm the Examiner's conclusion that the District did not violate MERA.

**SUMMARY OF THE FACTS**

As indicated in our Order, above, we have affirmed the Examiner's Findings of Fact and those facts can be summarized as follows.

Peter Crivello has been employed by the West Allis-West Milwaukee School District as a Recreational Instructor since 1979. In the early to mid-1980's, he was involved in various attempts to organize the non-exempt full-time employees of the District's Recreation Department, culminating in certification of Local 80, District Council 48, AFSCME, AFL-CIO (Union) to represent the bargaining unit in 1985 or early 1986. Director of Recreation Douglas Johnson made it quite clear that he opposed these organizing attempts. Mr. Johnson told Greg Radtke, another of the organizers, that he would never forget the organizers.

After the Union was certified, it brought a prohibited practice complaint against the District, resulting in an order to bargain in good faith. Mr. Crivello was a member of the initial bargaining team and served as Union steward from the time of certification until 1991. In this capacity, he often had difficulty in setting up first and second step grievance meetings with Mr. Johnson.

In 1983, the District posted the position of Programmer, an administrative job responsible for assisting in the staffing and coordination of the recreation programs. Mr. Crivello applied for the position, but it was awarded to Jeri Franz, an individual whose highest educational level at the time was graduation from high school. Sometime after Ms. Franz was selected for the position, someone told Mr. Crivello that a Master's degree was necessary in order to become an administrator in the District. In reliance on this information, Mr. Crivello requested from Mr. Johnson and was allowed a one-year leave of absence to complete work on a Master's degree in Recreational Administration, which was conferred in 1985.

In the summer of 1998, Ms. Franz resigned her position as Programmer, which had been reduced to 50% and retitled Recreation Specialist during her incumbency, to accept a teaching position. Initially, Mr. Johnson decided, in light of budget constraints, not to fill the position and to distribute the duties among the three remaining department administrators. That proved unworkable. Mr. Johnson then approached the Union about posting the position as a leadworker bargaining unit position, 50% administrator and 50% instructor, conditioned upon being allowed to fill the job based upon qualifications and upon the Union's promise not to grieve his hiring decision. The membership of the bargaining unit voted 8-1 in favor of this approach, with Mr. Crivello casting the lone negative vote. Mr. Crivello's vote was premised on his belief that a Master's degree was required for an administrative job and that he would be the only qualified candidate if the job was not placed within the bargaining unit and opened for posting. Without a unanimous vote, the Union decided not to agree to refrain from grieving Mr. Johnson's hiring decision. Mr. Johnson then withdrew his proposal and posted the position as a bargaining unit position governed by the following portions of Article VII of the parties' collective bargaining agreement:

. . .

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 position was posted in April 1999 with a closing date of April 15, 1999. It did not list qualifications but did limit eligibility to bargaining unit members, current recreation instructors, and instructor/groundskeepers. The posting listed a statement of the hours, salary range, and general work responsibilities. Mr. Johnson and the other administrators intended that all current bargaining unit members would be eligible to apply. Five bargaining unit employees applied for the position, of whom Peter Crivello was the most senior. Each was advised the hiring process would consist of two parts, the first being an interview with Supervisor of

Recreation Gary Polczynski, Recreation Specialist Skip Mazurek, and Manager of Maintenance and Operations Joe Ales. Two or three candidates selected from the initial five would move forward to a final interview with Mr. Johnson and the other two administrators. In establishing this process, Mr. Johnson did not direct any of the initial interviewers to select or bypass any particular candidate, nor did he participate in creating the interview questions. Mr. Polczynski and Mr. Mazurek developed those questions based on the language of the job posting. Each candidate was asked the same 12 questions, focusing on the candidate's experience in arts and crafts and how he or she would handle and improve the department's programs and activities. Except for a question about how the candidate would distinguish himself from the other candidates, none of the questions focused specifically on the candidate's educational background.

The three interviewers kept notes as the interviews proceeded and each assigned numerical scores to the answers, using a scale of one to ten. No objective criteria or benchmarks were used for scoring and the numerical scores reflected each interviewer's subjective impressions of the candidates' responses. The ranking of the candidates by the interviewers was very similar. Gary Polczynski ranked Michael Sperka, the successful candidate, first and ranked Mr. Crivello fourth. Mr. Polczynski felt that Mr. Crivello's answers did not demonstrate the innovative leadership qualities that Polczynski was looking for and that Crivello's answers were short and lacked creativity. Skip Mazurek ranked Mr. Sperka second, Ms. Strasser first and Mr. Crivello fourth. Mr. Mazurek felt that Mr. Crivello's answers lacked innovation, elaboration, and leadership qualities. Joe Ales ranked Mr. Sperka first and Mr. Crivello fifth. After discussion, the interviewers advanced three names to the second round of interviews conducted by Mr. Johnson. Mr. Crivello was not among them and thus he was not selected to fill the position.

## **DISCUSSION**

The crux of this case is whether Mr. Johnson's hostility towards Mr. Crivello's lawful concerted activity in organizing the Union in the early to mid-1980's and serving as the Union Steward from 1986 through 1991 played any part in the decision not to promote Mr. Crivello to the position of Recreation Programmer/Instructor in 1999. The Examiner concluded that "animus is not the most plausible reason for the District's decision not to award Crivello the Programmer position." Examiner's Decision at 19. In reaching his conclusion, the Examiner properly applied the four-part test set forth in *MUSKEGO-NORWAY C.S.J.S.D. NO. 9 v. WERB*, 35 Wis.2d 540 (1967) and reaffirmed in *EMPLOYMENT RELATIONS DEPT. v. WERC*, 122 Wis.2d 132 (1985), i.e., (1) that a municipal employee engaged in lawful concerted activity; (2) that the municipal employer, by its officers or agents, was aware of said activity; (3) that the municipal employer was hostile to the lawful concerted activity; and (4) that the municipal employer took action against the municipal employee based at least in part upon such hostility.

As the Examiner explained in more detail, there is no question that Mr. Crivello engaged in lawful concerted activity in organizing the Union, serving on its initial bargaining team, and serving as its steward, commencing in the early to mid 1980's and continuing through 1991. There is equally no question that the School District, by its agents, Mr. Johnson and others, was aware of Mr. Crivello's activity. The Examiner correctly found (and the School District does not directly dispute on review) that, at the time of the organizing drive in the early to mid-1980's, Mr. Johnson was hostile to Mr. Crivello's protected activity.

Regarding the fourth element, i.e., whether Johnson's animus played a role in the District's decision not to promote Mr. Crivello, Crivello contends that the Examiner should have focused less upon the outcome of the selection process and instead should have found that "the selection process itself was designed by Mr. Johnson, with the idea of excluding the consideration of (a) objective criteria and (b) more specifically, all of Mr. Crivello's qualifications." Mr. Crivello further urges that the Examiner should have found that "this was Mr. Johnson's first opportunity to feasibly discriminate against Mr. Crivello." (Complainant's Brief at 10).

Mr. Crivello's first point is premised on the fact that the objective criteria of seniority and educational attainment would have favored him; therefore, by undermining or negating the value of these criteria in the selection process, Mr. Johnson was able to successfully thwart Mr. Crivello's promotion. Implicit in this argument is the notion that the selection process could only have been legitimate if these two criteria were pivotal. Conversely, this argument assumes that reliance on criteria (whether subjective or objective) that disfavored Mr. Crivello would necessarily reflect bias and thus invalidate the process. This argument is logically flawed, as the legitimacy of the selection criteria cannot depend so crucially on whether the criteria favor or disfavor Mr. Crivello.

While the Examiner did not make an explicit factual finding regarding the design of the interview process (and we have now done so in Finding 27, above), the Examiner clearly and properly addressed the legitimacy of the selection criteria on their own merits, i.e., whether the process was "reasonably designed to select the best qualified candidate." (Examiner's Decision at 16). As to seniority, the Examiner concluded that it would have violated the collective bargaining agreement for seniority as such to be a determining factor. He further noted that, although seniority could act as a proxy for experience, the successful candidate had 15 years of experience in the District compared with Crivello's 20 years. The Examiner aptly remarked, "If the less experienced candidate has a decade and 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." Decision at 17. Regarding educational attainment (i.e., Crivello's Master's degree), the Examiner noted that, despite Mr. Crivello's mistaken belief, a Master's degree had never been a requirement for an administrative position in the District.

Further, the Examiner properly reasoned that, while an advanced degree could be a relevant indicator of accomplishment, “[I]t is not . . . so obviously relevant to this position that failure to include it is evidence of an illegal motive.” Finally, the Examiner thoughtfully considered the subjectivity inherent in relying almost exclusively on interview results, but properly concluded that so-called objective tests carry their own validity issues and that “[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.” Given all of the foregoing, it is apparent that the Examiner did examine the design of the selection system, not just its outcome, and determined that, while it was not designed to favor Mr. Crivello, neither was it designed to undermine his candidacy. We agree with the Examiner’s analysis and conclusions.

We further note that the interview questions were developed by Mr. Mazurek and Mr. Polczynski, not Mr. Johnson, and were designed to elicit responses from the applicants that would demonstrate their leadership, creativity and innovation. While it is arguably better practice to develop benchmark responses for the questions, the subjective nature of the scoring did result in fairly consistent scoring across the three interviewers, with Mr. Crivello scoring the lowest or next to the lowest of the five applicants and the successful applicant, Mr. Sperka, being ranked first or second by each interviewer. The Examiner credited the interviewers’ testimony that Mr. Crivello did not respond to the questions in a manner that demonstrated his enthusiasm about the job or that he was more qualified than the other applicants. Thus there is nothing in the nature of the interviews themselves that would invalidate their legitimacy.

Mr. Crivello’s second point, i.e., that Mr. Johnson had no opportunity to retaliate against Mr. Crivello until the 1999 promotional opportunity, is related to his argument that the passage of time should not weigh against his claim. Under MUSKEGO-NORWAY, it is up to the complainant to establish a causal relationship between demonstrated animus and the adverse action. Where the adverse action follows closely upon the protected activity and/or the display of animus, timing can be a strong circumstantial indication of such causal relationship. As we recently stated, “Just as a lengthy period between the origin of the hostility and an adverse action would tend to militate against finding a nexus, a relatively brief lapse of time facilitates finding a link.” VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03) AT 19). On this record, it appears that Mr. Johnson’s most recent display of hostility towards Mr. Crivello’s protected activity occurred in 1991, the last date on which Crivello was actively involved with the Union. While the lapse of time does not preclude finding a connection with the 1999 promotion decision, it does remove timing as one of the factors suggesting a connection. Therefore Mr. Crivello must establish that connection through other evidence. Similarly, if we were to assume that the 1999 promotion was Mr. Johnson’s first opportunity to retaliate, that might negate timing as a factor militating against finding a nexus between the animus and the adverse action. However, it would not satisfy the complainant’s burden to present affirmative evidence that the two events were connected. The Examiner correctly

reasoned that the only persuasive credible evidence that Mr. Crivello offered to affirmatively support the connection was the allegedly biased design of the selection process. 1/ As discussed above, we, like the Examiner, have concluded that the process was not demonstrably biased. Hence, it follows that Mr. Crivello has not sustained his burden of proof on this difficult issue.

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*1/ Mr. Crivello challenges the Examiner's failure to find that Mr. Johnson told Union representative Greg Radtke, at some point during the 1980's organizing drive, that "Crivello would never go anywhere in the Department." The Examiner did not decide whether Johnson actually made this statement, reasoning that it was unnecessary because he (the Examiner) had already found that Johnson harbored animus towards Crivello's activities in organizing the Union. Upon a consideration of the record, and after hearing on May 20, 2004, Examiner Nielsen's impressions of the demeanor of witnesses during hearing, we conclude that the statement did not occur as testified. Like the Examiner, we note that Mr. Johnson's denial was forthright and that one would reasonably have expected Mr. Radtke to have related this important statement to Mr. Crivello and Mr. Crivello to have corroborated it during his testimony. We further note that Mr. Radtke's testimony was vague and undetailed as to the time, place, or other context in which this statement was made. In reaching this conclusion we do not necessarily suggest that Mr. Radtke intentionally misrepresented the facts, but merely that his memory may have been hazy or faulty given the lengthy passage of time and the considerable acrimony that accompanied the 1980's organizing drives.*

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Accordingly, we affirm the Examiner's conclusion that the District did not discriminate against Mr. Crivello when he was denied the promotion in April 1999 and we dismiss his complaint.

Dated at Madison, Wisconsin, this 2nd day of June, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

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