

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**STEPHEN J. RACLAW and the STURTEVANT  
PROFESSIONAL FIRE FIGHTERS ASSOCIATION  
UNION LOCAL 3914, IAFF, AFL-CIO, Complainants,**

vs.

**VILLAGE OF STURTEVANT and  
ARTHUR M. SCOLA, STURTEVANT  
DIRECTOR OF PUBLIC SAFETY, Respondents.**

Case 39  
No. 60990  
MP-3803

**Decision No. 30378-A**

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Appearances:

**Mr. John B. Kiel**, Attorney at Law, 3300 252<sup>nd</sup> Avenue, Salem, Wisconsin 53168, on behalf of the Complainant.

Schwartz, Tofte & Nielsen, Ltd., Attorneys at Law, by **Mr. Mark F. Nielsen**, 704 Park Avenue, Racine, Wisconsin 53403, on behalf of the Respondent.

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

On March 11, 2002, Stephen J. Raclaw and the Sturtevant Professional Fire Fighters Association, Union Local 3914, IAFF, AFL-CIO, hereinafter the Complainants, filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that the Village of Sturtevant and Arthur M. Scola, Sturtevant Director of Public Safety, hereinafter the Respondents, had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 3, Stats., by the actions Scola took against Complainant Raclaw. On July 17, 2002, the Respondents filed their answer wherein they denied that by taking the actions against Complainant Raclaw they had committed prohibited practices as alleged by Complainants.

No. 30378-A

The Commission appointed a member of its staff, David E. Shaw, as Examiner to conduct hearing and make and issue Findings of Fact, Conclusions of Law and Order in the matter. Hearing was held before the Examiner on September 5 and 6 and November 26 and 27, 2002 in Racine, Wisconsin. A stenographic transcript was made of the hearing. At hearing on September 6, 2002, Complainants verbally amended their complaint on the record to include additional factual allegations and additional violations of Secs. 111.70(3)(a)1 and 3, Stats. Respondents denied the additional allegations. The parties submitted post-hearing briefs and reply briefs by January 21, 2003.

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

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

### **FINDINGS OF FACT**

1. Complainant Stephen J. Raclaw, hereinafter Raclaw, is an individual and resident of Wisconsin. From November 19, 1999 until November 5, 2000, Raclaw was employed by the Village of Sturtevant Fire Department as a part-time fire fighter, and from November 6, 2000 until his termination on January 9, 2002, as a full-time fire fighter/paramedic. Raclaw was required to take and pass a physical exam at the time of his hire as a full-time firefighter. Raclaw did so, but the examination did not include a vision test. At the time he was hired as a full-time firefighter, Raclaw apprised Scola that he had been terminated from the New Berlin Police Department due to his vision-related disability. Raclaw is legally blind, but with corrective surgery is able to drive and possesses a valid driver's license.

2. Complainant Sturtevant Professional Fire Fighter Association, Union Local 3914, IAFF, AFL-CIO, hereinafter the Union, is a labor organization with its mailing address in c/o its legal counsel's offices. At all times herein, the Union has been the certified exclusive collective bargaining representative of the bargaining unit consisting of "all regular full-time sworn employees of the Sturtevant Fire Department, but excluding supervisory employees as defined in WI Stats., Sec. 111.70(i). . ." The bargaining unit consists of nine full-time fire fighters. Since July of 2001, Matthew Hurtienne has been President of the Union. From July of 2001 until January 9, 2002, Raclaw was the Union's Secretary/Treasurer and also was on its executive board and was the liaison between the executive board and the Union's Health and Safety Committee from September of 2001 to the time of his termination.

3. The Respondent Village of Sturtevant, hereinafter the Village, is a municipal employer with its principal offices located at 2801 89<sup>th</sup> Street, Sturtevant, Wisconsin 53177. The Village has maintained and operated the full-time Village of Sturtevant Fire Department since June of 1998. The Fire Department is staffed by full-time and part-time firefighters.

Respondent Arthur Scola, hereinafter Scola, is an individual and a resident of Wisconsin, and at all times material herein, has held the position of Director of Public Safety for the Village. In that position, Scola is the administrative head of both the Village's Fire Department and its Police Department, as well as the 911 Emergency Dispatch Services. Scola reports to the Village Board's Public Safety Committee and the Village Administrator. Scola has been Director of Public Safety since the Fire Department became full-time in 1998. Prior to that time, Scola had been a firefighter and officer with the Racine Fire Department and had been a member of the I.A.F.F..

The Village is governed by an elected Board of Trustees, a Village President, Allan Acker, and a Village Administrator – Henke – and various committees made up of Board members. At all times material herein, Marianne Mitchell was the Chair of the Personnel, Policy and Legal Committee and Shirley TenCate was the Chair of the Public Safety Committee.

Since April of 2001, Dwight "Ike" Wendt has been an elected Board member, and has served on the Public Safety Committee. Wendt had been a member of the Village's Fire Department from 1980 until December of 2000, when his position of Bureau Chief was eliminated.

4. The Union and the Village were parties to a collective bargaining agreement covering the period from January 1, 1999 through December 31, 2000. Said agreement contained, in relevant part, the following provisions:

### **ARTICLE III**

### **MANAGEMENT RIGHTS**

#### **SECTION 1**

The Village possesses the sole right to operate the Sturtevant Fire Department and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this Agreement and the past practices within the Sturtevant Fire Department unless the past practices are modified by this Agreement, or by the Village under rights conferred upon it by this Agreement, or the work rules of the Sturtevant Fire Department. These

rights, which are normally exercised by the Director of Public Safety of the Sturtevant Fire Department, include, but are not limited to, the following:

- A. To direct all operations of the Sturtevant Fire Department.
- B. The Union acknowledges that the establishment and modification of the rules of the Sturtevant Fire Department are within the sole authority of the Village of Sturtevant, and that it may establish, modify, or repeal rules without negotiations of any type. New rules or changes in rules shall be posted in the Fire Station ten (10) calendar days prior to their effective date unless an emergency requires more rapid implementation of the rule. The Village agrees that all rules will be reasonable with the reasonableness subject to the Grievance Procedure starting at the second step.
- C. To hire, promote, transfer, and assign employees in positions with the Sturtevant Fire Department.
- D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause pursuant to WI. Stats. sec. 62.13.
- E. To contract out for goods or services, except such services as are presently being performed by bargaining unit members.
- F. To take whatever action is necessary to carryout the functions of the Village and the Sturtevant Fire Department in situations of emergency.

The Village reserves the total discretion with respect to functions and/or missions of the Department, including the budget, organization and technology of performing that function or mission except as may be modified by State law. The Union agrees that it will not attempt to abridge these management rights and the Village agrees that these rights shall not be exercised to undermine this Agreement or the existent past practices in the Department unless said practices have been modified in accordance with this Article. These rights shall be exercised in a reasonable manner, consistent with the traditional manner in which they have been exercised prior to the execution of this Agreement. The exercise of these rights shall be subject to the grievance procedure.

## **ARTICLE IV**

### **ASSOCIATION RIGHTS AND PRIVILEGES**

#### **SECTION 1**

The Association shall keep the Director of Public Safety and the Sturtevant Fire Department currently advised as to the name of the authorized Association representatives who are designated to act on behalf of the Association for the purpose of investigating and processing grievances. One (1) such representative shall be allowed a reasonable amount of time during working hours, without loss of pay, upon permission being granted by the Director of Public Safety to investigate and/or process grievances in Steps 1 and 2 of the grievance procedure. Permission will be granted provided the activity does not impair the operation of the Department. Any dispute concerning the exercise of discretion in determining the allowable paid grievance time shall be subject to the grievance procedure.

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## **ARTICLE VI**

### **SENIORITY**

#### **SECTION 1 – Definition**

Shall mean the status attained by the length of continuous service following the successful completion of the probationary period; the employee's seniority date shall then be retroactive to the date of hire as a full-time employee in the fire department.

#### **SECTION 2 – Probationary Period**

- A. New employees shall be on a probationary status for a period of 365 days, and until meeting all paramedic certification as determined by the Director of Public Safety. Probationary status may be extended by the Director of Public Safety with a six (6) month option. During their probationary period, new employees may be discharged at the discretion of the Director of Public Safety without recourse to the contractual grievance procedure. If still employed after such date, seniority shall date from the first

day of hiring. Until a probationary employee has acquired seniority, he shall have no re-employment rights in case of layoff.

- B. All firefighters must obtain paramedic certification within eighteen (18) months of the date of hire, or he/she will be deemed to have resigned.
- C. All firefighters who are now employees of the Sturtevant Fire Department must obtain paramedic certification within eighteen (18) months from the date that this Agreement is ratified and signed, or he/she will be deemed to have resigned.

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## **ARTICLE X**

### **HOURS OF WORK**

#### **SECTION 1**

The work schedule of non-civilian (sworn) employees of the Fire Department will be a repetitive tour of duty cycle consisting of twenty-four (24) hours on continuous active duty, followed by forty-eight (48) hours continuous hours off duty, which results in an average fifty-six (56) hour work week and a 2,912 hour work year.

. . .

#### **SECTION 4 – Training, Schools, and Seminars**

Employees can be detailed by the Director of Public Safety to an eight (8) hour day for training, schools, and seminars with the following equivalencies: up to three (3) eight (8) hour days shall equal a twenty-four (24) hour shift, without the need to pay overtime.

#### **SECTION 5 – Shift Hours**

The starting time for day shift operations may be scheduled between 07:00 and 07:00 the following day. Personnel shall be relieved when the next scheduled relief arrives.

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## **ARTICLE XII**

### **OVERTIME**

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#### **SECTION 4 – Mandatory Call-Back**

When during the course of an emergency or filling vacancies, the Director of Public Safety of the Fire Department or his designee can order personnel to report for duty or to remain on duty, past the end of their respective shift. Where it is found the employees on duty have performed forty-eight (48) hours of consecutive “in station” duty, when possible, every effort shall be made to relieve those employees. The personnel to be ordered to report for duty can be either the senior employee with the fewest overtime hours or the least senior employee.

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## **ARTICLE XXII**

### **GRIEVANCE PROCEDURES**

#### **SECTION 1**

A grievance shall consist of a dispute involving the interpretations or application of provisions of this Agreement, including a complaint involving working conditions established by this Agreement and the application of the Fire Department Rules and Regulations. The grievance procedure shall not apply to disciplinary actions or any other matter contained in WI. Stats. sec. 62.13. All matters subject to the provisions of WI. Stats. sec. 62.13, not covered in this Agreement, shall be processed in accordance with such Statute.

#### **SECTION 2**

A grievance shall be governed and controlled by the following procedures:

**A. STEP 1**

If an employee has a grievance, he/she shall first present and discuss the grievance orally with the Officer in Charge in charge of his/her platoon, either alone or accompanied by an Association representative. The employee is to state that he/she is presenting a first step grievance and the Association representative is to identify his/her position and authority. The Officer in Charge shall orally communicate the decision of the Director of Public Safety to the employee before the end of the employee's next regularly scheduled workday. In order to be timely, a grievance must be presented at the Step 1 level within five (5) calendar days of knowledge of the circumstances causing the grievance.

**B. STEP 2**

The grievance shall be considered settled at the Step 1 level, unless within five (5) business days after the communication of the Director of Public Safety's decision,, the employee and/or Association representative shall reduce the grievance to writing and present it to the Director of Public Safety. He/She shall specifically state the provision or provisions of the Agreement, Department rules, regulations or procedures which are alleged to have been violated. . .

. . .

Following its expiration, the 1999-2000 agreement continued in effect pending negotiation of a successor agreement.

5. The Village has written personnel policies covering its employees which are set forth in a "Personnel Policy Manual", a copy of which is provided to individual employees. The Manual has been updated a number of times, including in early 2001 and January and May of 2002. Said Manual contained, in relevant part, the following provisions:

**AUTHORITY**

This policy manual is adopted under the authority of Wisconsin Statute §61.34, as amended.



This manual sets forth employment guidelines. It is not intended to be construed as and does not constitute an employment contract. The final interpretation and implementation of any of the policies and procedures in this manual are vested solely in the Village Board. The policies and procedures are subject to review and change from time to time by the Village Board with or without notice.

Should any provision of this manual be declared illegal by a court of law, the balance shall remain intact.

### **SCOPE**

This policy manual shall cover personnel administration for all employees and departments of the Village of Sturtevant except:

1. Members of the Village Board and appointed members of governing sub-groups.
2. When an employee has an employment contract or is subject to a collective bargaining agreement with the Village, in which case the specific provisions of the employment contract or collective bargaining agreement shall govern to the extent these provisions are inconsistent with the provisions or policies of this policy manual.

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### **DISTRIBUTION AND RESPONSIBILITY**

A copy of the policy manual and all amendments will be provided to every member of the Personnel Committee. The Personnel Committee or their designee(s) shall be responsible for the interpretation, administration, and enforcement of this manual.

The Village Board of Trustees may amend this manual in the same manner as adopted. Department Heads and other Village employees are encouraged to provide recommendations for improvements or changes in this manual.

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## **RULES OF CONDUCT**

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### **Conflict of Interest/Political Activity**

Employment shall not be offered as consideration or required for the political support of any political party or candidate for a public office.

No employee is prohibited from engaging in political activity, provided that such activity does not interfere with normal work performance, is not conducted during working hours, and does not involve the use of Village equipment or property.

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### **Village Property**

Village employees are prohibited from using Village-owned equipment, vehicles, materials, or property for personal reasons without prior approval from the Village Board.

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### **Prohibited Conduct**

The following are examples of specific conduct that is prohibited and may result in disciplinary action. This list is not intended to be all-inclusive and other circumstances that may warrant disciplinary action will be reviewed on a case-by-case basis.

. . .

7. Rudeness and/or discourteous conduct toward other employees or the public.

. . .

9. Insubordination or refusal to comply with the proper order of an authorized supervisor.

. . .

14. Personal use or abuse of Village equipment or property, including vehicles, telephones, or mail service.

. . .

18. Fighting, gambling, horse play which creates a disturbance or hazard, or the use of profane, obscene or abusive language during working hours.

. . .

23. Violation of any other commonly accepted reasonable rule of conduct, including departmental rules and procedures, or other behavior that might interfere with the proper conduct of Village business.

. . .

## **DISCIPLINE**

### Disciplinary Procedures

It is expected that supervisory personnel will uniformly enforce rules and regulations as outlined in the Personnel Policy Manual and document the date and specific instances of misconduct on appropriate forms. In all instances, this must be done with the employee's knowledge. The degree of disciplinary action shall be tailored to the offense and must be consistent with Village Policy. It would not be appropriate, for example, to suspend an employee for being tardy the first time, when a verbal or written warning would suffice. Occasionally the severe nature of an offense is such that some or all of the steps below may be omitted and suspension or termination of employment may be considered immediately.

The disciplinary procedure should take into consideration:

1. The seriousness of the offense.
2. The employee's prior work record.
3. Whether the employee has been disciplined in the past for the same infraction.
4. The employee's attitude.

. . .

Disciplinary Actions

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**Involuntary Termination**

An employee's Department Head/Immediate Supervisor may recommend involuntary termination of employment to the Village Administrator. If the Village Administrator agrees with the recommendation, the termination notice shall be in writing to the affected employee. Non-probationary employees shall be given the specific reasons for employment termination. A terminated employee shall receive payment for accrued vacation time and all hours worked. Terminated employees will not be eligible for payment of accrued, unused sick leave benefits.

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6. On or about June 4, 2001, Scola caused the following memorandum to be posted:

**TO:** All Public Safety Personnel  
**FROM:** Director of Public Safety, Arthur M. Scola  
**DATE:** June 4, 2001  
**RE:** Village of Sturtevant – Board of Trustees and President

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No staff of the Police Department, Fire Department, 911 Communications or civilian employee shall submit, either verbally or in writing, any communication to the Village President or Board of Trustees without first submitting the material through the chain of command to the Director of Public Safety.

The Director of Public Safety shall be the liaison with the Board and President.

Communication is defined as any complaint, suggestion, and memorandum or like information.

This policy shall be in force immediately and strict adherence shall be maintained.

7. On Thursday, July 12, 2001, Raclaw was operating the ambulance unit and Slotty was riding with him in the vehicle on the way to conducting a fire inspection at a

convenience store. After conducting the inspection, Raclaw had to navigate around a repair truck that was partially blocking the alley in order to exit. In doing so, Raclaw drove the unit over the curb. After Raclaw and Slotty returned to the station, they noticed that the driver's side rear tire was cut. Slotty later called Scola on either July 14 or 15 and told Scola that he wanted to take the ambulance unit out of service because of the cut tire and informed Scola of what had occurred in that regard and that Raclaw was driving. Scola asked Slotty if Raclaw had done this before and Slotty answered that Raclaw had from what he had heard. Scola then told Slotty to put it in writing and place it in his mailbox. Slotty responded as directed by the following letter of July 16, 2001:

Dear Director Scola:

As I discussed with you on the telephone over the weekend about a situation that happened to the rescue squad (135). On Thursday, July 12, 2001, Squad 135 pulled into the back of a store there was a repair truck parked in the driveway. This was a very tight corner, but enough room to make the turn. Privet (sic) Steve Raclaw was the operator of the Squad and myself was the Officer in Charge. Pvt. Raclaw proceeded to turn the corner and the driver side rear wheel hit the curb damaging the crome wheel and the tire. This is the second time that Pvt. Steven Raclaw has damaged the Squads wheels.

Sincerely,

Kevin C. Slotty  
Kevin C. Slotty /s/  
Acting Driver/Operator

Slotty had no personal knowledge of Raclaw having damaged the ambulance's wheels previously, basing his statement in that regard on what he had heard from others.

8. In July of 2001, the Union elected new officers and notified Scola of this by the following letter of July 14, 2001:

July 14, 2001

Art Scola  
Director of Public Safety  
Village of Sturtevant  
2801 89<sup>th</sup> St.  
Sturtevant, WI 53177

Director Scola,

This letter is to inform you of the changes in the Executive Board of the Sturtevant Professional Fire Fighters, I.A.F.F., Local 3914. As of July 15, 2001 at 07:00, the new President will be Matt Hurtienne and the new Secretary/Treasurer will be Steve Raclaw. All union issues will now go through these individuals. If you have any questions, please contact Mr. Hurtienne or Mr. Raclaw. Thank you.

Sincerely,

Paul Guilbert, III  
President  
Sturtevant Professional Fire Fighters  
I.A.F.F. Local 3914

9. The members of the bargaining unit shared a number of concerns, including concerns regarding staffing of the Fire Department, safety procedures, discipline, equipment, supplies and the recently-purchased engine. They discussed these concerns among themselves and at times with Scola.

On or about August 1, 2001, Scola caused the following memorandum to be posted:

TO: Full-time Firefighters  
FROM: Arthur M. Scola  
DATE: August 1, 2001  
RE: Fire Department Comments

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Recently, I have noticed that there seems to be a lot of negativism concerning the day-to day-operations of the fire department and the attitudes of some of the firefighters. I would like you to write down your frustrations in regards to our department, and then I want you to list the changes that you feel could remedy these problems. In addition, please list the positive things, which you see that have occurred and are now occurring in the Sturtevant Fire Department. So often we focus only on the negative situations; we also need to look at the positive things that are going on in our fire department. In any business and and/or organization there is always room for improvement in attitude and operations; this could be a first step to some positive changes in our fire department.

I am looking forward to your suggestions and will set up a meeting to discuss your written proposals.

Subsequently, Slotty submitted his concerns about the Department to Scola in writing. Slotty used the Department's computer to draft the document.

10. On or about August 23, 2001, Hurtienne and Raclaw submitted a written grievance to Village President Acker regarding the manner in which the "tobacco-free" policy had been implemented, which identified them as the individuals submitting the grievance in their capacity as Union officers.

11. By the following letter of September 19, 2001, Raclaw advised Scola of the Union's representatives on the Fire Department's Health and Safety Committee:

To: Director Art Scola  
From: Secretary/Treasurer Stephen Raclaw  
Re: Health & Safety Committee

Dear Sir,

This letter is to inform you that at tonight's union meeting, the union chose its representatives for the Health & Safety Committee. The member who will be the liaison to you is AB/O Kevin Slotty. Other members of the committee include B/O Jack Jasperson and myself. B/O Jasperson's position is one of support and my position is as a liaison to the executive board. If you have any questions, feel free to contact either Lt. Hurtienne or myself.

Thank you.

Stephen Raclaw  
Secretary/Treasurer

12. By the following memorandum of September 20, 2001, Scola advised the Fire Department personnel that staffing was being reduced:

TO: All Sturtevant Fire Department Personnel

FROM: Arthur M. Scola AMS /s/

DATE: September 20, 2001

RE: New Staffing Level

Effective immediately: The Sturtevant Fire Department staffing levels will be diminished by one-part time personnel per day. In effect what this means is that there will be three full-time firefighters and one part-time firefighter working from 0700 hours to 1800 hours, and three full-time firefighters will be scheduled from 1800 hours to 0700 hours.

Financial concerns and cost cutting by the Village of Sturtevant Finance and Budgetary Committee brought about this decision to cut the number of personnel.

The Union's members were concerned about the reduced staffing and decided to seek the support of the local citizens and attempt to convince the Village Board to restore the staffing. The members, including Raclaw, distributed leaflets to citizens and the Union asked the Board if it could make a presentation at a Board meeting to explain their concerns. The Union was advised it could do so at the Public Safety Committee meeting at which all of the Board members would be present.

The Union formed a committee to make the presentation. This committee consisted of Hurtienne, Raclaw, Slotty and Jasperson. Raclaw was assigned to prepare the financial aspects of the staffing matter. Those present at the October 9, 2001 Board meeting included the Board, Scola, Hurtienne, Jasperson, Raclaw, Slotty and members of the public. Hurtienne, Jasperson, Raclaw and Slotty sat up front and were introduced as being there on behalf of the Union. Hurtienne and Jasperson then did a Power Point presentation that lasted approximately 45 minutes and included answering questions from those present. Raclaw and Slotty might have answered a question from the public, but did not otherwise speak.

After their presentation, Hurtienne, Jasperson, Raclaw and Slotty left the Board meeting and returned to the Fire Department dayroom. Scola then came in and told them, "Good job with the presentation."

The Village Board did not restore the part-time firefighter position.



13. On October 10, 2001, Scola called Slotty into the middle office at the fire station and told him that what he had said at the meeting was “bullshit” and that he was not going to do what he thought it would take to get the position restored. Subsequent to October 10, 2001, Scola told Slotty he was sick of talking about the staffing issue, and sick of dealing with it.

14. On October 22, 2001, Raclaw arrived at the Fire Department shortly before the start of his shift. After stowing his personal gear, he saw Melissa Shingledecker, a full-time firefighter/paramedic who was just completing her shift. Shingledecker informed Raclaw they would be short one on his shift. Slotty and A/Lt. Curtis Wendt were the other full-time firefighters on that shift; however, Slotty was at the National Fire Academy for training and Wendt was to be at paramedic classes. As Raclaw was the only full-time firefighter on that shift, he moved up to the Acting Lieutenant (A/Lt.) position. Two part-time firefighters were assigned to the shift as well – Curt Serdynski and James Schrock. Raclaw observed Curtis Wendt getting into his car sometime between 7:00 a.m., and 7:30 a.m. Wendt’s paramedic class was at the Gateway Technical College’s downtown campus in Racine and started at 8:00 a.m. Wendt arrived at the class on time and returned to the station after class at approximately 3:30 p.m.

Sometime between 7:30 and 8:00 a.m., Raclaw saw Scola come in and went to greet him. Scola asked Raclaw how many people they had and Raclaw told him there were only three. Scola said they needed to have four and directed Raclaw to “mandate in” if he had to. Article XII, Section 4 – Mandatory Call-Back, provides that full-time personnel may be ordered in to work to fill a vacancy. Raclaw began calling full-time personnel who were off-duty, but the only one he was able to contact was Shingledecker. When he talked to Shingledecker on the phone, Raclaw informed her she had to return to work. Shingledecker objected, that she had just completed 48 hours on duty and asked to speak to Scola. Raclaw connected Shingledecker to Scola. A few minutes later Scola called Raclaw and informed him that Shingledecker had worked a 48 and would be too tired and he did not want her in. Raclaw informed Scola there had only been two calls in those 48 hours. Scola then told Raclaw to find someone else.

Raclaw went through the list of full-time personnel again, but without success. At approximately 8:00 a.m., Raclaw called Lt. Hurtienne on the latter’s cell phone. Hurtienne was on his way to Waukegan, Illinois where he taught a paramedic class on his off days. Raclaw informed Hurtienne that they had only three people going into the shift and that Scola had let Shingledecker out of the mandate. Hurtienne then told Raclaw to file a grievance. Raclaw then typed up a grievance on his laptop computer, which grievance was dated October 22, 2001 and identified Raclaw as the union representative filing the form, and stated, in relevant part:

Briefly explain contract violation or past practice and remedy sought:

Staffing was allowed to fall below an acceptable level agreed upon by Director Scola and Local 2914. The shift of 1 fulltime FF/PM, 1 part-time FF/PM, and part-time FF/EMT was deemed workable. This is in direct violation of a verbal agreement between the parties.

Raclaw took the grievance and drove over to Scola's office between 8:15 – 8:30 a.m. Scola was in his office and Raclaw knocked and asked if he had a couple of moments. Scola told Raclaw to come in. Raclaw then told Scola, "Sorry, Chief, but the Union has to take a stance on the staffing issue." Raclaw then placed the grievance on Scola's desk and slid it towards him. Scola picked up the grievance and read it. Scola then tossed the grievance on his desk, leaned back in his chair and pointing at Raclaw said, "You better think about your position here before you file this." Raclaw appeared stunned and said, "What?" and Scola repeated what he had said with the same motions. Scola appeared to be angry. Raclaw picked up the grievance and said he was sorry. As he was leaving, Raclaw turned and asked Scola, "What do you want me to do then, Chief? How do you want me to get a fourth person in here?" Scola told Raclaw to call the full-timers and Raclaw said that he had done so. Scola then told Raclaw that he knew what was going on – that they were not answering their phones because they knew they would be mandated in. Scola then told Raclaw to call the part-timers and mandate them if he had to. Raclaw questioned whether they could legally do that, and Scola responded to the effect that they would do what he says if they wanted to work there.

Raclaw left Scola's office and went back to the fire station, where he unsuccessfully attempted to contact a part-timer. Scola then called Raclaw between 8:30 a.m. and 8:45 a.m. and asked if he had been able to get anyone. Raclaw responded that he had not. Scola then said, "What do you want me to do? What the fuck do you want me to do? What does the union want from me? Do you want me to get Mount Pleasant in here? I'll get Mount Pleasant in here and shut this place down this afternoon." Raclaw responded to the effect that all they wanted was the staffing they had agreed to. Scola then left his office and drove to a 9:00 a.m. meeting at Ives Grove. When Scola arrived at the meeting, he saw Jasperson there. Jasperson was at the meeting as a representative of the Union Grove Fire Department. Scola ordered Jasperson to report for work and Jasperson did so, arriving around 9:00 a.m. Neither Raclaw, Serdyneski, nor Scola observed Curtis Wendt at the fire station between 7:00 a.m. and 9:00 a.m. on October 22, 2001, other than Raclaw seeing Wendt get in his car between 7:00 and 7:30 a.m.

Later on October 22, 2001, Raclaw called Hurtienne on his cellphone and told Hurtienne that he had drawn up the paperwork for the grievance and presented it to Scola and repeated to Hurtienne what Scola had said to him. Raclaw then told Hurtienne that he was

shocked and afraid about his job and that he was not going to file the grievance; that Hurtienne would have to file it. Hurtienne then told Raclaw that they would not file a grievance because he was nervous about retaliation against Raclaw and that they would resolve the issue later.

15. Dwight Wendt had complained to Scola a few times while he was a Bureau Chief in the Department about Raclaw leaving the station too fast with the rescue squad and returning with scuffed tires. Wendt also mentioned this to Scola a couple of times after Wendt was elected to the Village Board.

Acting Lt. Curtis Wendt had twice mentioned to Scola between April and June of 2001 that Raclaw had hit the shoulder of the road while on hospital runs with the rescue squad. Wendt mentioned a similar occurrence to Scola in July of 2001. When Wendt had observed Raclaw hit the shoulder of the road, he told Raclaw to "be careful" or "take due regard."

16. Late in October of 2001, Scola decided to extend Raclaw's probationary period. Scola did not first review Department records to determine whether Raclaw's driving had improved before making his decision. On October 31, 2001, Scola called Lt. Wendt to his office to discuss Scola's decision to extend Raclaw's probation. Raclaw's probationary period would have ended as of November 6, 2001. Scola and Wendt discussed Raclaw's driving and Scola showed Wendt the following letter he had typed that day:

TO: Pvt. Stephen Raclaw

FROM: Arthur M. Scola AMS /s/

DATE: October 31, 2001

RE: Six-month probationary extension

Under the Sturtevant Professional Firefighter's IAFF Local 3914 contract, Article VI (six), Seniority, Section II (two), Probationary Period, I am extending your probationary period for six (6) additional months. This extended probationary period will end on May 6, 2002. The extension is due to the fact that I have received written and oral communication concerning your driving techniques, which need to be drastically improved.

Over the next six months, you will be training with A/Lt. Curtis Wendt. The Director of Public Safety will conduct the final testing. I fully expect that with this extensive training there will be no problem with your retention on the Sturtevant Fire Department.

Wendt agreed with Scola's decision to extend Raclaw's probation, and Scola directed Wendt to provide Raclaw with driver training. Wendt then met with Kevin Slotty, a State-certified Driver/Operator, and directed Slotty to take Raclaw through the driver training course. Raclaw had previously advised Wendt that he was in the State certification driving class at Waukesha County Technical College. Slotty then spent approximately two hours with Raclaw on October 31, 2001 providing driver training.

Training time is documented first by completing a training division sheet listing the date, shift, instructor, time and length of the class, subject and content of the class and the names of those receiving the training. The form is then signed by the officer on the shift. The training time is then further documented by entering the information in the data base on the Department's computer. Slotty completed the training division sheet regarding his driver training of Raclaw and submitted it to Lt. Wendt, who asked Slotty how Raclaw had done. Slotty replied that Raclaw had done "fine, no problems." Wendt then signed the sheet and Slotty then put the information in the Department's data base.

17. Raclaw was off on November 1 and 2, 2001 per his normal work schedule. November 3, 2001 was his next regular work day. As that was a Saturday, and Scola did not normally work on weekends, Scola had his October 31, 2001 letter to Raclaw extending his probation, notarized on November 1, 2001 and placed it in Raclaw's locker in an envelope marked "confidential".

Raclaw found the letter in his locker when he reported for work on November 3, 2001. Raclaw showed the letter to Slotty and they discussed whether Scola could do that. Raclaw was upset that his probation had been extended. Slotty and Raclaw discussed various concerns they had regarding staffing, equipment, supplies, etc., and Raclaw drafted Respondent Exhibit 1 on the Department's computer as they spoke. Raclaw and Slotty also discussed whether Raclaw should respond to Scola's letter and Slotty advised Raclaw that it would be best for him not to do so. Raclaw drafted the following three documents on the computer on November 3, 2001:

### Document 1

November 3, 2001

Working for Art Scola has been an experience at best. I have learned a lot from him. The only thing is that it has been all negative. He has taught me how get your firefighters angry at you, how to talk behind people's backs, how to tell people what they want to hear, how to make a pile of shit look like a flowerbed.

In my 2 years here I have been belittled, felt discriminated against and, worked in fear. Fear came in multiple forms. Fear of a hardass leader, who doesn't give a shit about his men. Fear of dying or getting seriously injured in a fire because he was too cheap to buy me gear (the Village must provide my first set), or because of short staffing, lack of equipment, lack of accountability systems, etc. The list is too long to mention. It's best to say that if it's a safety regulation, Scola has broken it. He even in 10/01 cut staffing to save his personal assistant's job. That whole episode will follow in later paragraphs. Belittling is easy. I've learned how to make your employees feel like they are the size of ants. All you have to do is say things like "washing my fucking car", "getting the fuck outta my office!" or, "What the fuck do you want me to do about it!" Let me tell you hearing that is a real morale booster.

Let's go on to our new engine. Scola bought the bottom of the barrel, low bid engine. He claims he had no more money to spend. We ask why spend it then, why not wait until next year for more funds. Would you buy a Geo Metro when you really need and (sic) Chevy Suburban? The engine is underpowered and underbraked. Let me apologize now for someone I may injure or kill later when I am unable to stop that engine. No one in the fire suppression side wanted that engine; no one wants to drive it. I say a prayer every time I get behind the wheel.

You may think you are safe in the Village of Sturtevant, but the paramedic system and having proper staffing to run the system is not a big concern for Scola. On several occasions, he has ordered the staffing to fall below the minimum standard set by the state. What does this mean? It means you will not get the paramedic unit you deserve when you need it. All so Scola can save his budget from the costs of overtime. When you need an ambulance, do you really care if it costs one and half times the normal amount to insure that paramedic unit is there?

Another Scola budget saver. When some of us started this department, he asked us to use our firefighting gear from another department until he could find the money to buy us gear. Two years later, I still have no village issued gear. This means, if I get injured in a fire, it will cost the taxpayers an enormous amount of money through medical bills and legal action. Scola is directly violating a state law that mandates fire departments to issue properly fitting gear to its employees.

Sensing turmoil in the department, Scola asked the members to write letters to him about our concerns. Only 3 people responded. He then sat down with us one on one to discuss our concerns. The members came up with some good ideas. They addressed staffing, maintenance issues, lack of standard operating procedures, lack of leadership, just to name a few. The members brought forth some positives as well. Scola did nothing from this. He changed nothing. Everything is the same as before the letters were written.

In October 2001 Scola had the Insurance Services Office rate the efficiency of the department. However he lacked a lot of the needed documentation to prove things such as hose and pump testing. So what did he do? He instructed his officers to falsify documentation to show he ran a great department. He then placed a "gag order" on personnel not to talk to ISO unless specifically asked a question by them. Then you were to only provide the answer and nothing more. He had us place equipment on the rigs that had not previously been there. Equipment that we had wanted on the rigs, but were told no. We all wanted to know why there was a big push now, shouldn't this equipment always have been on the rigs? The end result was a Class 4, the same class the Village of Sturtevant had before this evaluation.

Also in October 2001, the department lost a part time firefighter during the day. The union tried to figure out who had cut this position. We tried to justify our stance for increased manpower at a village board meeting on October 9<sup>th</sup>. As the union officials presented our case, all Scola did was sit back and watch. He claims he supported us. However, in a meeting in his office later on that week, he admitted he cut that staffing. He admitted to one firefighter, "I'd lose a cop or a firefighter before I'd lose my secretary." Is this really in the best interest of public safety?

About his secretary, a person who earns more than a second year firefighter. In 2001, Scola cut a part-time secretary and a part-time assistant chief. Both positions were less combined than his new secretary. Members believe that the department ran smoother with the 2 part-time positions then (sic) the full time secretary. We are frequently out of routine office supplies and our report system is more confusing than it was. Scheduling is a nightmare. Often members vacation days and comp time hours are forgotten about. Members comp time amounts are also off. This leaves our members to track time themselves. When a firefighter designed his own computer program to increase efficiency of tracking hours, he declined its use. He instead opts to use his secretary and the nightmare continues.

(Respondents' Exhibit 1)

**Document 2**

November 3, 2001

This letter is to document the events of October 22, 2001. On that day I was working my assigned shift and A/LT Wendt was detailed to school and A/DO Slotty was out at the national fire academy. I was working with FF/PM Serdynski and FF/EMT Shrock. At shift change that morning I was informed by of-going (sic) shift person FF/PM Shingledecker that I had 3 for the day shift. I knew that this fell below minimum staffing but knowing that if I mandated someone to work (Shingledecker was the only option for a mandate) I would not be backed by DPS Scola.

I opted to run with 3. When DPS Scola came in, he asked how many we had working; I advised him that we had 3. He stated "we gotta get someone in here, mandate if you have to." I proceeded to make phone calls of (sic) off duty firefighter/paramedics. I left a message with FF/PM Shingledecker's brother, asking her to call the station when she could. She called back and he told her she would have to come into work. She protested and I advised her that she is the only person I was able to get a hold of. She said, "let me talk to the chief!" I transferred her to DPS Scola's office. He called over in 2 to 3 minutes later and said "yeah, 'claw, Melissa's been here for 48 hours, she'd be a zombie if she came in here." I said "ok" and hung up the phone.

I called Local 3914 President Matt Hurtienne at home and told him of what transpired. I asked for his input on the matter and we agreed that a grievance should be filed against Scola for his failure to comply with his own verbal order of having a minimum of 4 persons on a day shift. I hung up with Matt, and then filled out the grievance form and took it into Scola's office.

I knocked on the door which was open and asked "Chief, do you have a minute?" He told me to come in. I placed the form on his desk and said "I'm sorry to do this Chief, but the union has to take a firm stance on staffing issues." He proceeded to read the form and slid it back towards me on the desk. He stated "you better think about your position here before you hand that in." I was stunned and said, "excuse me?" He restated "you better think about YOUR position here before you hand this in." He seemed to emphasize "your" the second time. I took the form with me and asked how he wanted me to get a fourth person back in here. He said "What, aren't the full timers answering their phones, I know they don't, they know what's going on." He directed me to mandate a part time person in. When I asked if we can legally do that, he

replied "I can do whatever I want to, if they want to fucking work here they'll do what I say!!" I left the office and came back to the middle office.

I proceeded to call the part time personnel on the phone list. After not getting an answer I gave up. The chief called over the phone in his office. He asked me if I had found anyone to work, I told him that I hadn't. He then proceeded to yell at me "What do you want me to do 'claw? What the fuck do you want me to do? What does the union want? You want me to shut this place down? Do you? I'll shut this fucking place down now and have Mt. Pleasant in here this afternoon!!!" Trying to be as calm as possible I replied "All that we want as (sic) somewhat adequate staffing to do our job." He then directed me to order FF/PM Shingledecker into work. I returned to the middle office and tried to call her but got no answer. I called Scola and told him she was not answering the phone. He acknowledged this but gave me no further direction.

He then left; knowing we were short staffed to go to a meeting that was also attended by another member of the police department.

I feel that his statements were meant to be threatening. I felt like and still feel like my job is in jeopardy. I believe that is directly related to my involvement in the union.

Stephen J. Raclaw  
IAFF Local 3914 Secretary/Treasurer

(Respondents Exhibit 2)

**Document 3**

November 3, 2001

To: Director Scola  
From: Private Raclaw  
Re: Probationary Extension

Dear Sir,

I came into work on Saturday November 3, 2001 and found the confidential letter in my gear locker. After reading it I was and still am confused. You cite "driving concerns" as the reason for the extension of my probation. I was never informed in 2 years of working that I had any driving



concerns. I do recall the incident this past summer in which damage was done to 135's tire, but I did not receive any reprimand for that incident.

I don't believe my probation can be extended due to this, since it is not in my job description that I must drive. In your SOG "Duties of a Firefighter" dated October 8, 2001; under Section X, nowhere does it state that a firefighter must drive. The only mention to driving is the requirement is to have a valid driver's license, which I do.

The only mention to (sic) driving is in Section IX, which refers to duties of Driver/Operator. In section 9.3 it states the driver must be proficient in driving. What is the standard used to prove proficiency? How can I being a firefighter, be held back based on rules governing a driver? Why am I held to a higher standard then (sic) anyone else? Nobody else has ever had to complete a driving course to pass probation. I feel as though I am being discriminated against for something I have no control over.

To tell you the truth, the thought of coming to work here sickens me. I am so depressed every day I think about coming here for the next 6 months, trying to prove to you that I am "good enough" to work for you. I love this job more then anything or anyone in this world, now I curse it and could give a shit less about it. I am still glad to be working at the Town of Brookfield. There I am treated as an equal, not like some gimp you hired and now fuck with for your own amusement. I have given you all I can, tried to be the best, I found out that the best don't last here.

(Respondents Exhibit 3)

Slotty saw Respondents Exhibit 1, but only on the computer screen. Raclaw then stored these documents on the Department's computer protected by his personal password. Raclaw did not give his password to anyone else. None of the documents were ever distributed.

Raclaw also called Hurtienne on November 3, 2001 and told him that his probation had been extended and read Scola's letter to him. Raclaw and Hurtienne were both concerned that Raclaw's probation had been extended because of his attempt to file the grievance on October 22, 2001. Hurtienne contacted an IAFF representative, Patrick Kilbane, to find out what the Union could do for Raclaw. Hurtienne called Raclaw back and told him to write a statement as to what had occurred on October 22, 2001, which Raclaw then drafted on the computer (Respondents Exhibit 2). Hurtienne's discussions led to preparations in November for filing a prohibited practice complaint against Scola. Hurtienne, Jasperson, Raclaw and Slotty thereafter met with Kilbane and IAFF Attorney John Kiel, sometimes at the fire station, to discuss the matter.

18. Sometime in mid to late-November of 2001, Lt. Mansell discovered, and was able to access, Raclaw's November 3<sup>rd</sup> documents on the Department's computers. Mansell showed Respondents Exhibit 1 to Shingledecker on the computer screen and printed out a copy which he provided to Scola. Scola went to the computer and verified that Respondents Exhibits 1, 2 and 3 were there. The following day, Scola had someone print out the documents for him. Scola also reviewed other documents stored on the computer, noting a number of documents prepared by the Union. Scola took no action against anyone in that regard.

Scola subsequently discussed Respondents Exhibit 1 or its contents with then-Village Administrator Henke and shortly thereafter with the Chair of the Public Safety Committee, TenCate, and then Dwight Wendt, also a member of the Public Safety Committee. Dwight Wendt suggested some type of discipline was in order, but neither Wendt nor Scola mentioned termination in their discussion. At Henke's suggestion, Scola then contacted the Village's labor attorney, William Halsey, on December 12, 2001, to discuss what to do regarding Raclaw and Respondents Exhibit 1. Halsey asked Scola if the Village had a rule against employees making disparaging remarks about the Department or their supervisors. Scola responded that it did. In response to Halsey asking, Scola also informed Halsey that there was a policy prohibiting the use of Village equipment for personal use. Halsey advised Scola that the appropriate action was to discharge Raclaw, as Scola would be better off terminating him, given what Halsey felt were serious attitude problems, while Raclaw was still a probationary employee and Scola had the absolute right to do so. Halsey advised Scola that he would be inviting trouble by keeping Raclaw on past his probation, when a just cause standard would then apply. Scola indicated to Halsey that he would think about it.

At some point, the Village also checked with the law firm that serves the Village as its Village Attorney and that firm concurred in Halsey's advice.

On December 17, 2001, Halsey called Scola to find out what he had done. Scola told Halsey he had not yet terminated Raclaw because he felt he could not let anyone go before the holidays. Scola told Halsey, "I'm going to sit on this." Scola made his decision to terminate Raclaw in the mid to latter part of December, but before Christmas. At no time did Scola show the individuals he consulted about Raclaw Respondents Exhibits 2 and 3, nor did he mention them to anyone.

19. Sometime in the latter half of December, but prior to Christmas, the Union's leaders, Hurtienne, Jaspersen, Raclaw and Slotty, informed the Union's membership of their decision to file a prohibited practices complaint against Scola for extending Raclaw's probation. Prior to that time, the Union leadership had tried to keep the matter secret. Hurtienne personally told Mansell and Shingledecker about the prohibited practices complaint.

20. In the latter part of December of 2001, but prior to Christmas, Sergeant Marschke of the Village's Police Department informed Scola that he had heard that the Union was going to "sue" Scola.

On January 3, 2002, Hurtienne was working in the middle office at the fire station when Scola approached him and asked if the Union was suing him. Hurtienne asked Scola where he had heard that, and Scola responded that he had heard it from a police officer. Hurtienne then told Scola that he would neither confirm, nor deny it. Scola was upset and left the office.

21. At the January 7, 2002 meeting of the Village Board's Personnel, Policy and Legal Committee, Scola informed the Committee members that an employee was being terminated. When asked by a Committee member if it could "come back to bite them", Scola told them that the employee was still on probation. The Committee was informed that Attorney Halsey would handle the matter if charges were filed by the Union as a result of the termination.

22. On the morning of January 9, 2002, Scola informed Hurtienne that he wanted to meet with Hurtienne and Raclaw in his office at 3:00 p.m. that day. Hurtienne then informed Raclaw. At 3:00 p.m., Hurtienne and Raclaw appeared at Scola's office. In addition to Scola, Sergeant Marschke from the Police Department was also present. Scola then informed Raclaw that he could either sign a document that indicated he was resigning or he would be terminated, effective immediately. Hurtienne asked Scola why Raclaw was being terminated, and Scola responded that pursuant to the contract, he did not have to give a reason because Raclaw was still on probation. Raclaw indicated to Scola he would not resign. Scola then told Raclaw to clean out his locker and directed Sgt. Marschke to escort Raclaw out of the building. Hurtienne and Raclaw then went in the middle office and Hurtienne began trying to contact Kilbane and Kiel. Raclaw then went and cleaned out his locker and was escorted out of the fire station by Sgt. Marschke.

23. On January 19, 2002, Raclaw participated in a Driver/Operator - Pumper State Certification Practical Sills Examination at Waukesha County Technical College as a member of the Town of Brookfield Fire Department. Of the five parts of the examination, Raclaw failed the "over-the-road driving" portion for executing turns too wide, causing him to end up in the oncoming lane of traffic and failed the "staged driving evolution" portion for backing into the bay at an excessive angle. Candidates have an opportunity to retest with a different examiner and Raclaw did so. On his retest, Raclaw passed the "over-the-road driving" portion, but again failed the "staged driving evolution" portion, again for backing into the bay at an excessive angle. That portion of the examination was stopped as the apparatus Raclaw was driving would have hit the structure. Candidates are given three opportunities to retest.

24. At no time prior to his decision to extend Raclaw's probation did Scola inform Raclaw that there was a problem with his driving skills, nor did Scola document, or cause to be documented, any complaint about Raclaw's driving, with the exception of directing Slotty to put his verbal report regarding the July 12, 2001 incident in writing. At no time prior to his decision to extend Raclaw's probation did Scola direct anyone to provide Raclaw with additional driver training, nor did he in any way limit Raclaw's driving duties before or after his decision to extend Raclaw's probation.

25. Scola's statement to Raclaw on October 22, 2001 that "You better think about your position here before you file this" contained a threat of reprisal and had a reasonable tendency to interfere with, and did interfere with, restrain and coerce Raclaw and others in the exercise of their rights guaranteed in Sec. 111.70(2), Stats.

26. Scola's statement to Raclaw on October 22, 2001, after Raclaw had raised the issue of staffing and attempted to file a grievance, "What do you want me to do? What the fuck do you want me to do? What does the union want from me? Do you want me to get Mount Pleasant in here? I'll get Mount Pleasant in here and shut this place down this afternoon", contained a threat of reprisal and had a reasonable tendency to interfere with the employees' exercise of their rights guaranteed in Sec. 111.70(2), Stats.

27. Scola's decision to extend Raclaw's probation was motivated at least in part by Scola's animus towards Raclaw's attempt to file a grievance on October 22, 2001.

28. Scola was aware of the Union's intent to file a legal action against him and that it related to Raclaw when he made his decision to terminate Raclaw. At no time prior to hearing in this matter did Respondents provide Raclaw or the Union with a reason for terminating Raclaw on January 9, 2002. Scola's decision to terminate Raclaw was motivated at least in part by his animus towards Raclaw's having attempted to file a grievance on October 22, 2001 and the Union's contemplation of filing a complaint of prohibited practices against Scola.

Based upon the foregoing Findings of Fact, the Examiner makes and issues the following

### **CONCLUSIONS OF LAW**

1. By attempting to file a grievance on October 22, 2001, Complainant Stephen Raclaw was engaging in protected, concerted activity.

2. By making the statement to Raclaw set forth in Finding of Fact 25, Respondent Village of Sturtevant, through its agent, Respondent Arthur Scola, interfered with, restrained and coerced municipal employees in the exercise of their rights guaranteed in Sec. 111.70(2), Stats., in violation of Secs. 111.70(3)(a)1, Stats.

3. By making the statement to Raclaw set forth in Finding of Fact 26, Respondent Village of Sturtevant, through its agent, Respondent Arthur Scola, interfered with, restrained and coerced municipal employees in the exercise of their rights guaranteed in Sec. 111.70(2), Stats., in violation of Secs. 111.70(3)(a)1, Stats.

4. By Respondent Arthur Scola's decision to extend Complainant Raclaw's probation, based in part upon his animus towards Raclaw's having engaged in protected, concerted activity, Respondent Village of Sturtevant, through its agent, Respondent Arthur Scola, discriminated against Raclaw in regard to his tenure in violation of Sec. 111.70(3)(a)3, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

5. Respondents Exhibit 2, but not Respondents Exhibits 1 and 3, constitutes lawful, concerted activity within the meaning of Sec. 111.70(2), Stats.

6. Complainants' preparation of a prohibited practices complaint against Respondents constitutes lawful, concerted activity within the meaning of Sec. 111.70(2), Stats.

7. By Respondent Arrthur Scola's decision to terminate Complainant Raclaw's employment based, at least in part, upon his animus towards Raclaw's and the Union's having engaged in lawful, concerted activity, Respondent Village of Sturtevant, through its agent, Respondent Scola, discriminated against Raclaw in regard to tenure in his employment in violation of Sec. 111.70(3)(a)3, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

### **ORDER**

That the Respondent Village of Sturtevant, its officers and agents, shall immediately:

(a) Cease and desist from interfering with, restraining or coercing Stephen Raclaw or any of its employees in the exercise of their rights guaranteed in Sec. 111.70(2), Stats.

(b) Cease and desist from discriminating against Stephen Raclaw or any of its employees for engaging in lawful concerted activity.

(c) Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

(1) Immediately offer to reinstate Stephen Raclaw to his former position on a non-probationary basis and without loss of seniority, and make him whole by paying him all wages and benefits he would have earned, less any amount he earned or received that he would not otherwise have received but for his termination, plus interest at the rate of twelve percent (12%) *per annum* on said amount from the date of his termination to the date he is reinstated (or the date he is offered reinstatement, but declines). 1/

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*1/ The applicable interest rate is that set forth in Sec. 814.04(4), Stats., in effect at the time the complaint is initially filed with the agency. WILMOT UHS, DEC. NO. 18820-B (WERC, 12/83)., citing ANDERSON V. LIRC, 111 Wis. 2D 245 (1983), and MADISON TEACHERS, INC. V. WERC, 115 Wis. 2D 623 (Ct. App. IV 1983).*

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(2) Notify all of its employees in the Village of Sturtevant Fire Department by posting in conspicuous places where employees are employed in that Department copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by Director of Public Safety Scola and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Village of Sturtevant that said notices are not altered, defaced, or covered by other material.

(3) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin, this 15th day of July, 2003.

David E. Shaw /s/

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David E. Shaw, Examiner

**APPENDIX "A"**

**NOTICE TO ALL EMPLOYEES**  
**OF THE VILLAGE OF STURTEVANT**  
**FIRE DEPARTMENT**

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

1. WE WILL immediately offer to reinstate Stephen J. Raclaw to his former position in the Village of Sturtevant Fire Department on a non-probationary basis and make him whole for all wages and benefits lost as a result of his termination.
2. WE WILL NOT interfere with, restrain or coerce Stephen Raclaw or any other employees in the exercise of their rights pursuant to the Municipal Employment Relations Act.
3. WE WILL NOT discriminate against Stephen Raclaw or any other employees because of their having exercised their rights pursuant to the Municipal Employment Relations Act.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

VILLAGE OF STURTEVANT

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Arthur M. Scola  
Director of Public Safety

**THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE  
HEREOF AND MUST NOT BE ALTERED OR COVERED BY ANY OTHER  
MATERIAL.**

**VILLAGE OF STURTEVANT (FIRE DEPARTMENT)**

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

Complainants filed a complaint of prohibited practices alleging: (1) that Respondent interfered with, restrained and coerced Complainants in the exercise of the rights guaranteed in Sec. 111.70(2), Stats., by Scola's threatening statements to Raclaw when he tried to file a grievance on October 22, 2001; and (2) by Scola's decision to terminate Raclaw after learning that the Union was going to take legal action against him in regard to his decision to extend Raclaw's probationary period; and that Respondents discriminated against Raclaw in violation of Sec. 111.70(3)(a)3, Stats., by (1) Scola's threatening Raclaw when he attempted to file a grievance on October 22, 2001, and then acting upon that threat by extending Raclaw's probationary period; and (2) by Scola's decision to terminate Raclaw's employment after learning that the Union was going to take legal action against him in regard to his decision to extend Raclaw's probationary period; and that Respondent violated Sec. 111.70(3)(a)5, Stats., by said conduct as it denied the Union the opportunity to file and process grievances in accord with the parties' collective bargaining agreement. 2/

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*2/ Complainants have not addressed this allegation further and it therefore is considered to have been abandoned.*

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At hearing, Complainant amended their complaint to additionally allege that Raclaw's drafting and storing of Respondents Exhibits 1, 2 and 3 on the Village's computer constituted protected, concerted activity, and that by Scola's entering the password-protected files of a member of the Union's Executive Board, Respondents interfered with the rights of Raclaw, the Union and its members in violation of Sec. 111.70(3)(a)1, Stats., 3/ and that by Scola's considering Raclaw's summary of safety and working condition concerns (Respondents Exhibit 1) in his decision to terminate Raclaw, discriminated against Raclaw in violation of Sec. 111.70(3)(a)3, Stats.

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*3/ Complainants have not addressed this allegation further in their brief and it is therefore also deemed to have been abandoned.*

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Respondents deny that Scola made the statement that Complainants allege he made to Raclaw when he attempted to file a grievance on October 22, 2001, and deny that the subsequent statement by Scola on that date constituted a threat. Respondents assert that Scola



had a valid, non-discriminatory basis for extending Raclaw's probation and for terminating his employment, and deny that Raclaw's having engaged in protected, concerted activity played any part in Scola's decision to extend Raclaw's probation or his decision to terminate Raclaw's employment. Respondents also deny that Raclaw's drafting and storing of Respondents Exhibit 1 on the Village's computer constituted protected, concerted activity.

### **POSITIONS OF THE PARTIES**

#### **Complainants**

Complainants first assert that Scola threatened Raclaw when the latter was attempting to file a grievance on October 22, 2001 on behalf of the Association in violation of Sec. 111.70(3)(a)1, Stats. It is well-established that resorting to contractually-established grievance procedures and processing grievances under that procedure are fundamental rights included within an employee's right to representation. While there are limits to the rights to file grievances by an employee or a union, such limits must be established by lawful means. An employer's remarks, as well as the circumstances under which they were made, must be considered in order to determine the meaning, that an employee could reasonably place on the statement. BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84).

Complainants assert that by October 22, 2001, Scola had become frustrated and impatient with the Union's continued insistence on dealing with staffing issues. When Raclaw gave Scola the grievance on October 22, Scola picked it up, rocked back in his chair, and after reading it, threw it on his desk, and then pointed his finger at Raclaw and said, "You better think about your position here before you file this." When Raclaw said, "What?", Scola repeated himself, using the same motions. Scola's threats did not end after Raclaw left. He later called Raclaw and after asking if Raclaw had got someone, and learned that he had not, Scola then threatened, "What do you want me to do? What the fuck do you want me to do? What does the union want from me? Do you want me to get Mount Pleasant in here? I'll get Mount Pleasant in here and shut this place down this afternoon." Scola was frustrated with dealing with the staffing issue and on cross-examination did not dispute that he did not want to deal with the staffing grievance. Scola also admitted that his goal was to deter Raclaw from filing the grievance.

According to Complainants, Scola was determined to let Raclaw and the Union know that the latter's insistence on dealing with the staffing issue put their individual and collective job security at stake. He accomplished this by threatening both Raclaw and the Union. Considering all of the circumstances, it is clear that Scola's comments contained a threat of reprisal that would tend to interfere with the filing and processing of the grievance and were intended to directly interfere with the filing and processing of grievances and the pursuit of other protected, concerted activity related to staffing. Not only did his remarks have a

reasonable tendency to interfere with the rights guaranteed by Sec. 111.70(2), Stats., the remarks did in fact interfere with those rights by casting a chill on such activity. Accordingly, Complainants have proved their allegations regarding Sec. 111.70(3)(a)1, Stats.

Next, Complainants assert that Scola's actions extending Raclaw's probationary period were motivated by his animus toward Raclaw's efforts to file the staffing grievance, in violation of Sec. 111.70(3)(a)3, Stats. Complainants note that an employer's action is unlawful where it is motivated at least in part by animus towards the employee's engaging in protected, concerted activity, regardless of whether there are valid, non-discriminatory reasons for such actions. *MUSKEGO-NORWAY SCHOOL DISTRICT V. WERB*, 35 Wis. 2D 540 (1967); *DEPARTMENT OF EMPLOYMENT RELATIONS V. WERC*, 122 Wis.2D, 132 (1985). While evidence of hostility and illegal motive may be by direct evidence such as overt statements, it is more often inferred from the surrounding circumstances. *CITY OF RACINE (POLICE DEPARTMENT)*, DEC. NO. 27020-A (Mawhinney, 7/92).

The timing of the adverse employment action may support a finding that it is in retaliation for engaging in protected, concerted activity, such as filing a grievance. *NORTHEAST WISCONSIN TECHNICAL COLLEGE*, DEC. NO. 28909-D and DEC. NO. 28954-C (WERC, 3/99) and *MUSKEGO-NORWAY SCHOOL DISTRICT*, SUPRA. The evasiveness of an employer witness has also been found to be a telltale sign of the employer's effort to conceal its hostile motive for an adverse action. *TOWN OF CALEDONIA*, DEC. NO. 28737-A (Mawhinney, 4/97); *CITY OF RACINE*, DEC. NO. 28673-A (Honeyman, 1/97). It has also been found that a sequence of events that included no major event between the time the employee engaged in protected, concerted activity and the adverse employment action was indicative of an improper motive. *CITY OF LAKE GENEVA*, DEC. NO. 30091-A (Greco, 2/02).

Applying these well-established legal standards to this case, reveals that in order to make sure that Raclaw and the Union understood that continued challenges to staffing would come with consequences, Scola acted on his threats and extended Raclaw's probationary period within nine days of the latter's unsuccessful effort to file a grievance. Scola offered the pretext that he was extending Raclaw's probationary period because of written and verbal complaints concerning Raclaw's driving and that the driving needed "drastic improvement". There is no support in the record for a claim that Raclaw's performance as a driver warranted extending his probationary period. When Raclaw was hired by the Village's Fire Department, he had made them aware that he had been terminated from the City of New Berlin Police Department due to a disability. Raclaw was hired as a part-time firefighter and his responsibilities included driving and operating fire department apparatus. During his tenure as a part-time firefighter, there were no complaints made to Scola regarding Raclaw's performance as a driver. When Raclaw was hired as a full-time employee of the Department, he was subject to a medical examination by the Department's physician before starting his full-time employment. Scola had no concerns about Raclaw's skill as a driver when he hired him as a full-time firefighter.

More importantly, prior to November 3, 2001, Raclaw's driving skills were not criticized and Raclaw had not been told that Scola had received complaints about his driving, nor was he told that his driving required "drastic improvement." It was only after Raclaw attempted to file the staffing grievance that he was informed that Scola had received such complaints, and that his driving needed such drastic improvement. Slotty's July 16, 2000 report to Scola had been treated previously by Scola as a simple statement of fact prepared at Scola's request, and Scola had not even bothered to include it in Raclaw's personnel file. One would have expected that if Raclaw's driving was such a problem that there would be a written record of such deficiencies and that they would involve more than just a single event that occurred in July of 2001, nearly four months before Raclaw's probationary period was extended. If the events of July 12, 2001 were serious enough to justify the extension of Raclaw's probationary period, one would have expected Scola to discuss the deficiency with Raclaw at the time, and would have expected him to quickly follow up to make sure that remedial actions were taken. However, Raclaw was not offered driver training until the end of October of 2001.

Scola also contended that he had received three to four verbal complaints about Raclaw's driving from Curtis Wendt; however, he did not document these, nor could he recall when Wendt had made them. One would also expect that in a small department that the Chief would personally evaluate the driving performance of an employee's skills that needed drastic improvement, particularly where the Chief claims to have received several complaints about that employee's driving. However, Scola never bothered to personally observe Raclaw's driving performance. Last, if an employee's driving skills are so deficient as to require "drastic improvements", one would expect the employee would be relieved of his responsibility to drive. However, Raclaw not only continued to drive throughout his tenure in the Department, he was assigned driving responsibilities in July and August and even more frequently in September, October, November and December of 2001, and even into January of 2002.

While Scola testified he would not have extended Raclaw's probationary period if he had believed Raclaw's driving had improved, he never bothered to check to learn whether Raclaw's driving had improved. Had he done so, he would have learned that on October 31, 2001, Raclaw had participated in driver training with Slotty and had demonstrated good technique, and had no problems. Scola did not consult with Slotty because he was not really interested in learning about the quality of Raclaw's driving, only in identifying a pretext for taking the adverse employment action against Raclaw.

Additional evidence of anti-union animus and improper motive is found in the way Raclaw was treated vis-à-vis other employees whose driving had been the subject of a written report. In October of 1998, Paul Guilbert was a probationary firefighter in the Department. Guilbert backed a Department apparatus into another stationary vehicle, damaging the bumper of one vehicle and equipment on the rear of the other. The accident was reported to then-

Bureau Chief, Dwight Wendt, who caused an accident report with the Village Police Department to be drafted. However, no adverse employment action was imposed on Guilbert. The difference in treatment is easily understood; i.e. Raclaw tried to file a staffing grievance on behalf of the Union, while Guilbert was not even a member of a labor organization at the time, since the Department was not then organized.

Complainants assert that they have shown that Raclaw was engaged in protected, concerted activities known to Respondents when Raclaw tried to file the grievance with Scola, and that considering the direct evidence, as well as the total circumstances surrounding the extension of Raclaw's probationary period, that Scola was hostile to Raclaw's protected activities, and that the extension of his probationary period was based on that hostility, and that Respondents' claim that that action was due to a legitimate, non-discriminatory reason is without merit.

Complainants also assert that the decision to terminate Raclaw violated Sec. 111.70(3)(a)3, Stats., since it was made in retaliation for the Union's intent to file a prohibited practice complaint against Respondents. After Raclaw's probationary period was extended in early November of 2001, the Union decided to file a prohibited practice complaint against Scola and the Village. The membership was apprised of the decision in December of 2001. Scola testified that he learned of the Union's decision from a police officer sometime before Christmas of 2001. On January 3, 2002, Scola approached Lt. Hurtienne and asked him if the Union was suing him. Hurtienne asked Scola where he had heard that and Scola responded that he had heard it from one of the police officers. Hurtienne then did not deny the allegation and Scola became upset and left the office. On January 9, 2002, having become aware of, and confirmed that the Union intended to file a complaint against him, Scola decided to terminate Raclaw. Filing a prohibited practice complaint is protected, concerted activity. *MUSGRAVE V. MARATHON COUNTY*, DEC. NO. 25757-C (WERC, 5/91). Considering the circumstances, it again becomes apparent that Scola discriminated against Raclaw for Raclaw's and the Union's involvement in the protected, concerted activity of filing a prohibited practice complaint.

Complainants note that Respondents assert that Raclaw was terminated because Scola became aware of documents that were "highly critical" of Scola and the Department on a Village computer at the fire station (Respondent Exhibits 1, 2 and 3). Scola asserted that the documents he retrieved support Raclaw's termination for four reasons: improper use of the Department's computer system; lack of loyalty to the Department; his attitude and Scola's concern that Raclaw was "troubled". The offered reasons are pretext and intended to cover up Scola's real motive of retaliating against Raclaw for the Union's decision to process its prohibited practice complaint. Further, it was Raclaw's decision to draft the document in the first instance that motivated Scola to terminate him. Scola specifically denied that he was offended by the content of the document, but admitted he was upset because Raclaw had

reduced his thoughts to writing in a letter intended for the Union's membership without first talking to Scola. In HOLMEN SCHOOL DISTRICT, DEC. NO. 28522-A (Greco, 7/97), the examiner concluded that a supervisor's insistence, through threat of discipline, that employees first contact her with work problems before going to the union, constituted a prohibited practice. The situation in this case is analogous. Here, Scola was upset because Raclaw did not come to him before preparing his communications. Allowing such a motive to provide the basis for termination would render the Union ineffective.

Even on their merits, Scola's reasons do not withstand muster. The claim that Raclaw was terminated for inappropriate use of the Village computer system is not supported by the record. The record reveals that the Village does not maintain a policy that prohibits employees from using Department computers to draft documents that pertain to their employment in the Village. The Chair of the Village's Personnel, Policy and Legal Committee, testified that the Village does not have a policy that regulates the use of its computers, and after reviewing Respondent Exhibits 1, 2 and 3, testified that, as Chair of that Committee, she would like to see people use the Village's computer system to come forward with those kinds of concerns. Even Scola acknowledged that use of the computers for Union business has been allowed in the past. His concerns regarding Raclaw's attitude and loyalty to the Department are also unsupported. Respondent Exhibits 1 and 3 were drafted and filed under password protection and were unedited compositions that Raclaw had no intention of circulating without revision. Thus, they are not reliable indicators of his attitude or loyalty. If anything, they show that Raclaw was a loyal employee with a good attitude, as he was concerned enough to take the time to prepare a draft letter raising safety issues affecting department members. Scola did not like the blunt, critical manner in which Raclaw advocated and raised the safety issues that had been a topic of discussion between Raclaw and fellow firefighters, characterizing this as an "attitude" problem. Raclaw was informed of the extension of his probation, and understandably felt the need to express himself to Scola and his fellow Union members. He did so by drafting, and then setting aside, a rebuttal to Scola in a communication to his fellow union members. His actions are not indicative of a bad attitude, but are responsible, normal reactions of an employee who feels he has been treated unfairly and has been the target of anti-union animus.

While Scola asserted he believed Respondent Exhibit 1 indicated that Raclaw was "troubled", he failed to define what he meant by that word. He could not have believed that Raclaw was so troubled that he posed a danger to himself or others, had that been the case, he presumably would not have allowed Raclaw to continue to operate Fire Department apparatus, but would have instead immediately terminated him. However, Scola did nothing for nearly two months. It was only after he confirmed that the Union was preparing a prohibited practice complaint against him that he decided to terminate Raclaw. Further, it was not until the hearing in this case that the Respondents first offered the four reasons associated with Respondent Exhibits 1, 2 and 3 as support of the termination decision.

Complainants assert that regardless of whether Respondent Exhibits 1, 2 and 3 played a role in the decision to terminate Raclaw, Respondents violated Section 111.70(3)(a)3, Stats., and that if it is concluded that those exhibits did play a role, then that in itself is a basis for finding a violation of that provision, since the documents themselves are protected, concerted activity.

In their reply brief, Complainants assert that the claims that Raclaw's probationary period was extended due to his driving do not withstand scrutiny, but are pretext for discrimination. Looking at the time frame that Dwight and Curtis Wendt testified they brought concerns to Scola regarding Raclaw's driving, the timing of Scola's decision to extend Raclaw's probationary period is suspect. Dwight Wendt testified that his complaints against Raclaw occurred during his tenure on the Fire Department in approximately November of 2000. Curtis Wendt claims to have complained to Scola about Raclaw's driving in the spring or early summer of 2001. Neither were concerned enough to take any action and did not bother to record their concerns, even though Curtis Wendt was Raclaw's acting lieutenant, nor was Raclaw offered any driver training. Firefighter Shingledecker claimed that the ambulance "swayed" when driven by Raclaw, but she also was not concerned enough to take any formal action. The July 12, 2000 incident reported by Slotty was not a matter of actionable concern for Raclaw's supervisors at the time. Slotty testified that he did not think it was an incident, and did not think that Scola seemed overly concerned about it. Prior to Raclaw's attempting to file the grievance, Scola did not take any time to address the alleged concerns regarding Raclaw's driving. Even though the Village's Personnel Policy required Scola to file performance evaluations of employees, Scola did not bother to make any record of the alleged driving concerns in Raclaw's personnel file, nor did he bother to ask for written confirmation of the alleged verbal complaints about Raclaw's driving. Scola also did not discuss any alleged concerns about his driving with Raclaw and instead, as did Raclaw's other supervisors, continued to assign Raclaw to drive. It was not until after Raclaw attempted to file the grievance that Scola directed Raclaw's company officers to begin offering him driver training. Timing is everything in this case and it shows that the Respondents' reliance on the alleged complaints about Raclaw's driving are mere pretext for discrimination.

Complainants also assert that the testimony of Dwight Wendt and Curtis Wendt is not credible. Dwight Wendt allegedly complained to Scola about Raclaw's driving sometime in November or December of 2000, but he did not bother to generate any record at all regarding Raclaw, unlike the prior situation involving Guilbert. Complainants also assert that Wendt's claim that Raclaw's driving was deficient was, by his own admission, based on seeing him leave the station on a couple of runs and seeing scuffs on the tire when he returned. Curtis Wendt's alleged concerns about Raclaw's driving are limited to two instances in which Raclaw allegedly hit the shoulder of the roadway with the rescue squad, which Wendt allegedly reported to Scola sometime between April and June of 2001. However, until Raclaw attempted to file the grievance, Wendt had done nearly nothing about those instances. Complainants

posit that the reason is that driving on a gravel shoulder of a highway with a rescue squad routinely occurs by operators of emergency vehicles. Even Scola admits that is the case. Thus, Wendt exaggerated his concerns about Raclaw at the hearing, leaving his testimony not credible.

Further compromising Curtis Wendt's credibility is his testimony that he remained on duty between 7:00 a.m. and 9:00 a.m. on the morning of October 22. Wendt's explanation of what occurred does not stand up under a review of the evidence. As the evidence shows, Wendt was in his paramedic class on time at 8:00 a.m., and not at the station. Curtis Wendt had an incentive to stretch the truth in order to support Scola's position as, if it were not for Scola's support and recommendation, he would have been terminated from his position in the Department for failing to fulfill the condition of employment of completing his paramedic training and certification. Curtis Wendt owes Scola for that support in obtaining an extension to the deadline for obtaining such certification. His father, Dwight Wendt, also understood that Scola's support would be vital to protecting his son's interest. For these reasons, their testimony should not be considered credible.

Complainants assert that the record reveals that Raclaw is a good driver whose driving performance is comparable to that of other firefighters. Hurtienne, a lieutenant in the Department, and Slotty, who was Raclaw's acting lieutenant while Wendt was at paramedic school, testified that they had no complaints about Raclaw's driving, and also testified that it is not unusual for firefighters to ride the curb with emergency vehicles. The testimony of the acting Fire Chief in the Town of Brookfield Fire Department, where Raclaw is employed on a part-time basis, was consistent with Slotty's.

Respondents' claim that Raclaw's scores on the January 19, 2002 State Driver Operator examination evidences poor driving skills is not probative in this proceeding. A passing score on a single maneuver was all that separated Raclaw from obtaining his certification on that date. Further, the State allows candidates for fire apparatus/driver operator certification who do not receive passing scores on all exercises, three chances to become certified, recognizing that they are not necessarily unqualified to drive because they did not pass all of the exercises on their first try. Also, Raclaw did not fail the maneuver for "riding curbs" or hitting shoulders or excessive speed; rather, he was criticized for his backing skills. Thus, what occurred on January 19, 2002 shows nothing about Raclaw's skills as a driver in the Village's Fire Department, and does not support Respondents' claims that Raclaw's probationary period was extended due to his poor driving.

Last, Complainants assert that the claim that Raclaw was terminated because he maintained the attitude expressed in his draft documents is not credible. Other than Respondents Exhibit 2, the witness statement, Raclaw tried to keep the remaining draft documents private. Raclaw wrote the documents out of frustration in an effort to get it off his chest. Using writing as a tool to relieve anger and frustration substantiates a constructive

attitude. More telling, is that even Scola was forced to admit that Raclaw's performance remained positive even after his probation was extended, regardless of the thoughts he expressed in an unprinted, password-protected document.

Even if Raclaw's documents contain language and content that is rude, insubordinate, etc., the preparation of those documents cannot provide a basis for discipline, as they were not distributed. Further, it is "generally recognized that in collective bargaining and in grievance meetings, frank discussions of the issues may result in heated exchanges and the use of coarse language is not uncommon." MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT), DEC. NO. 27664-A (Crowley, 10/93). The same is true with respect to initial drafts of communications to bargaining unit members with respect to matters of safety. Here, Raclaw engaged in protected, concerted activity of preparing a letter to fellow firefighters regarding matters of safety, a witness statement, and a rebuttal to the unlawful extension of his probationary period. Scola only became aware of these documents when he used Raclaw's private password to access them. Since the letters were in the draft stage and not distributed, the letters could not encroach on Scola's ability to maintain order and respect within the Department. Thus, even if the letters contained the "rude, insubordinate, abusive and uncivil content" that offended Scola, on balance the interests of employees to engage in protected, concerted activity in preparing such draft letters regarding safety issues, outweigh any countervailing concerns raised by Respondents. As to the contention that Scola was disturbed and offended by Raclaw's draft documents, to avoid this, Scola only need stay out of the password-protected documents of Union officials.

Complainants conclude that the record reveals that Scola was frustrated and upset with the Union for not letting go of the staffing issue, and that Raclaw bore the brunt of Scola's hostility because he had tried to file a grievance regarding the staffing issue. The best the Village can offer as justification for the termination decision is the claim that Raclaw was fired for writing letters that evinced a bad attitude. However, even that basis would violate the law. Complainants conclude that the allegations should be sustained, and the relief requested ordered along with any other relief deemed appropriate.

### **Respondents**

Respondents assert that while it does not matter why Raclaw's probation was continued and his employment ultimately terminated, so long as it was not in any part based upon anti-union animus, they have demonstrated that Scola had a reasonable basis for these actions. Raclaw's probation was extended due to the need to improve his driving skills, and his employment was terminated due to the document he produced and stored on the Village's computer, which document indicated an attitude of animus towards both the Department head and the program the Department was following.



With regard to the extension of Raclaw's probation, the parties' Agreement provides for a probationary period of a minimum of twelve (12) months with an additional six (6) month extension at the discretion of the Director of Public Safety. This requires that a new employee's employment status has to be reviewed by the Director near the employee's anniversary date; in Raclaw's case, November 6, 2001. Scola had to make a decision prior to that date to either fire Raclaw, continue his probation, or promote him to tenured status. Continuing probation has no detrimental effect on the employee other than merely delaying the tenure decision.

As Scola is the chief administrator of three different departments, he must rely upon his subordinates to advise him of problems, and his management style is to empower the people working under him. In July of 2001, Slotty called Scola and made him aware that Raclaw had damaged a tire on the rescue squad by driving over a curb. When Scola asked Slotty whether this was the first time this had occurred, Slotty had indicated that it was not. Slotty subsequently sent a memo to Scola restating those points. In addition, Raclaw's regular supervisor, Acting Lt. Curtis Wendt, had a number of conversations with Scola regarding Raclaw's driving in the period April to June of 2001. Wendt told Scola that Raclaw had driven onto the shoulder during rescue squad runs a number of times. Scola instructed Wendt that Raclaw's driving had to improve, and Wendt talked to Raclaw about it. However, Raclaw again ran onto the shoulder on a run sometime after the July incident with Slotty. Additionally, a Village Board member and former officer in the Fire Department, Dwight Wendt, had also approached Scola to complain about Raclaw's speed and erratic driving when going on runs and coming back with scuffed tires. In deciding to extend Raclaw's probation, Scola showed Lt. Wendt the letter continuing Raclaw's probation and expressing concerns about his driving, and Wendt agreed with both the evaluation of his driving and concurred in the decision to continue Raclaw's probation. As Raclaw himself admitted that part of his job is to drive equipment, and that any member of the Department may be called upon to do so, the information Scola received regarding Raclaw's driving deficiencies provided a reasonable basis for extending his probationary period. Further, Scola would not have solicited Lt. Wendt's opinion or gone through the trouble of ordering training for Raclaw, if it was simply a pretext.

There are two problems with the Union's position that Raclaw was actually a good driver and that therefore, Scola's reliance on his poor driving to continue his probation is likely to be pretextual. First, what matters is what Scola believed, rather than whether factually Raclaw was a poor driver. While Slotty downplayed the seriousness of the incident in July of 2001 when testifying about his memo to Scola, there is no evidence that Slotty ever informed Scola that his memo was inaccurate. Second, Raclaw actually was not a good driver. Raclaw testified that in taking his State certification practical exam on January 19, 2002, that he was driving to the same standard and effort as his driving with the Village's department, and that it was the best he could do. However, he failed three out of four attempts at driving maneuvers during the first and second tries and the fourth maneuver had to be stopped to keep

him from colliding with the building. Further, Raclaw tacitly admitted that he was not much of a driver in what he described as his rebuttal to the extension of his probation (Respondents Exhibit 3), wherein he complained that he was not hired as a driver, and stated that his driving is something he cannot do anything about. Nowhere did he dispute the statement that he is a deficient driver.

Respondents assert that Scola's decision to terminate Raclaw was also reasonable. Sometime in early winter of 2001, Lt. Mansell became aware of Respondent Exhibit 1 stored on the Department's computer which was extremely critical of Scola and his administration of the Fire Department. Mansell printed out the document and took it to Scola, who then went to the computer and verified that the document was there. Scola was disturbed and offended by the attitude of Raclaw. The Fire Department being a paramilitary operation, operates on respect for authority, and this respect runs both ways, as Scola has to be able to trust the men under him. The attitude Raclaw expressed towards his superior in the Department was particularly distressing, as it could not be credited to mere ignorance. Raclaw was in his third year with the Department, and the attitudes expressed were both mature and informed, and unlikely to easily change.

In considering what to do, Scola sought the opinions of the Village Administrator, the Village's labor attorney, the Chair of the Public Safety Committee, and another Village Board member. All advised that he take disciplinary action and the labor attorney, William Halsey, was particularly emphatic that Raclaw should be terminated while he was still a probationary employee. Following Halsey's advice, Scola went before the Village Board and advised them that he was going to terminate a probationary employee, and there were no objections. As Raclaw was a probationary employee, Scola could do whatever he pleased within reason and need not show a disciplinary violation to fire him. However, Scola's concerns over the document and the attitude expressed in it were well grounded in pre-existing Village policies. The harangue contained in Respondent Exhibit 1 was printed and stored on Village equipment in violation of Village personnel policies prohibiting the use of Village-owned equipment for personal reasons. If the document is considered not to be personal, but a policy document, then it implicates the rule against the use of Village equipment for a political activity. Given the rude, insubordinate, abusive and uncivil language in the document, it violates the prohibited conduct section of the personnel policies. No employer would tolerate the accusations Raclaw made about Scola. The level of discipline to be imposed was in Scola's discretion and he acted in accord with the advice he received from the Village's labor attorney and other advisers. That action was reasonable in its nature.

As to the allegation that Scola was motivated by anti-union animus and that his stated reasons for his actions are a pretext to disguise his true motive, Respondents note the difficulties of demonstrating a negative, in addition to the difficulty of demonstrating a subjective state of mind. However, there is direct evidence in Scola's own testimony that he

was not motivated by such animus, and there is circumstantial corroboration of his testimony based upon his personal history of union membership and lack of any prior anti-union attitudes or practices on his part. There is also the direct testimony of the Village's labor attorney, William Halsey, that it was he who counseled Scola to terminate Raclaw, and that his advice was not motivated in any way by Raclaw's union membership, but was based on an analysis grounded in his professional experience and training. There is also circumstantial evidence corroborating Halsey's and Scola's direct statements in that the process followed in making the decision indicated that Scola was not initially decided on the action to take, and that his decision was a result of concurrence from a number of other persons on the action that was taken.

The Complainant's circumstantial evidence of Scola's state of mind is contradicted by the record. The assertion that the Union's October 9 lobbying efforts before the Village Board provided a motive that would give rise to animus on Scola's part is based on a false premise that Scola was upset with the effort. The assumption that it was Scola's plan to reduce staff is contradicted by the testimony of Scola and Board member Dwight Wendt that it was the Village Board that made the decision and instructed Scola to implement it, while Scola opposed the cuts. Rather than being opposed to the Union's lobbying efforts, Scola assisted it beforehand by making the Department's Power Point equipment available to them for the presentation and then afterwards, went out of his way to complement them on their effort. The most Complainants were able to show was that Scola was not willing to pay the political price he thought necessary to get staffing raised. Further, there was no connection presented between the presentation and Raclaw. The presentation was done by Hurtienne and Jasperson, and Raclaw's part in it, other than sitting with the others at the meeting, was not privy to Scola. There was also no evidence that there was any action taken against any other Union member who had distributed fliers, helped in the preparation of the presentation, or sat on the panel at the presentation. To the contrary, in at least one instance where Union President Hurtienne was exposed to discipline, Scola gave him the opportunity to respond to the matter and was talked out of imposing any discipline. It was more likely that Scola would have been more angry with Hurtienne, as far as being a public spokesman and for attempting to grieve the staffing levels, as it was directed by Hurtienne, or for threatening to complain against him.

The argument that Raclaw's presentation of the grievance on October 22 provided a motive for animus is also not persuasive. No grievance was ever formally filed, and had it been pursued, it would have been without merit. Scola's response to the grievance was neither unreasonable, nor in violation of the contract. The attempt to interpret Scola's statement that the Union should reconsider its position as being a threat to Raclaw's position with the Village, is an act of will rather than an act of reasonable interpretation. Raclaw initiated a grievance against Scola for telling him that while he must mandate in a firefighter, he could not mandate in Shingledecker because she had just come off of a 48-hour shift. He presented an unsigned grievance to Scola and Scola gave it back to him telling him the Union should reconsider its

position. Scola acted correctly. In filing an initial grievance, the grievant is to say what the grievance is and management is supposed to respond. If the Union is not satisfied with the response, then they file a properly filled-out written grievance. In this case, Scola responded, and the Union chose not to pursue it. Scola rightfully rejected the grievance as the determination of staffing levels is a matter wholly within the right of management under the Agreement. Respondents also question why Raclaw's attempt to file a grievance would give Scola a motive for vengeance against Raclaw, as the latter was not insolent or defiant to Scola and the Union did not pursue the grievance.

The assertions that the Union's intent to file prohibited practice complaint against Scola gave him a motive to fire Raclaw is also not supported by the record. The evidence indicates that the termination decision was made before any rumor of any lawsuit reached Scola, and further that the information Scola received about a proposed lawsuit did not indicate it was connected to Raclaw in any way. Scola estimated he became aware of Raclaw's attitude sometime in early to mid-November, however, he was certain he spoke to the then-Village Administrator soon after becoming aware of the document, and immediately after that spoke to Halsey at the Administrator's suggestion. As an attorney for the Village, Halsey must keep track of his time spent on Village matters in order to be compensated and he made a contemporaneous record of the dates of his conversations with Scola. According to Halsey, Scola called him on December 12, 2001 and informed him of finding the document (Respondent Exhibit 1) and its contents and they discussed the attitude Raclaw had expressed. After discussing the matter, Halsey counseled Scola that he thought Raclaw should be fired as problems with negative attitude are very serious matters, and that as a practical matter, it was best to terminate such an employee during his probationary period because it could be done without a showing of cause. Halsey called Scola back on December 17 because he had not yet heard that Raclaw had actually been fired. Scola then confirmed that Raclaw would be fired, but that he could not bring himself to fire someone immediately before the holidays, telling Halsey that he was going to "sit on this". Halsey testified that Raclaw's union activities or a potential lawsuit against Scola was not a part of his analysis as to what action should be taken, nor did Scola ever mention any of that in talking to Halsey about the matter.

Further, it was not proven that Scola had knowledge that a prohibited practice action was being contemplated concerning the continuation of Raclaw's probation. The testimony of both Scola and Hurtienne regarding their conversation about the Union possibly suing Scola shows no indication that Scola had any idea of what the litigation was to be about. The testimony was that the Union tried to keep their plan secret, even from their own members, and Hurtienne testified that, as far as he knew, the decision to file a complaint on Raclaw's probation extension was not known outside of the Union membership.

Respondents also dispute the assertion that Respondents Exhibit 1 is a union document; asserting instead that it is an insubordinate and disloyal harangue that was stored on Village

computers. The record indicates that the document was not a union communication, and there was nothing in it that would have made Scola believe that it was a union communication. Thus, the argument that it was a prohibited practice to terminate Raclaw for the document based on the document fails the first two steps of the MUSKEGO-NORWAY test, in that preparing and storing the document was not engaging in protected, concerted activity and the employer was not aware of such activity if it occurred.

As to Raclaw's claim on the third day of hearing that the document was drafted for the Union's Executive Board, Respondents assert that Raclaw was pretty much compelled to make that claim as he would otherwise be without a remedy. Beyond this, his testimony is refuted by the contents of the document itself and the lack of its use. On its face, the document does not have the form or content of an expression of fact or opinions addressed to the Union membership or leadership. Secondly, it is unlikely that this was actually an internal union document, since it was not used as one; Raclaw admitting that he never showed it to anyone else in the Union. Further, even if it were subjectively intended to be part of some concerted activity, there is nothing in Respondent Exhibit 1 that would have put Scola on notice of such a character.

Respondents assert that there is other circumstantial evidence of the lack of pretext. The claim that the proximity in time between the extension of Raclaw's probation and his attempted filing of the grievance on October 22 is evidence of pretext, ignores the fact that the timing of the extension was dictated by the calendar and the collective bargaining agreement, as it was tied to Raclaw's anniversary date of November 6. Further, the record indicates that discussions about Raclaw's driving problem were ongoing during this period and prior to October 22. The driving problem is well-documented and was based substantially on what other people reported to Scola, and is supported circumstantially by the evidence that Raclaw is actually a bad driver. The existence of a legitimate reason for extending Raclaw's probation undermines the claim that the stated reason was pretextual. As to Raclaw's termination, evidence that Raclaw violated previously-established existing standards (the Village's personnel policies) is circumstantial evidence rebutting a claim of pretext.

Also, Scola has himself been a member of the IAFF for the vast majority of his firefighting career, and there is no testimony indicating that he had made comments denigrating that union in particular or unions in general. Scola has no history of disciplining union members, the only prior discipline Complainants could recall was with regard to Lt. Wendt.

Further, there is the process that Scola went through in making his decisions. The possibility that a decision was based on improper motive is lessened by a showing that an orderly and broad-based process was followed in arriving at the decision. In making the decision to continue Raclaw's probation, Scola had Raclaw's immediate supervisor review the decision and he concurred in Scola's decision. As to the termination decision, while it was

ultimately decided upon by Scola, the circumstances and process out of which it resulted were not unilateral. Scola did not initiate the sequence of events that led to Raclaw's firing. It was Lt. Mansell that discovered Respondent Exhibit 1 and took the document to Scola. The decision to discipline by termination was made in consultation with a number of other persons, and specifically upon the advice of attorney Halsey. Further, the Village, although not Scola, double-checked Halsey's advice with the Village's other attorneys. This process of consultation and double-checking is not consistent with the theory that Scola was acting out of personal motivation.

Respondents conclude that Raclaw is in his only available forum, and that this is why Complainants have striven so vigorously to find an interpretation of the facts that would justify linking the decision of management to Raclaw's union membership and activity. No such connection can be fairly found based on the evidence.

In their reply brief, Respondents first assert that the factual assertion that Scola was angry about the Union's lobbying of the Village Board to restore staffing levels because it violated the "lobbying policy" ignores the context of the presentation and all of the testimony in that regard. There was no evidence that Scola ever complained of or even made mention of a violation of the policy, and in any event, Scola testified that he had given the Union permission to make the presentation. Rather than criticizing the presentation, Scola complemented the Union in that regard.

Respondents also dispute the factual assertion that there was a "verbal agreement" regarding staffing levels. While it does not particularly matter whether there was such an agreement, it is undisputed that Scola ordered a mandate to restore staffing levels to the guidelines and further that there was no separate agreement. Hurtienne did not claim that there was an agreement, rather he stated that there was a conversation with Scola at the end of October wherein the Union asked Scola what the bottom line was on staffing and Scola reiterated the levels expressed in his September 20 memorandum. The claim of such an agreement is based on Complainants' attorney having gotten Scola to use the term "violation of contract" in his testimony when referring to a violation of his staffing level memo. Scola later clarified what he meant on re-direct and further noted that staffing is reserved to management under the management rights clause of the Agreement.

Respondents again dispute the assertion that Respondent Exhibit 1 was anything other than a harangue; that even if it were to be considered a union document, there was nothing in it that would have given Scola any notion that the document was intended as such, nor would any reasonable person have had that impression.

With respect to Complainants' legal premises, Respondents assert that Complainants implicitly rely on a false legal premise that the union's perception of the employer's motive can

be substituted for proof of subjective animus by the employer in proving discrimination. Complainants' argument seems to be that if a collateral effect of an employer's actions is to disquiet an employee, this is somehow evidence that the action was intended to do so. In the case of a charge of discrimination, the union is required to demonstrate the employer's actual intentions.

As to the alleged interference, the Complainants' apparent belief is that when a supervisor presented with a grievance tells the union they are wrong-headed on the grievance, this act's inherent effect is to intimidate the union out of filing the grievance. That is not the case; rather it is Step 1 of the grievance procedure. Here, Raclaw told Scola what the grievance was, and Scola told him they should reconsider their position. The procedure on its face assumes that there will be a communication on positions, and it contemplates that the employer will not agree that the union's position has merit. The Agreement also provides that the Union has five days to consider its position and decide whether it wants to go forward with the grievance, allowing a calm reflection that would mitigate any situational stress. The fact that one of the parties changed its position after the presentation of the grievance is hardly proof of intimidation. The proposed grievance itself was legal nonsense, and even if it had not been, Scola quite rightly pointed out that the logical end of the Union's position that the Department cannot continue to operate below staffing levels, would be shutting down the Department whenever someone did not show up for work. Thus, his response was reasonable, and well within the bounds of the grievance process.

Respondents posit that the allegations of anti-union animus are alleged because such allegations had to be made in order to do anything for Raclaw, as he was a probationary employee and the continuation of his probationary status was completely at the discretion of the Director of Public Safety under the parties' Agreement. When Raclaw was fired, he was still a probationary employee and thus had no just cause protection and no grievance rights. The Union recognized that Raclaw is completely without rights or remedies unless they claim a prohibited practice and in order to do so, they needed to assert anti-union animus. Thus, the interpretations of statements and events urged by Complainants is attributable to need, rather than a reasonable view of the evidence.

The interest of a witness in the finding of a fact bears directly upon that witness' credibility when testifying in support of the finding. Here, Raclaw testified as to his subjective understanding of what Scola's statements meant and his subjective intention as to what Respondent Exhibit 1 was meant to be. Raclaw is obviously an interested witness. The Union witnesses who testified as to their personal opinion that Raclaw was a fine driver are biased witnesses to the extent that they have a personal loyalty to Raclaw, and are interested witnesses to the extent they are trying to protect a fellow union officer. This is in contrast to Respondents' witnesses as to Raclaw's driving proficiency. Former firefighter Shingledecker has no current affiliation with the Department and there is no indication in the record that she

has any conflicts with the Union or with the Village that would give her an interest or bias. It was her testimony that Raclaw was not only a bad driver, but a notoriously bad driver. This not only circumstantially supports the testimony of others as to instances of poor driving, but casts doubt upon the veracity of those biased witnesses who testified that Raclaw was an excellent driver. Lt. Wendt is a member of the Union and the record established that the Union has supported him to protect his job. He is also the only other person in the unit who had recently been disciplined by Scola. Given Wendt's precarious employment status at the time of hearing, and his interest in protecting the Union's goodwill, Wendt nevertheless confirmed his observations of Raclaw's having driven off the road and his reporting those incidents to Scola, and his confirming Scola's decision to continue Raclaw's probation. The Associate Dean for Fire and EMT Training at Waukesha Technical College testified that he had knowledge of the testing of Raclaw's driving abilities through an ordinary practical skills exam as part of the State certification process. That testing showed that Raclaw was a deficient driver. While Erickson knew Scola as an instructor and Raclaw as a student, there is no particular relationship appearing on the record that would give Erickson an investment in the outcome of these proceedings. The testing on January 19 was administered and documented according to normal procedures of the institution that was in the business of conducting such tests, and the procedures included having a different examiner do the re-test. Erickson's testimony corroborates those witnesses who testified that Raclaw had poor driving skills, and circumstantially corroborates that poor driving by Raclaw was observed by Slotty, Lt. Wendt and Dwight Wendt and was reported to Scola.

The testimony of the various witnesses that Raclaw had problems driving is also circumstantially corroborated by his own testimony that he is legally blind, and that the examining physician did not administer an eye exam during the pre-employment physical. Raclaw's corrected vision is still well less than the minimum accepted for firefighters under the NFPA 1500 national standards. That his vision problems caused the driving problem is supported by Raclaw's statements in the document he characterized as a rebuttal to the extension of his probation (Respondent Exhibit 3) that he feels that having to demonstrate driving proficiency means "I am being discriminated against for something I have no control over" and that he feels like he is being treated "like some gimp." Viewed in the context of Raclaw's vision problem, Respondent Exhibit 3 would appear to constitute an admission by Raclaw of his poor driving proficiency. This also circumstantially supports the allegations of poor driving, as common sense would appear to dictate that a man whose eyesight, even when corrected, is very bad, would be expected to have difficulty in managing visual cues such as lane lines, curbing lines, building entrances, etc. The testimony that there was a driving skills problem and that it was noticed was well corroborated, in turn opening to question the credibility of the testimony of those witnesses who testified that Raclaw never had any problems driving, and their opinions that his problems would be due to anti-union animus.



While Complainants make an issue of the failure to keep extensive documentation of the driving problem, or to follow a more thorough corrective regimen, the existence of a large body of other evidence corroborating Scola's legitimate concern, produced from so many credible sources, offsets any suspicions that the Department's recordkeeping shortcomings are anything more ominous than that. What might be expected in a large, highly-regimented department with a long history of administrative experience is not what will be found in a small, newly-formed department, such as the Village's. The Department was started from scratch less than three years before the events in question, and has a total of nine full-time employees, all of whom are relatively inexperienced, and it shares its chief executive with two other Village departments. While in a perfect world, Raclaw's driving problem would have been addressed more effectively in the two months prior to the point at which it had to be done, the driving deficiencies did have to be addressed at the anniversary date, and they were. Scola's action in extending the probation of Raclaw was the reasonable choice to make under the circumstances.

Respondents conclude that the adage that all other things being equal, the simplest explanation is most likely to be the true explanation, is applicable in this case. Complainants offer at most a circumstantial case and there is no direct evidence of any animus, nor of a pretext. In order to believe the Complainant's proposition that Raclaw was an excellent driver, and that his driving was never a source of complaint, one would have to discredit the testimony of Erickson, Shingledecker, Dwight Wendt, and Curtis Wendt, that Slotty's memo and Raclaw's own document (Respondent Exhibit 3) do not mean what they appear to say, and that the standard testing done at WTC does not measure what it is designed to measure. It also means that one must believe that a man with vision as poor as Raclaw's is not likely to have problems when driving. Crediting Complainants' case would further require a finding that Attorney Halsey is lying about the basis on which he offered his advice to Scola and the advice received from the Village's other attorneys. Respondents offer that the more reasonable explanation is that Raclaw was simply unfortunate in that his driving difficulties came to the attention of his superior officers and that he made an ill-considered move in revealing his true attitude in a setting where it was discovered by his employer. More importantly, the Respondents were able to produce a body of well-supported evidence demonstrating that its concerns and actions were well-founded and legitimate. Complainants were unable to produce any evidence that the participants in the decisions in question were engaged in either an anti-union course of action or in a cover-up of the same. Thus, Complainants have failed to prove their case.

## **DISCUSSION**

### **Interference**

Complainants assert that Respondents directly violated Sec. 111.70(3)(a)1, Stats., by the statements Scola made to Raclaw on October 22, 2001.

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

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

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

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

In order to establish a violation of Sec. 111.70(3)(a)1, Stats., 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. BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84). 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. WERC v. EVANSVILLE, 69 Wis. 2d 140 (1975); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84). 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, Stats., if the employer had valid business reasons for its actions. CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91).

### **Scola's Statements**

Complainants first assert that Scola's statement to Raclaw when he attempted to file the grievance on October 22, 2001 constituted interference as it contained a threat of reprisal if Raclaw were to continue to press the grievance. It is noted in this regard that the Commission has held that processing a grievance under the parties' contractual grievance procedure constitute lawful, concerted activity within the meaning of Sec. 111.70(2), Stats. VILLAGE OF WEST MILWAUKEE, DEC. NO. 9845-B (WERC, 10/71). See also, MONONA GROVE SCHOOL DISTRICT, DEC. NO. 20700-G (WERC, 10/86).

The parties dispute what it is that Scola said to Raclaw. Scola denied that he told Raclaw he'd better think about "your position here" or "your future", and testified that he stated something to the effect that Raclaw should "rethink the position of the Union." Raclaw

testified that Scola pointed at him and said, “You’d better think about your position here before you file this.” When Raclaw said, “What?”, Scola then repeated what he had said. Scola agrees that he repeated what he said after Raclaw said, “What?”

Union President Hurtienne corroborated Raclaw’s version. Hurtienne testified that when he talked to Raclaw later in the day on October 22, that Raclaw told him that when he had tried to file the grievance, Scola said, “You’d better think about your position before you file this.” Also corroborating Raclaw’s version is his account of what happened on October 22 that he drafted on November 3 at Hurtienne’s direction. Raclaw’s statement on November 3 of what had occurred on October 22 was close in time, if not contemporaneous, with the events of October 22. While Raclaw’s version in the November 3 document varies somewhat from what he testified Scola said, the statements are substantially similar. 4/

Scola also testified that Raclaw appeared a “little bit stunned” after his statement to Raclaw and continued to look stunned after he repeated his statement. A department head

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*4/ The version in Raclaw’s November 3 document being somewhat more damning: “You better think about your position here before you hand this in” with the accent on “your”.*

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telling a local union official he should think about the union’s position before he files the grievance should not of itself be something that would frighten or “stun” a union official, even if he were a probationary employee. 5/ However, a department head telling a local union official, who he knows is a probationary employee, that the employee ought to think about “your position here before you file this”, would likely frighten or “stun” that employee, as it can reasonably be construed to contain a threat to his employment if he persists in filing the grievance. The Examiner concludes that this is what occurred in this instance.

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*5/ As Respondents point out, there is some presumption that management might not agree with the union’s position and that there will be some give and take regarding their respective positions. That does not constitute “interference”, as long as management’s statements do not contain a “threat of reprisal or a promise of benefit” to induce the union to change its position on the grievance.*

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Further, Scola’s statement not only had the likely effect of discouraging Raclaw and the other members of the Union in exercising their rights under Sec. 111.70(2), Stats., by pursuing a grievance, it did in fact have that effect. Hurtienne testified that when Raclaw told him that he (Raclaw) was afraid for his job and would not file the grievance, that he (Hurtienne) then

told Raclaw they would not file the grievance, being afraid of retaliation against Raclaw if they did.

It is concluded that Scola's statement to Raclaw on October 22, 2001, when Raclaw attempted to file a grievance, contained a threat of reprisal which tended to interfere with, restrain or coerce Raclaw and other members of the Union in the exercise of their rights guaranteed in Sec. 111.70(2), Stats., and therefore constituted "interference" in violation of Sec. 111.70(3)(a)1, Stats.

Complainants also assert that Scola's statement to Raclaw shortly after he attempted to file the grievance also constituted interference within the meaning of Sec. 111.70(3)(a)1, Stats. There does not appear to be a dispute as to what Scola said. Raclaw testified that shortly after he had left Scola's office, Scola called him and asked if he had been able to get anyone, and that when Raclaw responded that he had not, Scola then said, "What do you want me to do? What the fuck do you want me to do? What does the union want from me? Do you want me to get Mount Pleasant in here? I'll get Mount Pleasant in here and shut this place down this afternoon." It would not be unreasonable for Raclaw to conclude from that statement that if the Union was going to continue to give Scola a problem whenever staffing fell below the minimum, he would shut the Department down whenever that happened and rely on the agreement with Mount Pleasant to provide fire protection.

Respondents assert that this was not a threat, but the logical end of the Union's position that the Department cannot continue to operate when they fall below the minimum staffing level. The argument is clever, but not convincing. Respondents do not assert that this was something that could not realistically occur, i.e., that it was beyond Scola's power to make it happen. Ostensibly, Scola has the authority to carry out his threat. Further, Scola's statement was not a prediction of what might happen; rather, it was a statement of what he would do, and it was tied to the Union's having challenged his actions when he felt he had done all he could to address the staffing problem that morning. While Scola's frustration with the situation is understandable, his statement constituted a "threat of reprisal" for having engaged in lawful, concerted activity. As such, Scola's statement would tend to interfere with, restrain or coerce the Union and its members in the exercise of their Sec. 111.70(2), Stats., rights. Thus, a violation of Sec. 111.70(3)(a)1, Stats., has been found regarding this statement as well.

### **Discrimination**

Complainants assert that Scola's decision to extend Raclaw's probationary period and his subsequent decision to terminate Raclaw constitute discrimination within the meaning of Sec. 111.70(3)(a)3, Stats., as the decisions were motivated, at least in part, by his animus towards Raclaw's having attempted to file the grievance on October 22, 2001, and as to the latter decision, also towards the Union's intent to file a prohibited practices complaint against him.

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

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

In order to establish a violation of this section, a complainant must establish by a clear and satisfactory preponderance of the evidence all of the following elements:

1. The employee was engaged in lawful and concerted activities protected by MERA; and
2. The employer was aware of those activities; and
3. The employer was hostile to those activities; and
4. The employer's conduct was motivated, in whole or in part, by hostility toward the protected activities. MUSKEGO-NORWAY C.S.J.S.D No. 9 v. WERB, 35 Wis. 2d 540 (1967); EMPLOYMENT RELATIONS DEPARTMENT v. WERC, 122 Wis. 2d 132 (1985); CITY OF MILWAUKEE, ET AL, DEC. No. 29270-B (WERC, 12/98).

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

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

be encouraged or tolerated. See EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS. 2D 132, 141 (1985).

### **Extension of Raclaw's Probation**

There is no dispute that Raclaw was engaged in lawful, concerted activity when he appeared with the Union's leadership at the October 9, 2001 Board meeting, when the Union made its presentation regarding the staffing issue, and when he attempted to file the grievance with Scola on October 22, 2001. While Respondents assert there is no evidence that Scola was aware of Raclaw's role in the preparation of the presentation, there is no dispute that Scola was aware that Raclaw was the Union's Secretary-Treasurer, and they do not deny that Scola was aware that Raclaw appeared at the October 9 Board meeting as a representative of the Union. Obviously, Scola was aware Raclaw attempted to file the grievance with him on October 22.

The dispute is with regard to the third and fourth elements. With regard to the Union's presentation at the October 9 Board meeting, there is not sufficient evidence in the record from which it can be inferred that Scola bore any animus toward Raclaw for his part in the presentation, nor for that matter toward any of those who participated in the presentation. As Respondents point out, there is no evidence that Raclaw's preparatory work was known to Scola, and his participation at the Board meeting was minimal beyond his being present. Further, the evidence does not show that Scola was upset by the Union's presentation, only that he was not optimistic about its success. Also as Respondents point out, Scola opposed the reduction in staffing and made the reduction at the direction of the Village Administrator and the Board's Finance Committee. Therefore, he would seemingly not be opposed to the Union's efforts to get the Board to restore the staffing. That is not to say that Scola did not become weary of the Union's continuing to harp on the staffing issue after it was clear to him that the Board was not going to restore the position.

With regard to Raclaw's attempt to file a grievance on October 22, 2001, as discussed above, the Examiner has concluded that Scola told Raclaw that "You better think about your position here before you file this." That statement is direct evidence of Scola's animus towards Raclaw's engaging in lawful, concerted activity, i.e., attempting to file a grievance. That finding is further supported by Scola's subsequent statement to Raclaw on October 22 that he would get Mount Pleasant in there and "shut this place down." There is also Scola's statement to Slotty that he was sick of talking about and dealing with the staffing issue. Thus, there is sufficient evidence to find that Scola was hostile towards Raclaw's having engaged in lawful, concerted activity on October 22 when he attempted to file the grievance.

The question then becomes whether Scola's hostility played a part in his decision to extend Raclaw's probationary period. As Complainants point out, motive must often be gleaned from the totality of the circumstances. In this case, there is first the timing of Scola's

decision. While Respondents correctly point out that Scola had to make a decision about Raclaw's status prior to his November 6 anniversary date, it cannot be ignored that Scola's decision on October 31 was only 9 days after Raclaw's attempt to file the grievance. It seems unlikely that Scola's animus towards Raclaw for his attempt to file the grievance would have dissipated within that brief time span. Second, there is the basis Scola offered for his decision to extend Raclaw's probation. Complainants assert Scola's reliance on Raclaw's driving is simply a pretext behind which to hide his true motive. Respondents deny this and assert there is not only evidence that Scola received complaints about Raclaw's driving in sufficient number that he could reasonably believe there was a problem, but there is also ample evidence that Raclaw was in fact not a good driver.

Determining whether Scola's cited reason for extending Raclaw's probation was pretext or the real basis for his decision involves consideration of a number of factors. First, while it appears Raclaw may have had some problems with his driving, 6/ the evidence is that nothing was said to Raclaw about his driving before Scola's decision, with the possible exception that his Acting Lieutenant, Curtis Wendt, may have told him to "be careful" a couple of times in the Spring of 2001 when Raclaw hit the shoulder of the road on runs with the rescue squad. Further, Raclaw continued to be assigned to drive Department apparatus, with no additional driver training until the day Scola had his decision to extend Raclaw's probation put in letter form – October 31, 2001. The evidence also indicates that Raclaw's driving was not a concern to Scola when he hired Raclaw as a full-time firefighter after having been a part-time firefighter in the Department for a year.

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*6/ Contrary to Respondents' assertion that Complainants' witnesses characterized Raclaw as a "fine" driver, those witnesses testified that the things Raclaw was criticized for were not uncommon occurrences in a fire department.*

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There is also the timing of Scola's concern about Raclaw's driving in relation to the complaints he received. Crediting Respondents' witnesses as to their complaints to Scola about Raclaw's driving, the evidence indicates that the last complaint Scola received was sometime in July of 2001, when Slotty informed Scola about the July 12 incident, or when, according to Lt. Wendt, Raclaw again had hit the shoulder of the road on a run. According to Dwight Wendt, Curtis Wendt's father and former Bureau Chief in the Department and now a Village Board member, he complained to Scola about Raclaw's driving a "few times", but mostly when Wendt was still on the Fire Department. Wendt left the Department in December of 2000, shortly after Raclaw was hired as a full-time firefighter in the Department. Although Wendt testified he also talked to Scola about Raclaw after he became a Board member a "couple of times", it was not established when this occurred.

Lt. Curtis Wendt testified that he mentioned Raclaw's driving to Scola a couple of times in the period from April to June of 2001, possibly once again in July, and these were in regard to Raclaw's having hit the shoulder of the road while on hospital runs. While Lt. Wendt testified that he talked to Raclaw about this, it was only to tell Raclaw to "be careful" and to take "due regard."

The only other "complaint" Respondents cite 7/ is Slotty's letter of July 16, 2001 in reference to the July 12 incident where Raclaw ran over the curb and nicked the tire on the rescue squad in trying to get by the truck parked in the alley. This is also the only documentation of any problem with Raclaw's driving. There is, however, no indication that Scola considered the July 12 incident to be of serious concern and nothing much was said to Raclaw about it.

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*7/ While Respondents cite Shingledecker's testimony regarding Raclaw's driving, it does not appear she ever informed Scola of her concerns.*

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Thus, even looking at the evidence in a light most favorable to Respondents, Scola did not receive any complaints about Raclaw's driving from sometime in July to the time he made his decision to extend Raclaw's probation, which was sometime late in October according to Scola, and the most that was said to Raclaw about his driving was to "be careful." This would seem to belie Scola's having had a serious, ongoing concern about Raclaw's driving.

Further, Scola testified that he would have reconsidered his decision to extend Raclaw's probation if Raclaw's driving had improved; however, he conceded he did not bother to review the Department's training records to see whether or not that had occurred before he made his decision. The most Scola could offer in this regard was testimony that he showed Lt. Wendt his letter to Raclaw extending Raclaw's probation on October 31 and asked Wendt if he concurred in his decision, to which Wendt responded that he did.

However, the Examiner finds the credibility of Lt. Wendt and Scola to be lacking for several reasons. Foremost is Lt. Wendt's positively incredible testimony that he remained at the fire station until 9:00 a.m. on October 22, 2001. The overwhelming evidence in the record is that Wendt left for paramedic class between 7:00 and 7:30 a.m., arrived at class on time at 8:00 a.m., and returned to the station that afternoon after his paramedic class. This was established by the testimony of Raclaw, Serdynski and Scola that they did not see him at the station during the time Raclaw was attempting to mandate someone in, and more positively by the attendance records for his paramedic class. The latter strictly note any tardiness or absence, and indicate that Wendt was present when the class began at 8:00 a.m. on October 22. Further, while acknowledging that if he were present he would have been the



officer in charge and responsible for getting someone in, Wendt could offer no explanation as to why he did not attempt to do so. Scola's willingness to now rely on Wendt's assertions that he was at the station that morning, seemingly to make Raclaw's grievance appear more unreasonable, only detracts from his own credibility.

Adding to Wendt's and Scola's credibility problems are the questionable Department records that Scola relies on to support his assertion that Wendt remained at the station until 9:00 a.m. and traded the rest of the shift with Jasperson. Scola cited the records in testifying that he later went back and checked the records at Wendt's request and discovered that Wendt had been at the station until 9:00 a.m. on October 22. Besides being at odds with the evidence, the times on the various records do not correspond. Respondents Exhibit 9 includes the Department Daily/Pay Report with the date of "11/06/2001" crossed out and the date "OCTOBER 22, 2001" handwritten in. The document indicates Wendt worked 0700-0900 for a total of 2 hours and that Jasperson worked 0900-0700 for a total of 22 hours. Yet Wendt testified that he returned to the station after class and Scola testified that Wendt's attendance at paramedic class was considered as work time, both in terms of pay and the hours recorded on the time sheet. The "Trade Application" (Respondents Exhibit 13) shows that on October 22, 2001, Wendt wished to trade 13 hours (from 1800 hours on 10/22 to 0700 hours on 10/23) with Jasperson for 13 hours (0700 to 2000 hours on 11/4). Scola subsequently had to concede, on cross-examination, that the records were inconsistent.

There are also inconsistencies in Lt. Wendt's and Scola's testimony as to their conversations about Raclaw's driving. Wendt testified that his comments to Scola were with regard to Raclaw's hitting the shoulder of the road. Scola testified that Wendt had mentioned problems with turning, backing up and judging distances. Scola also testified that Lt. Wendt had requested at the end of Raclaw's probation that his probationary period be extended. Wendt, however, testified that Scola showed him the letter extending Raclaw's probation and asked him about it, and that Wendt indicated he was okay with it. These discrepancies in their testimony indicate a willingness on Scola's part to stretch things to defend his position in this case. This, along with his willingness to accept Wendt's assertions that Wendt was at the station until 9:00 a.m. on October 22, and his willingness to rely on the obviously inconsistent records to support that assertion, places Scola's credibility in doubt.

In conclusion, given the proximity in time of Scola's decision to extend Raclaw's probation to his threatening statement to Raclaw on October 22, 2001, and the lack of credible evidence to support Scola's assertions that he had ongoing serious concerns about Raclaw's driving ability at that point, it is concluded that concern about Raclaw's driving was a pretext, and that Scola's decision extending Raclaw's probation was based, at least in part, on his hostility toward Raclaw's attempt to file the grievance. Therefore, it is concluded that Scola's decision to extend Raclaw's probationary period was discriminatory within the meaning of Sec. 111.70(3)(a)3, Stats.

As there is no evidence that Raclaw would not have passed his probationary period on November 6, 2001, but for Scola's discriminatory act in extending his probation, the remedy deemed to be appropriate is to order that Raclaw be deemed to have passed his probation effective November 6, 2001, and to have become a tenured employee of the Fire Department on that date.

### **Raclaw's Termination**

Complainants assert that Scola's decision to terminate Raclaw's employment was motivated by his having learned that the Union intended to bring a prohibited practices complaint against him in connection with his decision to extend Raclaw's probation, and that even the basis Respondents offer for the termination – Raclaw's drafting and storing his documents on the computer – would violate the law.

Respondents assert that Scola's decision to terminate Raclaw was based on the attitude evinced in Raclaw's personal harangue against Scola and the Department, and that the decision was made by Scola after seeking advice from others, including the Village's labor counsel, and before he learned the Union was suing him. Respondents assert that in the latter regard, Scola was never made aware that the lawsuit was in any way connected to Raclaw.

The evidence shows that sometime in mid to late November, Lt. Mansell was able to locate and access the documents Raclaw had drafted and stored on the Fire Department's computer. Upon locating the documents, Mansell printed out Respondents Exhibit 1, which on its face appears to be a diatribe against Scola, and took it to Scola. Thereafter, Scola was also able to obtain Respondents Exhibit 2 – Raclaw's summary of what had occurred on October 22, and Respondents Exhibit 3 – Raclaw's rebuttal to Scola's extension of his probation. Scola then talked to the Village's Administrator, the Chair of the Public Safety Committee, Board member Dwight Wendt and the Village's labor counsel, William Halsey. According to Scola, he only showed those persons a copy of Respondents Exhibit 1, and did not share Respondents Exhibits 2 or 3 with them. According to Halsey, his time records indicate that he spoke with Scola about the matter on December 12 and again on December 17, 2001. Scola testified that he decided to terminate Raclaw based on Respondents Exhibit 1, specifically for misuse of the Village's computers, Raclaw's lack of loyalty to Scola and the Department, Raclaw's attitude, and that Scola felt Raclaw was "troubled" based on what he had stated in the document. Scola further testified that he had made his decision to terminate Raclaw before he learned that the Union was thinking of suing him and that he waited until after the holidays to carry out his decision out of compassion.

As Respondents assert, Complainants' rely largely upon circumstantial evidence to support their claim that Raclaw was terminated because of Scola's anti-union animus. As Complainants note, that is often all complainants in these cases have to rely on, as the illegal motive would not be obviously stated in most cases.

The evidence establishes that within three or four weeks of deciding to extend Raclaw's probation, Scola obtained the three documents Raclaw had drafted on November 3. While Respondents assert that Scola did not go looking for ways to fire Raclaw, there is no explanation in the record as to how or why Lt. Mansell located and accessed Raclaw's documents on the computer. Assuming that it was not at Scola's direction, he nevertheless ended up obtaining all three of Raclaw's documents. Scola insists it was only Respondents Exhibit 1 that was the basis for his concern and that this was the only document he showed to the others in consulting with them about what to do about Raclaw.

Complainants assert that all three documents, including Respondents Exhibit 1, involve protected, concerted activity and therefore cannot legally be a basis for Scola's decision to terminate Raclaw. The Examiner disagrees as to Respondents Exhibit 1. Sec. 111.70(2), Stats., guarantees municipal employees the right to engage in "lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. . .". While the document references a number of matters that were of collective concern among the Union's members, e.g., safety practices, staffing and equipment, there is no urging of collective action on anyone's part, nor does it demand any action from management. The document appears on its face to be a personal diatribe against Scola by its author. The Complainants in fact assert that it was, among other things, Raclaw's way of dealing with his anger and frustration by getting it off his chest. While Raclaw may have intended to restate those concerns with the Union's Executive Board at some future date, there is no evidence that he did so, or that he utilized this document, or a later draft of it, for such a purpose. Thus, any relation to collective bargaining or mutual aid or protection the document has is too attenuated to afford it protection.

As to Respondents Exhibit 3, it appears to be a rebuttal Raclaw would have liked to make to Scola regarding the decision to extend his probation. Again, the letter is personal to Raclaw and does not involve a collective concern or a call for collective action. It is instead a statement of Raclaw's personal feelings, much like Respondents Exhibit 1.

That is not the case, however, with regard to Respondents Exhibit 2. That document expressly states that it is written to document the events of October 22, 2001, as relates to Raclaw's attempts to mandate someone in and Scola's statements to Raclaw when he attempted to file the grievance and shortly afterward. At the bottom of the document, Raclaw states his name and his position as Secretary-Treasurer of the Union. It is clearly intended to relate to Union concerns and was done for purpose of mutual aid or protection.

While Scola insists that he based his decision regarding Raclaw and his consultations with others solely on Respondents Exhibit 1, he nevertheless was aware of the contents of Respondents Exhibit 2 sometime in November of 2001. At that point, he was aware of Raclaw's view of what had occurred on October 22; i.e., that Raclaw viewed Scola's

statements as threatening, that Raclaw feared for his job as a result, and that he felt that it was related to his union activities. Scola made no attempt to tell Raclaw that he was mistaken on any of these points. He also did not show the document to anyone else. One wonders if he would have received the same advice from those he consulted had he done so. Scola's decision not to make the document or its contents known to any of those he consulted raises a serious doubt in the Examiner's mind as to whether any weight should be given to the fact that he consulted with the others in determining Scola's motive in deciding to terminate Raclaw. While the advice of the others was based on Respondents Exhibit 1, it is not at all clear that the document was the sole basis for Scola's decision.

Also of significance is that Respondents Exhibit 2 alerted Scola to the fact that Raclaw had documented what he viewed to be the events of October 22, that he viewed his job as being in jeopardy because of his union activities, and that Raclaw had created the document on November 3 in conjunction with his having been notified that his probation had been extended. Scola was aware that Raclaw was an Union officer at the time. This is significant because Scola was then aware of all of this when Sgt. Marschke told him sometime in December that he had heard that the Union was thinking of suing Scola. While Respondents assert that neither Marschke's statement, nor Hurtienne's statement on January 3, 2002 drew any connection to Raclaw, it would not have taken much for Scola to draw the connection between his actions against Raclaw and such a lawsuit, given what he already knew. The Examiner concludes that Scola did so.

The evidence is not clear as to when Scola made his decision to terminate Raclaw, however, it cannot be ignored that it was within less than two months of his decision to extend Raclaw's probation. Halsey testified that Scola had not yet made a decision when they spoke on December 12, but it appeared to Halsey that he had made it by December 17, when they spoke again. It is also not clear when Sgt. Marschke told Scola that he heard the Union was thinking of suing him. Scola could not recall exactly when it was, only that it was after he had made his decision, but before Christmas. While Scola's testimony that he was waiting until after the holidays to terminate Raclaw has some semblance of credibility, his testimony that he put off making a decision about what to do because he wanted to "understand" the documents makes no sense on its face. Given Scola's inability to recall these dates or exactly when he first saw the documents, or when he talked to those he consulted, the Examiner does not find Scola's testimony that his decision was made before he was told the Union was thinking of suing him to be convincing, especially when taking into account the other factors that have detracted from Scola's credibility as well.

The Examiner will not comment on the wisdom of Raclaw's drafting and storing the documents on his employer's computer. It is noted, however, that there is no specific Village policy addressing computer use, and the two Board members who testified, Marianne Mitchell and Dwight Wendt, did not appear to have a problem with Raclaw using the computer in this

regard, as long as it related to matters in the Fire Department. Scola himself acknowledged that he did not have a problem with the Union using the computer to draft communications to him. He also testified that after Raclaw's documents were found, he went through the computer and found a couple of letters from the Union regarding union issues. Scola did not indicate any action was taken on that basis.

Also of note is that the documents had not been printed out or in any way distributed. Respondents Exhibit 1 was simply Raclaw's private thoughts at the time it was discovered. While Raclaw might have intended to share his thoughts on matters referenced in Respondents Exhibit 1 at some point, he had not yet done so. While Scola would understandably be upset at what Raclaw thought about him, it was still just his thoughts, and he had attempted to keep them private by protecting the stored documents with his password. This is presumably why Scola relies on the "attitude" Raclaw evinced in Respondents Exhibit 1, rather than the document itself.

This brings us to the matter of the advice Scola claims to have received with regard to what he should do about Raclaw with respect to Respondents Exhibit 1. Scola testified that he discussed the matter with the Village Administrator, the Chair of the Public Safety Committee, Board member Dwight Wendt and Attorney William Halsey, and that all of them advised him to terminate Raclaw. Of those four, only Wendt and Halsey testified. While Halsey testified that he did advise Scola to terminate Raclaw before he became a tenured employee, Dwight Wendt testified that he only suggested that some type of discipline might be appropriate, but that termination was not mentioned by either him or Scola. According to Wendt, the first he heard about Raclaw being terminated was sometime after the first of the year in 2002. This likely was the meeting of the Personnel, Policy and Legal Committee on January 7, 2002, when Scola informed the Committee that he was terminating a probationary firefighter. This again is indicative of Scola's willingness to stretch the truth to support his position.

Given all of the foregoing, the Examiner is satisfied that Complainants have established by a clear and satisfactory preponderance of the evidence, albeit that evidence is largely circumstantial, that Scola's decision to terminate was motivated at least in part by the animus he had previously displayed toward Raclaw's having attempted to file the grievance on October 22, as well as motivated by his learning that the Union was intending to bring a legal action against him related to his actions against Raclaw. Therefore, it is concluded that Scola's actions in terminating Raclaw constitute discrimination within the meaning of Sec. 111.70(3)(a)3, Stats.

The appropriate remedy deemed necessary to make Raclaw whole is to order the Respondent Village to immediately offer Raclaw reinstatement to the Fire Department as a

non-probationary employee 8/ and to pay him all lost wages and benefits he would have received but for the Respondent's illegal conduct, less any monies and benefits he received that he would not have otherwise received but for his having been terminated from his employment with the Village. As required by law, the Respondent Village is to pay interest on the monies at the rate of twelve percent (12%) per annum. In addition, the Respondent Village is ordered to post the notice set forth herein at such places notices to employees are posted in the Fire Department.

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*8/ As the Examiner indicated at hearing, if the Respondents wish to challenge Raclaw's physical suitability for reinstatement, that opportunity would arise in the context of a remedy hearing.*

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Dated at Madison, Wisconsin, this 15th day of July, 2003.

David E. Shaw /s/

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David E. Shaw, Examiner