STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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-B

Appearances:

John B. Kiel, Attorney at Law, 3300 252nd Avenue, Salem, Wisconsin 53168, appearing on behalf of Stephen J. Raclaw and the Sturtevant Professional Fire Fighters Association Union Local 3914, IAFF, AFL-CIO..

Mark F. Nielsen, Schwartz, Tofte & Nielsen, Ltd., Attorneys at Law, 704 Park Avenue, Racine, Wisconsin 53403, appearing on behalf of Village of Sturtevant and Arthur M. Scola.

ORDER ON REVIEW OF EXAMINER'S DECISION

On July 15, 2003, Examiner David E. Shaw issued Findings of Fact, Conclusions of Law and Order, in which he held that the Respondents Village of Sturtevant (the Village) and Arthur M. Scola (Scola or the Chief) discriminated against the Complainant Stephen J. Raclaw (Raclaw) in violation of Sec. 111.70(3)(a)3, Stats., (and derivatively Sec. 111.70(3)(a)1, Stats.), by extending his probation as a firefighter on October 31, 2001, and by terminating his employment on January 9, 2002. The Examiner further held that the Respondents violated Sec. 111.70(3)(a)1, Stats., by certain statements Scola made to Raclaw on October 22, 2001.

On August 1, 2003, the Respondents filed a timely petition for review of the Examiner's decision, pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed briefs and reply briefs, the last of which was received on September 29, 2003.

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

ORDER

A. The Examiner's Findings of Fact 1 through 25 are affirmed.

B. The Examiner's Finding of Fact 26 is set aside.

C. The Examiner's Findings of Fact 27 and 28 are renumbered Findings 26 and 27 and are affirmed.

D. The following Finding of Fact is made:

> 28. Scola's decision to terminate Raclaw was motivated at least in part by hostility to the documents Raclaw generated on his computer on November 3, 2001.

E. The Examiner's Conclusions of Law 1 and 2 are affirmed.

F. The Examiner's Conclusion of Law 3 is set aside.

G. The Examiner's Conclusion of Law 4 is renumbered Conclusion of Law 3 and is affirmed.

H. The Examiner's Conclusion of Law 5 renumbered Conclusion of Law 4 and is affirmed in part and reversed in part as follows:

> 4. Respondents' Exhibits 1, 2, and 3 constitute lawful, concerted activity within the meaning of Sec. 111.70(2), Stats.

I. The Examiner's Conclusions of Law 6 and 7 are renumbered Conclusions of Law 5 and 6 and are affirmed.

J. The Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 28th day of November, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

MEMORANDUM ACCOMPANYING ORDER

This case began on March 11, 2002, when Raclaw and the Union filed a complaint alleging that the Village and Arthur Scola, the Director of Public Safety, had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 3, Stats., by certain actions Scola took against Raclaw. On July 17, 2002, the Village and Scola filed an answer denying that they had committed the alleged prohibited practices. The Commission's duly-appointed Examiner, David E. Shaw, conducted hearings on September 5 and 6 and November 26 and 27, 2002 in Racine, Wisconsin, which were stenographically transcribed. At the outset of the hearing on September 6, 2002, Raclaw and the Union 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. After the parties filed briefs and reply briefs, the Examiner issued his decision on July 15, 2003.

For the reasons set forth below, we hold that the allegations pertaining to the second of Scola's statements to Raclaw on October 22, 2001, should be dismissed for lack of notice and pleading; that the Examiner correctly held that one of the statements the Chief made to Raclaw on October 22, 2001, would have a reasonable tendency to interfere with employees' exercise of their rights under Section (2) of Chapter 111.70 (MERA); that the Examiner correctly held that the Respondents extended Mr. Racaw's probation in late October 2001, at least in part out of hostility toward his attempt to file a grievance, in violation of Section (3)(a)3 of MERA; that all of the documents Raclaw generated on his computer on November 3, 2001, comprised lawful concerted activity within the meaning of Section (2) of MERA; that the Respondents terminated Raclaw in January 2002 at least in part out of hostility toward his November 3, 2001, documents and toward the Complainants' initiation of prohibited practice litigation against the Respondents, in violation of Section (3)(a)3 of MERA; that our customary remedy of reinstatement and back pay should not be limited, despite the Village's proffer of "after-acquired" evidence regarding Raclaw's ability to perform the job.

Summary of the Facts

We have largely affirmed the facts as found by the Examiner and we summarize them as follows. 1/ Raclaw worked as a firefighter/paramedic for the Village of Sturtevant from November 19, 1999, until his termination on January 9, 2002. For approximately the first year of that period, he worked part-time, followed by about 14 months of full-time employment. The Village employs both full and part-time firefighters, but only the full-timers are members of the bargaining unit represented by the Union. Bargaining unit members, including Raclaw, are subject to a one-year probationary period after beginning full-time employment.

1/ Specific findings that have been challenged by the Respondents will be addressed in more detail in the discussion that follows.

In order to become a full-time employee, Raclaw was required to go through an application process that included an interview with Scola as well as a physical examination by a Village-designated physician. Raclaw informed the Chief of his (Raclaw's) vision-related disability during the application process. Raclaw held a valid driver's license during his employment, restricted only by "corrective lenses," and, like other department personnel, was assigned from time to time to operate various firefighting and other emergency equipment.

Scola received some complaints about Raclaw's driving. On July 12, 2001, while accompanied by firefighter Kevin Slotty, Raclaw damaged an ambulance tire while trying to navigate around a parked repair truck as he exited an alley. Although he had no personal knowledge of any prior incidents (and the record does not reflect that there were any), Slotty told Scola that he thought this had happened once before. The Chief asked Slotty to document the incident. The resulting letter dated July 16, 2001, is the only documentary evidence of Raclaw's alleged driving problems. Dwight Wendt, a former fire department member, complained to Scola a few times about Raclaw's leaving the station too fast with the rescue squad and returning with scuffed tires. He also mentioned this to the Chief a couple times after April 2001, when Mr. Wendt was elected to the Village Board. Dwight Wendt's son, Curtis Wendt, an Acting Lieutenant in the department and Raclaw's supervisor, also complained to the Chief about some incidents where Raclaw had hit the shoulder of the road while on hospital runs with the rescue squad. However, the record does not reflect any complaints to Scola subsequent to July 2001 about Raclaw's driving.

During the latter part of his employment, Raclaw held certain offices in the Union, including membership on the Union's Health and Safety Committee. During the summer of 2001, the Union members began voicing among themselves and to the Chief a number of concerns regarding staffing, safety procedures, discipline, equipment, supplies, and a recently-purchased engine. The Chief posted a memorandum on August 1, 2001, noting "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." His memo invited employees to put their concerns in writing to him.

On September 20, 2001, Scola informed fire department personnel that, owing to budget cuts, the staffing levels would be reduced by one part-time personnel per day. The Union expressed its concern about the staffing reduction by leafleting Village residents and making a presentation to the Village Board at a Public Safety Committee hearing on October 9, 2001. Raclaw was present but did not formally participate in the Union's Power Point presentation, which lasted about 45 minutes. The Village did not restore the funding. Thereafter, Scola made statements to Slotty indicating that he (Scola) thought the comments made during the presentation had been "bullshit" and that he (Scola) was "sick" of dealing with the staffing issue.

On October 22, 2001, Raclaw arrived shortly before the 7 a.m. beginning of his shift and learned that the shift would be one firefighter short of the current guidelines. As Acting Lieutenant for the shift, Raclaw was responsible for "mandating in" in order to achieve the

appropriate complement of firefighters. He called Melissa Shingledecker, who objected that she had just completed a 48-hour shift and asked to speak with the Chief. The Chief excused Ms. Schingledecker and told Raclaw to find someone else. After about an hour, Raclaw reached Union president Hurtienne on his cell phone; Hurtienne told Raclaw to file a grievance about the understaffing. Raclaw filled out a grievance form indicating that the staffing was "in direct violation of a verbal agreement between the parties." He brought the grievance to Scola, who picked it up, read it, tossed it back onto his desk, leaned back in his chair, pointed at Raclaw and said, "You better think about your position here before you file this." Raclaw appeared stunned and said, "What?" The Chief repeated what he said with the same motions and appeared to be angry. A short time later, the Chief telephoned Raclaw to inquire whether he had been able to fill the shift, to which Raclaw responded that he had not. The Chief 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." A while later, the Chief attended a meeting at Ives Grove also attended by another full-time Village firefighter, and Scola ordered him to report to work.

Later on October 22, 2001, Raclaw spoke with Union President Hurtienne and reported the interaction with Scola over the grievance. Raclaw stated in that conversation that he feared for his job and did not intend to file the grievance, to which Hurtienne responded that the Union would not file the grievance either, because he was also nervous about possible retaliation against Raclaw.

Sometime in late October 2001, Scola decided to extend Raclaw's probationary period for an additional six months. On October 31, 2001, the Chief called Lieutenant Curtis Wendt into his office to discuss this decision and showed him a letter he had prepared that day addressed to Raclaw. The letter stated that 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." The letter went on to inform Raclaw that he would be training over the next six months with Lieutenant Wendt, and "I fully expect that with this extensive training there will be no problem with your retention on the Sturtevant Fire Department." Lieutenant Wendt then met with Slotty, a state-certified driver/operator, and directed him to take Raclaw through the driver training course. On that same day, October 31, Slotty spent about two hours providing driver training to Raclaw, after which Slotty documented the training, submitted the documentation to Lieutenant Wendt, informed him verbally that Raclaw had done "fine, no problems," obtained Lieutenant Wendt's signature, and then put the information into the department's database. The record does not reflect that Lieutenant Wendt or the Chief subsequently provided or planned to provide any other or additional driver training to Raclaw.

At no time prior to extending Raclaw's probation did the Chief inform Raclaw that there was a problem with his driving skills, attempt to limit Raclaw's driving duties, or direct anyone to provide Raclaw with additional driver training. Nor did the Chief limit Raclaw's driving duties after extending his probation.

On November 3, 2001, Raclaw's next scheduled work day, he found in his locker an envelope marked "confidential" which contained the Chief's letter extending Raclaw's probation. Raclaw was upset and showed the letter to Slotty, after which they discussed various concerns that they had regarding staffing, equipment, supplies, etc. As they spoke, Raclaw drafted a document on the computer referencing these concerns. This document, introduced into evidence as Respondents' Exhibit 1, is reproduced here in full:

Respondents' Exhibit 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 to 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 9th. 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 (sic) vacation days and comp time hours are forgotten about. Members (sic) 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.

On the same date, November 3, Raclaw also spoke with Union President Hurtienne and read him Scola's letter. Hurtienne shared Raclaw's concern that action had been taken against Raclaw in retaliation for attempting to file the grievance on October 22. After consulting an IAFF representative, President Hurtienne advised Raclaw to write a statement about what had transpired on October 22. Raclaw then drafted the following two documents, as well, introduced into evidence as Respondents' Exhibits 2 and 3, respectively:

Respondents' Exhibit 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 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.

Raclaw stored Respondents' Exhibits 1, 2, and 3 on the department's computer protected by his personal password. Slotty saw Exhibit 1 as it was being drafted on the computer screen, but did not see the other two documents. None of the documents was ever delivered or distributed and Raclaw did not give his password to anyone.

During November, the Union engaged in preparations for filing a prohibited practice complaint against Scola, including meetings with IAFF representatives and attorneys, sometimes at the fire station. Sometime in mid to late November, one of the full-time firefighters, Lieutenant Mansell, unbeknownst to Raclaw, discovered his password and accessed the three documents that Raclaw had prepared on November 3. Lieutenant Mansell showed Respondents' Exhibit 1 to Ms. Shingledecker, then printed out a copy and provided it to the Chief. The Chief went to the computer, where he reviewed not only the three documents from November 3 but other documents prepared on behalf of the Union. The following day, he had someone print out the November 3 documents. The Chief subsequently discussed the contents of Respondents' Exhibit 1 with the chair of the Village Public Safety Committee, with Village Board member Dwight Wendt, and with Village Administrator Henke, who suggested that he contact the Village's labor attorney, William Halsey. On December 12, 2001, Scola spoke with Halsey about Raclaw's attitude and the contents of Respondents' Exhibit 1. Halsey inquired whether the Village had a rule prohibiting disparaging remarks about the employer and/or prohibiting the use of Village equipment for personal use, and the Chief answered "yes." Attorney Halsey then recommended that the Chief discharge Raclaw, as it would be relatively easy to do so during his probationary period and attitude problems could be difficult to address later. The Chief said he would think about it and at some point thereafter also discussed the issue with the Village Attorney, who concurred with Attorney Halsey's advice. On December 17, 2001, the Chief informed Attorney Halsey in a telephone conversation that he did not want to terminate Raclaw just before Christmas. In mid to late December, Scola made the decision to discharge Raclaw. The Chief had not discussed or shown Respondents Exhibits 2 or 3 to anyone whose advice he sought regarding Raclaw.

In the same time frame, i.e., the latter part of December prior to Christmas, the Union's leadership, which had previously tried to keep the matter confidential, began getting questions from bargaining unit members about the Union's plans regarding Raclaw. The Union then informed the membership individually and directly -- and specifically Mr. Mansell and Ms. Shingledecker -- of the decision to bring a prohibited practice complaint against Scola for extending Raclaw's probation. Also in that time frame, Sergeant Marschke of the Village's Police Department informed the Chief that he had heard that the Union was bringing a lawsuit. On January 3, 2002, the Chief approached Union President Hurtienne at the fire station and asked if the Union was "suing" him. Hurtienne would neither confirm nor deny it and the Chief left the office upset. At the January 7, 2002 meeting of the Village Personnel, Policy and Legal Committee, Scola informed the committee that he was terminating a probationary employee. On January 9, 2002, the Chief met with Union President Hurtienne and Raclaw in the Chief's office and informed them that he was terminating Raclaw but that he could resign instead. Raclaw chose not to resign and was then escorted from the fire station by Sergeant Marschke.

On January 19, 2002, Raclaw took a Driver/Operator driving skills test at Waukesha County Technical College. Candidates are given three opportunities to retake each part of the five-part examination, though not necessarily on the same day. Raclaw initially failed two portions of the test: the "over the road driving" for executing turns too wide and the "staged driving evolution" for backing into the bay at an excessive angle. On his second try, he passed the "over the road driving" portion but again failed the "staged driving evolution" portion for backing into the bay at a bad angle.

Since 1996 Raclaw has worked as a firefighter for the Town of Brookfield, where he operates ambulances and other "heavy equipment" without apparent problems. At some point during 2001, Raclaw received the necessary certification as an HEO (Heavy Equipment Operator) for the Town of Brookfield Fire Department.

DISCUSSION

Respondents' Objections to the Examiner's Findings of Fact

In their petition for review, the Respondents specifically challenge nine of the Examiner's findings; they appear to challenge an additional finding (Finding 15) in their brief in support of their petition. Four of the challenged findings (Findings 25, 26, 27, and 28) are in the nature of ultimate findings -- mixed findings of fact and law -- that we will address below in connection with our discussion of the elements of the alleged violations.

We turn first, then, to the Respondents' objections to Examiner Findings 1, 7, 14, 15, 16, and 18.

Finding of Fact 1

The Examiner found that "Raclaw apprised Scola that he had been terminated from the New Berlin Police Department due to his vision related disability." The Examiner continued, "Raclaw is legally blind, but with corrective surgery is able to drive and possesses a valid driver's license." The Respondents take issue with both of these findings. Although Raclaw's job application stated that he had been terminated from the New Berlin Police Department because of a "disability," the Respondents note that the application did not include the term "vision-related." They point out that the Chief could have assumed that Raclaw was visually competent, since the Chief believed that Raclaw had passed a pre-hire medical exam that ostensibly included a vision test; it did not become evident until the hearing in this case that the physician had failed to administer the eye exam. The Respondents also point to the Chief's testimony that he was unaware that Raclaw was "legally blind" until he heard Raclaw describe himself that way at the hearing. Regarding the Examiner's assertion that Raclaw "is able to drive," Respondents argue that he is not "able to drive emergency vehicles as required by the job of a firefighter," based on his failure to pass all portions of the certification test taken in January 2002, after he had been terminated, and further that his "uncorrected vision is far below the minimum standards required of any person who wishes to be employed as a firefighter."

The record amply supports the Examiner's findings. While the application form did not state "vision-related disability," the Chief did not deny being aware, prior to hiring Raclaw, that he had been terminated for a disability. Moreover, both Scola and Raclaw testified that they discussed Raclaw's unusual visual affect during his interview for full-time employment. The Chief testified that, during the interview, "I mentioned the fact that . . . I felt that he had something wrong with his eyes." TR 828-29. The Examiner reasonably

inferred from the contents of the application and the contents of the interview that the Chief put two-and-two together and realized that Raclaw's disability was vision-related. Neither Raclaw's reassurances during the interview that his vision had been surgically corrected nor the Chief's assumption that Raclaw had passed an eye exam undermine the Examiner's inference. The alternative inference is far less plausible, as it would have the Chief hiring a firefighter who had been terminated from police work without the Chief inquiring as to the nature of the disability for which Raclaw was terminated.

The Examiner's finding that Raclaw "is able to drive" is based upon the uncontroverted evidence that he holds a valid driver's license, restricted only by "corrective lenses," actually does drive, and operates emergency vehicles for the Town of Brookfield Fire Department. Whether or not Raclaw is a good driver, or whether he can drive emergency vehicles according to Village standards, are bones of contention in this case as to the appropriateness of reinstatement as a remedy. However, since the Examiner made no such findings, the Respondents' objections are misplaced.

Finding of Fact 7

In Finding 7, the Examiner describes an incident on July 12, 2001, in which Raclaw damaged a vehicle's tires while on a run accompanied by firefighter Slotty. The Examiner also describes a conversation a few days later, in which Slotty informed Scola about the incident and asked him to take the equipment out of service for repairs. The Chief asked whether Raclaw had done this before. Respondents object to the Examiner's finding that, "Slotty answered that Raclaw had from what he had heard." The Respondents point out that the documentation that Slotty subsequently produced in response to the Chief's directive simply states, "This is the second time that Pvt. Steven Raclaw has damaged the Squads wheels." (RX. 4). The Respondents' primary concern is that, whether or not Slotty actually knew there had been a second incident, the Chief was entitled to rely upon Slotty's assertion to that effect in Respondents' Exhibit 4 when forming a judgment about Raclaw's driving.

Once again, the Respondents do not actually challenge the Examiner's finding as such, nor do they contend that Raclaw actually had been involved in an earlier incident. Rather, their objection seems to be that the Examiner did not take proper account of this finding when examining the Chief's motives. The only evidence in the record regarding this conversation is Slotty's testimony. At page 452 he testified, "Asked if this was – if Steve did this before and I 'Well, yeah, I guess so *from what I hear*.' And all he [the Chief] said was give me something on paper, put it in my mailbox." (TR. 452) (emphasis added). Slotty later confirmed that his statement on Respondents' Exhibit 4 about the second incident was based on rumor. Tr. 454. Hence, the Examiner's finding is accurate.

Finding of Fact 14

The Examiner found that, on October 22, 2001, when Raclaw attempted to file a grievance about the allegedly inadequate staffing, Scola reviewed the grievance, pointed at Raclaw and said, "You had better think about your position here before you file this." This is a pivotal finding, as it forms the basis for the Examiner's conclusion that the Respondents violated Section (3)(a)1 of MERA, which we affirm. This statement, together with other evidence and inferences, is also material to our conclusion that the Chief's decision to extend Raclaw's probation was based at least in part on hostility to his attempt to file a grievance. The Respondents' version of this conversation is nearly identical, but they offer a more benign interpretation. According to Scola, he said something to the effect, "You better think about maybe the union's position on this." Both Raclaw and Scola testified that Raclaw was taken aback by the Chief's response and said, "What?," whereupon the Chief repeated his statement and tossed the grievance back. Raclaw then appeared stunned, picked up the grievance, left the office, and the Union never re-filed the grievance. In essence, the Examiner interpreted the words "your position" to refer to Raclaw's job, while the Respondents contend those words referred to "the Union's position in the grievance."

The Respondents are correct that the Complainants bear the burden of proof and that our conclusion should be supported by a clear and satisfactory preponderance of credible and competent evidence. SEC. 111.07 (4), STATS. However, "[I]t is the function of the administrative board to judge the impact of statements and to determine whether or not they are coercive." WERC V. EVANSVILLE, 69 WIS.2D 140, 153 (1975). We find the Examiner's interpretation well-supported by the record and for much the same reasons he articulated. Raclaw was so upset by what he perceived as a threat to his job that he immediately telephoned Union President Hurtienne and told him so; Hurtienne's testimony corroborated Raclaw's account. Like the Examiner, we believe it unlikely that a firefighter who had the fortitude to hand-deliver a grievance to the Chief would be intimidated or "stunned" if the Chief had simply expressed disagreement with its content, or that the Union would have decided to avoid further confrontation over the matter just because the Chief suggested they reconsider before the grievance had even been filed. We also doubt that Raclaw would have been shocked and asked the Chief to repeat himself if Raclaw had not felt threatened, or that the Chief, seeing himself misunderstood and inadvertently causing distress, would have repeated himself in exactly the same language without any ameliorating explanation. Finally, like the Examiner, we find especially credible Raclaw's nearly contemporaneous recording of both this conversation and its effect on him (in even more pronounced form) in Respondents' Exhibit 2. Hence, under the circumstances the Examiner's interpretation of the Chief's statement is considerably more reasonable than the Respondents' and we affirm the Examiner's finding. 2/

2/ Although not noted by the Examiner, we also view the Chief's testimony on this subject to have been somewhat evasive and defensive, further detracting from his credibility and reinforcing the credibility conclusions that we and the Examiner have been compelled to draw in this case.

Finding of Fact 15

The Respondents contend that the Examiner improperly concluded that "there were no complaints [about Raclaw's driving] after July." (Initial Brief of Respondents at 15). Finding 15 contains no such statement, but simply sets forth the occasions on which either Dwight Wendt or his son, Lieutenant Wendt, complained to the Chief, the last of which was in July 2001. Nor, contrary to the Respondents' assertion, did the Examiner make such a statement in his discussion at page 56, i.e.:

> 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." (emphasis added).

The Respondents offer no evidence to contradict the accuracy of the Examiner's statement. They assert that the elder Wendt's complaints may have occurred after July 2001, based upon his testimony that he complained to the Chief a couple times after he was elected to the Village Board, an event that occurred in April 2001. This mere possibility is hardly sufficient, given that the Respondents would bear the burden of producing evidence to support the legitimacy of their proffered ground for extending Raclaw's probation, i.e., his driving record and the underlying complaints. As to the younger Wendt's complaints about Raclaw's driving, the record indicates (as both the Examiner and the Respondents state) that Lieutenant Wendt may have admonished Raclaw to "be careful" or take "due regard" on a couple occasions in or after July, but it contains no evidence that Wendt reported these incidents to Scola, as the Respondents would have us find. Accordingly, we see no basis for altering the Examiner's finding on this point.

Finding of Fact 16

The Respondents do not object to the Examiner's explicit findings in Finding 16. Instead they assert that the Examiner omitted a material fact, i.e., that the Chief had already extended Raclaw's probation before Slotty entered the data regarding Raclaw's "fine" performance on the driver training undertaken on October 31, 2001. The Respondents suggest that the Examiner's statement in Finding 16 ("Scola did not first review Department records to determine whether Raclaw's driving had improved before making his decision") somehow reflects an inaccurate assumption that the results of Slotty's testing would have been available to the Chief had he looked. We see no merit in this convoluted interpretation of the Examiner's decision.

In Finding 16, the Examiner set forth in chronological order the events regarding the decision to extend Raclaw's probation. It is clear that the Examiner understood that the Chief

made the decision near the end of October, informed Lieutenant Wendt of the decision on October 31, and directed Lieutenant Wendt to provide Raclaw with driver training; that Wendt thereafter on October 31 directed Slotty to take Raclaw through the driver training course, that Slotty thereafter spent two hours on October 31 with Raclaw providing training, that Slotty then documented the training, showed the results to Wendt, and entered the data. The Examiner clearly did not "omit" to find – nor did he misperceive – that the results of Slotty's testing were not available before the Chief made his decision. Just as clearly, the Examiner's statement, quoted above, accurately referred to a material fact: that the Chief failed to inquire about Raclaw's driving between July (when he'd received the last complaints reflected in this record) and October 31, when his probation was extended ostensibly for poor driving. We see nothing to disturb in Examiner Finding 16.

Finding of Fact 18

The Respondents strenuously object to the Examiner's finding that "Sometime in mid to late-November of 2001, Lieutenant Mansell discovered, and was able to access, Raclaw's November 3rd documents on the Department's computers." They do not dispute that Mansell immediately provided the Chief with access to these documents and that the Chief had reviewed and copied them within a day after their discovery. As to the timing of that discovery, Respondents contend that the more reasonable inference from the record is that this occurred shortly before December 12, the date of Scola's first conversation with Village labor attorney Halsey. Respondents acknowledge that the Chief himself testified several times that the documents were discovered in early to mid-November, but they note that the Chief's testimony was markedly fuzzy regarding dates. More telling, they say, is his testimony that he discussed the documents with Village officials and attorneys shortly after receiving the documents. Since Attorney Halsey's records reflected his first conversation with the Chief as occurring on December 12, the Respondents claim that the documents were discovered within a few days prior to that date.

As the Complainants correctly note, the only testimony on this issue came from the Chief, who did not claim to have an accurate memory. The Chief's most specific testimony on the subject is as follows:

Q (by Kiel): You had discussions with several people within the Village of Sturtevant administration regarding these documents, is that right?

A (by Scola): That's correct.

Q. When did those discussions take place?

A. After receiving the documents and after researching the documents and rereading them. The first person I believe I went to see was Mr. Henke.

Q. What date was that?

A. I couldn't really tell you the approximate date, probably right after I received these documents.

Q. And you received those documents at the beginning of November, is that right?

A. I would think it would be more into the middle of November. ..."

TR. at 268.

The Examiner's conclusion from this vague testimony seems sufficiently accurate to us. The Chief was far from firm in his recollection that he spoke with Village officials shortly after obtaining the documents. Moreover, the time frame within which the events took place is at most a few weeks. Indeed, for purposes of the Examiner's analysis of the Chief's state of mind at the time he made the termination decision, the salient element is undisputed: the Chief was aware of the documents prior to mid to late-December, when he acknowledges having heard about the pending "lawsuit." The Examiner reasoned and we concur (as discussed more fully below) that the Chief inferred that the "lawsuit" related to Raclaw because he was aware from reading Respondents' Exhibits 2 and 3 that Raclaw believed his probation had been extended unlawfully, in retaliation for the attempted grievance on October 22. For this inference, it is only pertinent that the Chief have reviewed the documents prior to learning of the lawsuit, whether that review occurred in mid-November or earlier in December. Hence, we see no reason to determine the issue with any greater specificity and we decline to alter Finding 18.

Violations of Section (3)(a)1

The Examiner held that two of the Chief's statements to Raclaw on October 22, 2001 were likely to discourage Raclaw and other Union members from exercising their rights under Section (2) of MERA: first, "You'd better think about your position here before you file this [grievance];" second, "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." The Respondents do not deny the statements, but contend they were misinterpreted by the Examiner. As to the second statement, the Respondents also object that they had no adequate notice, in that neither the Complaint nor the Amended Complaint referred specifically to that statement nor was there any other notice of this claimed violation prior to the close of hearing.

Regarding the first statement, "You'd better think about your position here before you file this," we have already considered and rejected the Respondents' argument about the proper interpretation of the statement. See discussion of Finding of Fact 14, above at page 14. Having construed that statement as an ill-disguised threat to Raclaw's job security,

it is relatively simple to conclude that it comprised a threat of reprisal that 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) (a statement "suggesting" that an employee would fare better without the union present in a meeting regarding a job opportunity held unlawful, because the statement contained an implicit threat that seeking union representation might cost the job); VALLEY SANITATION CO., INC., DEC. NO. 9475-A (WERC 1/71) (unlawful to threaten employee with discharge for testifying at Commission hearing). As the Examiner noted, both Raclaw and the Union in fact chose to withdraw the grievance rather than risk Raclaw's job security.

The Respondents are correct that employer interference can sometimes be outweighed by a legitimate business interest. CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91). They argue that an employer is entitled to offer a frank and even negative assessment when confronted with a grievance, an assertion with which we generally agree. As the Complainants point out, however, this argument assumes that the Chief was responding to the merits of the grievance rather than threatening Raclaw's job. As we have not accepted the Chief's proffered interpretation of his remark, and as the Respondents could hardly have a legitimate business interest in threatening Raclaw, the CEDAR-GROVE defense is not available to the Respondents in this case.

As to the Chief's exasperated remark about "bringing in Mount Pleasant," we agree with the Respondents that notice of a claimed violation normally should precede the close of hearing as a matter of due process. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 20941-B (WERC, 1/85); GENERAL ELECTRIC V. WERB, 3 WIS.2D 227, 243 (1958). In this case the statement does not appear in any allegations within the Complaint even as amended at hearing. Although the Respondents acknowledge the essential accuracy of the Chief's alleged statement about Mount Pleasant, it is possible that they would have approached the evidence differently had the statement itself been alleged to violate the law. Hence, while we find that the Chief made the Mount Pleasant statement, and while that statement bears on other issues in this case, we reverse the Examiner's holding that the statement in itself independently violated Section (3)(a)1 and dismiss that allegation for lack of notice and opportunity to litigate.

Violation of Section (3)(a)3: Extending Raclaw's Probation

The Examiner properly set forth the four elements of a successful claim of discrimination in violation of Section (3)(a)3: that the employee was engaged in lawful concerted activities; that the employer was aware of those activities; that the employer was hostile to those activities; and that the employer took adverse action against the employee at least in part out of hostility toward those activities. MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 WIS.2D 540 (1961); EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122 WIS.2D 132 (1985). As the Examiner properly concluded, the first two elements of this analysis are not in dispute. The Respondents, however, forcefully dispute the Examiner's conclusions that Raclaw aggravated the Chief on October 22, 2001, by attempting to file the staffing shortage grievance, and that the Chief retaliated against Raclaw by extending his probation on October 31, 2001.

As the Examiner noted, determining the existence of unlawful animus and its nexus with adverse action is usually an exercise in drawing logical inferences from the totality of the established facts. CESA #4, ET AL., DEC. NO. 13100-E (YAFFE, 12/77), AFF'D, DEC. NO. 13100-G (WERC, 5/79); EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122 WIS.2D 132 (1985). This exercise draws upon the Commission's long experience in deciphering situations like the present case, where motives are largely unstated and indicia are entwined subtly within the circumstances. Circumstantial factors that can influence a finding of improper motive include timing, failure to offer prior warning of the seriousness of the ostensible misconduct, failure to have seriously investigated the ostensible misconduct, and failure to inform the employee contemporaneously of the reason. SEE GENERALLY, HARDIN & HIGGINS, JR., THE DEVELOPING LABOR LAW (BNA, 4TH ED.) VOL I at 296-97 and cases cited therein. Offering a pretext in itself has been found to suggest unlawful motive. NORTHEAST WISCONSIN TECHNICAL COLLEGE, DEC. NO. 18954-C (WERC, 3/99). In our view, the Examiner conducted this exercise adroitly and we largely adopt his reasoning.

The Examiner concluded that the Chief's strong annoyance at the persistence of the staffing issue, embodied in his remarks to Slotty shortly after the Union's presentation to the Village Board and his inflamed remarks to Raclaw on October 22, 2001, contributed to the Chief's decision nine days later to extend Raclaw's probation. 3/ While, as the Respondents argue, the opportunity presented itself because Raclaw was approaching the end of his one-year probationary period, the timing is nonetheless proximate to the staffing situation that spawned the Chief's anger with Raclaw. The Respondents object to what they view as the Examiner's speculative assertion that the Chief's animus is unlikely to have dissipated in nine days and suggest that the Examiner should have required affirmative evidence that the animus continued. This criticism is misplaced. Just as a lengthy period between the origin of the hostility and an adverse action would tend to militate against finding a nexus, a relatively brief lapse of time facilitates finding a link. Such an inference is not speculative but rather an experienced assessment of probabilities, which the Commission and its examiners have been entrusted to make and lies squarely within our specialized expertise. CF. WERC V. EVANSVILLE, 69 WIS. 2D 140, 150 (1975) ("'the drawing of inferences from the facts is a function of the [commission] and not of the courts,'" quoting from ST. FRANCIS HOSPITAL V. WERB, 8 WIS.2D 308, 311 (1959)).

3/ While we have dismissed the claim that the Chief's second set of remarks to Raclaw on October 22 (i.e., regarding calling in Mount Pleasant) violated the law, we nonetheless view those remarks as demonstrating significant anger over the staffing issue and therefore as supporting our conclusion that the Chief harbored "animus" toward Raclaw's activity such as to satisfy the third element of the (3)(a)3 analysis. See, e.g., NACCO MATERIALS HANDLING GROUP, INC., 331 NLRB NO. 164 (2000).

The Examiner finds the Chief's motives most forcefully impugned by the ground advanced by the Chief for taking action against Raclaw, his driving techniques, which the Examiner found pretextual. The Respondents take the Examiner heavily to task on this point.

They posit four prongs to the Examiner's reasoning and subject each to critical scrutiny: that Raclaw was not given prior notice of his driving problems; that he was allowed to continue to operate apparatus; that the Chief hired Raclaw as a full-timer despite his having worked in the Department previously as a part-timer; and that there had been no complaints about Raclaw's driving between July 17 and October 31, 2001.

Since the Chief's decision would be unlawful if his annoyance with Raclaw's protected activity played any role in the decision, the task is to examine the likelihood that various factors would have existed if the Chief had been motivated solely by Raclaw's driving problems. Put differently, what evidence is there that the Chief was so concerned about Raclaw's driving that he is likely to have extended Raclaw's probation solely on that basis? 4/

4/ Contrary to the Respondents' argument, the Examiner did not find that Raclaw's driving problems could not have led to the extension of his probation in some objective sense. (Resp. Initial Br. at 15) The question is subjective, i.e., whether driving problems actually did motivate the Chief in this case. Similarly, contrary to what the Respondents imply, it is not essential to establish that other probationary employees with similar driving difficulties had their probation extended. While comparative evidence can shed light on the authenticity of an employer's motives, it is not uncommon for such evidence to be unavailable in a small work force like the Sturtevant Public Safety Department. In this connection, however, we note that the record suggests that some of the alleged flaws in Raclaw's driving, such as the right wheels sliding off the pavement and kicking up stones during a rapid drive, were not uncommon in the Department.

The Respondents state with some plausibility that the Chief was too busy to concern himself with the daily job performance of firefighters and relied upon his supervisory staff for that purpose. Hence, they say, it is not surprising that the Chief said nothing to Raclaw about his driving prior to the end of his probation and did not follow up on the issue afterwards. One problem with this argument is that the Chief, and not a subordinate, initiated the decision to extend Raclaw's probation. In addition, if the Chief had been genuinely concerned about this issue prior to the end of October, one would expect him to have directed a subordinate to keep tabs on Raclaw and that either the Chief or one of those responsible subordinates would have apprised Raclaw that he had a serious problem. While it is true, as Respondents note, that the purpose of probation is to ferret out problems, it is also true that this particular probation was relatively lengthy, lasting a year, during which time no one in the chain of command apprised Raclaw that his driving was a serious problem.

The Respondents next argue that the Examiner should have drawn no negative inference from the fact that the Chief continued to allow Raclaw to operate equipment, given the small cadre of full-time firefighters on whom the Department relied for such purposes. This has some merit in the abstract, but squares poorly with the Respondents' vehemence in urging during this proceeding that Raclaw be denied reinstatement because his driving is so unreliable. We think that driving skills poor enough to extend an already lengthy probation,

if genuinely perceived to be such, would also have been viewed as sufficiently poor to preclude or limit driving emergency vehicles without demonstrable improvement. We therefore concur in the Examiner's inference that permitting Raclaw to drive without restriction undermines the likelihood that his driving skills were the motivation for extending his probation.

Respondents also challenge the Examiner's reasoning that Scola's hiring Raclaw as a full-time firefighter after observing him as a part time firefighter belies any genuine concern with Raclaw's driving. The Respondents correctly note that the record suggests that part-timers generally do not operate emergency apparatus and on that basis we would agree that this factor does not supply a useful basis for discrediting the Chief's concern with Raclaw's driving. However, we do not view this factor as predominating in the Examiner's reasoning nor do we find it instrumental in our own conclusion.

The Respondents also contend that the Examiner understated the number and nature of complaints regarding Raclaw's driving, in dismissing it as a pretext. As discussed in connection with Finding of Fact 15, above at page 15, the Examiner properly focused on the complaints that came to Scola's attention and accurately found a dearth of such complaints between July and the end of October 2001. Given the Chief's apparent lack of personal day to day attention to Raclaw's driving, the Examiner also properly took into account the Chief's failure to conduct a reasonable inquiry on the subject before extending Raclaw's probation. A manager in the Chief's position reasonably would be expected to verify an employee's defects before relying upon them in writing to justify disciplinary action. In this case, the Chief appears to have presented his decision to Lieutenant Wendt as a virtual fait accompli, albeit in draft form. Even this perfunctory discussion with Lieutenant Wendt might have served to buttress the authenticity of the Chief's decision, except that, as the Examiner notes, Wendt and Scola presented materially different versions of the conversation. Each asserted that the other had taken the initiative in expressing concern about Raclaw's driving and suggesting that his probation be extended. Also, the Chief testified that Wendt had mentioned problems with turning, back up and judging distances, whereas Wendt testified that his concerns were Raclaw's wheels entering the shoulder of the road. These discrepancies suggest that the conversation was at best a token effort at touching base, rather than a serious effort to correct a problem. Certainly Wendt made only a modest gesture at providing Raclaw with driver training – passing the task along to Slotty and apparently approving as sufficient the two-hour skills session that Slotty undertook with Raclaw on October 31, 2001. Evidently neither the Chief nor Wendt thought it important that Raclaw had performed well on this test, as the record reflects no discussion about it between the Chief and Wendt, even though Scola's letter extending probation did not get notarized or conveyed to Raclaw until November 1. Such minimal adherence to the language and spirit of the Chief's letter (calling for "extensive training" "over the next six months" in order to "drastically improve" Raclaw's driving)

reinforces our impression that the driving issue was largely pretextual. Such deviations from standard practice or reasonable expectations are not unlawful in themselves, but taken together they tend to undermine the authenticity of the Chief's stated reasons. 5/

5/ This is not to say that the Chief was completely unconcerned with Raclaw's driving or that Raclaw's driving was not any sort of problem. The fact that the Chief asked Slotty to document the tire damage incident in July 2001 indicates that the Chief harbored some real concern about Raclaw's driving even before the October 22 incident.

Finally, the Respondents object that the Examiner unfairly discredited Scola's testimony by attributing to him guilt-by-association with the acknowledged prevarications in Lieutenant Wendt's testimony. Lieutenant Wendt falsely asserted in Department records and in his testimony that he was at the station on the morning of October 22, 2001, which, if true, would have meant that the Department was properly staffed and to that extent invalidated the grievance Raclaw tried to file. Since, after Wendt had been discredited at hearing, the Respondents had disavowed in their briefs any argument based on Wendt's presence at the station on October 22, they criticize the Examiner's statement that, "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." (Dec. No. 30378-A at 57). However, the Examiner's comment was not directed at the validity of the Respondents' legal arguments, but rather at the negative image the Chief portrayed by his willingness at the hearing to rely upon Wendt's assertions and Wendt's recordkeeping legerdemain, contrary to what all other witnesses had said and contrary to where Wendt was supposed to be, i.e., at school. We acknowledge, as the Respondents argue, that Wendt's prevarications may not have been consciously endorsed by the Chief, but we take the Examiner's point regarding the Chief's credibility to be more subtle. The Examiner found the Chief overly eager to embrace Wendt's facially improbable claims, because those claims supported the position he had adopted regarding the speciousness of the Union's staffing grievance – which, in turn, supported the Chief's explanation of the remark he made to Raclaw when the grievance was first presented. While we find other factors more meaningful in evaluating the Chief's credibility, 6/ the Examiner's point is nonetheless valid.

6/ In our view, the Chief's credibility suffered most significantly when he denied the threatening connotation of his remarks to Raclaw on October 22 and offered instead an explanation that we did not find credible for reasons wholly unrelated to the Chief's decision to rely upon Wendt's improbable assertions about his presence on October 22.

In sum, we affirm the Examiner's conclusion that Scola, in deciding to extend Raclaw's probation, was motivated at least in part by his antipathy to Raclaw's and the Union's grievance activity. Since the record reflects no intervening events between October 31 and November 6, 2001, such that Raclaw's probation may have been extended even without the unlawful motive, we also affirm the Examiner's conclusion that the remedy for this violation is Raclaw's reinstatement as a non-probationary employee as of November 6, 2001.

Violation of Section (3)(a)3: Termination of Raclaw's Employment

The Examiner also concluded that Scola's decision to terminate Raclaw was motivated at least in part by hostility generated by the Union's intention to file a prohibited practice charge on Raclaw's behalf, in violation of Section (3)(a)3 of MERA. The Respondents counter that the Chief was not aware of the impending prohibited practice case in late December 2001, when the Chief decided to terminate Raclaw. Moreover, the Respondents assert that the decision was based entirely upon the negative "attitude" Raclaw evinced in Respondents' Exhibit 1, drafted and stored on his computer on November 3, but then discovered surreptitiously and conveyed to the Chief sometime in late November or early December.

As set forth at the outset of the previous section, a violation of Section (3)(a)3 depends upon clear and convincing evidence supporting each prong of the traditional four-part analysis: (1) protected activity that is (2) known to the employer and (3) has generated hostility (4) contributing, at least in part, to the employer's decision to take adverse action. Unlike the claim regarding the extension of Raclaw's probation, however, each of these elements is in some dispute regarding Raclaw's termination. While we accept the Respondents' contention that Exhibit 1 played a role in Raclaw's termination, we nonetheless affirm the Examiner's conclusion that the impending prohibited practice complaint also played a role. Both motives, in our view, were unlawful and each independently supports our conclusion that Raclaw's termination violated Section (3)(a)3.

We note that the Complainants have not sought review of the Examiner's conclusion that Respondents' Exhibit 1 did not constitute lawful concerted activity within the protection of Section 2 of MERA. However, it is well settled that a petition for review opens the entire Examiner decision for affirmation, modification or reversal. See Secs. 111.07(5) and 111.70(4)(a), Stats.; TRANS AMERICA INSURANCE CO. V. DILHR DEPARTMENT, 54 WIS.2D 252 (1971); STATE V. INDUSTRIAL COMMISSION, 233 WIS. 461 (1940); GREEN COUNTY, DEC. NO. 26798-B (WERC, 7/92). Accordingly, we have reviewed all elements of the Examiner's decision de novo, and, as indicated in Paragraph G of our Conclusions of Law, we have reversed the Examiner on this issue. We hold that Raclaw's November 3 documents, in particular Respondents' Exhibit 1, comprise lawful, concerted activity.

Determining whether Exhibit 1 is lawful concerted activity, either alone or in combination with Exhibits 2 and 3, is a close question and bears discussion. As with the other elements of a Section (3)(a)3 violation, determining whether activity is protected requires a case by case analysis of the context.

> "It is impossible to define 'concerted' acts in the abstract. Analysis of what a concerted act is demands an examination of the facts of each case to determine whether employee behavior involved should be afforded the protection of Sec. 111.70(2) of MERA. At root, this determination demands an evaluation of whether the behavior involved manifests and furthers purely individual or collective concern."

CITY OF LACROSSE, DEC. NO. 17084-D (WERC, 10/83), AFF'D, CIR. CT. CASE NO.-83-CV 821 (1985).

Respondents characterize Respondents' Exhibit 1 as a personal "rant" lacking any characteristics of a "union document," certainly none that the Chief could have discerned on its face. We note first that the rights created by Sec. 111.70(2), Stats., embrace more than union activity as such. 7/ CITY OF OSHKOSH, DEC. NO. 28971-A (MAWHINNEY, 8/97), AFF'D BY OPERATION OF LAW, DEC. NO. 28971-B (WERC, 9/97); SCHOOL DISTRICT OF NEKOOSA, DEC. NO. 25026-A (GRATZ, 5/88), AFF'D BY OPERATION OF LAW, DEC. NO. 25026-B (WERC, 6/88). Expressing work-related concerns on behalf of others, with or without a union, is primordial concerted activity that lays the foundation for union representation and collective bargaining.

7/ Section 2 states in pertinent part, "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 ... ." (Emphasis added).

In this case, the subject matter of Exhibit 1 comprised a myriad of safety and morale issues, prominent among them the staffing and equipment concerns buzzing throughout the bargaining unit since the previous summer and underlying both the Union's presentation to the Village Board and the aborted October 22 grievance. The Chief was well aware of these simmering concerns, referring to them in his August 1, 2001 memo as "a lot of negativism" and "attitudes." Moreover, in much of Exhibit 1, Raclaw speaks in a collective voice, i.e., "we" and "us," and sometimes refers explicitly to the Union. Virtually every topic broached in the lengthy document relates to working conditions that were the subject of contemporaneous firehouse discontent. The most pointed remarks (e.g., hiring a full-time

secretary after cutting a part-time assistant chief) relate directly to the staffing issue, on which the Chief had already shown irritability, and do so in a manner critical of the Chief. It is also relevant that Raclaw had been a spokesperson for the Union on safety issues, as a member of the Union's safety committee. Moreover, Exhibit 1 was drafted at the same time as Exhibits 2 and 3 (November 3), the same day that Raclaw had received notice of his probation being extended without any prior warning. It is clear, when reading Exhibits 2 and 3 together, that Raclaw saw that probation extension as unlawful retaliation for his October 22 union activity, leading him to draft both a record of the events of October 22 (Exhibit 2) and what resembles a draft grievance responding to the notice of extended probation (Exhibit 3). The concerted nature of Exhibit 1 is augmented by the undisputed testimony that Slotty sat with Raclaw while he drafted the document, saw the document on Raclaw's screen while it was in draft, and helped him generate material for inclusion. (Tr. 478-497). In our view, therefore, these documents are a bundle of reactions, plans, and responses linked inextricably with each other, with the protected activity of October 22, and with the collectively-advanced safety concerns. Hence, we hold that the content of Exhibit 1, generated in an atmosphere prickly with Union activity on the same subjects, is "concerted" activity for "mutual aid or protection" within the ambit of Section 2 of MERA.

Respondents posit that the Chief did not harbor animus toward issues addressed in Exhibit 1, but rather toward the "disloyal" or "disturbed" attitude that Raclaw displays therein. In general, the law gives wide berth to employees expressing mutual concerns about working conditions. Concerted activity by its nature often occurs in tense, confrontational, or chilly atmospheres, and some intemperance is to be expected in those situations. A mild-mannered complaint is likely to aggravate an employer less than a harshly-worded one, and sometimes it is the vehemence itself that renders concerted activity effective; certainly Section 2 cannot be read to protect only ineffective concerted activity. SEE CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03). Thus, unless concerted activity is marked by flagrant misconduct, it does not lose its protection. In addition, what constitutes "flagrant misconduct," will depend upon the nature of the work place and the effect on the employer's authority. For example, in CKS TOOL & ENGINEERING, 332 NLRB NO. 162, 168 LRRM 1047 (2000), the NLRB deemed protected an employee's obscenity-laden speech during a management presentation at a staff meeting, because the employee was deemed to be implicitly acting on behalf of his co-workers and because his language was commonly tolerated by management at such meetings. Some measure of "disloyalty" and "disparagement" are tolerated, even if the employer arguably has suffered some harm to its business. SEE, E.G., ALLSTATE INSURANCE CO., 332 NLRB NO. 66, 165 LRRM 1293 (2000) (insurance agent's activity was protected, where gave interview to a magazine, in which she complained about the company's working conditions); ARLINGTON ELECTRIC, INC., 332 NLRB NO. 74, 166 LRRM 1049 (2000) (it was protected for an employee to distribute literature to the public urging them not to use a hospital that subcontracted with a company that did not provide family health insurance). Hence, unless the form of expression exceeds the law's liberal parameters, the law does not distinguish between hostility towards the subject matter and hostility towards the attitude or manner of expression. See also CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03).

Here, Raclaw's pointed, bitter, and angry tone in Exhibit 1 offended the Chief – a lawful reaction in itself, so long as it does not result in retaliation. The record reflects sensitivity on the Chief's part to work-related complaints, as he had labeled them "negativity" and "attitude" in his August 1, 2001 memorandum, and as "bullshit" in his comments to Slotty the day after the Union's presentation to the Board, and as he had previously indicated that he was "sick of hearing about" the staffing issues. However, since Raclaw never disseminated Exhibit 1, his somewhat hyperbolic warnings of public endangerment were not conveyed to the citizens of the Village (at least through Raclaw) and could not have undermined public confidence in the Department. Had Raclaw vented his frustrations with similar vitriol, but in more public circumstances, perhaps undermining the Chief's authority before other subordinates, the expression might have lost its protection. As the Examiner noted, however, there is no indication in this record that Raclaw intended to disseminate these documents without further editing. We further note that stationhouse jargon evidently included plenty of salty language, judging by the Chief's own words. Finally, having themselves pierced the intended privacy of Raclaw's unpublished musings, the Respondents have little claim that Raclaw should have been more circumspect in his language. 8/

8/ It is axiomatic that any Village rule against "disparaging" the Department could not extend to activity that is protected under Section 2 of MERA. Nor are we concerned that Raclaw used a Department computer to produce Exhibits 1, 2, and 3, since, as the Examiner noted, the record does not reflect any clear policy or rule against such use, the two Village Board members who testified both opined that it would be appropriate to use the computers for Department-related business, and the Chief himself acknowledged that the computers were used for Union business with his knowledge and tacit approval.

In short, the sentiments Raclaw expressed in Exhibit 1, under the circumstances present here, fall within the protection of Section 2 of MERA. It follows that, if the Respondents terminated Raclaw in reaction to the sentiments he expressed in Exhibit 1, they violated Section (3)(a)3 of MERA. The Respondents claim, however, that the Chief inoculated his discharge decision by relying upon the advice of Village attorneys and other officials who either recommended (in Halsey's case) or agreed that discharge was an appropriate response to Exhibit 1. Thus, Respondents posit, unless the advisers also harbored animus toward Raclaw's concerted activity, their intervening recommendation cleansed the termination decision of any animus attributable to the Chief. This argument might have some merit if the Chief had not initiated the inquiry, controlled the flow of information to the advisers, and both made and implemented the ultimate decision.

After reviewing Respondents Exhibits 1, 2, and 3 at some point in late November or early December, the Chief discussed Exhibit 1 (but not Exhibits 2 and 3) with Village Administrator Henke and with two members of the Village's Public Safety Committee,

Ms. TenCate and Mr. Wendt, Sr. At Mr. Henke's suggestion, Scola telephoned Village labor attorney Halsey on December 12, sharing with him the contents of Exhibit 1. Halsey advised Scola that discharge would be appropriate, given Raclaw's "attitude" problems, and also given the fact that the Village had rules against disparaging the Department and using Village equipment for personal use. The Chief also checked with the Village Attorney, who concurred in Mr. Halsey's advice. It is worth emphasizing, as the Examiner did, that none of these officials were aware of Exhibits 2 and 3, which provide context for the bitterness Raclaw reflected in Exhibit 1 and refer quite explicitly to Raclaw's belief that he had been mistreated and retaliated against. Those documents might have raised a red flag or at least elicited further inquiry from Village officials when consulted. In any event, even Scola does not claim that he was merely a rubber stamp in the decision to terminate Raclaw or that others made the decision and he merely carried it out. He himself initiated the process and brought the issue to the Village Personnel Committee on January 7, 2002. Nor would reliance upon the advice of others, particularly where those others have no authority to effectively recommend personnel actions, 9/ insulate his decision from liability under MERA. CF. CITY OF COLUMBUS POLICE DEPT., DEC. NO. 27853-B (WERC, 6/95) (employer held to have violated its duty to bargain, even though its refusal to ratify the agreement was based upon an attorney's advice).

9/ CF. NORTHEAST WISCONSIN TECHNICAL COLLEGE, DEC. NO. 28954-C, 28909-D (WERC, 3/99); GREEN LAKE COUNTY, DEC. NO. 28792-A (NIELSEN, 4/97).

Thus, to the extent the Respondents discharged Raclaw in reaction to Exhibit 1, as they admit, they violated Section (3)(a)3 of MERA. We also conclude, however, as did the Examiner, that the Chief was not motivated solely by the contents of Exhibit 1, but was also motivated in part by learning that the Union was contemplating legal action against him for extending Raclaw's probation. As such legal action is protected activity, MARATHON COUNTY (MUSGROVE), DEC. NO. 25757-C, 25908-C (WERC, 5/91), AFF'D IN RELEVANT PART, WIS. CT. APP. 9/16/93 (unpublished decision), it would violate Section (3)(a)3 for the Respondents to discharge Raclaw in response thereto. On this issue, it is the second element of the (a)3 analysis – the employer's knowledge of the employee's protected activity – that is most difficult.

The Respondents vigorously dispute that, at the time he decided to terminate Raclaw, the Chief knew of the impending legal action or knew it was connected to Raclaw. The Chief outright denied such knowledge and the record contains no other direct evidence on the issue.

As with other elements of the (3)(a)3 analysis, circumstantial evidence becomes pivotal. The evidence establishes the following circumstances:

- the Union began preparation for the prohibited practice claim shortly after November 3, 2001, when Raclaw learned of his probation extension;
- while the Union's leadership (comprising nearly half of the nine bargaining unit members) attempted to maintain confidentiality regarding these preparations for some weeks, the preparations included meetings at the station with attorneys and witnesses;
- sometime in the latter part of November or early December, the Chief obtained and reviewed Respondents Exhibits 1, 2, and 3, gleaning the information that Raclaw was "document[ing] the events of October 22, 2001" because Raclaw had felt threatened for his "involvement in the union" (RX 2);
- in the latter part of December, but prior to Christmas, drafts of the prohibited practice complaint were under review by the Union leadership and they began hearing questions from the members about the status of the Raclaw issue; accordingly, the Union leadership decided to inform bargaining unit members about the impending legal action;
- in the latter part of December, but prior to Christmas, a Village police officer (Marschke) told Scola that he had heard that the Union was planning to "sue" him;
- on December 12, Scola telephoned Attorney Halsey to discuss Exhibit 1 and whether Raclaw should be terminated;
- on December 17, Scola told Halsey that he intended to discharge Raclaw but wanted to wait until after the holidays;
- on January 3, 2002, Scola approached Union President Hurtienne, asked whether the Union was suing him, received a noncommittal answer, and left the office upset;
- on January 7, 2002, Scola informed the Village Board's Personnel Committee that he was terminating an employee;
- on January 9, 2002, Scola terminated Raclaw, refusing to provide a reason.

Whether these circumstances support an inference that the Chief had heard about Raclaw's impending legal action prior to December 17, 2002, by which date the Chief had decided to terminate Raclaw, is a very close question and one on which the Complainants bear

the burden of production. 10/ For the Complainants to prevail, it is necessary to infer that Marschke knew about the impending prohibited practice claim and conveyed that information to Scola prior to December 17. Certainly nothing in the record *precludes* that inference, unless Scola's denial is to be accepted at face value. The Examiner did not find Scola credible either on this issue in particular or in general, and, while we do not rely as heavily as the Examiner did upon Scola's linking himself with Lieutenant Wendt's discredited testimony, we see no persuasive reason to disturb the Examiner's general credibility determination. We have concluded independently that Scola was untruthful regarding the statement he made to Raclaw on October 22, 2001, and in asserting that Raclaw's grievance activity played no role in the decision to extend his probation. Therefore, the Chief's testimony alone is not sufficiently credible to persuade us that he had decided to terminate Raclaw before learning about the Union's legal action.

10/ The Respondents also argue that the record does not support the Examiner's conclusion that the Chief connected Marschke's mention of a "lawsuit" with a possible prohibited practice claim involving Raclaw. We agree with the Examiner's analysis of this point. The record supplies absolutely no suggestion that any incident other than the Raclaw incident might have become the subject of a lawsuit, nor any evidence that the Chief inquired about the basis for the lawsuit, which might have been expected if he were truly in the dark. Moreover, as the Examiner noted, the Chief knew very well from reviewing Respondents Exhibits 1, 2, and 3 that Raclaw and the Union perceived Raclaw to have been treated unlawfully.

Discounting the Chief's testimony still leaves the Complainants with an affirmative burden to persuade us that the Chief had the requisite knowledge. We, like the Examiner, are convinced primarily because it appears unlikely under all the circumstances that the Chief would have terminated Raclaw solely because of the contents of Exhibit 1. Like the Examiner, we note that the Chief was still undecided about terminating Raclaw on December 12 (during his first conversation with Attorney Halsey about Exhibit 1), although by then he had clearly reviewed the documents in some depth and discussed them with a number of other officials. Scola explained the delay between December 12 and December 17 by saying that he needed to "understand" the documents, an explanation that we, like the Examiner, find inherently improbable, especially since he took no steps to discuss them with Raclaw. The circumstances strongly suggest that the impending legal action had become common knowledge in the station by December 17, only four days before the four-day Christmas weekend. 11/ We think it likely and we therefore infer that Scola was undecided about how to respond to Exhibit 1 until Marshke told him about the Union's "lawsuit" sometime before December 17, and that this information became a "tipping point" in his decision-making process. That the Chief found this news disturbing is reflected in his questioning Union President Hartienne on the subject on January 3, 2002 and becoming visibly upset when Hurtienne did not deny the rumor.

11/ Christmas fell on a Tuesday in 2001.

Hence, we conclude that the impending prohibited practice claim, as well as the protected activity reflected in Exhibit 1, played a role in Respondents' decision to discharge Raclaw on January 9, 2002.

Remedy

The standard remedy for violations of Section (3)(a)3 is reinstatement and back pay, minus interim earnings and other appropriate mitigation. In this case, the Respondents contend that reinstatement is "void as against public policy," because "Raclaw does not meet the minimum physical requirements for the job of being a firefighter." The Respondents assert that they acquired evidence at the hearing in this matter that Raclaw does not meet the Village's standards on visual acuity, i.e., National Fire Protection Association (NFPA) standard of 20/30, inasmuch as he testified that his vision was 20/60 in one eye and 20/70 or 20/80 in the other. 12/

12/ We observe that Respondents have elected to use the somewhat inflammatory term "legally blind" to describe Raclaw, who indeed described himself that way at one point in the hearing. However, it appears from the context surrounding Raclaw's testimony that he used that term to refer to his condition prior to corrective surgery.

The Respondents' position is a permutation of the "after acquired evidence rule" that has become a commonplace device to limit reinstatement and back pay in employment discrimination litigation. SEE, MCKENNON V. NASHVILLE BANNER PUBLISHING CO., 115 S.CT. 879, 883 (1996). In a decision also issued today, CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03), we consider for the first time whether the Commission should modify its traditional remedies by adopting such a rule in cases arising under Section (3)(a)3 of MERA. For the reasons set forth at length in CLARK COUNTY, and given the fact that Raclaw is being reinstated to a non-probationary position, we decline to do so. While the Respondents in this case proffer after-acquired evidence of physical incapacity rather than misconduct, the policies on which we relied in CLARK COUNTY are implicated nonetheless. Sorting out the Village's actual standards regarding visual acuity, whether those standards have been applied consistently, and whether Raclaw meets those standards are questions quintessentially suited to a "just cause" grievance arbitration. Accordingly, we adhere to the rule we have

established in CLARK COUNTY and decline to limit our traditional remedies of reinstatement and back pay based upon after-acquired evidence. 13/

13/ It is implicit in our CLARK COUNTY discussion that we also do not believe that a remedy hearing would be appropriate to resolve issues of after-acquired evidence of misconduct or incapacity, and to that extent we do not endorse the Examiner's suggestion in footnote 8 of his decision. We do note, as in CLARK COUNTY, that, should Raclaw accept reinstatement, the Village may take whatever steps it believes are appropriate and lawful to handle the issue of his alleged incapacity.

Dated at Madison, Wisconsin, this 28th day of November, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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