STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL #580, AFL-CIO, MARK J. BACKES, KENNETH CRANDALL and ARNOLD D. LUND, JR., Complainants,

vs.

EDGERTON FIRE PROTECTION DISTRICT, Respondent.

Case 2
No. 62485
MP-3950

Decision No. 30686-A

Appearances:

Mr. John B. Kiel, Attorney at Law, 3300 – 252nd Avenue, Salem, Wisconsin 53168, appearing on behalf of Complainants.

Mr. Richard R. Grant, Consigny, Andrews, Hemming & Grant, S.C., Attorneys at Law, 303 East Court Street, P.O. Box 1449, Janesville, Wisconsin 53547-1449, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On June 23, 2003, the Complainants filed a complaint of prohibited practices alleging that the Respondent had violated Secs. 111.70(3)(a)1, 3 and 4 Stats., by acts based on its hostility toward Mark J. Backes', Kenneth R. Crandall's and Arnold D. Lund Jr.'s exercise of lawful, concerted activity protected by Sec. 111.70(2), Stats., and by refusing to collectively bargain in good faith with the International Association of Fire Fighters, Local #580, AFL-CIO. On July 24, 2003, Complainants filed an amended complaint. After informal attempts to resolve the matter proved unsuccessful, the Commission, on August 13, 2003, appointed Richard B. McLaughlin, a member of its staff, to act as Examiner. Respondent filed its

answer to the amended complaint on August 14, 2003. On September 19, 2003, Respondent filed Motions in Limine. Hearing was conducted in Madison, Wisconsin on September 22, September 23, November 13 and December 19, 2003. Complainant amended the complaint during the first day of hearing to clarify its allegations regarding Sec. 111.70(3)(a)1, Stats. Lynn Schultz filed a transcript of the first day of hearing with the Commission on October 14, 2003, and filed a transcript of the second day of hearing on October 31, 2003. Nancy Delaney filed a transcript of the third day of hearing on November 20, 2003. Heidi Davis filed a transcript of the final day of hearing on January 16, 2004. Complainants and Respondent filed briefs and reply briefs by March 31, 2004.

In a letter to the parties dated May 17, 2004, I stated:

> I have begun my review of the record. In this case as any other, my review starts with the briefs, turning to legal research only after I have prepared Findings of Fact. Argument in the briefs concerning the duty to bargain focuses on CITY OF BROOKFIELD V. WERC, 87 WIS.2D 819 (1979). This case, clearly applicable to the complaint, is one of a series of cases by which the Court adopted and applied the "primary relation test." Among the other cases is UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 WIS.2D 89 (1977). My experience is that discussion of one case prompts discussion of the other. The briefs do not address RACINE. They need not. However, I think it is probable that my review of the precedent may involve cases in addition to BROOKFIELD. Whether or not those cases prove applicable, I thought it appropriate to alert you to the possibility, and to determine whether you wished to comment on RACINE or any other "primary relation test" case prior to my independent research.
>
> You need not file further argument, but please let me know if you wish the opportunity. If the two of you wish to consult on the point prior to responding to me, please do so. You may file your response in writing or by e-mail. If you want to discuss the matter with me by phone, I think a conference call would be the appropriate means to do so.

The parties agreed to submit supplemental briefs in response to this letter, the last of which was filed with the Commission on July 2, 2004.

FINDINGS OF FACT

1. The International Association of Fire Fighters, Local #580, AFL-CIO (the Association) is a labor organization, which maintains its principal offices at 303 Milton Avenue, Janesville, Wisconsin 53545. Mark J. Backes, Kenneth R. Crandall and Arnold D. Lund, Jr., are individuals who, for purposes of this proceeding, use the mailing address of 3300-252nd Avenue, Salem Wisconsin 53168. Patrick Kilbane is a District Field Service Representative for the Association.

2. The Edgerton Fire Protection District Commission (the District or the Board) is a municipal employer, which maintains its principal offices at 621 North Main Street, Edgerton, Wisconsin 53534.

3. The City of Edgerton and the Towns of Albion, Fulton, Porter and Sumner formed the District on May 7, 1992. In the agreement creating the District (the Agreement), the founding municipalities authorized the District to provide fire protection services for the entire City of Edgerton, the entire townships of Albion and Fulton and portions of the towns of Porter and Sumner. The Agreement authorizes the District to contract its services beyond the areas covered in the Agreement. A Board of Trustees, also referred to as Commissioners, administers the District. The Board includes six regular members and six alternates, each appointed by the municipalities composing the District. The Board's President is Richard J. Linsley. Under Article IX of the Agreement, a Fire Chief oversees the day-to-day operations of the District. The Agreement specifies that the Fire Chief, in September, must submit an annual budget for Board review at a public hearing during its October meeting. Section VI, E of the Agreement provides, "A two-thirds (2/3) majority of all Trustees shall be required to adopt the annual budget". Section VI, D provides, "A simple majority of a quorum shall be sufficient to pass all motions, ordinances, and resolutions" of the Board other than the annual budget. Article X of the Agreement specifies the "Procedure For Selection of Fire Department Officers and Personnel" thus:

> . . . The Fire Chief and two (2) Assistant Chiefs shall either be members of the department in good standing for at least two years or persons with at least two (2) years training and experience in fire department operations.
>
> A. The Board of Trustees shall approve or disapprove all officers elected to such positions of authority by the volunteer members of the Edgerton Fire Protection District.
> B. The Board of Trustees or its designate shall administer all personnel matters. Said authority to administer shall include, but is not limited to, the selection of volunteer members of the Edgerton Fire Protection District.
> C. The Board of Trustees may remove for just cause any officer or other member of the fire department. . . .

The District's Director of Human Relations is Robert C. Hellendrung, who also serves as the District's bookkeeper. In a resolution executed on September 3, 1998, the District addressed and stated the roles of its Board and the Fire Chief regarding employees thus:

> WHEREAS, the commissioners want to clarify the roles of the commission and the Fire Chief regarding employees of the Edgerton Fire District Commission, (but not the fire fighters, they being subject to the direction and control of the Edgerton Volunteer Fire Department, Inc., a separate entity).

. . .

> 1. All personnel matters involving any employee of the commission shall be within the purview of the Commission, except as provided below. "Employee" will include any part or full time personnel including, without limitation, the driver/dispatcher, that are paid by the Commission.
>
> 2. When responding to a fire call or other emergency, or for training purposes, any employee of the Commission actively engaged in such response, emergency or training shall be subject to the direction of the Fire Chief. . . .

As authorized in an amendment to the Agreement executed on July 28, 1992, the District sub-contracts for the provision of emergency medical services.

4. The Edgerton Volunteer Fire Department, Inc. (the Volunteers), is a corporation formed under the laws of Wisconsin, with roots tracing back more than one hundred years. Its by-laws specify that a Board of Directors, composed of three Trustees, administers its operation. Section 1.01 of the by-laws specifies its "principal business office shall be the Edgerton Fire Department building, 621 North Main Street, Edgerton, Wisconsin." The by-laws make a President, Vice-President, Secretary, Treasurer and Sergeant At Arms the corporate officers. Section 8.07 of the by-laws addresses the "Election and Enumeration of Fire Officers" thus:

> There shall be a chief, at least one assistant chief, three (3) captains, three (3) lieutenants, a safety officer, training officer and assistant training officer. They shall be elected at the annual meeting of the Department in January for a two year term. . . .

Section 8.08 addresses the authority of the Chief thus:

> It shall be the duty of the Chief to take charge of all fire and emergency scenes. He shall be in command of all fire line officers and shall safeguard the livelihood of all members. He shall enjoy all rights and duties given him by State or local laws, and as granted to him by the Edgerton Fire Protection District Commission, the Directors and the members.

The By-laws contain provisions covering the discipline of members as well as their compensation, including a retirement benefit, a memorial benefit for the death of a volunteer or a member of the volunteer's immediate family. The memorial benefit extends to District Trustees. The By-laws addressed Fire Inspections until an amendment in 2001 removed the provision.

5. The District budgets a personnel appropriation, which it pays as a donation to the Volunteers. The Volunteers supplement these funds with monies from their own fund-raising activities and distribute them to members as compensation for responding to fire calls. The Volunteers use a Form 1099 to account for total annual payments to individual volunteer fire fighters. The District funds the cost of a Workers Compensation and a life insurance plan covering Volunteers. The District pays for dues and for training necessary to maintain the skills and certification of volunteer fire fighters. Insurance companies make "2% Dues" payments to the State of Wisconsin, which collects them, then pays them to municipal fire departments that maintain approved training regimens and building inspections. The municipal members of the District pay that money to the District, which runs it through the District budget, passing at least part of it to the Volunteers. Both the District and the Volunteers purchase fire suppression equipment. The District purchases larger capital items, such as tankers and pumpers, which can cost several hundred thousand dollars. The Volunteers, however, supply significant capital items, such as a rescue truck (cost, roughly $40,000); a four-wheel drive pickup for fighting grass fires (cost, roughly $30,000); an ATV (cost, roughly $11,000); a boat and trailer (cost, roughly $8,500). The District and the Volunteers can share costs on certain equipments, such as air packs, toward which the Volunteers contributed $10,000. Once purchased, these items become District property.

6. At the time of the District's formation, the City of Edgerton employed two full-time and two part-time employees, who staffed its Fire Department as driver-dispatchers, and also served as individual members of the Volunteers. The two full-time employees, Edward Hartzel and Donald Vickers, interviewed for positions with the District, but opted to remain City of Edgerton employees. The District then hired two other individuals, Lund Jr. and Backes. Sometime around 1993, the District hired Hartzel to work on a part-time basis, to fill-in for Lund Jr. and Backes when they took time off work. Hartzel worked in that position from roughly 1993 through 1997, averaging roughly two days per week. Hartzel retired in 1997, and the District replaced him with Wayne Achterberg, who worked until 2000. The District replaced Achterberg with Crandall. Sometime during that year, after a request from Crandall, the District determined to change his job description to include fire inspections, and Crandall became a full-time District employee. Prior to this, the Volunteers performed fire inspections. The District uses a form W-2 to account for its annual payments to its employees. Lund Jr., Backes, and Crandall have been, at all times relevant to this matter, individual members of the Volunteers.

7. Sometime in the winter of 2002, Crandall contacted Kilbane to determine the benefits of forming a union of District employees. Kilbane and Crandall communicated through e-mails and meetings and by February of 2002, those meetings included Lund Jr. and Backes. Kilbane recommended they sign authorization cards, naming the Association as bargaining representative. In a letter to Linsley dated April 7, 2002, Scott Morovits, the Association's President, stated:

> This letter is to inform you that the three full-time fire fighters currently working for the . . . District . . . have elected to join the International

> Association of Fire Fighters (IAFF) as members of IAFF Local 580. We are pleased that they have chosen to join the IAFF and welcome them as brothers in IAFF Local 580. We ask that the Edgerton Fire Protection District recognize IAFF Local 580 as the exclusive bargaining agent either voluntarily or by statutory procedure overseen by the Wisconsin Employment Relations Commission. We believe it will best serve both parties if the District chooses the voluntary recognition. . . .

The District responded in a letter dated May 15, 2002 from its counsel, Richard R. Grant, to Morovits, which states:

> It is the wish of the employer that a free election be conducted by secret ballot, allowing the employees to further consider their decision and then determine whether or not they wish your union to represent them. . . .

By letter dated May 21, 2002, Kilbane informed Grant that the Association had filed a petition for election with the Commission. Peter G. Davis, the Commission's General Counsel, responded by sending a Stipulation for Election form to Grant under a cover letter dated May 31, 2002. Grant responded in a letter to Davis dated June 6, 2002, which stated that he hoped to arrange a meeting with the District to address the May 31 letter. In a letter dated June 13, 2002, Grant stated the District's position thus:

. . .

> First of all, the Stipulation for Election refers to an eligibility list attached, which was not attached to my documentation.
>
> Secondly and more importantly, we have problems with the description of the unit. In the attachment to the Union's Petition for Election, under item 1, it states: "Number of employees: 3", while under item 2, it states "The bargaining unit is made up of approximately 81 professional employees whose primary function is fire protection, fire prevention, and emergency medical services." To my knowledge, there are only 3 such employees on the Fire District payroll, who have always been denominated, "driver/dispatchers." These three employees also perform some fire inspection duties. The fire protection in this district is then assisted by volunteer, non-employee individuals that I do not think would be in any way a proper part of a unit of the Edgerton Fire Protection District . . . The three employees, furthermore, are not even certified in the categories mentioned in the proposed unit language positions that require a certification.

. . .

In a letter to Davis dated June 14, 2002, Kilbane clarified that the Association's petition sought to include the three positions occupied by Backes, Lund Jr., and Crandall, and did not include the Volunteers. Kilbane added that the position description of these positions warranted the unit description in the Association's petition, which included "Fife (sic) fighters, Emergency Medical Technicians, Paramedics, Motor Pump Operators, Lieutenants, Captains, Fire Inspectors, Fire Mechanic". In a letter to Davis dated July 23, 2002, Grant stated:

> . . . We still do have a unit clarification problem in that the job description . . . does not conform to the description proposed in the stipulation. These employees are not firefighters, emergency medical technicians, paramedics or fire mechanics, as those terms are normally defined. From the very beginning, the only way the . . . District could justify two or three employees in addition to the volunteers, was to strictly limit the role to be played by each of the employees. It would be inaccurate and misleading to suggest that the . . . District either now or at some time in the future, employs individuals in the capacities listed in the proposed unit description. Pursuant to the job description, any unit should apply to "full-time driver/dispatcher/fire inspectors" only. . . .

The "Responsibilities" portion of the job description referred to in Grant's and in Kilbane's letters reads thus:

> Responsible for answering all incoming calls to the department in a professional and expedient manner. Set off paging/alerting system to notify firemen. Work with the Rock County 911 Communications Center and other emergency services, such as police and ambulance. Responsible for driving first truck and operating same at fire scene. In the absence of an officer, is in charge of fire scene. Must be a pump operator, be able to operate both diesel and gasoline powered heavy trucks, be able to operate air brake system. Must be able to work with the public on a daily basis, have good telephone communications skills, be able to work under stressful situations. Must have a working knowledge of all fire department equipment, visually inspect all portable equipment weekly and within 24 hours after use, run small engines on a weekly basis. Attend department training sessions. Must be familiar with incident command system, have a good working knowledge of the area of the Fire District. Notify the Fire Chief of all needed supplies and/of repairs. Will be responsible for all Fire Inspections as required within the Fire Protection District and related administrative duties. Must be able to perform general maintenance on building, grounds and equipment. Maintain station and equipment in clean and safe condition. Maintain personal appearance to be in a professional manner. Perform other duties as assigned by Fire Chief.

When performing the driver/operator functions noted in the position description, District employees wear the same protective gear and use the same fire suppression equipment as the volunteer firefighters. Further discussions concerning the unit description proved fruitless, and in a letter to Davis dated September 3, 2002, the District formally requested "a hearing before the WERC." At a pre-hearing conference on October 14, 2002, the Association and District agreed to enter into a Stipulation for Election for a bargaining unit described thus:

> All regular full-time fire fighter/driver/dispatcher/fire inspectors employed by the Edgerton Fire Protection District, excluding supervisors, confidential, managerial and executive employees and volunteers.

Backes, Lund Jr., and Crandall were the eligible voters under this unit description. After a mail ballot, the Commission determined that a majority favored representation by the Association, and, on December 2, 2002, the Commission issued an Order Certifying the Association as the exclusive collective bargaining representative of the unit.

8. In a letter to Grant dated December 14, 2002, Kilbane sought to start the collective bargaining for a first contract, stating "I would like to secure a starting date and would prefer to meet on a regular basis if that works with your schedule." After a series of e-mails and letters regarding dates to meet, Kilbane and Grant agreed to start bargaining on January 27, 2003. The Association brought to that meeting an outline, consisting of 27 numbered items for discussion. Grant responded that the District did not think meaningful bargaining could occur unless the Association presented the District a comprehensive proposal, which the District would respond to, hopefully within thirty days. Kilbane responded by preparing an entire proposed first contract, dated February 22, 2003, which he mailed to Grant. The District did not make any counter proposal, and the parties did not meet again to bargain over the terms of the agreement.

9. John Gietzel, in late January or February of 2003, filed a letter with the Wisconsin Department of Commerce that states:

> As Chief of the Edgerton Volunteer Fire Department I am writing to ask if you could clarify some of the aspects of Comm. 30:081(a) and if they are applicable to our situation.
>
> In our earlier phone conversation you had asked me to provide more information on the structure of our organization and our employee status.
>
> Prior to 1991 the Edgerton Volunteer Fire Department was regulated and funded by the City of Edgerton. The City of Edgerton contracted with the adjoining Towns to supply fire protection services with them. During this time the city employed 2 full-time and 2 part-time driver-dispatchers who were also members of the Volunteer Fire Department also.

On May 7, 1992 the surrounding Towns and the City of Edgerton formed what is now known as the Edgerton Fire Protection District Inc. The District's main purpose is to provide a means of funding for the Volunteer Fire Department. The Edgerton Volunteer Fire Department still exists as a separate entity and provides fire protection services for the municipalities within the District.

At the time of the Districts formation the City's two (2) full-time employees went to work for the cities DPW and the District hired the two (2) part-time employees as full-time driver-dispatchers. The driver-dispatchers were not considered firefighters by the City or the District because they were also members of the Volunteer Department. At the time of an alarm they would fall under the jurisdiction of the Volunteer Department.

As of November 20th, 2002, the three (3) driver-dispatchers . . . chose to join a firefighters union (IAFF). Prior to the November 20th union certification date the WERC held a hearing to clarify the general unit description. At this time, the IAFF felt that the overlap in job duties between the driver-dispatcher/inspector job description and a firefighter job description were enough to incorporate this title into the "general unit description." With that in mind, is that considered a promotion per Comm. 30.08?

Also, to clarify the qualifications of our 3 full-time employees – none of the 3 full-time driver-dispatchers have the required entry level Firefighter 1 certification. Again, all three have over 20 years on the Edgerton Volunteer Fire Department. After talking with Jim Neal, who was Fire Chief and is retired from the department, he recalled the department was to get a list of members and job duties and sent it to Blackhawk Technical College to grant members grand-fathering. This list was never delivered and only a verbal agreement was made to the volunteers – saying they could take Firefighter 1 if they wanted. However, at our office, there is no list of grand-fathered members nor is there anything *in writing* that the members were grandfathered. Is this also a violation of Comm. 30.08?

Finally, if the 3 full-time members were grandfathered on the *Edgerton Volunteer Fire Department* then became employees of the *Edgerton Fire Protection District* (separate entities) would they then need the basic fire fighter schooling?

. . .

The Department of Commerce responded in a letter dated March 1, 2003. The District supplied this response with a cover letter to Kilbane dated April 18, 2003. The April 18 letter noted the District did not find the Department's answer determinative on the questions posed, and sought information on the issues from the Association. Between this response and mid-May of 2003, the District and the Association researched and communicated concerning this issue,

but did not reach any agreement on whether unit members had been "grandfathered" to meet State of Wisconsin employment standards as fire fighters. During this period the Association also attempted to secure a collective bargaining session on the contract.

10. Minutes of the District's meeting on April 3, 2003, include the following under the heading "New Business:"

> Chief Gietzel presented a request for a new tanker. Discussion followed. Bob Hellendrung presented information of several options for possible financing for the proposed purchase. Chief Gietzel was directed to check the current value of truck 73 and truck 77 and to check to see if the price quoted for a new tanker would be guaranteed for 90 days.

The "New Business" entry for the May 1, 2003 states:

> Chief Gietzel presented a truck replacement schedule for the district to consider. Discussion followed. Chief Gietzel was directed to spec out both a pumper and tanker and present more information to the Board.

In a letter to Grant dated May 7, 2003, Kilbane noted that "Crandall was presented a letter of reprimand by the Chief and asked to sign it." Kilbane further noted that after "some discussion, the letter was withdrawn." Kilbane also noted "that in the future, when attending to matters of discipline, union representation should be afforded to any member(s) of the bargaining unit". He added that "when the Chief asks the members of the bargaining unit to sign documents regarding changes in the operations of the . . . District, such documents should be reviewed by a union representative prior to signing." On May 23, 2003, the District posted a meeting notice for "its regular meeting for the month of June, Thursday, June 5, 2003, at 7:00 P M". Item 7) of the notice states: "Motion to go into closed session pursuant to Wisconsin State Code 19.85(1)(f) to discuss personnel matters". On June 4, 2003, the District posted an amended notice for "its regular meeting for the month of June, Thursday, June 5, 2003, at 7:00 P M", which states Item 7) thus:

> Consider action on budget amendments
> 1) Truck purchase
> 2) Paid personnel positions

Between the posting of the two notices of the June 5, 2003 meeting, Hellendrung and Linsley discussed the cost of the proposed truck purchase and the potential cost of unit employees. Hellendrung came to the June 5 meeting with handwritten notes that were essentially a proposed 2004 budget. When the Board came to Item 7) during its meeting, Hellendrung made a presentation concerning the 2004 budget that highlighted areas that could be expected to increase significantly, including the purchase of a truck, EMS services, and items of fixed expense. The new truck purchase included in his notes was a new tanker, projected to cost $280,000.00. The presentation included increases in attorney fees, including those prompted by collective bargaining. Hellendrung's notes also included a $41,000.00 entry for increased

costs for wages and benefits for unit employees, which reflects the difference between projected costs for the 2004 budget of $185,000.00 and 2003 costs of roughly $144,000.00. Hellendrung generated the projected increases by costing the Association's comprehensive proposal and subtracting from that amount the cost of the package he understood the District to take regarding wages and benefits. He roughly halved the difference between the two positions, which yielded $41,000.00. After Hellendrung's presentation, Trustee David Viney asked what would be the easiest means to cut $150,000.00 from the budget. Hellendrung responded that the easiest means would be to eliminate the unit positions. Shortly after this, Trustee Ronald Webb made a motion to eliminate the positions, and Trustee David Viney seconded it. The Board voted unanimously to eliminate the positions. There was little discussion between Hellendrung's presentation and the Board's vote. The Board did discuss the purchase of the new truck, but did not consider any staffing alternatives other than the complete elimination of the positions, did not discuss any collective bargaining proposal and did not discuss alternative ways to reduce the budget. Hellendrung's presentation reflected his analysis that the Board could not meet his projected 2004 budget shortfall other than through the elimination of the unit positions or of the new truck purchase. The Board did discuss that using the Volunteers to perform the duties of the unit employees would continue the existing level of service, while generating savings. To facilitate this change, the Board approved the purchase of a security keypad for the Fire Station, to permit authorized personnel access to the building that had before been provided by the full-time staff. The Board also approved the installation of monitoring equipment to provide security functions that had before been provided by the full-time staff. Kilbane, Backes and Lund Jr., attended the meeting. None had notice prior to the meeting that the Board's consideration of Item 7) meant the elimination of unit positions.

11. In letters to unit employees dated June 6, 2003, the District stated, "The Commission decided that for financial reasons they will terminate the three full time employee positions effective June 30, 2003." In a letter dated June 6, 2003, Grant asked Kilbane to "Please let me know by the end of the month if you have any questions or concerns regarding any duty to bargain that may still exist." Kilbane responded in a letter dated June 9, 2003 that noted that the Board vote to eliminate the positions "was based on their anti-union animus" and that the Association "will seek every remedy available to us under the law to correct the wrongdoings of the District Commissioners." In a letter to Kilbane dated June 12, 2003, Grant reiterated the District's willingness "to bargain on any required items resulting from the termination of these three full-time positions." The Association did not respond to the District's willingness to negotiate the impact of the decision and did not request to bargain the impact of the decision. The District's vote provoked controversy in the underlying municipalities, generating newspaper articles as well as animated discussions at Town Board meetings. On July 12, 2003, the Association secured a temporary restraining order from the Dane County Circuit Court that required the District to reinstate the unit employees and bargain with the Association. The Circuit Court on September 25, 2003, vacated the order, and the District reinstated its termination of the unit positions.

12. At its annual meeting in October 2002 to set the 2003 budget, the District funded the three full-time positions, and authorized a roughly 2% increase in their wage rates.

During this period, the governor and legislature considered the elimination of state revenue sharing payments to municipalities. The District consistently opposed the desire of the unit employees to form a union. On November 7, 2002, Hellendrung, Grant and Linsley met with the three unit employees. Hellendrung read an extensive statement explaining why the employees should vote "no" in the election, noting among other points that the District could not pay the budgeted wage increases during the processing of the election petition. At its January 8, 2003 meeting, the Board approved the mailing of an informational letter to members of the Volunteers. The letter addressed "Dear Volunteers", and signed by Linsley, reads thus:

> On behalf of the Edgerton Fire Protection District, I would like to clarify the present status of the Driver/Dispatcher Petition for unionization. The International Association of Fire Fighters, Local 580, has just recently been certified as the Union bargaining representative for the driver/dispatchers. The Commission fully intends to respond to this certification and the certified union, within the confines of applicable law. That law provides that no changes will be made to existing wages, hours, and conditions of employment, except as bargained and agreed to for these employees, between the Union and the Commission. Therefore, previously-existing conditions must remain in full force and effect on these topics. You should expect the status quo to continue until and unless otherwise agreed to, as it affects the driver/dispatcher employees.

Both before and after the elimination of the full-time positions, Backes, Lund Jr., and Crandall were individual members of the Volunteers. Throughout the certification/bargaining process, the unionization of District employees proved a contentious topic within the District and within the Volunteers.

13. The efforts of the individual Complainants to join or to decline to join the Association and, following its certification, to use it as their exclusive bargaining representative for purposes of collective bargaining are lawful, concerted activity. The District was aware of that activity. The District opposed Complainant's efforts to have the Association serve as their collective bargaining representative. The District was motivated by its desire to control the operation of the District without any Association role, particularly regarding District finances, and was not motivated by hostility to Complainant's exercise of lawful, concerted activity. The District's opposition to the Association reflected its view of the legal limit of its ability to oppose the Association becoming the exclusive bargaining representative of the three full-time employees. The District did not, from the Association's certification until the termination of the positions, bargain in good faith with the Association. The District's decision to terminate the positions is primarily related to the wages, hours and conditions of employment of the employees occupying the positions, and not to the formulation or management of public policy.

CONCLUSIONS OF LAW

1. The Association is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

2. As occupants of fire fighter/driver/dispatcher/fire inspector positions employed by the District, Backes, Lund Jr., and Crandall are each a "Municipal employee" within the meaning of Sec. 111.70(1)(i), Stats.

3. The District is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

4. The District's decision to terminate the full-time positions occupied by Backes, Lund Jr., and Crandall is a mandatory subject of bargaining and The District's refusal to bargain that decision constitutes a violation of Sec. 111.70(3)(a)4, and derivatively, Sec. 111.70(3)(a)1, Stats.

5. The District failed to bargain in good faith with the Association following the Association's certification on December 2, 2002, in violation of Sec. 111.70(3)(a)4, and derivatively, Sec. 111.70(3)(a)1, Stats.

6. The District's decision to terminate the full-time positions occupied by Backes, Lund Jr., and Crandall was not motivated by hostility to their exercise of lawful, concerted activity and does not violate Sec. 111.70(3)(a)3, Stats., nor constitute an independent violation of Sec. 111.70(3)(a)1, Stats.

7. District bad faith in bargaining with the Association was motivated by its desire to control its operations, particularly its finances, and was not motivated by hostility to its employees' exercise of lawful, concerted activity, and thus does not violate Sec. 111.70(3)(a)3, Stats., nor constitute an independent violation of Sec. 111.70(3)(a)1, Stats.

ORDER

1. Those portions of the amended complaint alleging independent District violation of Sec. 111.70(3)(a)1, Stats., or violation of Sec. 111.70(3)(a)3, Stats., are dismissed.

2. To remedy its violation of Secs. 111.70(3)(a)1 and 4, Stats., the District shall immediately:

   a. Cease and desist from refusing to bargain with the Association as the exclusive collective bargaining representative of the District's full-time employees.

b. Cease and desist from bargaining in bad faith with the Association over its decision to terminate the positions occupied by its full-time employees.

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

(1). Restore the status quo by reinstating Backes, Lund Jr., and Crandall to the full-time positions they occupied prior to the District's termination of those positions, and make them whole by paying them all wages and benefits they would have earned, less any amount they earned or received that they would not otherwise have earned or received but for the termination of their positions, plus interest at the rate of twelve percent (12%) *per annum* on those amounts for the entire period of their termination until the date each is reinstated or refuses reinstatement.

(2). Bargain, in good faith, on the request of the Association concerning the wages, hours and conditions of employment of Backes, Lund Jr., and Crandall, including any decision to terminate their positions.

(3). Notify the employees represented by the Association by posting in conspicuous places in District facilities where employees are employed copies of the Notice marked "Appendix A". The Notice shall be signed by the President of the District Board of Trustees, 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 County to insure that said notices are not altered, defaced, or covered by other material.

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

Dated at Madison, Wisconsin this 20th day July, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

APPENDIX "A"

**NOTICE TO ALL EMPLOYEES
OF THE EDGERTON FIRE PROTECTION DISTRICT
REPRESENTED BY THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
LOCAL #580, AFL-CIO**

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 bargain in good faith with the International Association of Fire Fighters, Local #580, AFL-CIO concerning the wages, hours and conditions of employment of employees of the Edgerton Fire Protection District represented by them, including any decision to terminate those positions.

2. WE WILL restore the status quo by reinstating employees of the Edgerton Fire Protection District represented by the International Association of Fire Fighters, Local #580, AFL-CIO to the positions they held prior to the termination of the positions in June of 2003, and by making them whole for losses traceable to the termination decision.

Dated this _____ day of _____, 2003.

EDGERTON FIRE PROTECTION DISTRICT

_____
President
Board of Trustees, Edgerton Fire Protection District

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

EDGERTON FIRE PROTECTION DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE PARTIES' POSITIONS

The Complainants' Brief

After a review of the evidence, Complainants contend that Hellendrung's November 7, 2003 remarks constitute "pre-election statements, which include threats of reprisals and promises of benefits based on Complainants' support or non-support of a union." As such, the remarks are unlawful under Commission case law. More specifically, the Wisconsin Supreme Court found essentially the same remarks unlawful in CITY OF EVANSVILLE, 69 Wis. 2D 140 (1975). A detailed examination of Hellendrung's statement makes "it abundantly clear that employees could expect changes for the worse if the Union were to prevail and implicitly promised better conditions if it didn't." Since the remarks made "threats and promises regarding matters within (The District's) control" they must be found unlawful under a consistent string of Commission cases.

Beyond this, the District violated Sec. 111.70(3)(a)3, Stats., by terminating Backes, Crandall and Lund. The four elements that establish a violation of this section have been demonstrated. The election petition establishes the existence of lawful, concerted activity. While evidence of proscribed hostility can rest on inference, the District's hostility "against the Union was blatant, long standing and overt" as established by the anti-union comments of the District's command staff and Board members. Nor is there any defense to this conclusion. The evidence will not support an inference that the terminations can meaningfully be traced to "an alleged need to buy a new fire truck" or to "the effects of cuts in state shared revenue." More specifically, these asserted concerns existed in October of 2002, when the Board adopted a budget providing for an increase in the wages of its full-time employees. The purchase of the new truck was expressly considered at that time. Thus, when the Board acted to terminate the employees in June of 2003, the sole change to account for the Board's reversal of its October, 2002 budget was the unionization of its full-time employees. Since there is no objective reason for the action outside of this factor, the District's assertion of an economic basis for the termination decision must be viewed as a pretext.

The District's duty to bargain with the Association arose with the Association's certification. The District never meaningfully bargained, and actively sought to undercut the Association. The District refused requests to meet, never responded to the Association's proposal, and actively sought an administrative determination that Backes, Crandall and Lund "were not eligible to work as fire fighters in the employ" of the District. This course of conduct establishes a violation of the duty to bargain enforced under Sec. 111.70(3)(a)4, Stats.

Complainants conclude by requesting the Commission "issue a remedial order that provides the following relief:

1. Adjudicates the foregoing conduct of the Respondents as unlawful.
2. Prohibits this type of conduct in the future.
3. Directs the Respondent to immediately reinstate Backes, Crandall and Lund Jr. to their positions as full-time fire fighters with the District.
4. Directs the Respondent to meet and negotiate with Local #580 over the terms and conditions of employment of Local #580 members who are employed as full time fire fighters with the District.
5. Directs the District to make Complainants Backes, Crandall and Lund Jr. whole for any injury suffered as a result of the District's unlawful actions.
6. Directs the District to post a notice of findings conclusions and order of the Commission in this matter in appropriate locations intended to apprise bargaining unit members of their rights.
7. Directs the Respondent to reimburse Complainant for all expenses incurred in the protection of the Complainants' interests, including reasonable fees for representation, costs and expenses in order to enforce conduct in compliance with the law, including those associated with processing of a temporary injunction on behalf of Backes, Crandall and Lund, Jr.
8. Directs Respondent to engage in such other remedial conduct as the Commission believes is reasonable and necessary to ensure compliance with the provisions of Section 111.70, Wis. Stats.

The District's Brief

After an extensive review of the evidence and governing law, the District contends that Complainants have failed to carry their burden of proving "a connection or 'nexus' between claimed prohibited statements of 'agents' of the trustees and the voting trustees' motives, intent or hostility in eliminating the positions." It necessarily follows that the trustees cannot be found to have committed any prohibited practices.

Complainants' evidence of proscribed hostility is suspect for several reasons. Most of the evidence occurred outside the one-year limit set by Sec. 111.07(14), Stats., and cannot, in any event, be connected to the trustees who voted on June 5, 2003. Beyond this, the evidence is closely disputed. The evidence reliably indicates no more than that the trustees were motivated by fiscal and bona-fide public safety concerns.

Nor has Complainant demonstrated Hellendrung's pre-election remarks were tainted by proscribed hostility. His concern with the cost of a labor agreement, the impact of unionization on volunteer fire fighters, and the adverse impact on the pre-existing employer/employee relationship represents no more than the exercise of employer free speech

rights. Beyond this, review of the evidence manifests that the trustees "were upholding their duty under the law to protect the interest of their citizens." Since District agents were concerned only with the "results" of unionization rather than employee "exercise" of their right to an election, the concerns were lawful under a string of Commission cases. That Complainants did not complain about the comments of District agents until well after "the public policy decision to terminate these positions and go all-volunteer was made on 6/5/03" undercuts, if not waives, any assertion of a violation of Sec. 111.70(3)(a)1 or 3, Stats.

Significantly, the implication of an improper motive based on the termination decision itself "would turn on its head the Supreme Court's affirmance of layoff as a non-mandatory bargaining subject under CITY OF BROOKFIELD V. WERC, 87 Wis. 2D 804 (1979).

Nor have Complainants demonstrated a violation of Sec. 111.70(3)(a)4, Stats. Whatever delay occurred in setting bargaining meetings reflects joint concern "with the firefighter certification issue." The work of both parties on this threshold issue "not only justifies the delay but fails to prove any effort by the District to seek to frustrate agreement".

The District concludes that law and fact support a conclusion that "the District trustees took the time to investigate and consider the status of the employees and how their union demands fit into the District's overall financial picture." That effort led the District to conclude that "going to an all-volunteer operation made the most economic sense, without jeopardizing the District's fire protection safety and services". This decision "was the very public policy and decision-making the trustees were duty-bound to make by law." It follows that the amended complaint "should be dismissed."

The Complainants' Reply Brief

District arguments regarding BROOKFIELD are misplaced, since that decision sought to reconcile the potentially competing interests of employees in bargaining and of the public in the political process by which public policy is set. In October of 2002, after a public meeting and in conformance with its own rules, the District funded three full-time positions. In June of 2003, "with less than twenty-four hours notice, inadequate notice of the issue to be considered and virtually no debate" the District Board acted to terminate those positions. This precipitous action cut the public out of the budgetary debate and produced a broad public outcry against the Board. BROOKFIELD cannot persuasively be stretched to shield such actions.

Complainants have demonstrated a nexus between the anti-union hostility of District agents and the trustees. More specifically, the inference of hostility rests on the timing and sequence of events concerning Union activity; the timing and sequence of events concerning the continuation of the full-time positions; the timing and sequence of events concerning the District's alleged revenue-sharing concerns; the timing and sequence of events concerning vehicle replacement; the unsupported assertions by Trustees concerning the safety of District equipment; and the last minute change to the District's agenda for the June 5, 2003 meeting.

Beyond this, Hellendrung's anti-Union comments are attributable to the Board. He consistently acted as their agent and as a valued resource in its decision-making. The law does not require Complainants to produce "a smoking gun" to prove their case. Here, Trustee comments made after the June 5, 2003 meeting reliably reflect the anti-Union hostility that underlies the vote. Since the amendment of the complaint occurred within the one-year period set by Sec. 111.07(14), Stats., there can be no persuasive contention that Complainants waived any claim to challenge Hellendrung's pre-election remarks.

A review of the record establishes that the District's defense is frivolous, and thus, under Commission case law, warrants the imposition of attorney fees and costs against it.

The District's Reply Brief

The District prefaces its reply with an extensive review of the "major factual misrepresentations of Claimants" and of Complainants' assertion of argument and accusation as fact. The District then contends that Complainants failed to prove that the November 7, 2003 speech was unlawful. The speech had no impact on the employees "since the pre-election positions of the three employees were not changed one iota." That Complainant waited until hearing to complain about the speech undercuts its position. That the District took no adverse action between November of 2002 and June of 2003 establishes how tenuous the Complainants' assertion of unlawful conduct is.

More significantly, the speech reflects no more than the District's assertion of free speech rights. Since the District made no changes in working conditions, Hellendrung's comments lack the "ominous tone" referred to in cases cited by Complainant. Rather, Hellendrung restricted his comments to his "concerns for potential changes if the Union was certified". This underscored that the changes would turn on collective bargaining, not unilateral employer conduct. This supports rather than undermines the Association. More significantly, it distinguishes Hellendrung's comments from those addressed by the EVANSVILLE Court. That case involves direct threats of unilateral employer action connected to employee voting. Hellendrung's comments reflect his concern with the results of bargaining, which the District could not control if and when it occurred. Thus, Hellendrung's comments directly address what the vote was about: "Will I be able to better address my employment needs by keeping the prior procedure or by electing the union and using the bargaining procedure?"

Nor will the record support a finding of a District violation of Sec. 111.70(3)(a)3, Stats. Cases cited by Complainants fail to link proscribed hostility to the Board's decision to "solve a perceived $150,000 shortfall by going all-volunteer and purchasing needed equipment for safe and effective firefighting." Complainants ignore that the District, as every Wisconsin municipality in 2003, "was indeed faced with a budget crisis." Statements by command staff have not been linked to voting Board members. Significantly, the Board considered the economic viability of the full-time positions during every budget, not simply those coinciding with a union organizational campaign. Beyond this, Complainants ignore the impact of BROOKFIELD, which reserves "to government bodies the right to eliminate expenses similar to the three positions involved in this case without the obligation to bargain."

The Complainants' misreading of BROOKFIELD similarly taints its reading of other case law. Complainants consistently presume proscribed hostility and then assert that the Board's basis for acting was something other than the economics of providing fire suppression service. For example, the Board's funding of three full-time positions in October of 2003 cannot, standing alone, establish a basis to infer pretext. The Board did postpone a truck purchase in that budget. This fails to establish, however, that the Board took any action to establish a 2004 budget. For and after the 2004 budget, projected revenue shortfalls had to be accounted for, as did the ongoing deterioration of the Board's equipment. In its June 5, 2003 meeting, the Board did not act to alter the 2003 budget, but to address a crisis that would hit in the 2004 budget. Thus, the Board's conduct cannot be considered to relate to anything but the economics of providing fire suppression services in a fiscally responsible fashion. Each District witness testified that "the only realistic way the projected $150,000 shortfall could be reasonably addressed, was either to eliminate purchasing the first truck . . . or to eliminate the three paid positions". This "choice had nothing to do with anti-union animus."

The Association, with the Board, was "pursuing the certification issue, since it was critical to these three employees whether they could work in the union-negotiated positions or not." That the Association did not seek to meet between January and June of 2003 underscores this. The Board distinguished between driver/dispatcher/inspector positions and fire fighter positions of the volunteer department to avoid any issue of recertification. The Association shared this concern, and the delay in meeting thus cannot be held against the District. Since the Association never requested to bargain the impact of the decision to terminate the full-time positions, there can be no finding of a violation of Sec. 111.70(3)(a)4, Stats.

The complaint, as amended, "should be dismissed."

The Complainant's Response to the May 17 Letter

After noting that the Complainant declined the District's offer to bargain the impact of the terminations due to its interest "in restoration of the *status quo* and thereafter bargaining over the contract", Complainant argues that RACINE is "analogous." More specifically, Complainant contends that "the District's decision to provide services exclusively through volunteers related less to the District's policies and functions than it did to the wages, hours and conditions of employment of the full-time employees." Because the use of full-time employees did not expand fire services, RACINE is applicable, and the District engaged in "a per se refusal to bargain". Ignoring the District's anti-union hostility, this conduct violates the MERA. An examination of the evidence will not support a conclusion that the Association ever waived its right to demand bargaining on the termination decision. That the Association declined to bargain the impact of the decision cannot be evidence of a waiver on the broader bargaining issue under Commission and judicial precedent. Complainant concludes that the record establishes violations of Secs. 111.70(3)(a)1 and 3, Stats., and demands appropriate make whole relief.

The District's Response to the May 17 Letter

The District notes that neither brief addressed RACINE, and contends that "the reliance on CITY OF BROOKFIELD, without the need to discuss other cases is correct." BROOKFIELD involved "a nearly identical issue as to the duty to bargain as the case" posed here. The BROOKFIELD court's concern with the integrity of the political process cannot obscure that it determined a municipal employer's termination of employees for economic reasons is essential to the requirements of Chapter 62 and demand treating the decision as a permissive subject of bargaining.

Further decisions affirm this conclusion, including LOCAL 2236 V. WERC, 157 Wis. 2D 708 (Wis. App. 1990). This line of thinking has been affirmed in other cases, which establish that "CITY OF BROOKFIELD controls the issue of the duty to bargain" and demands the complaint's dismissal.

Complainant's Response

LOCAL 2236 is distinguishable from this matter. In that case, the municipal employer completely severed itself from the underlying service. Here, the District still controls the provision of fire suppression service, and did not change its relationship with the Volunteers. Unlike the employer in LOCAL 2236, the District does not operate at a deficit, and is not incurring losses. Here, as in RACINE, the employer simply determined to offer the same service at a lower cost.

Public policy, as expressed in judicial and Commission case law, will not permit an employer to subcontract to mask anti-union hostility. An examination of the evidence establishes that the District terminated the employees "without negotiation" not as a legitimate public policy choice, but as a means of destroying the Association. Against this background, District use of BROOKFIELD "is a transparent effort to cloak the District's unlawful acts behind a shroud of legitimacy."

The District's Response

Complainant's view obscures that the decision to cut service and to direct funds toward the upgrade of equipment "was a choice between alternative social and political goals and values" not simply the "transferring of work from one entity to the other and only involving wages, hours and conditions of employment." The choice the District confronted was "public policy, pure and simple, as defined under CITY OF BROOKFIELD". Complainant's mischaracterization of the factual and legal context of the District's decision must not be accepted.

DISCUSSION

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

Sec. 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to "encourage or discourage a membership in any labor organization by discrimination in regard to . . . tenure or other terms or conditions of employment." To prove a violation of this section, the Complainants must, by a clear and satisfactory preponderance of the evidence [see Sec. 111.07(3), Stats., made applicable by Sec. 111.70(4)(a), Stats.], establish that: (1) The individual Complainants were engaged in activity protected by Sec. 111.70(2), Stats.; (2) The District was aware of this activity; (3) The District was hostile to the activity; and (4) The District acted toward the individual Complainants, at least in part, based upon hostility to the individual Complainant's exercise of protected activity. MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 WIS.2D 540 (1967), as discussed in EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985).

The Association, and to a lesser degree the District, focused on the alleged violation of Sec. 111.70(3)(a)3, Stats., at hearing and in post-hearing argument. This emphasis played a significant role in prompting my May 17 letter. In my opinion, the issues posed by Sec. 111.70(3)(a)3, Stats., are peripheral, while the duty to bargain issues are fundamental.

As a legal matter, alleged District violations of Sec. 111.70(3)(a)3, Stats., during the time preceding the Association's certification have less than a direct bearing on this matter. Unlike EVANSVILLE, the record does not question whether employer conduct warrants a bargaining order following union failure to win a majority vote due to employer prohibited practices. With the Association's certification, the District's duty to bargain became indisputable. Unlike EVANSVILLE, the issues thus posed are the scope of the duty and whether the District met it.

The issue regarding the scope of the duty to bargain is whether the District's decision to terminate unit positions constitutes a mandatory or a permissive subject of bargaining. If a mandatory subject, there is no dispute the District did not meet its duty to bargain, since it offered to bargain only the decision's impact. The remaining issue regarding the District's discharge of its duty spans the time between the Association's certification and the positions' termination.

The application of Sec. 111.70(3)(a)3, Stats., adds nothing of independent significance to either aspect of the issue concerning the duty to bargain. The duty demands good faith. If the bargaining between the Association's certification and the District's termination of the unit positions was tainted by anti-union hostility, the District failed to discharge its duty. The same is true if the District's bargaining can be characterized as surface bargaining. In either event, the District failed to bargain in good faith. The Association views the bad faith bargaining as the culmination of anti-union hostility. Whether or not this is the case, the analysis must address the good faith of District bargaining. A conclusion that the District did not bargain in good faith demands the restoration of the status quo ante, coupled with a bargaining order, to

prevent the District from benefiting from a prohibited practice. Thus, application of Sec. 111.70(3)(a)3, Stats., adds nothing to the scope of potential remedial issues.

As a factual matter, evidence concerning the application of Sec. 111.70(3)(a)3, Stats., provides more a preface to the bargaining issues than a basis for a finding of anti-union hostility. It is undisputed that the first two elements of the governing standard have been met. Complainants' concerted activity is replete in the record, and there is no doubt the District was aware of it. The parties more closely dispute whether the District was hostile to the exercise of concerted activity. The evidence demonstrates that the District actively opposed Complainant's organizational efforts. The evidence can be read to indicate anti-union hostility, particularly on the part of certain Volunteers. However, such a conclusion is of dubious worth. How, if at all, the behavior of certain Volunteers links to the Board's decisional process is less than evident. Beyond this, the Association's assertion of a pervasive District effort to dislodge the Association is less than persuasive. The termination vote was shrouded in mystery, and if the culmination of an ongoing anti-union campaign, appears remarkably poorly staged.

The Association asserts the May 7 letter was the "last straw" by which the District, fed up with the Association, determined to be rid of it. This view is difficult to square with the record. The letter was less than a watershed event. Beyond this, the evidence will not clarify why the District, fed up with the Association, agreed to withdraw the reprimand. Similarly, it is less than clear why the District showed no interest in Complainants' return to the Volunteers. If motivated to crush the Association, it is unclear why the District showed no interest in allowing Association supporters to remain a unionizing force in the Volunteers.

None of these difficulties are posed by concluding the District acted as it asserts. From the time of Hellendrung's November speech, it is evident the District was motivated by issues of its control over the District, particularly regarding the expenditure of funds. That the District did not want a union for its full-time employees is evident. Its conduct consistently manifests the belief that it could lay off its full-time employees whenever it wished. The evidence affords no persuasive basis to believe the District acted other than on its perception of its legal authority. It opposed the Association to its view of the limit of the law, bargained only to the extent it felt legally obligated, then terminated the employees consistent with its reading of BROOKFIELD, when it determined not to be bothered by the bargaining process. The inference of anti-union hostility adds no clarity beyond this, but does preface the significance of the bargaining issues posed.

In sum, the complaint poses fundamental issues on the scope of the District's duty to bargain and on its discharge of that duty. The inference of anti-union hostility affords dubious assistance in this determination, for it invites an academic inquiry into the specific nature of the bad faith at issue, when the determination of the bargaining obligation is the trigger of statutory remedies. If, for example, anti-union hostility is found, but the termination decision is permissive, what is the scope of the remedy? In any event, evidence of anti-union hostility is insufficient to conclude that Complainants met their burden of proof on this issue.

Complainant amended the complaint at hearing to specifically challenge what it viewed as anti-union comments to individual complainants, which would constitute independent violations of Sec. 111.70(3)(a)1, Stats. I do not view these allegations to pose any issue independent of the application of Sec. 111.70(3)(a)3, Stats. While this view has support in CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03), I believe the inquiry the Association seeks on this point can be meaningful only if the election is effectively reopened. As noted above, there is no persuasive reason to do this. Beyond this, application of CLARK COUNTY may prove unhelpful in addressing election-based conduct. In any event, the Association was certified and the issues turn on the District's discharge of its duty to bargain. The dismissal of the alleged violations of Sec. 111.70(3)(a)3, Stats., includes the alleged independent violations of Sec. 111.70(3)(a)1, Stats.

The Alleged Violation of Sec. 111.70(3)(a)4, Stats.

Sec. 111.70(3)(a)4, Stats., makes it a prohibited practice for the District "(t)o refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit." Sec. 111.70(1)(a), Stats., defines "Collective bargaining" to mean "the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement". The section adds, "The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession." The Commission applies the statutory standards by examining "the totality of (the employer's) conduct" to determine bad faith, CITY OF GREEN BAY, DEC. NO. 18731-B (WERC, 6/83) AT 11.

The "totality of conduct" analysis applies to the examination of the District's conduct from the Association's certification through its termination of the unit positions. The question of the District's good faith during this period does not pose a close issue. Collective bargaining does not compel the making of a concession, but does require an employer "to meet and confer at reasonable times . . . with the intention of reaching an agreement."

The evidence manifests no significant indicia of an intention to agree on the District's part. The Association highlights pre-certification conduct. The evidence does show a series of problems with the unit description, including a debate on a typographical error regarding the number of employees in the unit. The request for voluntary recognition made it clear the Association sought only full-time employees. As noted above, pre-certification conduct is of dubious worth, and arguably reflects an aggressive campaign to keep the Association from prevailing in an election. It does, however, serve as a troublesome preface to the District's post certification bargaining conduct. On December 2, 2002, the Commission certified the Association, and within two weeks Kilbane sought to meet, "on a regular basis". No meeting proved mutually agreeable until January 27, 2003. At that meeting, the Association presented an outline of issues. The District did not meaningfully respond to any issue proposed by the Association and raised none of its own, other than asking for a comprehensive proposal.

The Association provided the District with such a proposal on February 22, 2003. The District never responded, and there were no more bargaining meetings. The Association unsuccessfully sought to secure further meetings. The degree to which the Association pushed the District is arguable, but it is evident that the District's refusal to offer any proposal is its sole responsibility. The duty to bargain is mutual, and no effort was evident from the District. The paucity of meetings and the lack of substance to the one that took place afford no indicia of the intention reach an agreement.

The District's concern with the firefighting certification of its unit members affords no defense to this point. That the District had concerns on this issue was evident from June of 2002. In spite of this, the District chose not to act on the point until after the first bargaining session. Between late-January or February and mid-May of 2003, the District sought a legal determination on the issue. Why the District agreed to the unit description on which the Association was certified, then acted on the view that the description rendered the incumbents unqualified to fill unit positions is, at best, difficult to understand. Even assuming the issue posed a significant good-faith dispute cannot explain why the District would not meet to discuss the dispute in the bargaining process. At a minimum, the certification issue posed potential issues regarding lay-off, recall or training. The District did not, however, bring these matters to the table. Rather, the District chose to engage in an extended dialogue over how the point could be researched. There is no evident reason why bargaining could not have proceeded during this period. The District's willingness to research a point that it thought might impact on the tenure of unit employees without a corresponding willingness to discuss the implications of the research affords no indicia of the intention to reach agreement, and continuing indication of a desire not to meet, thus precluding agreement.

By late May or early June of 2003, Gietzel and Hellendrung began the specific deliberations that culminated in the termination decision. Significantly, the District voiced no concern to the Association, even though these deliberations posed significant issues regarding lay off and the economics of the Association's proposal. Hellendrung's presentation of budget options at the Board's June 5 meeting presumed that the cost of the Association's proposal could be meaningfully assessed by comparing a District proposal that was never made to the Association's initial proposal and halving the difference. That the District had not made a proposal, had not sought Association movement, and had not even alerted the Association to the possibility of terminating unit positions for economic reasons cannot be squared with a desire to reach agreement. Rather, it painted the Association into a corner from which the three positions would not emerge.

No compelling external circumstances account for the District's precipitous actions. It funded the three positions for 2003 at its annual meeting in 2002, and included a raise for them. It did not pay the raises, and did not fund the positions after their termination. The annual meeting took place at a time when State revenue sharing projections were more dire than was the case when the District terminated the positions. It was not necessary for the District to agree to any specific proposal made by the Association to pose its economic concerns for consideration at the bargaining table. The failure to do so cannot be squared with the intention to reach agreement. The totality of the District's bargaining conduct between the

Association's certification and its termination of the unit positions cannot be squared with the intention to reach agreement. There is no objective evidence of a willingness to meet and confer, much less evidence of the intention to agree on any substantive point. At best, the District's conduct manifests surface bargaining in violation of Sec. 111.70(3)(a)4, Stats., and derivatively, of Sec. 111.70(3)(a)1, Stats.

This poses whether the termination decision was a mandatory subject of bargaining.

This determination is guided by the "primary relation" standard established in BELOIT EDUCATION ASSOCIATION V. WERC, 73 Wis.2D 43 (1976). The standard demands determining whether a particular decision is primarily related to the wages, hours and conditions of employment of the employees, or whether it is primarily related to the formulation or management of public policy. The BELOIT court noted that the test can only be applied on a case-by-case basis.

As noted in my May 17 letter and as argued by the District, BROOKFIELD bears directly on this determination. In BROOKFIELD, the Court stated:

> We hold that economically motivated lay offs of public employees resulting from budgetary restraints is a matter primarily related to the exercise of municipal powers and responsibilities and the integrity of the political processes of municipal government. 87 Wis.2D at 830.

BROOKFIELD involved firefighter lay offs, which the Court found a permissive subject of bargaining.

In RACINE, the Court found that a school district's decision to subcontract its food service program "did not represent a choice among alternative social or political goals or values" and that "(t)he policies and functions of the district are unaffected." The Court concluded:

> The decision merely substituted private employees for public employees. The same work will be performed in the same places and in the same manner. The services provided by the district will not be affected. 81 Wis.2D at 102

Acknowledging that the effect of the decision would be "a financial saving" *Ibid.*, the Court concluded that the "primary impact of this decision is on . . . wages and benefits, and this aspect dominates any element of policy formulation" 81 Wis.2D at 103, thus making the decision a mandatory subject of bargaining.

There can be no conclusion of a conflict between these decisions. The Court issued BROOKFIELD after RACINE, and extensively cited RACINE. A review of the evidence makes RACINE the more compelling authority over the complaint.

The similarities between the complaint and BROOKFIELD are, on closer inspection, superficial. BROOKFIELD involved firefighters, but ironically in this case, only the Association is willing to call the eliminated positions firefighters. BROOKFIELD avowedly addresses lay offs. RACINE, however, did so implicitly. Inevitably, the contracted food service employees were permanently laid off as district employees. As in BROOKFIELD, the municipal employer in RACINE sought to reduce its budget through the lay off process. More to the point, Board minutes and Board issued termination letters do not refer to a lay off. Rather, they refer to the termination of positions. In BROOKFIELD, it is not clear if the lay offs were temporary or permanent. In any event, full-time firefighters continued to work, but at a lower staffing level. The District's termination of positions points more strongly to RACINE than to BROOKFIELD.

The municipal employer in BROOKFIELD faced a tight budget, as does The District. In BROOKFIELD, however, the budget tightness was municipality-wide, demanding immediate cuts across departments other that the fire department. In this case, The District's 2003 budget for the full-time positions was funded, and it did not face a present funding shortfall. Rather, the District reviewed its budget in light of anticipated shortfalls in its next budget.

On the broadest level, the complaint does not implicate the public policy choices discussed in RACINE and in BROOKFIELD. In RACINE, the Court noted that in the private sector "collective bargaining is limited by the need to protect the 'core of entrepreneurial control,' particularly power over the deployment of capital." Contrasted to this is the public sector, where "the principal limit on the scope of collective bargaining is concern for the integrity of political processes" 81 Wis.2D at 99. The RACINE Court concluded that the bargaining table is an inappropriate forum for those public policies in which "no group should act as an exclusive representative" and in which "discussions should be open . . . shaped through the regular political process" 81 Wis.2D at 100. The BROOKFIELD Court cited this analysis with approval, concluding, "Unquestionably, fewer firefighters will reduce the level and quality of services provided, but this is a policy decision by a community favoring a lower municipal tax base" 87 Wis.2D at 832.

The facts posed here only superficially implicate the public policy choices discussed in BROOKFIELD. In BROOKFIELD, the union actively participated in a robust public debate on the ramifications of a proposed lay off. The union ran an active public campaign against the lay offs, asserting the reduction in service would be drastic. It also sought to bargain the decision at the table. Ultimately, the city council voted to implement the lay offs, after lengthy and open debate. Here, the District funded the full-time positions at its annual meeting, at which a 2/3 majority was necessary to pass the budget. It terminated the positions at a meeting conducted on twenty-four hours notice that put Item 7) of the agenda as a consideration of two separately numbered items, "Truck purchase" and "Paid personnel positions." An earlier notice for the same meeting set Item 7) as a consideration, in closed session, of "personnel matters." The amended notice did not specifically link the two items, which, at the actual meeting, became the District's consideration of eliminating the full-time positions in favor of continuing the process to purchase a new truck. The similarity of this process to the wide-open and robust debate of Brookfield is superficial. No member of the public or of the Association could reasonably be expected to realize what was being contemplated from the

notice given of the June 5 meeting. At the meeting, Hellendrung, from handwritten notes, contrasted the cost of the positions and the cost of a new truck. On a question regarding the easiest means to effect immediate and substantial savings, Hellendrung responded that the full-time positions could be eliminated. The trustees offered little discussion on the points, and summarily approved the elimination of the positions. The depth of this discussion must be doubted. At hearing, not all of the witnesses agreed on the type of truck being considered.

There is no meaningful comparison between this process and the long-term, wide open and robust public discussion addressed by the BROOKFIELD Court. The District's citation of the integrity of the political process is, on these facts, more theory than fact.

More significantly, the discussion in BROOKFIELD concerned a public policy choice concerning the level of services. Here, no testifying decision maker stated that the decision to eliminate the full-time positions would reduce service. To the contrary, the evidence establishes that the Board expected to maintain the existing level of service through the Volunteers. As contemplated by the Board, volunteers, including Backes, Lund Jr., and Crandall, would perform the duties formerly done by Backes, Lund Jr., and Crandall. This points away from BROOKFIELD and toward RACINE. The fire station and equipment remained the same, with the same volunteers providing the same fire fighting services under the same conditions. A keypad was added to the fire station to permit access to the building once provided by full-time employees. Monitoring equipment was set up to take the place of on-site security provided by a full-time employee. As in RACINE, District services were not affected, a financial savings was presumably achieved, and the same work was to be performed in the same places and in the same manner. The decision simply substituted volunteers for full-time employees. As volunteers, the individual Complainant's could perform the same off-site duties they performed as full-time District employees. The sole distinction is that they would be compensated as volunteers.

Nor does LOCAL 2236 alter this analysis. The Commission and the Court of Appeals did not view that matter as a subcontract because Chippewa County ceded control of a nursing facility and its operations when it sold a health care center it once owned and operated. Here, The District ceded no control over fire suppression services. The Agreement, which provides at least nominal control by the District over the hiring, discipline and discharge of Volunteer officers and fire fighters, remains in effect. The Volunteers continue to operate from the fire station, using equipment that is owned by the District. Hellendrung continues as Human Relations Director, even though the District eliminated all of its front-line full-time employees. The District's decision is more analogous to the consolidation of services addressed by the Commission in GREEN BAY than to Chippewa County's action to cease providing health care services.

On balance, the District's decision to terminate the full-time positions was economically driven, and did not reflect a fundamental public policy choice. Because it thus primarily relates to wages, hours and conditions of employment, the decision is a mandatory subject of bargaining. The District's refusal to bargain the decision thus constitutes a violation of Sec. 111.70(3)(a)4, Stats., and derivatively, of Sec. 111.70(3)(a)1, Stats.

That the Association declined to bargain the impact of the decision unless the District bargained the decision does not affect the conclusions stated above. The BROOKFIELD Court viewed similar action by the union in that case "with disfavor" 87 Wis.2D at 833, but as noted by the Commission in GREEN BAY, the Court was addressing a matter in which only the impact of the decision constituted a mandatory subject of bargaining. In my view, the Association's unwillingness to bargain impact casts its own willingness to bargain in a poor light, and unnecessarily complicates the analysis of the District's discharge of its duty to bargain. Impact bargaining cannot persuasively be viewed as evidence of a waiver of the right to bargain the underlying decision. In any event, the Association's unwillingness to bargain impact does not affect remedy, see GREEN BAY, *supra.*.

In a similar vein, The District's willingness to bargain impact does not affect the conclusions stated above. The District chose not to meaningfully bargain impact until after it implemented the terminations. Even if the decision to terminate is viewed as permissive, it is not necessarily the case that the District could implement prior to fulfilling its duty to bargain impact. The Commission has viewed this as a determination that must be made on a case-by-case basis, CITY OF MADISON, DEC. NO. 17300-C (WERC, 7/83). Here, the District funded the positions in a more financially constricted environment than that prevailing at the time of the terminations, and the savings sought were to be realized in the next budget. This issue is not posed for determination given the conclusions stated above, but highlights that willingness to bargain impact does not act as a defense to the violations found above.

The remedy does not warrant extensive discussion. The Order restores the status quo, so that the District can discharge its duty to bargain in good faith, including any decision to terminate the positions, see DEC. NO. 18731-B AT 12. The interest rate noted in the Order is that set forth in Sec. 814.04(4), Stats., in effect at the time the complaint is initially filed with the agency, see WILMOT UNION HIGH SCHOOL, 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).

Complainant requests attorney fees and costs. In CLARK COUNTY, DEC. NO. 30361-B AT 19, the Commission stated:

> Regarding attorney's fees, the Commission has long construed this remedy to be limited to certain duty of fair representation cases and to cases where an extraordinary remedy is appropriate.

Presumably, the Association's request reflects that the District's anti-union hostility is an extraordinary type of bad faith demanding an extraordinary remedy. My dismissal of the complaint regarding the alleged violation of Sec. 111.70(3)(a)3, Stats., addresses this point. If

it is the Association's view that the District's "frivolous" defenses extend to the bad faith bargaining issues, then my May 17 letter should establish that I do not view a significant part of that defense as frivolous. No extraordinary remedy is appropriate here under CLARK COUNTY.

Dated at Madison, Wisconsin this 20th day of July, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

RBM/gjc
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