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-B

Appearances:

John B. Kiel, Shneidman, Hawks & Ehlke, S.C., Attorneys at Law, 700 West Michigan, Suite 500, P. O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of the International Association of Fire Fighters Local #580, AFL-CIO, Mark J. Backes, Kenneth Crandall, and Arnold D. Lund, Jr.

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 Edgerton Fire Protection District.

ORDER ON REVIEW OF EXAMINER'S DECISION

On July 20, 2004, Examiner Richard B. McLaughlin issued Findings of Fact, Conclusions of Law and Order in the above-captioned matter, concluding that the Edgerton Fire Protection District (hereafter District) had violated Secs. 111.70(3)(a)4 and 1, Stats., by terminating the full-time positions held by Mark J. Backes, Kenneth Crandall, and Arnold D. Lund, Jr., without first bargaining over that decision with the International Association of Fire Fighters Local #580, AFL-CIO (hereafter Association or Union) and by failing to negotiate in good faith with the Union after December 2, 2002, when the Union was certified as the collective bargaining representative for the unit comprising those employees. The Examiner held that the District was not motivated by anti-union animus in deciding to terminate the three full time positions and dismissed the alleged violations of Secs. 111.70(3)(a)3 and 1, Stats.

Both the Complainants and the Respondent filed timely petitions seeking review of the Examiner's decision. Each thereafter submitted written arguments in support of its respective position, the last of which was received on October 25, 2004. The Commission subsequently consulted with the Examiner as to witness demeanor.

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

ORDER

A. The Examiner's Findings of Fact 1 through 7 are affirmed.

B. The Examiner's Finding of Fact 8 is modified by adding the following language and as modified is affirmed:

8. * * *

The Union's proposed collective bargaining agreement contained the following proposed recognition clause:

> The District recognizes the Union as the sole or exclusive representative of all members of the bargaining unit consisting of all regular full time fire fighter/driver/dispatcher/fire inspectors employed by the District, excluding supervisors, confidential, managerial and executive employees and volunteers. The Union recognizes the rights of all such individuals as provided by law.

C. The Examiner's Finding of Fact 9 is modified to read in its entirety as follows and as modified is affirmed:

9. By letter dated January 31, 2003, Fire Chief John Gietzel sent the following inquiry to the Wisconsin Department of Commerce:

> 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) [sic] 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 [sic] formation the City's two (2) full-time employees went to work for the cities [sic] 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 send 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? (Emphasis in original)
>
> . . .

The foregoing letter was not copied to the Union. 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, stating in part as follows:

> In seeking clarification of this issue, we received a letter from Shirley K. Noltemeyer, Occupational Safety Inspector for the Wisconsin Department of Commerce, Safety and Buildings Division, dated March 1, 2003, copy enclosed. While we believe her conclusions about our district being a "non-stock, non-profit corporation" is incorrect, it appears as though the conclusion on how the regulations would affect grandfathering is correct.
>
> What we have now learned, however, is that even the volunteer fire department did not actually notify the State of Wisconsin of the grandfathering election for the volunteer department and of course, there was no notification applicable to the new district, either. This is because it appears there was only oral discussions by the then-chief with the volunteers to the effect that they would be grandfathered, while no notification required by the statute and the regulations was actually completed.
>
> However, before we presume that, I wanted to contact you so that you and your people could take a look and let us know if these facts are incorrect. I would appreciate your doing that and getting back to me at your earliest opportunity. 1/

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 contacted the District's negotiator's office by telephone on one or two occasions to discuss dates for continuing the collective bargaining negotiations, but did not propose any dates in writing or by e-mail, as he had done before, and did not speak directly with the District's negotiator. After receiving the Union's comprehensive contract proposal in late February 2003,

the District did not initiate any efforts to set up further negotiations sessions and did not respond to the Association's contacts with the District's negotiator's office on the scheduling issue. 2/

1/ The Examiner had characterized the Respondent's April 18, 2003 letter as having "noted the District did not find the Department's answer determinative on the questions posed, and sought information on the issues from the Association." In its petition for review, the Respondent objected to the Examiner's characterization. We have quoted directly from the letter rather than characterize its content.

2/ The Examiner had found that "During this period [i.e., April 18, 2003 and mid-May 2003] the Association also attempted to secure a collective bargaining session on the contract." The District objected to this finding on the ground that the Association's negotiator had testified that he orally requested a meeting date in a telephone conversation with the District negotiator and that the District negotiator had denied in his testimony that any such conversation regarding dates had occurred. In fact the Association's negotiator seemed to confirm in his testimony that he had spoken with the District's negotiator's secretary regarding dates, not with the negotiator himself. In any case, as reflected in Conclusion of Law 5, below, even assuming that the District failed to respond to Association inquiries about scheduling and/or did not actively pursue negotiations during this time period, the District's conduct was not so dilatory as to amount to a refusal to bargain, under the evidence and circumstances presented here.

D. The Examiner's Finding of Fact 10 is modified to read in its entirety as follows and as modified is affirmed:

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 Board meeting minutes 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 referenced in his notes was a new tanker, projected to cost $280,000.00. The presentation included about $30,000 increase in attorney's fees, primarily related to 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 then subtracting the cost of the salaries the District was currently paying the employees. 3/

3/ The Examiner had stated, "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." The District challenged that finding,

arguing that, in context, Hellendrung's testimony is more accurately construed to say that Hellendrung

estimated the likely contractual increase to be half way between the employees' current wages and the Association's proposal. While the testimony is not completely clear, we accept the District's suggested interpretation of Hellendrung's testimony.

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 briefly discussed 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.

Prior to his presentation, Hellendrung had not discussed with the Fire Chiefs or the Volunteers that there might be a financial conflict between purchasing a truck and keeping the full-time firefighters, nor did he ask their opinions on that choice. Prior to his presentation, Hellendrung did not discuss revenue expectations or estimates with any local government officials of the municipalities included within the District nor had they provided him any specific information in that regard. As of the hearing in this matter, the District had not received any information indicating a significant loss of revenues.

As of the June Board meeting, the District had no reason to believe it would not have sufficient funds to fulfill is FY 2003 budgetary commitments, including the salaries of the three bargaining unit members, and at no time did the District lack sufficient funds to do so.

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 but did not have notice prior to the meeting that the Board's consideration of Item 7 meant the elimination of unit positions.

It was highly unusual, if not unprecedented for the District to discuss budgetary development issues and/or implement major budgetary changes mid-year, rather than at the October Board meeting ordained for that purpose in the District's by-laws. The District did not precede this budgetary discussion/alteration with a public budget meeting.

E. The Examiner's Finding of Fact 11 is modified to read in its entirety as follows and as modified is affirmed:

> 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. Ronald Webb, a District Commissioner and member of the Edgerton Common Council, stated shortly after the June 5 Board meeting that "The union issue factored into that [decision to eliminate the positions] because of added expenses like the $30,000 to $50,000 the district would have had to spend for attorney's fees and upcoming contract negotiations." Nancy Dickinson, a District Commissioner, stated on or about June 11, that "the union issue has an impact. Have you ever heard of a union negotiating a contract in which the members got a decrease in pay?" On or about June 25, 2003, during the public session of a Albion Town Board meeting, discussion occurred about the elimination of the full time positions. Present was Clifford Swann, an Albion town official and a member of the District Commission. In explaining the District's decision, Swann made comments to the effect that the Union would drive up the District's costs because of the need to pay $30,000 to $50,000 to an attorney to negotiate, and that the Union might create animosity

in the department because the volunteers were concerned that the union would not allow them to do union work. 4/

4/ Both Swann and Union representative Kilbane testified to the content of Swann's remarks at the Albion meeting. They generally agreed on the gist of Swann's remarks about the Union driving up costs. Swann, however, testified that his remarks about the volunteers were in the form of a question, i.e., to the effect, "could the volunteers and the union work together or would the union refuse to let the volunteers do union work?" To the extent their versions diverge, we believe Kilbane's is more accurate. Swann's testimony in general was somewhat inconsistent, e.g., Swann seemed quite certain at first that it was a tanker truck that the District needed in order to convey more water to the outlying areas of the District, such as Albion; later he had to acknowledge that it was a pumper truck that was being purchased, not a tanker, and that the pumper would not solve any of the water conveyance problems he had noted in his earlier testimony. In addition, Swann's recollection of the discussion at the Albion meeting was more tentative than Kilbane's.

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.

F. The Examiner's Finding of Fact 12 is modified to read in its entirety as follows and as modified is affirmed:

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, shortly before employees received their mail ballots from the Commission for the union election, Hellendrung, Grant and Linsley met with the three unit employees, two of whom were not scheduled to be on duty and had been directed and paid to come in specifically to hear Hellendrung's statement. Hellendrung read the following statement to the assembled employees: 5/

5/ The Examiner had not quoted Hellendrung's entire statement, but instead had found, "Hellendrung read an extensive statement explaining why the employees should vote 'no' in the election, noting among other points Hellendrung's view that the District could not pay the budgeted wage increases during the processing of the election petition." The Union objected that Hellendrung's entire statement should be included in the findings, since the Union had argued that the statement evidenced Hellendrung's anti-union animus and independently violated (3)(a)1. We agree with the Union and have modified the finding accordingly.

We, the Fire District, are opposed to having a union coming between you, our employees, and us.

We feel we have the ability, being non-union, to have an informal relationship with you now. That would be taken away with having a union.

Remember, that by having a union, you or we will not have the flexibility to handle situations, add, increase, change benefit or working conditions, work schedules, trading days, etc., because everything will be controlled by the contract that is negotiated.

Any time during this meeting feel free to ask any questions you want. The meeting is for both you and us to understand the issues and changes that will occur if we have a union between us.

Remember when we first created this fire district there was much discussion as to whether we could afford to have a manned station 24 hours a day, 7 days a week. It was the decision of the Board, at that time, to provide 24/7 coverage as long as it was economically fisable [sic]. We still need to look at that criteria on the operation of the district.

We started with 2 employees, Arnie and Mark. You both requested that we hire Eddie on part time bases [sic] to give you some extra time off. We committed to more days being picked up by Eddie to give you more time off and kept your salaries at the increased pay level. We replaced Eddie with Wayne to maintain the same levels. When Wayne left we changed the work schedules to create a third full time position and hired Kenny. This was made possible by adding the fire inspections to the job description. This was accomplished by working together, with agreement with the three of you. Kenny, we brought your pay scale to the same as Arnie and Mark in just over a year after starting with us. This was again accomplished with working together and with the approval of Arnie and Mark and the Board.

Benefits:

We have given you a very lucrative benefit package. We have accommodated your request for additional benefits when ever possible. We have doubled life insurance coverage at no cost to you. We gave you long term disability coverage at no cost to

you. We agree to payroll deduction for tax deferred retirement when asked for.

Most of these benefits that are in the state programs are set up with the employee having to pay a portion of the premium. We have never once asked you to contribute a penny to the cost of any of the insurances.

You are all aware of the costs of medical insurance and how it increases each year. We have never asked you to contribute to the costs. We all know it is common to require employees to pay a portion even up to half the medical insurance costs.

Arnie I know you have asked about protective services. If you would be under protective services we believe you would have to be certified under Firefighter I and II. You are currently grandfathered under the volunteers, not as District employees. Under DILHR regulation you would have to pass physical requirements. I have showed you that before when we discussed it. Also you may fall into the manditory [sic] retirement at age 55. This may also be true if you are in the union.

We do not know what the union has promised they can do for you. Remember. Belonging to a union cost you union dues. I don't know how much but Kenny you have told me both you and Arnie are already paying them. How much does that cost you per year? In 5 years in 10 years. Can increase any time. The union cannot guarantee you anything not even the same benefits you currently have. That would all have to be negotiated.

How much of your dues you pay actually provides any benefits for you. What does an international union really care about 3 people in Edgerton?

Remember no union and no law requires us to agree to anything we do not want to.

During this petition procedure we will not be able to give any salary increases because it is illegal to do so because of union activities. You will have to make any and all request [sic] for even minor changes through a third party (the union). Working conditions will change with a union. Everything will be negotiated. Things like personal phone calls – painting calls. Arnie your painting business is non-union – how will the union accept your advertising on your truck.

Arnie I know you had a reprimand that was not handled well.

But, we have discussed it since and I feel we (you and I) have an agreeable understanding about it.

I believe people can not just stop at the Janesville fire stations to just visit – BS – kill time.

What changes would happen with the volunteers. Would the [sic] still be allowed to clean equipment after a fire or would that be taking union work away.

There are hundreds of such questions and they will all have to be spelled out in a union contract.

It is not unusual that to reach agreement on the first contract it could take up to a year to settle.

Remember this is really not an easy decision to make. It is not just they promised I will get more money. First off they can not promise more money. They can only ask. With a union they ask – you don't. Without a union you have received an increase every year with or without asking for it.

Remember all expenses are paid for by all of us through taxes. The Board also has to be accountable to the public.

You all know that I am not a voting member of the Commission. I have represented your wishes to the Commission and you have received most of what you have asked for. With a union our relationship will end because the union will come between us. I do not want that to happen and I hope you do not either.

You will be receiving your ballots to vote in the mail in the next day or two. We want you to vote but vote No so we can continue our current relationship.

Please remember your decision affects not only you but the Commission, the volunteers and all of the citizes [sic] of the District as well as your families.

Thank you for your time.

Backes, Lund Jr., and Crandall each felt threatened to some extent by one or more of Hellendrung's comments in the November 7 meeting.

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.

G. The Examiner's Finding of Fact 13 is set aside and the following Findings of Fact are made:

> 13. In addition to the funds generated by the Volunteers that were used to purchase supplies and equipment, including vehicles, as described in Finding of Fact 5, the District maintained an Equipment Fund, also referred to as a Truck Fund, to which an amount was directed in each budget for purchasing and/or updating firefighting apparatus. The FY 2003 budget dedicated $20,000 to the Fund. At the time of the June 2003 Board meeting, the Equipment Fund contained approximately $140,000. In Hellendrung's presentation to the Board prior to the Board's vote to eliminate the three full-time bargaining unit positions, he did not consider or review the financial state of the Equipment Fund. At that meeting, neither Hellendrung nor the Board discussed ways to finance the purchase of an updated tanker or pumper truck, or whether to purchase a new truck as opposed to a used truck, before suggesting voting to eliminate the three full time bargaining unit positions. The District's firefighting apparatus, including the tanker and the pumper trucks, were tested regularly for safety and at all relevant times were safe for operation. Chief Gietzel believed that the purchase of a new tanker and/or pumper truck

was primarily for updated technology, not for safety. At the time of the hearing in the instant case, the District was considering the purchase of a pumper truck,

a pumper truck, a smaller and less expensive vehicle than a tanker truck, and was no longer considering the imminent replacement of the tanker.

14. 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 statement that Hellendrung read to the assembled full-time employees on November 7, 2002, would reasonably tend to interfere with, restrain or coerce employees in the exercise of that activity, as guaranteed in Sec. 111.70(2), Stats.

15. The District was aware of the Complainants' lawful concerted activity as described in Finding of Fact 14, above.

16. In eliminating the full time bargaining unit positions, the District was motivated at least in part by hostility to the Complainants' lawful concerted activity.

17. The District's decision to terminate the positions was primarily related to the wages, hours and conditions of employment of the employees occupying the positions, rather than the formulation or management of public policy.

H. The Examiner's Conclusions of Law 1 through 4 are affirmed.

I. The Examiner's Conclusions of Law 5 through 7 are reversed, and the following Conclusions of Law are made:

5. The District did not fail to bargain in good faith with the Union following the Union's certification on December 2, 2002, by failing to respond to the Union's inquiries regarding scheduling bargaining sessions, by failing to initiate such scheduling, and/or by failing to make a proposal or counterproposal in negotiations.

6. By Hellendrung's statement on November 7, 2002, the District interfered with, restrained, and/or coerced its employees in the exercise of their rights under Sec. 111.70(2), in violation of Sec. 111.70(3)(a)1, Stats.

7. The District's decision to terminate the full-time positions occupied by Backes, Lund Jr., and Crandall discriminated against those employees in the exercise of their lawful concerted activity, in violation of Secs. 111.70(3)(a)3 and 1, Stats.

J. The Examiner's Order is set aside and the following Order is made:

1. Those portions of the amended complaint alleging that the Respondent Edgerton Fire Protection District refused to bargain in good faith with the Complainant International Association of Fire Fighters Local #580, AFL-CIO, by its actions regarding the scheduling of contract negotiations and/or presenting a proposal or counterproposal in such negotiations, in violation of Secs. 111.70(3)(a)4 and 1, Stats., are dismissed.

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

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

b. Cease and desist from refusing to bargain with the Association as the exclusive collective bargaining representative of the District's full-time employees by unilaterally implementing a decision to terminate the full-time positions held by Complainants Backes, Lund Jr., and Crandall.

c. Cease and desist from discriminating against Complainants Backes, Lund Jr., and Crandall or any of its employees for engaging in lawful concerted activity.

d. Take the following affirmative action which the Commission finds will effectuate the purposes of the Municipal Employment Relations Act:

(1) Immediately offer to reinstate Complainants Backes, Lund Jr., and Crandall to their former positions without loss of seniority and benefits, 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 have received but for their termination from employment in June 2003, plus interest at the rate of twelve percent (12%) per annum 6/ on said amount from the date of their terminations to the date they are reinstated or refuse reinstatement.

6/ The applicable interest rate is that set forth in Sec.814.04(4), Stats., in effect at the time the complaint is initially filed with the agency. WILMOT UHS, DEC. NO. 18820-B (WERC, 12/83), CITING ANDERSON V. LIRC, 111 WIS. 2D 245 (1983), and MADISON TEACHER, INC. V. WERC, 115 WIS.2D 623 (CT. APP. IV 1983). The Respondent's argument that the 12% interest rate is inappropriate and/or unauthorized is discussed in the accompanying memorandum.

(2) Expunge from Complainants Backes', Lund Jr.'s, and Crandall's personnel files any reference to their terminations in June 2003.

(3) Bargain in good faith the Complainanat 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 their positions.

(4) Notify all of its employees in the bargaining unit represented by the Complainant International Association of Fire Fighters Local #580, AFL-CIO 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, as to what steps have been taken to comply with it.

Dated at Madison, Wisconsin, this 9th day of February, 2005.

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

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 purposes of the Municipal Employment Relations Act, we hereby notify our employees that:

1. WE WILL immediately offer to reinstate Mark J. Backes, Kenneth Crandall, and Arnold D. Lund, Jr. to their former full-time positions in the Edgerton Fire Protection District, and we will make them whole for all wages and benefits lost as a result of their termination.

2. 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 their positions.

3. WE WILL NOT interfere with, restrain or coerce Mark J. Backes, Kenneth Crandall, and Arnold D. Lund, Jr., or any other employees in the exercise of their rights to form or join a union and/or seek to bargain collectively with their employer, or any other rights pursuant to the Municipal Employment Relations Act.

4. WE WILL NOT discriminate against Mark J. Backes, Kenneth Crandall, and Arnold D. Lund, Jr., because of their having exercised their rights to form or join a union and/or seek to bargain collectively with their employer, or any other rights pursuant to the Municipal Employment Relations Act.

Dated this _____ day of _____, 2005

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 ORDER

Summary of the Facts

As indicated in the foregoing Order, we have largely affirmed but also supplemented the Examiner's Findings of Fact, and we now summarize the most salient of those findings.

The Edgerton Fire Protection District was formed in 1992, pursuant to an agreement among the participating municipalities of Edgerton, Albion, Fulton, Porter, and Sumner. The District is governed by a Board of Trustees (also referred to as Commissioners), comprising representatives from each participating municipality. At all relevant times, the Board President was Richard J. Linsley. Other members of the Board included Ronald Webb, Nancy Dickinson, and Clifford Swann. At all relevant times, the District employed a Director of Human Relations, Robert C. Hellendrung, who also served as the District's bookkeeper. Shortly after its formation, the District hired Complainants Backes and Lund, Jr., as full-time "driver/dispatchers." At relevant times, their duties primarily comprised manning the fire station, fielding calls for emergency services, and operating the first vehicle that responded to the scene of a fire. Once at the scene of a fire, these employees continued to operate the apparatus and sometimes engaged directly in other fire suppression activities, such as climbing ladders and assisting in rescues. In the absence of a fire chief or assistant chief on scene, the driver/dispatchers were in charge.

Beginning in about 1993 and continuing until sometime in 2000, the District also employed a part-time employee, primarily to fill in for Backes and Lund, Jr., when they took time off of work. At some point in 2000, the District hired Complainant Crandall to fill that part-time position. Somewhat later in 2000, at Crandall's request, the District increased his hours to full time and added fire inspection to the driver/dispatchers' job duties.

Fire suppression work itself is handled largely by the Edgerton Volunteer Fire Department, Inc., a separate entity from the District. The District, however, selects the members of the Volunteers, who are paid by the District between $5 and $10 per call. The Volunteers, with District Board approval, select the Fire Chief and other officers, who generally take charge at the fire scene and direct the other volunteer firefighters as well as the dispatcher/drivers. At all relevant times, the Fire Chief has been John Gietzel. Also, at all relevant times, the Complainants Backes, Lund, Jr., and Crandall have been longstanding members of the Volunteers. The Volunteers raise and contribute substantial funds to support the fire suppression mission of the District and have supplied a rescue truck, a four-wheel drive pick-up truck, an all terrain vehicle, a boat, and a trailer, as well as other miscellaneous supplies.

By letter dated April 7, 2002, the Complainant Union informed Board President Linsley that Backes, Lund, Jr., and Crandall had joined the Union. The letter further asked the District to recognize the Union as the employees' collective bargaining representative. On May 21, 2002, after the District had declined to voluntarily recognize the Union, the Union filed an election petition with the Commission. Although the Union made clear that it sought to

represent only the three full time employees, the parties skirmished for several months over the description of the bargaining unit for purposes of conducting the election. In particular, the parties disputed whether these employees were properly characterized as "fire fighters," or instead as "driver/dispatchers." On October 14, 2002, the Union and the District stipulated that the unit would be described as:

> 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.

At the October 2002 Board meeting, the District passed a budget for 2003 that included funding the three employees' salaries with a 2% wage increase.

Throughout the organizing drive and pre-election proceedings, the unionization of the full time employees was a contentious subject of conversation at the fire house, with adverse sentiment being expressed by some of the volunteers and their officers. On November 7, 2002, shortly before the WERC election mail ballots were to be distributed, Hellendrung called a mandatory meeting of the full-time employees, including those who were not scheduled to be on duty, at which he read to them the statement set forth in full in Finding of Fact 12, above. Each of the employees felt threatened to some extent by some of the comments in Hellendrung's presentation. For example, Backes inferred that the District would withhold raises that the employees felt they had been promised for 2003 and that the District would make the work place more strict and rigid. Lund Jr. felt that the District implied that unionization might cost him his fire fighter certification because he would not be able to pass the physical exam.

On December 2, 2002, after a majority of the bargaining unit employees voted in favor of Union representation, the Commission issued an Order Certifying the Union as the exclusive collective bargaining representative for the above-described unit. By letter dated December 14, 2002, the Union sought to initiate negotiations for a first contract and, after an exchange of e-mails regarding potential dates, the District and the Union met for the first time on January 27, 2002. The Union presented an outline of 27 numbered items for discussion; the District had no proposal prepared and asked the Union to provide a comprehensive contract proposal to which the District would hope to respond within 30 days. On February 22, 2003, the Union mailed to the District a comprehensive first contract proposal. The Union's proposed recognition clause recapitulated the unit description set forth in the stipulation for election.

By letter dated January 31, 2003, well before receiving the Union's comprehensive contract proposal, the District inquired of the State Department of Commerce whether (1) the bargaining unit members had been "promoted" from driver/dispatcher to fire fighter by virtue of the way their positions were described in the stipulated unit; (2) the bargaining unit members had been properly grandfathered in the Department's Firefighter I certification, since the District could find no written records to that effect; and (3) even if they had been properly grandfathered as volunteer fire fighters, the unit members would have to pass the fire fighter

training in order to be certified as fire fighters for the District. The letter was not copied to the Union and the record does not indicate that the Union or the unit members were aware that it had been sent. The Department responded by letter dated March 1, 2003, indicating that a job description change alone would not constitute a promotion, that grandfathering would not transfer from one employer to another, but in any event the District was not governed by the Commerce Department's regulations but rather by OSHA regulations. By letter dated April 18, 2003, the District sent the Union a copy of the Commerce Department's letter. The April 18 letter also stated the District's view that the Department was wrong in its conclusion that OSHA had jurisdiction over the District, and that the unit employees may not have been properly grandfathered as the District could find no written notification to the Commerce Department, and asked the Union for any information it wished to present on the subject.

The record does not reveal what communications, if any, occurred between the Union and the District between February 22, 2003, when the Union sent the District its comprehensive proposal, and District's letter of April 18, 2003. The District did not respond to the Union's proposal and did not attempt to schedule negotiations sessions. After the District's April 18, 2003 letter, the Union and the District communicated regarding the fire fighter certification and grandfathering issue, but did not reach any agreement. On one or two unspecified occasions, the Union contacted the office of the District's negotiator to discuss scheduling bargaining session(s), but did not offer any dates in writing. Prior to the events giving rise to this case, the parties met only once to negotiate, i.e., the initial session in January 2003.

The District maintained an Equipment Fund (also referred to as "truck fund") for which it budgeted regular contributions in order to prepare for the need to periodically replace or update fire fighting apparatus. For fiscal year 2003 (January through December 2003), the District budgeted $20,000 for the fund. As of June 5, 2003, the fund contained approximately $140,000. For at least a couple of years prior to June 2003, the District and the Volunteers had discussed the possibility of purchasing a new tanker and/or a new pumper vehicle. At the April 3, 2003 meeting of the District Board, Chief Gietzel presented a request for a new tanker and the Board discussed various financing options. The Chief was asked to provide further information about the costs of purchasing a tanker and a pumper. Although one of the vehicles had occasionally experienced problems with its clutch, both pieces of equipment were in safe operating condition as of June 2003 and could be expected to operate safely for at least another few years.

In early May, Chief Gietzel presented a letter of reprimand to Crandall and asked him to sign it. After some discussion, the Chief withdrew the reprimand. However, by letter dated May 7, 2003, the Union advised the District that Crandall should have been afforded Union representation during the meeting with the Chief and that the Union should have been given an opportunity to review the reprimand letter before Crandall was asked to sign it.

On May 23, 2003, the District posted its regular notice for its regular monthly meeting to take place on June 5, 2003. Enumerated item 7 stated, '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 the next day's meeting, in which enumerated item 7 had been changed to read: "Consider action on budget amendments 1) Truck purchase 2) Paid personnel positions." Between the two postings, Hellendrung and Board President Linsley had discussed the truck purchase issue as well as the costs of continuing the employment of the three bargaining unit employees.

When the Board reached item 7 at the meeting on June 5, 2003, Hellendrung made a brief presentation, based on personal notes resembling a mock-up of a 2004 budget, in which he noted that certain budget line items could increase significantly for the 2004 budget year, mentioning the purchase of a new tanker truck which he projected would cost $280,000, at least a $30,000 increase in attorney's fees primarily attributable to collective bargaining, and an estimated increase of $41,000 in wages, about half of the difference between the Union's initial wage increase proposal and the employees' current wages. He also mentioned the possibility of state revenue cuts affecting the member municipalities, and concluded his brief presentation, which was not accompanied by handouts, by stating that the District faced a potential $150,000 shortfall for 2004. Trustee David Viney asked what would be easiest way to cut $150,000 from the budget, to which Hellendrung responded that it would be easiest to eliminate the full-time positions. The Board very briefly discussed the truck purchase and their commitment to delivering the same level of services by using the Volunteers, and then voted to eliminate the three full time positions effective June 30, 2003.

It was highly unusual, if not unprecedented, for the District to consider a future fiscal year's budget prior to its October Board meeting and/or to implement major budgetary decisions in June and without any public hearing. Prior to the June 5 Board meeting, Hellendrung had not discussed with any of the constituent municipalities whether they anticipated revenue cuts or how any such cuts might affect District funding. Hellendrung had no specific information indicating that the District in fact would incur a loss of revenues for the 2004 fiscal year. The District had not provided the Union or any of the bargaining unit members any prior information suggesting the possibility of job elimination. The District did not discuss at the Board meeting or with the Union or employees whether there were alternatives to eliminating all three full-time positions or whether any or all of the cuts could be delayed. The District had sufficient funds to fulfill its 2003 budgetary commitments, including paying the salaries of the full-time employees.

The District's decision generated controversy in the constituent communities. Several Board members made statements indicating that the costs and other concerns associated with unionization (increased wages, attorney's fees for negotiations, and potential conflict with members of the Volunteers) had prompted their decision. Board members assured the public that the decision would not affect services.

By letter dated June 6, 2003, the District informed the Union that the positions would be terminated as of June 30 and invited the Union to let the District "know by the end of the month if you have any questions or concerns regarding any duty to bargain that may still exist." The Union responded by letter dated June 9, 2003, that the District's action was illegal. By letter dated June 12, 2003, the District stated its willingness "to bargain on any required

items resulting from the termination of the three full-time positions." The Union did not respond to the District's willingness to negotiate over the impact of its decision.

Discussion

The Complaint and Petition for Review raise several issues:

(1) Did Hellendrung's presentation to the assembled full time employees on November 7, 2002, shortly before the union election, reasonably tend to interfere with, restrain, or coerce employees in the exercise of their rights to engage in union activity, in violation of Sec. 111.70(3)(a)1, Stats.? 7/ We conclude that it did.

7/ Before the Examiner the Union argued that various pre-election statements by certain Volunteer officers as well as Hellendrung's November 7, 2002 speech to the full-time employees constituted independent violations of Sec. 111.70(3)(a)1, Stats., as they would tend to chill reasonable employees in the exercise of their rights to engage in union activity. In its Petition for Review, the Union does not challenge the Examiner's failure to hold that any of these statements independently violated subsection (3)(a)1. Rather, the Union asserts that the coercive elements in Hellendrung's November 7 presentation are evidence of his anti-union animus which in turn contributed at least in part to the District's decision to terminate the employees' positions, and that the termination decision independently violated (3)(a)1 as well as (3)(a)3. 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)." CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03) at 12. Accordingly we have examined whether Hellendrung's November 7 speech independently violates subsection (3)(a)1.

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(2) In the totality of the District's conduct between the Union's certification on December 12, 2002 and the June 5 Board meeting, did it refuse to bargain in good faith with the Union over the terms of a new contract? While the question is a close one, we conclude that the circumstances are not sufficient to establish such a refusal to bargain.

(3) Did the District act at least in part out of unlawful animus when it terminated all three bargaining unit positions at the June 5, 2003 Board meeting? On this issue we have little trouble concluding that the District's action violated Sec. 111.70(3)(a)3, Stats. 8/

8/ The District contends that the Union failed properly to challenge the Examiner's factual findings and conclusions of law on the allegations pertaining to subsection (3)(a)3. We believe the Union's petition is clearly sufficient to challenge the Examiner's decision on these points. In any case, as stated in the preceding footnote, the Commission has authority to review this issue on its own, whether or not raised by the parties.

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(4) Did the District have a duty to bargain over the decision to terminate the full-time positions so that, by making and implementing that decision unilaterally, the District violated Sec. 111.70(3)(a)4, Stats.? For the reasons thoughtfully set forth in the Examiner's decision, we agree with his conclusion that the District had such a duty to bargain and did violate the law, and that the Union did not waive its right to negotiate over the decision by failing to accept the District's post-implementation offer to negotiate over the "impact" of its decision.

(5) Is an award of 12% interest on back pay within the Commission's remedial authority? We conclude that it is.

Each of these conclusions is discussed more fully below.

A. The November 7, 2002 statement as an independent (3)(a)1 violation.

The Commission generally has interpreted the collective bargaining law in a manner that encourages free expression and robust debate among employers, employees, and unions regarding work place issues, including the fundamental decision about whether to form a unionized work place. SEE, E.G., RACINE UNIFIED SCHOOL DIST., DEC. NO. 29450-A (WERC, 4/99). Employers and employees are free to disagree vigorously about the advantages and disadvantages of collective bargaining, the merits of various negotiations proposals or grievances, and other disputatious labor relations matters. As we have said, "the rights established by Section 2 of MERA are often exercised in tense, chilly, or hostile atmospheres, because by its very nature such activity involves challenging the employer's authority," CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03) at 12, and "an employer is entitled to offer a frank and even negative assessment when confronted with a grievance," VILLAGE OF STURTEVANT, 30378-B (WERC, 11/03) at 18. However, latitude for such expression is not unbridled. As the statute expressly states, an employer's legitimate opposition to the union may not extend to interfering with, restraining, or coercing employees in the exercise of their rights to form a union. Such unlawful interference includes promising benefits if the union is defeated or threatening a loss of beneficial working conditions if the union is selected.

The boundary between permissible opposition and unlawful interference can be elusive, but, as the Union has argued, one of the Commission's seminal decisions interpreting Sec. 111.70(3)(a)1 provides apt guidance for the present case. In CITY OF EVANSVILLE, DEC. NO. 9440-C (WERC, 3/71), AFF'D SUB NOM. WERC V. EVANSVILLE, 69 WIS. 2D 140 (1975), as here, the employer communicated with its employees shortly before a union election urging them to vote against representation. 9/ In examining the City's communication, the Commission found that, beyond expressing legitimate opposition to the union, a number of the City's predictions about the consequences of a union were so inaccurate as to be coercive.

Some of the City's unlawful statements bear a fundamental similarity to some of Hellendrung's statements on November 7. For example, the City of Evansville told its employees:

> "If a union were to be accepted, it is conceivable that many new problems and hardships would be created not only on the city, but on the employee's [sic] as well. Some examples might be the installation of time clocks, regulated coffee breaks, and the possible loss of certain freedoms that the employee's [sic] now enjoy."

9/ The Examiner concluded that CITY OF EVANSVILLE carried little guidance for the present case, because the overall context in EVANSVILLE was quite different. In that case, the City's conduct did not merely comprise an independent violation of subsection (3)(a)1, but was found to have contributed to the Union losing the election. Ultimately the Commission, with the Supreme Court's approval, held that the employer's conduct had made a fair election impossible and ordered the City to recognize and bargain with the Union. While the employer's unlawful conduct in EVANSVILLE thus carried more immediate negative consequences for the employees, and while the Union in the instant case had less incentive to challenge the pre-election conduct until the District's subsequent vote on June 5, 2003 to eliminate the bargaining unit positions, the EVANSVILLE decision nonetheless is instructive for analyzing the independent (3)(a)1 violation that is alleged here.

The City of Evansville further asserted that the cooperative relationship among the City's departments would end, because each department "would have to conform to the work rules and standards of operation set forth by the union."

Similarly, Hellendrung's November 7 speech overstated the inflexibility that a union contract would bring and the consequent detriment to the employees: "You or we will not have the flexibility to handle situations, add, increase, change benefit or working conditions, work schedules, trading days, etc. because everything will be controlled by the contract that is negotiated." Further:

> "Working conditions will change with a union. Everything will be negotiated. Things like personal phone calls – painting calls. Arnie, your painting business is non-union – How will the union accept your advertising on your truck. … People can not just stop at the Janesville Fire Stations to just visit – BS – Kill time."

As in EVANSVILLE, where the City listed all the economic benefits it was willing to offer the employees without a union and implied that it would have a different attitude if those improvements were sought by the union, Hellendrung emphasized his positive attitude toward employee requests in the absence of a union and conveyed a thinly-veiled threat that such good will would likely end if a union were on the scene:

> "I have represented your wishes to the [District Board] and you have received most of what you have asked for. With a union our relationship will end because the union will come between us," and "First off, they can not promise more money they can only ask. With a union they ask – you don't. Without a union you have received an increase every year with or without asking for it."

Indeed, Hellendrung's remarks arguably were more threatening than those in CITY OF EVANSVILLE, in that Hellendrung implied that Union representation might cost unit member Lund Jr. his job because he would be unable to meet a putative physical exam requirement and/or submit to a mandatory retirement age. Hellendrung also unmistakably implied that union-generated improvements in wages might lead to District to eliminate the full-time positions entirely, as they might no longer be "economically fisable [sic]."

The pivotal inquiry in a (3)(a)1 violation is not the employer's intent in making these remarks nor the employees' actual subjective reactions, but rather the tendency of the remarks to chill a reasonable employee's union activity. CEDAR GROVE-BELGIUM AREA SCHOOL DIST., DEC. NO. 25849-B (WERC, 5/91) AT 11-12. Nonetheless, each employee testified to feeling threatened in a concrete way by some or all of Hellendrung's remarks, which, in fact, carried pointed references to the probable demise of working conditions that ostensibly benefited particular, named individuals. We think reasonable employees would have responded similarly. In the context of a mandatory meeting, which off duty employees were required to attend (albeit with pay), Hellendrung's remarks were misleading and threatening to a coercive degree and therefore unlawful.

Accordingly, we conclude that the District, through Hellendrung's November 7, 2002 presentation, violated Sec. 111.70(3)(a)1, Stats.

B. The Bad Faith Bargaining Allegation

The Examiner reviewed the District's conduct between December 12, 2002, when the Union was certified, to June 5, 2003, when the District terminated all three bargaining unit positions and decided that the District lacked a good faith intention to reach an agreement with the Union and thereby failed to bargain in good faith in violation of Sec. 111.70(3)(a)4, Stats. As appropriate when considering such an allegation, the Examiner looked at the "totality of the [the employer's] conduct," CITY OF GREEN BAY, DEC. NO. 18731-B (WERC, 6/83) at 11, and primarily at whether the District complied with its statutory duty "to meet and confer at reasonable times … with the intention of reaching an agreement." Sec. 111.70(1)(a), Stats.

The record provides a reasonable basis for the Examiner's skepticism about the District's good faith. Like the Examiner, we find it troubling that the parties met for the first time more than six weeks after the Union was certified, although we note that this time period did include the winter holidays. It is also less than ideal that the District was unprepared at the first negotiations session to present an offer or respond to the Union's outline of issues. Like the Examiner, we find the District's obsession with the employees' firefighter certification to be perplexing if not a deliberate diversion. While the District claims that the certification issue was of bilateral concern, that assertion is at odds with the District's apparently furtive

communications with State officials on the subject and the District's long delay between receiving the State's ambiguous answer on March 1, 2003 and conveying it to the Union on April 18. We also share the Examiner's dim view of the District's approach to the economic concerns that allegedly led to eliminating the positions at the June 5 Board meeting, including its failure to apprise the Union of the concerns and/or make any effort to negotiate a solution and its unwarrantably precipitous action. As discussed in more detail below, what the Examiner saw as indicia of bad faith bargaining we see as indicia of unlawful animus – two sides of the same unlawful coin, but with different remedial consequences. 10/

10/ As discussed in part D, below, the fact that the District acted unilaterally in addressing its asserted economic difficulties is more appropriately viewed as a separate per se violation of the duty to bargain in good faith, as the Examiner held and we have affirmed.

Our difficulty with upholding an allegation of general bad faith bargaining by the District during the five months between the Union's certification and the District's June 5 Board meeting is the meager evidence that the Union was actively seeking meetings and/or the District deliberately avoiding them. "Bad faith bargaining" is a fact-intensive, highly circumstantial claim that is relatively difficult to establish. Typically the evidence reveals a prolonged pattern of union proposals with little or no substantive response and/or a series of unsuccessful attempts to schedule a meeting. SEE, E.G., JEROME FILBRANDT PLUMBING & HEATING, DEC. NO. 27045-C (WERC, 9/92) (the employer bargained in bad faith by being unavailable for negotiations at sufficiently regular intervals). While the District clearly was not a model of proactive bargaining effort, there is scant evidence that it deliberately evaded Union efforts to meet and negotiate. The record reflects perhaps one or two telephone calls that the Union initiated regarding scheduling, in contrast with the e-mail exchange that preceded the one or only bargaining session in January 2002, contacts that apparently did not reach the District's negotiator himself. The paucity of Union scheduling contacts may be attributable to the relatively brief period of time involved (five months) and the distraction provided by the firefighter certification issue during the last two months of that period. Nonetheless, the record falls short of demonstrating a pattern of conduct such that we could conclude that the District refused to bargain or engaged in surface bargaining in violation of Sec. 111.70(3)(a)4, Stats.

C. Terminating the Full-Time Positions as a (3)(a)3 Violation.

The Examiner properly set forth the four elements of a successful claim of discrimination in violation of Section (3)(a)3: that the employees were engaged in lawful concerted activities; that the employer was aware of those activities; that the employer bore animus towards those activities; and that the employer took adverse action against the employees at least in part out of animus toward those activities. VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03) at 18, citing 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).

In the instant case, the Examiner acknowledged that the District was well aware of its employees' union activities, thus satisfying the first two elements of the paradigm. However, the Examiner concluded that the decision to terminate the positions at the June 5 Board meeting was not related to any District hostility to the Union, but instead "was motivated by issues of its control over the District, particularly regarding the expenditure of funds," and "terminated the employees … when it determined not to be bothered by the bargaining process." The Examiner perceived the District as acting within its view of its lawful authority, i.e., the District thought it had the right to lay off the full time employees without bargaining under the principles articulated in the BROOKFIELD case.

One problem with the Examiner's analysis is that even this relatively benign characterization of the District's motives would bring the District's action within the proscription of the law, since it conveys a causal connection between the District's opposition to the Union (wanting control over expenditures without the bother of bargaining) and the decision to get rid of the bargaining unit. This would be true whether or not the District believed its actions were lawful. While (3)(a)3 requires unlawful motive, it does not necessarily require that District officials realized their motive was unlawful, a concept that would be akin to mens rea in criminal law. Accordingly, we believe the Examiner employed an overly narrow notion of unlawful animus in dismissing the (3)(a)3 claim in the instant case.

The District contends that union activity played no role in the decision to terminate the entire bargaining unit, but rather that the decision was driven solely by the urgent fiscal crisis afflicting municipalities in June 2003 and the District's need to purchase a new truck. Under the Commission's traditional (3)(a)3 analysis, the Complainants carry the burden of establishing the element of unlawful motivation. However, that burden is met if opposition to the Union played any role at all in the District's decision, even if there were other legitimate operative factors. D.C. EVEREST SCHOOL AREA SCHOOL DISTRICT, DEC. NO. 29946-M (6/04) at 35-36. Since direct evidence of unlawful motive is infrequent,

> "[D]etermining 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). … 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)."

VILLAGE OF STURTEVANT, DEC. NO. 30378-B, at 19. Departure from standard operating procedures can also raise suspicion about the authenticity of an employer's asserted motives. ID. at 22. The exercise of examining inferences from the circumstances "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," and lies squarely within our specialized expertise. ID. at 19; 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... .'")

The instant case contains elements of all of the above-referenced circumstances suggesting that union avoidance/anti-union hostility was at least one of the factors affecting the District's June 5 layoff decision. We are primarily persuaded by the fact that the District's asserted economic exigencies are so unsupported both as to their substance and their timing as to exude pretext. We note in particular the following:

- The budget for fiscal year 2003, which did not end until December 31, 2003, had been established in October 2002, the District's regular and duly-designated Board meeting for budgetary purposes. That budget included sufficient funds to pay all three firefighters through December 31, 2003, including a 2% salary increase.

- Concerns about possible state cutbacks in municipal revenue shortfalls were greater in October 2002 than in June 2003.

- It was highly unusual if not unprecedented for the District to consider budgetary changes, especially such a drastic one, at a June Board meeting or at any time other than the October budget meeting.

- The June 5 budget modification was preceded by only 24 hours of public notice, based on a last minute amendment to the original meeting notice, and only opaquely referred to the possibility of changes in the District's full time staffing.

- The District's decision to implement a fundamental change in its budgetary structure was preceded by a brief, strictly oral presentation by Hellendrung, in which he referred to personal notes that were not formalized as budget documents and were not distributed.

- Before suggesting to the District's Board that its revenues were likely to encounter a substantial shortfall, Hellendrung had not consulted any of the constituent municipalities for evidence about any such projected shortfalls, nor did those shortfalls in fact materialize.

- The shortfall Hellendrung predicted, even if accurately based, would have affected the 2004 fiscal year, not 2003. Yet the layoffs were implemented with fully half of fiscal 2003 remaining.

- The ostensible need to purchase a new truck, while under study as of the April Board meeting, in fact had been under discussion for at least two years. Nothing had occurred between April and June to exacerbate or accelerate the importance of replacing some of the District's apparatus. All trucks in fact were in safe operating condition for the foreseeable future, the District maintained a truck fund with regular budgetary contributions specifically to avoid a crisis of unfunded liability, and that fund contained $140,000 as of June 2003. As the Examiner also noted, the truck issue loses some persuasiveness based upon the murkiness and inconsistency of the District's evidence about whether it was a tanker or a pumper truck that urgently needed replacement. Indeed, while Hellendrung's presentation on June 5 was directed toward the purchase of the relatively expensive tanker, by the time of the hearing in this matter the District had not only purchased no new equipment, but the only equipment under consideration was the far less expensive pumper truck.

- While the District asserts that it routinely revisited the economic viability of a full-time work force, the evidence belies that claim. The District's testimony on this point was vague, conclusory, and lacking in detail regarding timing or context. In contrast, the Union testified firmly and in some detail to the effect that the issue was not routinely or recently broached (except in Hellendrung's November 7 pre-election speech) in manner that was firm and detailed. Backes, for example, remembered only one occasion in which a Board member had questioned the need for a full-time work force, which was by then-Commissioner Gunderson in or about 1992. It is also telling that as recently as 2000 the District had increased its complement from 2.5 to 3 FTE's.

- The lack of any real discussion at the June 5 meeting about alternative ways to handle the ostensible fiscal crisis, including alternative means of funding the truck purchase, undermines the authenticity of the decision. The District had never intimated to the Union or the employees that it could not afford their services or that a reduction in force might be necessary. The District did not invite the opinions of the Volunteers on the subject, apparently not even the chiefs. The District had not asked the Union to agree to a wage freeze in lieu of layoffs, voluntary furloughs, partial layoffs, or any of the numerous other less drastic means of addressing a financial crisis, nor had the District consulted the public about their views on the issues. Even if the District believed it

> had no lawful duty to engage in such discussions, and even if the District believed it faced an urgent financial crisis, we think it unlikely that public officials would act so precipitously on an issue affecting their own political interests and the livelihood of their employees, absent an unstated motive – in this case, we believe, illegal hostility toward dealing with the Union.

Like the Examiner, we also find the District's efforts to confirm that the three full time employees lacked fire fighter certification not only misdirected (since certification was not required for bargaining unit membership) but indicative of something less than a good faith acceptance of the Union, especially when coupled with the District's sluggish approach to negotiations.

As to timing, the recent Union intervention regarding the Crandall reprimand could well have inflamed the District's animosity towards the Union. More persuasive, however, is the weak link between the timing of the District's action and its asserted reason for taking the action, i.e., revenue losses and capital expenditure needs. In this regard, we emphasize, as did the Examiner, that the issue is not whether the District was correct in its conclusion that financial exigencies required the immediate dissolution of the full-time positions, but instead whether the District's conclusion was genuine and untainted by hostility to the union activity. It is the genuineness, not the wisdom, of the District's asserted fiscal reasons that is belied by the circumstances we have described.

The District also points to a lack of any animus directly attributable to the Board members themselves, who moved and voted to address the financial crisis by terminating the bargaining unit positions. The District seems to argue that, even if Hellendrung bore animus and concocted or exaggerated a financial crisis, this was no more than "bringing the horse to water." The "decision to drink" was made by the Board members who genuinely believed Hellendrung's picture of an imminent financial crisis. However, Commission precedent solidly indicates that a Board vote under those circumstances would be unlawful because it would have been infected by Hellendrung's motives. D.C. EVEREST AREA SCHOOL DISTRICT, DEC. NO. 29946-M (JUNE 2004) at 40-41, quoting NORTHEAST WISCONSIN TECHNICAL COLLEGE, DEC. NO. 28954-C (WERC, 3/99) at 10. 11/ More importantly, the circumstances set forth above compellingly suggest (and we infer) that the Board members, as well as Hellendrung, were propelled at least in part by a desire to get rid of the Union, even if some or all of them also bore some authentic concern about the budget and even if those concerns had some basis in reality. Without belaboring those circumstances, most salient is the improbable methodology employed to address such a serious economic and political issue, from the short notice, to the lack of discussion, to the immediacy of implementation. 12/

11/ In NORTHEAST WISCONSIN TECHNICAL COLLEGE, the Commission stated, "We also reject the College's view that it is insulated from liability for the acts of its agents because the ultimate decision-makers were Board members. The Board's agents set the layoff in motion. Without their layoff recommendation, the record gives us no substantial basis for concluding the layoff would still have occurred. Under such circumstances, the College is culpable as a municipal employer based on the acts of its agents."

12/ We also note that several Board members made comments after the June 5 meeting demonstrating that the unionization of their employees figured prominently in their vote. See Finding of Fact 10, above.

We conclude from all of the foregoing that the District was indeed motivated at least in part by unlawful hostility when it abolished the three bargaining unit positions and terminated the employees in June 2003. 13/

13/ The Union notes and we agree that allowing Backes, Lund Jr., and Crandall to remain within the Volunteer fire fighters does not dissipate the inference that the District terminated their full time employment at least in part for unlawful reasons. It is not clear to what extent the District as a practical matter exercised authority to determine membership in the Volunteers. That aside, there is no reason to assume that the District's hostility to these individuals' union activity would extend to them as individuals in a non-union context. The District's unlawful objectives were served by eliminating the bargaining unit, regardless of whether the Complainants continued to provide services in a different capacity.

D. The Decision to Lay Off Was a Mandatory Subject of Bargaining

Much of the debate in connection with the District's Petition for Review centers upon the Examiner's holding that the District's decision to abolish the bargaining unit positions and lay off the incumbents was a mandatory subject of bargaining.

Harmonizing the Supreme Court's decisions in SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 WIS. 2D 89 (1977) and CITY OF BROOKFIELD V. WERC, 87 WIS. 2D 819 (1979), the Examiner concluded that, where a layoff decision affects only wage costs and does not effectuate a reduction in services, the decision is primarily related to wages, hours, and working conditions rather than managerial policy and is therefore a mandatory subject of bargaining. Inasmuch as the District clearly disavowed any intention to reduce fire fighter services, but instead intended to supply those services at the same level but through the significantly less expensive volunteers, the Examiner ruled that the District had a duty to bargain over both the decision and its impacts. We agree.

As the Examiner wrote:

> 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. …

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.

* * *

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 [V. WERC, 157 WIS.2D 708 (APP. CT. 1990)] 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 [DEC. NO. 18731-B (WERC, 6/83)] 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.

We concur in the foregoing analysis by the Examiner, in particular the application of the RACINE and GREEN BAY decisions. In GREEN BAY, issued well after the court's decision in BROOKFIELD, the Commission held that the City had a duty to bargain about a decision to merge its data processing work with that of Brown County under the auspices of a newly created Data Processing Commission. The Commission's decision expressly relied upon a series of cases, beginning with RACINE, holding that a public employer must negotiate over decisions that do not affect the level of services but merely achieve a less costly means of providing them, such as subcontracting or transferring work to another entity. DEC.NO. 18731-B at 8-10, and cases cited therein.

On review, the District heavily emphasizes the alleged public policy choice involved in its decision, i.e., whether to purchase a new truck, on the one hand, or maintain a full-time work force, on the other. Certainly every expenditure and budgetary decision carries some policy implications. Had the District faced a choice between reducing its fire protection services and purchasing a truck, its decision might more closely approach the public policy choices that animated the court's decision in BROOKFIELD. However, if public employer's choice to spend money on equipment rather than wages were ipso facto nonbargainable, even if services were unaffected, then virtually any economic issue affecting employees could be cast in nonbargainable terms, at least in an environment of limited revenues. An employer could

simply assert, "We cannot give you a raise, because we want to fix the plumbing" in order to remove wages from the scope of bargaining. This is why BELOIT requires a balancing of the relative weight of the asserted policy interests against the effect on wages, hours, and working conditions of employment. In BROOKFIELD, the court decided that a political body's decision to endure reduced services was sufficiently imbued with policy to outweigh the effect of a layoff on wages, hours, and conditions of employment. As the Examiner noted, the BROOKFIELD court's concern about a union preempting public debate over policy choices would have little resonance in a situation where the choice did not involve a potential loss of services. Asking the public, "Would you like to have the same service you have now and a new truck, too, but spend less money?" is like asking whether they want to have their cake and eat it, too – that is to say, not a serious policy choice at all.

In short, the Examiner correctly held that the District's decision to eliminate its full-time fire fighters while continuing to provide the same level of service through less expensive labor is a mandatory subject of bargaining and the District violated Sec. 111.70(3)(a)4, Stats., by unilaterally implementing this decision without negotiating.

The Examiner also correctly rejected the District's claim that the Union waived its right to bargain by failing to accept the District's post hoc offer to negotiate the impact of its decision. It is well settled that a union need not negotiate under the handicap of an already-implemented decision, particularly where the decision itself was a mandatory subject of bargaining. See, e.g., CITY OF GREEN BAY, DEC. NO. 18739-B (WERC, 6/83) at 12; RACINE SCHOOL DISTRICT, DEC. NO. 12055-B (WERC, 10/74), AFF'D SUB NOM., UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 WIS.2D 89 (1977).

E. Remedy

The Examiner issued the standard make-whole remedy for a (3)(a)4 unilateral change violation, i.e., a restoration of the status quo ante (the return of the three employees to their positions with back pay and an order to negotiate in good faith over the decision to terminate the positions). He also ordered that the back pay be accompanied by the standard statutory interest rate of 12% per annum. As the Examiner noted, this remedy on its face is not substantially different from the remedy available for a (3)(a)3 violation. However, we agree with the Union that the additional finding of a (3)(a)3 violation is not remedially inconsequential.

First, the language of the Notice the District must post references this additional illegal conduct. More importantly, the (3)(a)3 determination carries strong practical implications for the course of the negotiations and the District's future decision making. Having concluded that the District's initial decision to eliminate the bargaining unit was unlawfully motivated, any future similar decision by the District will necessarily be subject to closer scrutiny than if the decision had simply been a unilateral change violation. In particular, we envision that the District will resume good faith bargaining with the Union toward an initial contract, that any reductions in force that the District might propose would be demonstrably uninfected by anti-union animus, and that such a proposal would be part and parcel of the contract negotiations and hence subject to applicable impasse/deadlock resolution procedures.

The District challenges the Commission's authority to award interest at the post-judgment rate of 12% provided in Sec. 814.04(4), Stats. As the District acknowledges, the Commission has long construed its authority in this regard to be commensurate with that of the Labor and Industry Review Commission, as approved in ANDERSON V. LIRC, 111 WIS. 2D 245 (1983). SEE WILMOT UNION HIGH SCHOOL, DEC. NO. 18820-B (WERC, 12/83). Thus the Commission's back pay remedies have routinely included 12% interest for over 21 years. The District argues, however, that "the 'make whole' and 'discourage discriminatory practices' policies of discrimination law ... are distinguishable from the underlying policy of 111.70 pre-decision back pay awards." We see no such distinction, as the Commission's traditional remedial goals have included both those goals. Nor does the District elaborate upon the distinctions it suggests or refer to authority to support its assertion. Accordingly, we have included interest at the 12% rate on the back pay, in line with our standard orders.

Dated at Madison, Wisconsin, this 9th day of February, 2005.

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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