

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 2494, AFSCME, AFL-CIO, Complainant,

vs.

COUNTY OF WAUKESHA, Respondent.

Case 174
No. 63231
MP-4013

Decision No. 30799-A

Appearances:

Mr. Jack Bernfeld and Mr. Laurence Rodenstein, Staff Representatives, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, on behalf of Local 2494, AFSCME, AFL-CIO.

Michael, Best & Friedrich, LLP, Attorneys at Law, by **Mr. Scott C. Beightol**, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, and **Mr. James H. Richter**, Labor Relations Manager, Waukesha County, Waukesha County Government Center, 1320 Pewaukee Road, Waukesha, Wisconsin 53188, on behalf of Waukesha County.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Local 2494, AFSCME, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission on January 16, 2003, alleging that Waukesha County has violated Sec. 111.70(3)(a)1, 2 and 3, Stats. On February 12, 2003, the Commission appointed a member of its staff, Coleen A. Burns, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order. A hearing, which was transcribed, was held in Waukesha, Wisconsin on May 7, 2004. The record was closed on June 15, 2004, upon receipt of post-hearing argument.

No. 30799-A

Having considered the evidence and arguments of the parties, the Examiner makes and issues the following

FINDINGS OF FACT

1. Waukesha County, hereinafter the County or Respondent, is a municipal employer with its primary offices located at the Waukesha County Government Center, 1320 Pewaukee Road, Waukesha, Wisconsin 53188. James H. Richter is employed by the County as its Director of Human Resources. Norman A. Cummings is employed by the County as its Director of Administration. Richter, Cummings and County Executive Daniel M. Finley have authority to act on behalf of the County.

2. Local 2494, AFSCME, AFL-CIO, hereinafter Union or Complainant, is a labor organization affiliated with Wisconsin Council 40, AFSCME, AFL-CIO, and has principal offices at 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903. Mr. Laurence Rodenstein is employed by AFSCME, Council 40, as a Staff Representative and represents the Union for purposes of contract administration and collective bargaining.

3. At all times material hereto, the Union has been the sole and exclusive collective bargaining representative of certain County employees, including clerical, maintenance and custodial employees employed at the County Courthouse. Elizabeth Pantelis began her employment as a full-time Clerk Typist II in the County Clerk's Office in August, 2000 and has been the President of the Union since September, 2002. As President of the Union, Pantelis represents members of the Union's collective bargaining unit in matters relating to collective bargaining and the administration of the Union's labor contract. The Union and the County are parties to a collective bargaining agreement that, by its terms, is effective January 1, 2002 through December 31, 2003.

4. Since 1997, the County has administered a performance award program for employees who are not represented for purposes of collective bargaining. This program, which was established after the County Board abolished a system which provided step progression for such employees, has two components. One component is an across the board increase for all employees who receive a satisfactory performance evaluation. The second component provides such employees with eligibility for an additional performance award. The first component is applied to the employee's base wage and, thus, is cumulative. The second component, hereafter performance award bonus, is not applied to the employee's base wage and is not automatically renewed in any subsequent year. Each year the County Board approves the budget which funds the performance award program and the Personnel and Finance Committees of the County Board reviews the performance awards after they have been implemented. In the fall of 2002, the Union and the County were bargaining a successor agreement and preparing for interest arbitration. One effect of the County's bargaining

proposals was to increase the health insurance costs of employees represented by the Union. After Pantelis became Union President, she became aware of the County's performance award program and, after hearing that members of the Union's bargaining unit had concerns about the equity of this program, Pantelis, in November of 2002, telephoned Suzanne Zastrow, an Employment Services Manager in the County's Human Services Department, to discuss this program. At that time, Pantelis requested and received a list of performance award bonuses. Pantelis distributed this list at a November 5, 2002 Union meeting. On November 6, 2002, County managers and supervisors contacted Richter; asked if it were true that salary and performance award information had been distributed at a Union meeting; and stated that employees were stating that a reason for the performance awards was to defray the costs of the non-represented employees' health insurance coverage. On November 6, 2002, Richter telephoned Pantelis and stated that Department Heads and supervisors had contacted him about the previous night's Union meeting and, rather than make any assumptions, he wanted to ask Pantelis about comments that were alleged to have been made at this meeting. Richter indicated that there was friction between management and employees because the Union had stated that one reason that non-represented employees were getting a performance award bonus was to offset their increases in health insurances. Pantelis denied that such a statement had been made and further stated that the Union was not responsible for the interpretations and statements of individual members. Richter sent a letter dated November 6, 2002 to Pantelis, which states as follows:

Yesterday we talked about a number of comments that have come to my attention that were attributed to Local 2494's meeting of Tuesday, November 5, 2002. Since you have become President of the Local we have had a few opportunities to talk about issues and I believe one our mutual goals is to have clear and open communications. Based on the information that was shared with me and our conversation I thought it is important to clarify a number of issues with you.

The non-represented award performance information was requested and supplied to you. As I understand that information was communicated to employees at the Local's meeting and copies were provided to 10-15 employees.

I want to express my concern in regards to how the information was presented and distributed. I clearly understand that you have a right to request and be provided the information. Additionally, I also understand that it would be inappropriate for us to inquire as to the purpose for the request or what you intend to do with the data. However, based on the comments I have received there clearly was not a full discussion, presentation or understanding of the non-represented performance award program. I shared with you some of the comments that I had been hearing; your response was they were not accurate and the statements were not made at the meeting.

I believe the County and the Union share an obligation to provide as complete and accurate information to employees as possible. I also believe there was no intention by the union to embarrass any employees or create a conflict between coworkers, or employees and their supervisors. This obligation to provide accurate information is especially true when dealing with such sensitive information as a person's salary, even if it is a public record. It is my belief that the union did not meet their obligation in this circumstance.

The non-represented performance award program has several components, checks, and balances. For example, the performance awards are given based on merit and the employee's annual performance evaluation. This program is part of an overall compensation system that replaced a step system that was similar to the one in place for represented employees. Over the years the union has had the opportunity to engage the County in a dialogue about this program and how it could be applied to the employees you represent; for whatever reason that has not occurred.

You indicated that initially you provided 10-15 sets of the data to employees; what we do not know is how many other copies have been distributed over the course of the past day or two. My concern is that employees are now being provided information without the knowledge of why the program was created, how the program works, or how it is administered. This lack of information and understanding only leads to rumors, misconceptions and inaccuracies. It also has the unfortunate potential to create conflicts in the workplace between co-workers, and between employees and their supervisors.

It would be my hope that in the future, the Local will carefully consider their responsibilities in providing accurate information to employees and others and will ensure that a complete and accurate picture is presented. Misinformation and inappropriate rumors reflect on both the County and the Union.

AFSCME Staff Representative Rodenstein was cc'd on this letter. Richter did not provide any other individual with a copy of this letter. This letter upset Pantelis because she had told Richter that the statement had not been made. On November 8, 2002, Pantelis responded with the following letter:

After becoming president and the few meetings we did have, I was hoping that the county and the union could share a mutually beneficial relationship. The union is not here to draw lines in the sand, or to perpetuate an adversarial relationship with management. We are all striving for the same goal, which is a betterment of the county and its employees.

However, after receiving your letter yesterday, it is clear that open and clear communication is not one of your goals. The Union has a right, if not a moral obligation to share with members any and all public record information it finds relevant to the well-being of its membership.

Having made an assessment/judgment, based on third party conversations as to what happened at our Union Meeting, which you were not present at, and especially, after discussing with me the validity of the allegations to be false, (that information was never stated at the meeting) is in my opinion, unprofessional conduct on your part.

I agree the Union does have an obligation to provide complete and accurate information to employees, which is exactly what we did. For the County to even suggest that the Union purposely misrepresented information, or misleads its members is extremely inflammatory and reprehensible, as well as personally offensive. Once the information is given we can not be responsible for the way in which an individual interprets or dispenses that information.

If there are employee conflicts due to information provided, maybe you shouldn't assume it is based on misrepresented information. Maybe, you should look at the conflicts as a reaction to an unfair practice that the members are finally aware of.

As for the future, the Union will continue to achieve the betterment of its members along with the betterment of the county. We would like to foster a mutually beneficial rather than adversarial relationship. However, that will be up to you.

Richter did not provide Pantelis with any response to this letter or have any further discussion with Pantelis regarding the Union meeting of November 5, 2002. Virginia Ramos of the County's Human Resources Office sent an e-mail dated November 7, 2002 that states:

To: Department Heads and Elected Officials

From: Human Resources Office

RE: Release of 2001 Non-Represented Performance Award Information

This memo is to advise you that AFSCME Local 2494, through President Liz Pantelis, made a public records request for the non-base accumulating performance awards for 2001. They requested and were provided the employee's name, classification, and the dollar amount awarded.

We have historically tried to restrict access to this type of sensitive information. The open records law required our compliance with the request.

We do not know the purpose for the request, but can speculate that it is part of their case in the upcoming contract arbitration. The information was shared at a meeting of Local members the other evening. It is unclear as to how many copies have been distributed; however, if you become aware of any misinformation, rumors, or inaccurate information that you feel we should be addressing please let us know so we can follow-up as needed.

If you have any questions, contact Jim Richter or Sue Zastrow.

One of the managers that received a copy of the email provided a copy to Pantelis. Following receipt of Richter's letter, Pantelis continued to investigate the performance award program and this program was a frequent topic of discussion at Union meetings. In the latter part of 2002 and/or early 2003, Pantelis discussed this program with Norm Cummings, who is Richter's immediate supervisor. Norm Cummings was appointed by Finley and confirmed by the County Board. At the time of these discussions, Norm Cummings wanted to know why Pantelis was interested in the performance award program. Pantelis stated that the dollars provided in the performance award bonuses could be used to defray health insurance costs of employees. During contract negotiations, similar statements were made by Union representatives to County representatives. Norm Cummings responded that to use the performance award bonus money in that way would be tantamount to a social program in which employees denied the performance award bonus money would be writing a check to pay for health insurance increases of others. Norm Cummings stated that the performance award program had replaced a step system similar to that which was currently in place for employees represented by the Union and recommended that Pantelis review two documents, a feasibility study of the performance award plan and the audit which was conducted during the pilot period. The purpose of this recommendation was to provide an explanation of why the County Board had adopted the performance award plan. Norm Cummings also stated that the performance award plan was cost neutral when compared to the prior system. On December 10, 2002, Pantelis sent the following to Suzanne Zastrow:

Hi, Sue,

I just wanted to put in writing my request for information. Per my conversation with Norm Cummings (12/10/2002), he stated he was going to ask you to make me a copy of the evaluation of the open salary system compensation plan, that was submitted to county board in the calendar year 2000. Pursuant to ordinance 151-50.

Thanks

Liz Pantelis
Union President
Local 2494

Prior to sending this email, Pantelis had made a verbal request and was advised by Zastrow that she would need to discuss the request with Norm Cummings. Pantelis received the information requested from Zastrow. In early 2003, Pantelis met with County Board Chairman Jim Dwyer in his Courthouse office for the purpose of discussing the personnel ordinance that established the performance award program. During these discussions, Pantelis referred to a portion of this ordinance and stated her opinion that it provided for a one-time, rather than a yearly performance award bonus. Pantelis also questioned how the County justified yearly bonuses to the same people. Dwyer responded that, although the language of the ordinance may state that, the County Board intended that the performance award bonus would be available each year. In early 2003, Pantelis encountered Duane Paulson at the "Y" and stated that she was very upset that he, as the Chair of County Board Personnel Committee, had approved performance award bonuses. Paulson confirmed that he supported the performance award bonuses. Pantelis also questioned if Finley would win reelection if the public knew that he was providing more than \$260,000 per year in performance award bonuses to management. On April 10, 2003, Pantelis sent the following to Norm Cummings:

Subject: Request for information (RE: Award Bonus)

Norman,

Under the freedom of information act, I would like to request copies of the H.R. summaries and the dept. head recommendations and justifications that are submitted to Dan for his bonus award consideration. If you have any questions regarding this matter feel free to call me at X7014. If my request is denied, I would like to know under what statutory exclusions the request is being denied.

Thank You,

Liz Pantelis
Union President – Local 2494

CC: Zastrow, Suzanne

Prior to forwarding this request, Pantelis had made the same request of Zastrow, but was advised that the request must be made to Norm Cummings. Norm Cummings responded in an email dated April 21, 2003 that states as follows:

Subject: Request for Information (RE: Award Bonus)

I assume that you are requesting to inspect the records you list under Wisconsin law. The freedom of information act is a Federal law.

I am denying your request for dept. head recommendations and justifications sporting or denying proposed performance awards based on s.103.13(6)(d), Wis. Statutes. Section 103.13(6) sets forth the kinds of personnel records an employee has access to. The information you seek is the information that is listed as an exception to the right of inspection. Since the employee does not have access to the information, it certainly can be presumed that you do not have access.

Richter; Steve Schmitz; Zastrow and Tom Farley were cc'd on this email. Schmitz is an attorney in the Office of the Corporation Counsel and Farley is the Corporation Counsel. Pantelis did not receive the information requested in her request of April 10, 2003. Pantelis, in her capacity as Union President, sent a letter dated November 6, 2003 to Kathleen M. Cummings, County Board Supervisor, in which she apprised the Supervisor of certain facts regarding the County's performance award program; exhibited appreciation for the Supervisor's role in investigating a bonus program in the City of Waukesha; queried whether, given the accelerating cost of health care and other necessary expenses, it was realistic for management to have this addition to their already bountiful salary package; and expressed hope that the Supervisor would share the information provided with other County Board members and that someone would look into Waukesha County's bonus program, and that it too would cease.

5. Kathy Nickolaus assumed her office as the elected County Clerk in January, 2003. At that time, the Clerk's office employed a Deputy Clerk and three positions represented by the Union, including the position held by Pantelis. A Department of Administration budget team, headed by Norm Cummings, makes budget recommendations to Finley, but Finley has final authority to propose and submit an annual County budget to the County Board. The County Board, which has final authority to establish the County's annual budget, may accept, reject or modify any of the proposals contained in Finley's proposed budget. Consistent with normal budget procedures, Finley provided all County Departments, including that of the County Clerk, with budgetary targets in late spring or early summer of 2003. At the end of July, 2003, Nickolaus, as Department Head, met with Finley and submitted her proposed Department budget. The budget prepared by Nickolaus met the targets that had been established by Finley; maintained current staffing levels and proposed several new initiatives, *i.e.*, passports, dog licensing, purchasing a scanner and printing public directories. This budget projected new revenues from passports and dog licenses, with the passport revenues anticipated at \$50,000. Finley immediately responded to Nickolaus by

stating that he did not want her to implement any of the new initiatives. Finley stated that he did not want the Clerk's Office to sell passports because that duty was not a core function and explained that core functions are those that are statutorily required. In prior years, Finley had removed functions from the Register of Deeds' Office and the Treasurer's Office because they were not core functions. During this conversation with Nickolaus, Finley also stated that it would be a step backward to print public directories because they are available on the internet. Nickolaus told Finley that she would be performing any extra work resulting from her new initiatives and that the new initiatives would not require additional staff time. Finley did not comment upon staffing levels. Budget staff from the Department of Administration also attended this meeting and made notes of this meeting. When the budget staff alerted Norm Cummings to the fact that Finley expressed concerns over the new initiatives, Norm Cummings telephoned Nickolaus. During this telephone conversation, Norm Cummings discussed the concept of core functions and stated that, particularly with offices headed by elected officials, Finley wanted the offices to stick to core functions. Norm Cummings questioned whether Nickolaus' staff had enough to do because she was proposing initiatives that required additional effort, but was not requesting additional staff. Nickolaus stated that she would be performing any extra work and that it would not require additional staff time. At the end of July and in the beginning of August, 2003, the County received information from the State that lead Norm Cummings and the County Executive to conclude that the budget target that previously had been established by the County Executive had to be revised downward to offset an unanticipated loss of revenues. In early August of 2003, Finley telephoned Nickolaus to advise her that he was eliminating all of her new initiatives and that he was also eliminating one position. Based upon her understanding that Pantelis had the least seniority, Nickolaus told Finley that the abolished position would be that held by Pantelis. Finley responded that he knew that. When Nickolaus asked Finley why he was eliminating a position, he responded "Because I can" and offered no further explanation at that time. Following this telephone conversation, Nickolaus told Pantelis that the County Executive had decided to abolish Pantelis' position; that Nickolaus did not favor this elimination; and that Nickolaus would meet with the Finance and Personnel Committees of the County Board in an attempt to save the position. Pantelis was shocked and concluded that the position elimination was directed at the Union because no time study had been conducted in the Clerk's Office. In mid-August, Richter learned that Pantelis' position might be abolished and Richter encouraged Pantelis to apply for vacancies. Pantelis responded that she did not want to apply for other positions; that she liked her job; that Nickolaus had meetings planned; and that she did not want to move back and forth between Departments if Nickolaus were successful in her attempts to retain Pantelis' position. Thereafter, Nickolaus met with the Personnel Committee and the Finance Committee of the County Board. After Nickolaus contacted the County Board Personnel Committee to discuss saving her Clerk Typist II position, Paulson, the County Treasurer and Nickolaus discussed and agreed to propose that a full-time position in the Treasurer's office be filled and shared 50% of the time with the County Clerk's Office. Nickolaus continued to pursue the passport and dog licensing initiatives. Despite the

opposition of Norm Cummings and the County Executive, in September, 2003, the County Board approved the passport duties as a pilot program. The Personnel Committee requested that Nickolaus train staff so that they would be able to perform these duties if Nickolaus were unavailable. At that time, the Department of Administration projected passport revenues of \$21,500 and Nickolaus did not disagree with this projection. After two and one-half months of the trial period, the passport work has generated revenue of \$4,900, after deducting for staff time, including the time of the County Clerk, or about \$266 per hour. At some point in time, Finley told Nickolaus that he was looking for budget savings and that was the reason for the elimination of her Clerk Typist II position. On or about September 19, 2003, Pantelis telephoned Finley to question him on his proposed 2004 budget. Pantelis asked Finley how many employees were being laid off; if they were Union or non-represented positions; if positions were being created; and if created positions were represented or non-represented. Finley declined to provide specifics on the basis that his budget had not yet been submitted to the County Board, but, confirmed that less than twenty (20) positions would be abolished; that approximately twenty (20) positions would be created; that the abolished and created positions would be both union and non-union; and that Pantelis' position was one that would be abolished. Pantelis questioned why he was not considering a hiring freeze, a wage freeze, or eliminating performance award bonuses as alternatives to layoffs. Finley stated that he would not consider these options; no one would be laid off; and Pantelis just would not be working in the County Clerk's Office. When Pantelis questioned the propriety of awarding the bonuses, Finley responded that he would continue the bonus program; that he needed to run the County like a business; and that was how a business is run.

6. At the beginning of the budget process, Richter meets with Finley and/or the Department of Administration's budget staff to provide information on personnel matters that may have an impact on the budget. Throughout the budget process, Richter is apprised of and assists with issues relating to human resources. As the budget team moved through the 2004 budget process, political considerations, including public and individual County Supervisor calls for a zero levy increase, prompted the County Executive to conclude that his proposed budget must contain a tax freeze. At the end of July and in the beginning of August, 2003, the County received information from the State that lead Norm Cummings and the County Executive to conclude that the budget target that previously had been established by the County Executive had to be revised downward to offset an unanticipated loss of revenues. In order to meet the revised budget target, Norm Cummings and his budget team began to prepare a list of budget reductions in excess of \$300,000 to cover the anticipated shortfall in revenue. This list included the elimination of a Computer Coordinator position in the DA's Office; the elimination of a Clerk Typist II position in the Office of the County Clerk and savings from the capital budget and the Department of Administration. The Computer Coordinator position was selected for elimination because the County was advised that, later that year, the State would be providing computer support for DA functions. Prior to this time, other positions had been identified for elimination. Norm Cummings decided to propose the

in the Clerk of Court's Office because the County Clerk had made a request to significantly expand duties without making a request to increase staff and Norm Cummings concluded that, if the County Executive did not include the expanded duties in the budget, then a position could be abolished without a detrimental effect to the operations of the County Clerk's Office. Norm Cummings decided to propose the elimination of a Clerk Typist II position because the County Clerk's Office had two of these positions and the Account Clerk was needed to perform financial and accounting functions. On August 15, 2003, the State released information that confirmed that the revenue shortfall would be a little over \$200,000. Cummings recommended the elimination of a Clerk Typist II position in the County Clerk's Office as part of his proposal to reduce expenditures to meet the revised budget target and Finley accepted this recommendation. As part of the 2004 budget process, the County Executive, with the assistance of Norm Cummings and Richter, prepared a personnel ordinance that included the creation and abolishment of positions. This personnel ordinance abolished the Clerk Typist II position held by Pantelis. The County Executive did not accept any of the new initiatives proposed by the County Clerk when he prepared his proposed 2004 County Budget. In an email dated September 22, 2003, Richter advised Rodenstein of the following:

Larry---attached is a document that describes the severance plan we discussed this morning on the phone. After you have reviewed the document let me know if you have any questions. If you are ok with the plan and want to make it available to Local 2494 let me know.

Richter also sent a copy of this email and severance proposal to Pantelis. The severance plan, which was acceptable to the Union, was applicable to all employees laid off due to the abolition of or failure to fund positions in the 2004 budget. On September 23, 2003, Finley presented his 2004 budget to the County Board of Supervisors, which included the proposed personnel ordinance. Prior to September 29, 2003, Richter met with Pantelis, in her capacity as Union President, to review this personnel ordinance. This review lead Pantelis to conclude that all but two of the positions proposed for elimination were vacant, or the incumbent was either being reclassified or performing the same work with a different title. Pantelis further concluded she was the only employee being displaced because, in the second of the two positions, the employee was being reduced from full-time to part-time. Until September 30, 2003, the County Clerk opposed the elimination of the Clerk Typist II position. The Personnel Committee of the County Board met on September 30, 2003, to finalize their review of the County Clerk's budget. Approximately one week before this meeting, Paulson had asked Richter if it were possible for Departments to share a position and Richter had responded that it was possible. Norm Cummings and Richter were present at the meeting of September 30, 2003 to discuss the County Clerk's proposed initiatives and the County Executive's proposed abolishment of the Clerk Typist II position. Prior to the start of this meeting, Paulson advised Richter that the Treasurer had a position that could be shared with the County Clerk; that the

Treasurer and the County Clerk were willing to share the position; and that, rather than just abolishing the Clerk Typist II position in the County Clerk's Office, could the County Clerk receive additional support by sharing this position with the Treasurer. Concluding that this proposal made sense because the goal was budget reductions, Richter discussed this proposal with Norm Cummings and told Norm Cummings that they should discuss the proposal with Finley to determine whether or not he had any objections. Richter then left the meeting; met with Finley; advised Finley that Paulson had made a proposal and described the proposal. Finley responded that his goal was a position elimination and, since Paulson's proposal accomplished that, Richter could advise the Personnel Committee that Finley supported Paulson's proposal. Richter then returned to the Personnel Committee meeting and advised Paulson that Finley supported the shared position. The Personnel Committee then approved the abolishment of a Clerk Typist II position in the County Clerk's Office, with the understanding that the County Clerk and Treasurer would work out the details of the shared position. Subsequently, Richter met with the Treasurer, the County Clerk, Zastrow and, possibly a representative of the County Board Chairman, to discuss how the shared position would be filled. Thereafter, Richter advised Pantelis that she could be placed in the Clerk Typist I-II position in the Treasurer's Office without any loss of pay. Pantelis disagreed on the basis that this would be inconsistent with the Union contract and insisted that the position needed to be posted. Subsequently, the position was posted. Pantelis did not apply for this posted position because she had concluded that this would be a demotion and she did not want to be demoted. Although there were some modifications to the personnel ordinance proposed by the County Executive, the Finance Committee of the County Board and the County Board, as a whole, approved the County Executive's proposal to abolish of a Clerk Typist II position in the County Clerk's Office.

7. The effect of abolishing a Clerk Typist II position in the County Clerk's Office was to abolish the position held by Pantelis. The 2004 County Budget, which had expenditures of about \$238 million, was adopted in November, 2003. At the time that Pantelis' position was abolished, the projected savings to the County from this abolishment was \$38,995. On December 12, 2003, Richter sent the following letter to Pantelis:

This letter is to reconfirm our previous discussions regarding your layoff status. The County board has abolished your Clerk Typist II position in the County Clerk's office effective January 1, 2004. Your last day of work will be Tuesday, December 30, 2003. Your layoff period will begin January 1, 2004, and will expire January 1, 2005.

A severance benefit was approved by the County Board. Based on your length of service, you will be entitled to six (6) weeks of compensation; plus the County will pay its share of your health insurance for the first three (3) months of your layoff.

During the layoff period, you are eligible to bid on open positions. You may contact the Human Resources Office for additional information or with questions regarding vacancies at (262) 548-7044.

If you have any questions, or you need to discuss this in greater detail, do not hesitate to contact me.

Pantelis sent Richter a letter dated December 23, 2003, which states:

Due to my pending lay off and prior conversations with County Executive Dan Finley, in which he stated: "Liz, you won't be laid off", "There will be other jobs in the County for you", "You just won't be working in the County Clerk's Office", I was apparently under the misguided impression that I wouldn't be laid off and finding a comparable job would be somewhat easy.

I have applied for several positions and have been turned down for all of them. The classifications I applied for included promotions, lateral moves and even entry level.

I was offered a job in the Treasurer's Office, a clerk typist I/II. However, the way in which the County chose to offer it to me is in direct violation of our contract and a demotion. When I pointed that out, it was stated that they were making special arrangements for me, but when I asked why they couldn't make "Special Arrangements" in another department with my same classification, I received a response that they didn't have to do that.

Therefore, as of Dec. 30th, 2003 I will be officially laid off. I am officially requesting to utilize my County seniority and bump the least senior person in the bargaining unit. According to my records, furnished by your office and dated 7/28/2003, that person would be Sally J. Steiglbauer who is a clerk typist II in Corporation Counsel.

Sincerely,

Elizabeth Pantelis /s/
Elizabeth Pantelis
Union President, Local 2494

Richter sent the following letter, dated December 26, 2003, to Pantelis:

This letter is in response to your correspondence of December 23, 2003 wherein you requested to utilize your seniority to bump the least senior employee in the bargaining unit. In your correspondence you identified this individual as Ms. Sally Steiglbauer.

Section 9.04 of the collective bargaining agreement between the County and AFSCME Local 2494 clearly outlines the provisions under which employees may bump other employees when they are scheduled for lay-off. Specifically, Section 9.04 provides “Employees who are scheduled for lay-off may replace employees of lower job classifications within the same department, provided that they have more seniority than the person occupying the lower job classification.” Ms. Steiglbauer is not in a lower job classification and is not employed in your department therefore your request is denied.

There have been and continue to be positions in other departments that are available to you within the bargaining unit for which you may submit employee bids. Specifically there have been Clerk Typist II positions in the Treasurer’s office, Sheriff’s department, and Human Services. I am aware you have bid on a Clerk Typist II position in Human Services. Human Resources office will continue to be available to work with you to address any issues associated with this position and the lay-off in general.

If you have any questions regarding these vacancies do not hesitate to contact me so that we can discuss this in greater detail.

Prior to January 1, 2004, Pantelis applied for vacant positions posted by the County. Effective January 1, 2004, Pantelis was laid off from County employment. In January of 2004, Pantelis accepted a Clerk Typist II position in the County’s Sheriff’s Department. Prior to her return to work, Pantelis received benefits under her severance package.

8. Norman Cummings and Daniel Finley, but not James Richter, were responsible for the decision to propose the abolishment of a Clerk Typist II position in the County Clerk’s Office. Norm Cummings and Finley had business reasons for their proposal to abolish a Clerk Typist II position in the County Clerk’s Office. The County Board members had business reasons for their decisions to abolish a Clerk Typist II position in the County Clerk’s Office.

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

CONCLUSIONS OF LAW

1. Respondent, Waukesha County, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

2. Complainant, Local 2494, AFSCME, AFL-CIO, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

3. Elizabeth Pantelis is a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

4. Elizabeth Pantelis was engaged in lawful, concerted activity within the meaning of Sec. 111.70(2), Stats., when, as President of Local 2494, AFSCME, AFL-CIO, she requested information on the County's performance award program for non-represented County employees; discussed this program with various County managers and elected officials; and shared this information with members of the Union's collective bargaining unit.

5. Prior to Respondent's decision to abolish the Clerk Typist II position in the County Clerk's Office held by Elizabeth Pantelis, Representatives of Respondent, including James H. Richter, Norman A. Cummings, Daniel M. Finley, Jim Dwyer, and Duane Paulson, were aware that Elizabeth Pantelis had engaged in lawful, concerted activities protected by MERA.

6. Complainant has not established, by a clear and satisfactory preponderance of the evidence, that either County management's proposal to abolish the Clerk Typist II position held by Pantelis, or the County Board member's acceptance of this proposal, was motivated, in any part, by hostility to Pantelis', or any employee's, exercise of lawful, concerted activity protected by MERA.

7. Complainant has not established, by a clear and satisfactory preponderance of the evidence, that Respondent has interfered with, restrained or coerced municipal employees in the exercise of their rights guaranteed in Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

8. Complainant has not established, by a clear and satisfactory preponderance of the evidence, that, by abolishing the Clerk Typist II position occupied by Elizabeth Pantelis, Respondent has discriminated against Elizabeth Pantelis in regard to her hiring, tenure or other terms or conditions of employment in violation of Sec. 111.70(3)(a) 3, Stats.

9. Complainant has not established, by a clear and satisfactory preponderance of the evidence, that Respondent has initiated, created, dominated, or interfered with the formation or administration of any labor organization in violation of Sec. 111.70(3)(a)2, Stats.

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

ORDER

The complaint filed herein is dismissed in its entirety.

Dated at Madison, Wisconsin this 3rd day of November, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

WAUKESHA COUNTY

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

The Union has filed a complaint of prohibited practices alleging that the County's elimination of the position held by the Union President has violated Sec. 111.70(3)(a)1, 2 and 3, Stats. The County denies that it has committed the alleged prohibited practices. As affirmative defenses, the County asserts that the Complaint fails to state a claim upon which relief may be granted; that the Union, and specifically Pantelis has failed and continues to fail to mitigate damages; and that, at all times, the County has been motivated by legitimate, non-discriminatory business reasons.

Union

Union President Pantelis was engaged in protected, concerted activity when she advocated on behalf of Union employees on the issue of the inequities of the County's performance award bonus program for non-represented County employees. Her actions were incessant and aggressive, but always well within of the bounds of lawful behavior.

County management considered the performance award issues raised by Pantelis to be sensitive and controversial. The County's continuing sensitivity to this issue was evidenced at hearing, when the County made vociferous objections to Union exhibit(s) regarding disparate treatment. The evidence of Pantelis' interaction with County representatives provides a reasonable basis to infer that Finley and other County representatives were not happy with Pantelis.

Assuming *arguendo*, that there were legitimate reasons for Finley's decision to abolish Pantelis' position, the existence of a legitimate reason is not a defense, where, as here, the decision was also motivated by illegitimate reasons. County leadership knew which position they were eliminating. They also knew the effect was not only to displace the individual who challenged their actions, thus interfering with the union as a political institution and the union's ability to freely to choose its own leaders, but also, that the displacement of the Union President would have a chilling effect on the ability of the Union to function.

In summary, Pantelis engaged in protected, concerted activity and the County was aware of this protected activity. The record has produced several inferences reasonably derived from the facts of this case that are sufficient to establish a finding of hostility and that such hostility was a motivating factor in the decision to abolish Pantelis' position. The Union has met its burden of proof.

The remedy for such a fundamental breach of the union-management relationship should go beyond a simple make-whole remedy and posting of a public notice. The County should be ordered to restore Pantelis to her original position in the County Clerk's Office and compensate her for the interference caused by Finley's illegal action.

County

The County's action in abolishing the Clerk Typist II position in the Clerk of Court's Office was based solely upon legitimate business reasons. Specifically, it was the economic realities of the time and the context of the County's budget deliberations during the summer of 2003 that lead to the abolishment of this and other positions.

The County did everything it could to assist Pantelis in avoiding layoff, including offering her a shared position between the County Clerk and Treasurer, which position would have allowed her to continue doing the work that she had come to enjoy. Pantelis was offered another position, which she accepted without loss of wages, benefits or seniority. She continues in this position.

The Union bears the burden of proof to establish that the County has violated MERA as alleged by the Union. The Union has failed to meet this burden. The Union's complaint should be dismissed in its entirety.

DISCUSSION

Statutory Allegations

The Complainant asserts that the Respondent committed independent violations of Sec. 111.70(3)(a)1, 2 and 3, Stats., when it took adverse action against Union President Pantelis by abolishing her position in the Office of the County Clerk. Notwithstanding Respondent's affirmative defense to the contrary, Complainant has stated a claim that, if proven, would entitle Complainant to relief under MERA.

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

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

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

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

Sec. 111.70(3)(a)2, Stats., provides, that it is a prohibited practice for a municipal employer to "initiate, create, dominate or interfere with the formation or administration of any labor organization or contribute financial support to it," except that it is not a violation for a municipal employer to reimburse its employees for time spent conferring with the employer. This statutory proscription contemplates a municipal employer's active involvement in creating or supporting a labor organization. *MENOMONIE JT. SCHOOL DISTRICT NO. 1, DEC. NO. 14811-C (McGilligan, 3/78)* Sec. 111.70(3)(a)2 "interference" is of a magnitude which threatens the independence of a labor organization as the representative of employee interests." *COLUMBIA COUNTY, DEC. NO. 22683-B (WERC, 1/87)* "Domination" involves the actual subjugation of the labor organization to the employer's will. *BARRON COUNTY, DEC. NO. 26706-A (JONES, 8/91)* A dominated labor organization is so controlled by the employer that it is presumably incapable of effectively representing employee interests. *BLACKHAWK TECHNICAL COLLEGE, DEC. NO. 28448-B,29449-C (Nielsen, 7/97)*

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

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

In order to establish a violation of Sec. 111.70(3)(a)3, Stats., a complainant must prove all of the following elements:

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

Section 111.07(3), Stats., which is made applicable to this proceeding by Sec. 111.70(4)(a), Stats., provides that “the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence.”

Retaliation for lawful, concerted activity protected by MERA inherently discourages other employees from engaging in such concerted activity. Thus, to violate Sec. 111.70(3)(a)3, Stats., is to derivatively violate Section 111.70(3)(a)1, Stats. FINKELSON V. CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03)

As the Respondent argues, in FINKELSON, the Commission stated as follows:

In our view, a Section (3)(a)3 type analysis is sufficient and appropriate to apply to alleged violations of Sec. 111.70(3)(a)1, Stats., in cases like the present one, where the essence of the violation lies in the employer's motive for taking adverse action against one or more employees. If the circumstances demonstrate that the adverse action (e.g., termination, discipline, layoff) was lawfully motivated, we will not find it unlawful under Section (3)(a)1 simply because it could be perceived as retaliatory. To find an independent (3)(a)1 where the discipline was lawfully motivated would constructively establish a higher hurdle for disciplining union activists than for other employees. While we understand that the "valid reasons" portion of the traditional Sec. 111.70(3)(a)1, Stats., analysis can be viewed as sufficient protection against such a result, we think the law is well served by eliminating the potential for a contrary result.

The Examiner is satisfied that the “essence” of Complainant’s alleged violation of Sec. 111.70(3)(a)1 lies in Respondent’s motive for taking adverse action against Pantelis. Under the principles enunciated in FINKELSON, Complainant’s alleged “independent” violation of Sec. 111.70(3)(a)1, Stats., is, in fact, a derivative violation of Sec. 111.70(3)(a)3, Stats. Thus, to prevail upon its claim that Respondent violated Sec. 111.70(3)(a)1, Stats., Complainant first must prove that Respondent has violated Sec. 111.70(3)(a)3, Stats.

As Examiner David E. Shaw stated in VILLAGE OF STURTEVANT, DEC. NO. 30378-A (7/03):

Evidence of hostility and illegal motive may be direct, such as with overt statements of hostility, or as is usually the case, inferred from the circumstances. See TOWN OF MERCER, DEC. NO. 14783-A (Greco, 3/77). If direct evidence of hostility or illegal motive is found lacking, then one must look at the total circumstances surrounding the case. In order to uphold an allegation of a violation, these circumstances must be such as to give rise to an

inference of pretext which is reasonably based upon established facts that can logically support such an inference. See COOPERATIVE EDUCATION SERVICE AGENCY #4, ET AL., DEC. NO. 13100-E (Yaffe, 12/77), AFF'D, DEC. NO. 13100-G (WERC, 5/79).

It is irrelevant that an employer has legitimate grounds for its action if one of the motivating factors was hostility toward the employee's protected concerted activity. See LACROSSE COUNTY (HILLVIEW NURSING HOME), DEC. NO. 14704-B (WERC, 7/78). In setting forth the "in-part" test, the Wisconsin Supreme Court noted that an employer may not subject an employee to adverse consequences when one of the motivating factors is his or her union activities, no matter how many other valid reasons exist for the employer's actions. See MUSKEGO-NORWAY C.S.J.S.D. NO. 9 v. W.E.R.B., 35 WIS.2D 540, 562 (1967). Although the legitimate bases for an employer's actions may properly be considered in fashioning an appropriate remedy, discrimination against an employee due to concerted activity will not be encouraged or tolerated. See EMPLOYMENT RELATIONS DEPT. v. WERC, 122 WIS. 2D 132, 141 (1985).

Merits

Shortly after Elizabeth Pantelis became President of the Union in September of 2002, and continuing through 2003, Pantelis requested information on the County's performance award program for non-represented County employees; discussed this program with various County managers and elected officials; and shared this information with members of the Union's collective bargaining unit. By this conduct, Pantelis engaged in the exercise of lawful, concerted activities protected by MERA.

Given her position as Union President, the nature of her contacts with County representatives and their responses to these contacts (including Virginia Ramos' email of November 7, 2002), various County managers and elected officials, including County Executive Daniel Finley; County Director of Administration Norman Cummings; County Board Chairman Jim Dwyer; County Board Personnel Committee Chair Duane Paulson; and County Director of Human Resources James Richter, were aware of Pantelis' lawful, concerted activities protected by MERA. The Examiner turns to the issue of whether any County representative is hostile to Pantelis' exercise of lawful, concerted activities protected by MERA.

With respect to the performance award program activity which is the subject of this complaint, Pantelis' initial contact was with Employment Services Manager Suzanne Zastrow and involved a request for information. Zastrow provided the requested information. It is not

evident, that at the time of this contact, Zastrow exhibited any hostility to Pantelis' request for information.

Pantelis disseminated and discussed the information provided by Zastrow at a November 5, 2002 Union meeting. On November 6, 2002, Director of Human Services Richter telephoned Pantelis to clarify whether or not information that he was given by other managers and supervisors, regarding comments made at the Union meeting, was correct. Following this discussion, Richter issued his letter of November 6, 2002 and Pantelis responded with her letter of November 8, 2002. Richter did not respond to this November 8, 2002 letter because he and Pantelis had shared their thoughts and there was no need for further discussion. (T. at 225)

Pantelis construed Richter's letter to be a warning to be quiet about the performance award program and to not rock the boat. (T. at 29) The Union claims that the letter constitutes internal interference in Union affairs. Inasmuch as the letter was received more than one year before the Complaint was filed, the letter cannot be examined for the purpose of determining whether or not it violates MERA. However, this letter, as well as other County conduct occurring prior to the one year statute of limitations set forth in Sec. 111.07(14), Stats., may be examined for evidence of unlawful hostility. MORAINÉ PARK TECHNICAL COLLEGE, DEC. NO. 25747-C (McLaughlin, 9/89), aff'd DEC. NO. 25747-D (WERC, 1/90).

In his letter of November 6, 2002, Richter was critical of Pantelis' presentation of performance award bonus information to members of the Union's bargaining unit. Richter's criticisms were based on hearsay and disregarded the denials made by Pantelis during the telephone conversation of November 6, 2002.

On November 7, 2002, Virginia Ramos, an employee in Richter's office, issued a memo to "Department Heads and Elected Officials" on the "Release of 2001 Non-Represented Performance Award Information." This memo is a "heads up" to County management to explain why the Human Resources Office released information on the performance award bonus and to request that the Human Resources Office be alerted to "misinformation, rumors or inaccurate information" that should be addressed by the Human Resources Office. This memo contains the following:

We have historically tried to restrict access to this type of sensitive information.
The open records law required our compliance with the request.

Construed within the context of the memo, the "sensitive information" is performance award bonus information that identifies the "employee's name, classification, and dollar amount awarded." Information identifying an employee and the employee's compensation is sensitive. Thus, labeling the requested information as "sensitive" does not, in and of itself,

provide a reasonable basis to infer that Richter, or any Human Resources employee, is hostile to Pantelis' request for such information. Indeed, such an such inference is rebutted by the evidence that the Human Resources Office provided such information without any apparent objection; Richter's letter of November 6, 2002, in which he expressly recognized that Pantelis had a right to this information; and Richter's testimony that the Union is entitled to request information on the performance award program (T. at 227)

In summary, the evidence of Respondent conduct in November, 2002, does not indicate hostility to Pantelis' request for bonus performance award information. However, Richter's conduct exhibits "hostility" to Pantelis' presentation of information at the Union meeting of November 5, 2002.

A fair reading of Richter's letter of November 6, 2002 supports the inference that Richter's hostility is limited to the presentation of what Richter perceived to be incomplete and inaccurate information at the Union meeting on November 5, 2002. Given its juxtaposition to Richter's letter of November 6, 2002, one may reasonably infer that Richter's perception that Pantelis had not provided complete and accurate information to employees was also a motivating factor in the issuance of the "heads up" memo.

Following the Union meeting of November 5, 2002, Pantelis presented information at many Union meetings without eliciting any evident hostility from Richter. It is not evident that, following the memo of November 7, 2002, Richter engaged in any conduct that provides a reasonable basis to infer that Richter is hostile to Pantelis', or any employee's, exercise of lawful and concerted activity protected by MERA.

In summary, Richter's criticisms of Pantelis' conduct on November 5, 2002 reasonably support an inference that Richter is hostile to Pantelis' exercise of protected activity at the November 5, 2002 Union meeting. The Union argues that Richter's November, 2002 conduct suggests the substantial depth of resentment felt against Local 2494 activities in this area and serves as a prism into the County's thinking. However, the more reasonable conclusion to be drawn from the record, as a whole, is that the unlawful hostility exhibited by Richter in November, 2002 involved a personal, uncharacteristic and momentary fit of pique toward what Richter perceived to be an inaccurate and/or incomplete release of information on the performance award program.

After November, 2002, Pantelis continued to investigate the County's performance award program. During this investigation, Pantelis contacted, conferred with and/or requested information on the performance award program from Norm Cummings; Zastrow; Dwyer; Paulson; and Finley. At times, Pantelis was critical of the performance award program and/or an individual's support of this program. It is not evident that, during these contacts, any individual exhibited hostility to Pantelis' requests for performance award program information;

to her desire to discuss the performance award program; or to her dissemination of this information to Union bargaining unit members.

To be sure, during Pantelis' conversation with Paulson, Pantelis questioned whether Finley would win election if the public knew that he was providing more than \$260,000 per year in performance award bonuses. (T. at 45) It is not evident, however, that this remark caused Paulson any apprehension regarding the future job security of Finley, or any other concern. Notwithstanding Complainant's argument to the contrary, the record does not provide a reasonable basis to assume that Paulson must have reported Pantelis' remarks to Finley.

At times, County Representatives expressed disagreement with Pantelis' criticisms of the performance award program. Cummings, for example, expressed his opinion that to use monies set aside for performance bonus awards to offset employee health insurance costs would be tantamount to a social program funded by the nonrepresented employees. (T. at 204) However, expressions of disagreement with Pantelis' criticisms of, or opinions on, the performance award program do not, in and of themselves, provide a reasonable basis to infer unlawful hostility.

Norm Cummings states that, in early August of 2003, while finalizing the 2004 County Budget proposal of the County Executive, the County Executive made the decision to revise his proposed budget target by reducing this budget by approximately \$300,000. (T. at 175-176) Cummings further states that this budget target was based upon political decisions, *i.e.*, the County Executive's decision to propose a tax freeze in order to forestall those who wanted a zero levy budget (T. at 198) and economic reasons, *i.e.*, a projected loss of revenue, which loss was confirmed on August 15, 2003 (T. 175-76)

Cummings states that, in order to meet the revised budget target, Cummings and his budget team began to prepare a list of budget reductions in excess of \$300,000. (T. at 175-76) Cummings' testimony indicates that, at the time that Cummings was preparing this list, he became aware that the County Clerk had proposed new initiatives in her budget and that Finley was not supportive of these initiatives. (T. at 173) According to Cummings, he concluded that the County Clerk had proposed to significantly expand the duties of the County Clerk's office without requesting an increase in staff and, thus, if the County Clerk budget proposed by Finley did not include any expansion in duties, then one position could be abolished from the County Clerk's office without any detrimental effect to the operation of the office. (T. 182-83) Cummings states that he proposed the elimination of a Clerk Typist II position because there were two employees in the Clerk Typist II position and the Account Clerk position could not be abolished because it was needed to perform financial and accounting functions (T. at 179) and that he did not know which Clerk Typist II position would be abolished until the end of August, when he asked Richter for this information (T. at 181) Cummings further states that

he proposed the elimination of the Clerk Typist II position to the County Executive as one of his budget reduction proposals and that this proposal was accepted by the County Executive. (T. at 202)

Richter, who was involved in the budget process throughout 2003, confirms that the County Executive's initial budget target was revised; that this revision required a reduction of approximately \$300,000; and that the revision was based upon political, as well as economic considerations. (T. at 231) Richter also states that he understood that the Clerk Typist II position was being abolished because the County Clerk had proposed new budget initiatives that the County Executive did not agree with and, if the initiatives were not approved, then experience suggested that there was a staff position available for budget reduction. (T. at 234)

County Clerk Nickolaus states that, when she first presented her budget to Finley, he immediately responded that he did not want any of the new initiatives identified in her budget, but did not mention any staffing cuts and that, in a subsequent conversation, Finley advised her that he would be eliminating her new initiatives and one staff position. (T. at 97-98) Richter's testimony and Nickolaus' testimony is consistent with Cummings testimony regarding the genesis of the proposal to abolish the Clerk Typist II position in the County Clerk's Office.

Finley presented his proposed 2004 County Budget to the County Board on September 23, 2003, which proposal included the elimination of a Clerk Typist II position in the County Clerk's Office. The Board had authority to reject, modify and/or accept the proposals contained in this proposed budget. Prior to and after Finley's presentation of his proposed 2004 budget, the County Clerk opposed the elimination of the Clerk Typist II position. County Board Personnel Committee Chair Paulson was aware of the County Clerk's opposition.

On September 30, 2003, the members of the County Board Personnel Committee met to review the County Clerk budget that had been proposed by Finley. Prior to the start of this meeting, Paulson advised Richter that the Treasurer had a position that she was willing to share with the County Clerk and inquired, if, instead of just abolishing a position in the County Clerk's Office, could the County Clerk receive additional support by sharing the position with the Treasurer. (T. at 251) The record suggests that, at this time, the County Treasurer, County Clerk and Paulson anticipated that Pantelis would hold this shared position. (T. 256)

Concluding that Paulson's proposal made sense because the goal was budget reductions, Richter told Cummings that they should discuss the proposal with Finley to determine whether or not he had any objections; Richter then left the meeting to advise Finley that Paulson had made a proposal; and Richter described the proposal to Finley.. (T. 253) Richter recalls that Finley indicated that the proposal was acceptable because it met Finley's goal of a position elimination and that Richter could advise the Personnel Committee that Finley supported the shared position. (T. at 253-54)

After Richter reported that Finley supported the shared position, the Personnel Committee approved the elimination of a Clerk Typist II position in the County Clerk's Office, with the understanding that the Treasurer and the County Clerk would handle the details. (T. at 254-55) Thereafter, consistent with normal budget procedures, the County Board Finance Committee and the County Board approved the elimination of this position.

The "shared" position subsequently was offered to Pantelis. Pantelis rejected this offer because she did not believe that the offer was consistent with the requirements of the Union's collective bargaining agreement. (T. at 63-64) Pantelis was laid-off effective January 1, 2004.

In summary, Norm Cummings has provided business reasons for his decision to propose the elimination of the Clerk Typist II position in the County Clerk's Office and for the County Executive's acceptance of the same. Norm Cummings' testimony on this point finds support in the testimony of Richter and Nickolaus. The Complainant argues that these business reasons are pretextual or, at best, present a mixed motive.

At the time that Finley submitted the proposed budget, Finley knew that the abolished Clerk Typist II position in the County Clerk's Office was held by Pantelis. (T. at 98) Given Finley's comments to Pantelis, as well as the testimony of Richter and Norm Cummings, it is evident that, at the time of this submission, County management had concluded that there would be vacant positions for Pantelis to bid into and, thus, the elimination of her position would not result in her layoff from County employment. (T. at 54; 182; 243) However, as the Complainant recognizes, regardless of whether or not Pantelis would be able to obtain another County position, displacement from her position in the County Clerk's Office is an adverse employment action. Although the fact that Finley and other County representatives took this adverse employment action against the Union President is consistent with an inference of unlawful hostility, it is not sufficient, in and of itself, to reasonably infer a motive of unlawful hostility. FINKELSON, SUPRA.

As discussed above, prior to the elimination of her position, Pantelis had numerous contacts with County representatives regarding the performance award program. With the exception of Richter's conduct in November of 2002, it is not evident that, during these contacts, any County representative exhibited any hostility toward Pantelis.

Although Richter was involved in the budget process, the record provides no reasonable basis to conclude that he, rather, than Norm Cummings and Finley, was responsible for County management's recommendation to the County Board to abolish a Clerk Typist II position in the County Clerk's Office. Nor does the record provide a reasonable basis to impute the hostility exhibited by Richter in November of 2002 to any other County representative.

It is evident that Pantelis considers the performance award program to be unfair and indefensible. It is equally evident, however, that County representatives, including Richter, Norm Cummings, Finley, and Paulson, considered the bonuses to be reasonable and defensible and that this program was supported by the County Board. (Jt. Ex. 2; T. at 32-34; 44-45; 54-55; 184-187; 212-216).

The evidence of Pantelis' contacts with Norm Cummings, Finley, Paulson, and Dwyer, indicates that there was a willingness to listen to Pantelis; to provide her with information not protected by statute; and to have a dialog with Pantelis regarding the merits of the performance award program. Notwithstanding the Complainant's argument to the contrary, the record does not provide a reasonable basis to infer that Finley, or any other County representative responsible for the elimination of the position occupied by Pantelis, was unhappy with Pantelis for engaging in her performance program award activity; considered the performance award bonus to be a "scandal" to be kept hidden from the public; or feared, in any way, the effects of Pantelis' performance award program activity.

It is troubling that, when the County Clerk first questioned Finley about why he had decided to abolish a position in her office, he responded because he can. (T. at 107) Finley's failure to provide a reasonable response to the legitimate question of a Department Head suggests that the County Executive did not have a legitimate reason for taking this action. Nickolaus confirms, however, that, at some point, Finley told Nickolaus that he was looking for budget savings and that was why the Clerk Typist II position was abolished. (T. at 114)

In discussing her layoff with Pantelis, Finley remarked that no one would be laid off; that "you just won't be working in the County Clerk's Office." (T. at 54) This remark exhibits such a callous disregard of Pantelis' interest in retaining her chosen position that it reasonably gives rise to an inference of unlawful hostility. However, given the lack of direct evidence of hostility by Finley; the evidence that the County had business reasons for eliminating the Clerk Typist II position; and Finley's eventual recognition of these business reasons, it is more reasonable to attribute Finley's comments to Nickolaus and Pantelis to arrogance and tactlessness, than to infer unlawful hostility.

Although Complainant argues that Finley bragged that he could accomplish his budget goals even if they were improper, it is not evident that Finley has acknowledged any improper budget goals. Nor does the evidence that Finley did not pursue budget options deemed reasonable by the Complainant, including rejecting Pantelis' suggestion that he obtain his budget savings by eliminating the performance award bonus, provide a reasonable basis to infer that Finley has acted unlawfully.

The County Clerk's proposed budget would increase revenues by at least \$50,000. Arguably, these projected revenues could be used to offset the budget reductions anticipated by

the elimination of the Clerk Typist II position. However, at the time that Norm Cummings proposed the elimination of the Clerk Typist II position, he was anticipating that the County Executive would not agree to any of the new initiatives. Thus, there would not have been any revenues generated by new initiatives. Nickolaus' testimony, as well as Norm Cummings' testimony, indicates that it was reasonable for Norm Cummings to anticipate that the County Executive would not agree to any of the new initiatives. (T. at 97; 107; 158-62) The County Executive did not accept any of these new initiatives when he proposed his 2004 County Budget. (T. at 107)

The County Clerk intended to perform all work resulting from her proposed new initiatives and made these intentions known to Norm Cummings, as well as to Finley. (T. at 108-09) This evidence, which indicates that the County Clerk had time to perform additional work, suggests that Norm Cummings' conclusion that, if the new initiatives were not instituted, then the County Clerk's Office could be reduced in staff without adversely affecting the provision of services, is *bona fide*.

In the past, the County used a time study when it abolished the function of DNR licenses. (T. at 199-200) It is not evident, however, that there was a practice of time studies such that the County's failure to do a time study of the Clerk's Office would provide a reasonable basis to infer that the elimination of Pantelis' Clerk Typist II position was not *bona fide*.

The Complainant argues that any pretext of legitimacy was belied when the position abolished was restored. The record, however, does not indicate that the abolished position was restored. Rather, the record indicates that a decision was made to fill an existing vacant position in the Treasurer's Office and to share that position with the County Clerk. (T. at 99 and 251) It is not evident that the position in the Treasurer's Office was not currently funded. Moreover, when Richter was informed of the proposal on the "shared position," he concluded that it made sense because the goal was budget reductions. (T. at 253) The evidence of the County's decision to have the Treasurer share a position with the County Clerk does not provide a reasonable basis to infer that Respondent's professed reasons for the elimination of the Clerk Typist II position, *i.e.*, budget savings, are pretextual.

The Complainant, not the Respondent, bears the burden of proof in this proceeding. No adverse inference is warranted by the failure of the County to call the County Executive as a witness. Nor is an inference of unlawful hostility warranted by Respondent attorney's objection to an exhibit that the Complainant sought to introduce at hearing.

In summary, Norm Cummings and Finley were the County representatives responsible for proposing the abolishment of the Clerk Typist II position held by Pantelis. The members of the County Board's Personnel and Finance Committees and the Board, as a whole, accepted this proposal.

Respondent has offered legitimate business reasons for Norm Cummings' and Finley's decision to propose the abolishment of the Clerk Typist II position held by Pantelis, *i.e.*, budget savings. It is not evident that member's of the County Board accepted this proposal for any reason other than it had been proposed by Finley.

There is no direct evidence that Norm Cummings, Finley, or any member of the County Board is hostile to Pantelis' performance award program activities, or any other lawful, concerted activity protected by MERA. Although there is some indirect evidence of unlawful hostility on the part of Finley, the total circumstances of this case do not warrant the conclusion that Finley is hostile to Pantelis' lawful concerted, activity, or that Respondent's business reasons for the abolishment of the Clerk Typist II position are pretextual.

Conclusion

The clear and satisfactory preponderance of the evidence does not establish that Respondent's decision to abolish the Clerk Typist II position held by Pantelis was motivated, in any part, by hostility toward lawful, concerted activities protected by MERA. Thus, contrary to the argument of the Complainant, it has not met its burden of proof with respect to its Sec. 111.70(3)(a)3, Stats., claim. Inasmuch as Complainant's Sec. 111.70(3)(a)1 claim is derivative to its Sec. 111.70(3)(a)3 claim, Complainant has also failed to meet its burden of proof with respect to its Sec. 111.70(3)(a)1 claim.

Complainant has not established, by a clear and satisfactory preponderance of the evidence, that Respondent has initiated, created, dominated, or interfered with the formation or administration of any labor organization in violation of Sec. 111.70(3)(a)2, Stats. Complainant's complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 3rd day of November, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

CAB/gjc
30799-A

