STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NICKOLAS A. JANOVSKI, JR., Complainant,

vs.

CITY OF LAKE GENEVA UTILITY COMMISSION, Respondent.

Case 5
No. 63948
MP-4087

Decision No. 31126-A

Appearances:

Nickolas A. Janovski, Jr., W4766 Stateline Road, Walworth, Wisconsin 53184, appearing on his own behalf.

Steven B. Rynecki and **Paul Stenzel**, von Briesen & Roper, S. C., Attorneys at Law, 411 East Wisconsin Avenue, Suite 700, P.O. Box 3262, Milwaukee, Wisconsin 53201-3262, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On August 30, 2004, Complainant filed a complaint of prohibited practice alleging that Respondent had violated Sec. 111.70(3)(a)1, 2 and 3, Stats., by terminating his employment for asserting rights protected by Secs. 111.70(2), Stats. The Commission, on October 26, 2004, appointed Richard B. McLaughlin, a member of its staff, to act as Examiner. On November 9, 2004, Respondent filed its answer to the complaint. Hearing on the matter conducted in Lake Geneva, Wisconsin on November 17, 2004. Eileen Walsh Grzenia filed a transcript of the hearing with the Commission on December 7, 2004. The parties filed briefs and reply briefs by Janury 19, 2005. In a letter to the parties dated March 16, 2005, I stated:

> I write to advise you that I have reviewed the file in LAKE GENEVA UTILITY COMMISSION, Case 3, No. 63857, ME-3989, to clarify certain factual issues posed in the complaint case noted above. Case 3 is the Commission file reflecting the processing of the Petition for Election filed by the Labor Association of Wisconsin, Inc. The following summarizes my review of Case 3 . . .

> Sec. 227.45, Stats., may not require me to advise you of my review, but I think it makes such notice at least desirable. If you have any comment regarding the points stated above, please file them postmarked not later than March 24, 2005.

Complainant filed a response to this letter on March 29, 2005, which was postmarked March 24, 2005, and which states:

> The employee has no knowledge of the documents submitted between the WERC and the Lake Geneva Utility Commission.
>
> The only document between the WERC and the employer the employee is aware of is . . . a hand written memo from Dan Winkler dated July 16, 2004, detailing a conversation between him and Peter Davis of the WERC.
>
> This document clearly shows the employer did not begin any "investigation" into the employee until after they were aware of the employee's organized labor activity.

I received no other response to this letter by the date of issuance of this decision.

FINDINGS OF FACT

1. Complainant, Nickolas A. Janovski Jr., is an individual who resides at W4766 Stateline Road, Walworth, Wisconsin 53184. Complainant worked for the Respondent for several years prior to his discharge effective July 27, 2004.

2. Respondent, City of Lake Geneva Utility Commission, is a municipal employer which maintains its offices at 361 Main Street, P.O. Box 187, Lake Geneva, Wisconsin 53147. Respondent is administratively structured into three units: the Water Department, the Wastewater Department and the Business Office. Each unit reports to the Lake Geneva Utility Commission. The Commission's President is Birdell Brellenthin, and its Director is Daniel Winkler. Winkler also serves the City of Lake Geneva as its Director of Public Works. Kenneth Kurpeski is the Water Department Superintendent; is the direct supervisor of Kent Wiedenhoeft and Michael Love; and was the direct supervisor of Complainant prior to Complainant's discharge. Scott Tesmer is the Wastewater Department Superintendent and the direct supervisor of Scott Eckert, Robert Leber and Ken Bauman. Cynthia Gage-Twist is the Business Office Manager, and the direct supervisor of Marilyn Kolb and Barbara Giovannoni. Department supervisors report to Winkler, who reports to the Utility Commission.

3. Winkler and Kurpeski viewed Complainant as a good worker, but were concerned over time regarding his ability to get along with other employees and to control his temper. Complainant enjoyed, at certain points during his tenure with Respondent, a good working relationship with Business Office staff. With the retirement of Jerry Tomaske sometime in 2002, Kurpeski assigned Tomaske's custodial duties in the Business Office to

Complainant. As a result, Complainant spent more time in contact with Business Office employees. His working relationship with Business Office staff deteriorated over time, particularly with Twist. Each Business Office employee believed that Complainant disliked or resented Twist, and perceived his conduct toward her to be different than toward them. While speaking with Business Office employees other than Twist, Complainant and Love would refer on occasion to Twist as "the B" or as a "bitch", and would, on occasion, tell Kolb and Giovannoni that Winkler and Twist were having an affair. Giovannoni and Kolb perceived that Complainant performed or chose not to perform certain tasks to upset Twist. Complainant intimidated each Business Office employee in varying degrees. Twist feared him. Twist was sufficiently bothered by the work environment, and particularly by Complainant's treatment of her, that she took a roughly three month medical leave of absence in the summer of 2003.

4. Complainant viewed Utility managers to show favoritism to certain employees. Sometime late in 2003, Wiedenhoeft informed Complainant that Winkler informed him during his employment interview the prior August that Winkler viewed him as a person who could help Winkler bring about a change in the management of the Utility, and that Winkler hoped to replace certain employees Winkler had not hired, including Complainant, Love and Kurpeski. Complainant's concerns heightened in February of 2004, when the Utility switched his and Leber's work assignments to cross-train them. After this experience, Complainant concluded that Leber abused other employees; failed to perform his duties, particularly logging the operation of lift stations; used Utility internet access for personal use, including extensive viewing of pornographic sites; used Utility automotive supplies for his personal vehicle; and carried on an extra-marital affair during work time, using a Utility vehicle to travel to and from visits to his lover. Complainant believed Leber acted with impunity, and Complainant voiced his concerns to other employees.

5. Winkler authored a three-page memo to "All Utility Commission Employees" dated March 3, 2004 entitled "Insubordination – Boisterous or Disruptive Activity in the Workplace." The memo states:

> . . . All employees shall take note as follows:
>
> 1. **If the Director personally observes or hears employees being boisterous, disrespectful, or arguing with each other, in the "field", front office or the back operations area,** the employee(s) will be suspended without pay for one (1) day pending a full review of the situation and interviews with the affected employees and witnesses. The suspension is effective immediately and such employee(s) issued the suspension will be required to vacate all Commission premises. Depending upon the severity of the original insubordination incident and its cause, further disciplinary action may result, up to and including discharge. If the employee(s) involved in the incident refuse to leave the premises as ordered, the employee(s) will be found insubordinate a second time and the employee(s)

terminated at that time. Law enforcement may be called to remove the former employee(s) from the premises after demanding and obtaining all Utility Commission property . . .

2. **If an employee is being boisterous, disrespectful, or is arguing with another employee and is confronted by myself, asked to desist in the behavior, and begins being boisterous, disrespectful, or arguing with the Director,** the employee will be considered insubordinate a second time and the employee immediately discharged. Law enforcement may be called to remove the former employee from the premises after demanding and obtaining all Utility Commission property . . .

3. **If an employee is being boisterous, disrespectful, or argues with his or her supervisor or <u>any</u> supervisor, that supervisor is in full authority** to suspend the employee for insubordination without pay for one (1) day, effective immediately, pending a review of the situation and interviews by the Director with all employees involved and any witnesses. **If a supervisor observes such behavior taking place between any Utility employees, the supervisor is also in full authority** to suspend the employee for insubordination without pay for one (1) day, effective immediately, pending a review of the situation and interviews by the Director with all employees involved and any witnesses. Depending upon the severity of the insubordination incident and its cause, further disciplinary action may result, up to and including discharge. If the employee involved in the incident refuses to leave the premises as ordered by any supervisor, the employee may be escorted out by law enforcement to remove the employee, from the premises. . . .

4. **It is the responsibility of all employees to notify the Director of boisterous, insubordinate and disruptive conduct** as described herein or any other serious violation of the work rules. Failure to report such serious violations of the work rules may result in disciplinary action of a progressive nature.

5. **If an insubordinate employee attempts to harass . . . or . . . take retribution on any other employee** in any form for following the orders of the Director and reporting work rule violations, such conduct shall be reported immediately to and be investigated by the Director. If there is determined to be just cause, the insubordinate employee harassing any other employee shall be immediately discharged. The employee shall return all . . . Commission property . . . and vacate the premises. Law enforcement may be called to

> remove the former employee from the premises after demanding and obtaining all Utility Commission property . . . my objective is to ensure fair and honest treatment of all employees. Violating the established rules of conduct adversely impacts both operations and morale of the organization. It cannot and will not be tolerated. In order to guarantee fair treatment, any discharges will be subject to the full and impartial review of the governing body, our Utility Commission. . . .

Winkler discussed the memo at a staff meeting conducted on March 5. He authored the memo in response to Complainant's conduct. The Utility maintains a high season schedule between the months of April and September, which requires four nine-hour workdays on Monday through Thursday, with four hours on Friday. In early March, Complainant made vacation calendar entries indicating he wished to take off every Friday throughout the high season schedule. Winkler informed Kurpeski that Complainant could not do this, because the Utility could not meet high season work demands if Complainant worked a four-day week. When Kurpeski informed Complainant, Complainant screamed at Kurpeski. Complainant, after finishing with Kurpeski, went to the Business Office, illustrating his anger over the incident to Giovannoni by pointing through a window to a trailer and indicating that Complainant would do whatever he had to do to take Kurpeski's home from him, leaving the trailer for him. Winkler had heard Complainant yell at Kurpeski before, and had once sent Complainant home without pay for such conduct. He viewed the memo and staff meeting as necessary to demonstrate the need for civility in the workplace. Winkler enforced this memo in May of 2004, after a confrontation between Eckert and Leber. Eckert informed Tesmer that Leber was leaving work early, turning in time cards indicating he had filled out his shift. Tesmer confronted Leber on the point. Leber, angry over the point, confronted Eckert in a break room in early May, screaming epithets at Eckert, stating in effect that he knew where Eckert lived and graphically indicating the type of beating Eckert would receive there. Winkler was informed of the incident and confronted Leber. Leber apologized for the incident and stated it would not happen again. It was, to Winkler's knowledge, the first such incident in Leber's employment. Winkler suspended Leber for one day, and put him on a six-month probation period. He did not inform other employees of his action.

6. Winkler issued a memo, dated May 6, 2004, to all Utility employees entitled "Sick Leave." The memo reviewed the accrual and use of sick leave, as well as the implications of the abuse of sick leave. The memo states:

> . . . unauthorized absence, violation of personnel policies, unsatisfactory conduct, falsification of timekeeping records, and excessive absenteeism all relate to this type of abuse. These infractions are all subject to disciplinary action up to and including discharge. . . .

Winkler authored this memo in response to the Grievant's conduct. Sometime in early January of 2004, Complainant noted to Kolb that he had accrued eight hundred hours of sick leave, and

asked what happened after that level. Kolb responded that eight hundred hours was the maximum accrual, and that sick leave earned past that level could not be banked. Complainant responded that he would use more sick leave. Kolb, who handles the Utility payroll, noted Complainant used a large amount of sick leave between January and April of 2004, and informed Winker. Because Winkler was aware that other employees had large sick leave balances, he issued the memo to all employees rather than restricting it to Complainant. On May 25, 2004, Winkler verbally counseled Wiedenhoeft and Complainant for not following instructions on the placement of a bronze water fountain. Winkler informed Kurpeski that the fountain, which was worth roughly $130,000, should not be taken from storage until the installation contractor was ready to assemble it and put it into operation. Kurpeski informed Winkler that Complainant and Wiedenhoeft took the fountain from storage and moved it to the installation site at a time convenient to Complainant's work schedule without regard to the schedule of the installation contractor. In mid-June of 2004, Complainant moved a large number of book-keeping documents and their containers from the office in which they had long been stored to a smaller, upstairs office. Complainant and the co-worker who assisted him did not attempt to place the moved materials in the order in which they had been stored, or in any particular order. Some of the documents were no longer used, but some were, and their storage prior to the move was convenient to Business Office employees, particularly Twist. Twist was on vacation or leave at the time, and Giovannoni warned Complainant that the move would cause trouble. Kolb, after discussion with Complainant, believed that Complainant moved the files because he was upset that Winkler, on Kolb's suggestion, had directed that the locker room for field employees be moved from the shop area, which is viewable from the Business Office, to an office where it is not. When Twist returned to work, she reported the matter to Winkler, who told her that they would go through the files to determine which documents could be destroyed, but that the effort should not be made until he returned from vacation in July.

7. July 5, 2004 was a Monday, and the Utility offices were not open to the public in observance of the July fourth holiday. Complainant was on duty, and in the Utility office on the morning of July 5. Complainant saw Winkler and a woman in the Business Office. He did not identify himself to them, and returned to the lab, at the rear of the building. Winkler had disarmed the alarm to the office to enter it, and before leaving the office, informed the Complainant to enable the alarm.

8. On July 6, 2004, Complainant informed Kurpeski that he had seen Winkler and Twist in the Utility office on the morning of July 5, and that Twist's shoulders and back were bare and that she and Winkler were embracing. Complainant also phoned Bauman's home, and informed Bauman that he had seen Winkler and Twist in the Utility Office on the morning of July 5, in a compromising, sexually explicit position. He told Bauman that Winkler had heard him, found him in the lab, and stated that he was unaware that anyone was in the office. Complainant informed Bauman that he was relaying what he saw to Bauman because he feared retaliation. He asked for Bauman's advice, and Bauman stated that he would have a meeting with Brellenthin and his supervisor. Complainant relayed the story he told Bauman to other Utility employees after July 6.

9. On Thursday, July 8, 2004, Twist asked Complainant to empty a bag which collected scraps of paper fed through a paper shredder. Complainant removed the bag, but did not replace it, and the next use of the shredder resulted in paper scraps being fed to the office floor. Twist picked up the larger scraps and asked Kurpeski to have Complainant vacuum the rest. After receiving Kurpeski's instructions, Complainant went to the office floor and picked up the remaining scraps by hand. Twist saw him and said she had not meant for him to have to pick the scraps up, but to vacuum the floor. Complainant said nothing to Twist directly. Rather, he walked throughout the front office, complaining audibly so that other employees could hear him. He ultimately complained to Kurpeski that Twist was harassing him. Twist heard Complainant tell Kurpeski about the matter in the back of the office, joking that Twist was afraid to get on her hands and knees. She reported the matter to Winkler, who interviewed Kurpeski and Twist, then directed Kurpeski to send Complainant home for the balance of his shift, which was roughly three hours. Winkler informed Kurpeski that if Complainant raised his voice about the matter, he would face a three-day suspension. Winkler added that he would determine later whether or not the three remaining hours on Complainant's shift would be paid. Later that afternoon, Winkler phoned Tesmer, Brellenthin and Complainant. Winkler discussed with Tesmer whether a transfer to the Wastewater Department might address the problems between Complainant and Twist. Brellenthin advised Winkler that a meeting should be held on July 9, to address Complainant's conduct. Winkler then phoned Complainant, directing him to report for work on Friday, July 9, at 8:00 a.m. to meet with Winkler and Brellenthin about the incident. Complainant asked whether his job was at risk and whether he should bring an attorney.

10. On July 9, 2004, Complainant reported for the meeting. Brellenthin and Winkler informed Complainant what Winkler had concluded as a result of his interviews with Twist and Kurpeski, and asked Complainant to tell his side of the incident. Complainant responded that he had done nothing wrong, and had picked up the paper as directed. Winkler and Brellenthin referred to a memorandum during this discussion, but did not share the document with Complainant. The discussion became animated, with Complainant asking if he needed an attorney. Ultimately Brellenthin and Winkler sent Complainant home, without pay, and relieved him from call-in duties for the weekend as a "cooling-off" period. Complainant's account of the circumstances on July 9 was sufficiently convincing to Winkler that he interviewed Kurpeski and Twist after Complainant was sent home. He and Brellenthin ultimately concluded that Complainant had lied regarding the events, and decided to suspend him without pay. They documented their conclusions in a memo dated July 12, which Complainant found on his desk on Tuesday, July 13. The memo, authored by Winker, is entitled "Disrespectful Conduct and Insubordination", and states:

> While I value your work ethic, my top priority of getting along with your co-workers is simply not being met. Open criticism of fellow workers and supervisors for some reason continues. This kind of behavior is absolutely unacceptable, detrimental to the morale of the utility, and is disruptive to the workplace.

After our meeting . . . the following actions were and are hereby taken:

- You will be paid for a full day for Thursday, July 8th. . . .
- On Friday, July 9th . . . you are suspended the 4 hours without pay.
- You were relieved from on-call for the July 9th weekend.
- Effective immediately, you are relieved from normal custodial duties, subject to specific assignments from your supervisor.
- The early morning 2:30 AM shift for all operators is discontinued, as it is my desire to eliminate fatigue as a possible factor in these situations.
- Any further incidents of the kind described herein will result in dismissal.
- It is strongly recommended you pursue the counseling benefit through the City's EAP . . .

Sometime after the events of July 5, but prior to July 12, 2004, Complainant contacted representatives of the Labor Association of Wisconsin, Inc. (LAW). Sometime during this period, Complainant discussed this contact with other employees.

11. The Labor Association of Wisconsin, Inc., (LAW) conducted a meeting among certain employees of Respondent on July 14, 2004. Sometime before this meeting LAW sent a letter to Respondent, noting its interest in representing Respondent's employees. Brellenthin received that letter and was aware of the July 14 meeting prior to July 14. On Thursday, July 16, 2004, the Labor Association of Wisconsin, Inc., filed a "Petition for Election" form with the Commission, seeking an election in the following bargaining unit: "All regular full-time and regular part-time employees of the Lake Geneva Utility Commission, but excluding supervisory, managerial and confidential personnel." The Commission mailed a copy of the petition to Winkler in a letter dated July 19, 2004. On August 9, 2004, the parties filed a "Stipulation For Election" form with the Commission, which included an eligibility list of six employees. Complainant was not one of the named employees. On August 10, 2004, the Commission issued a Direction of Election by mail ballot, and certified the results of that election in an Order dated September 28, 2004.

12. During the afternoon of Thursday, July 15, 2004, Leber came to Winkler's office. He informed Winkler that Complainant was relaying to Wastewater Department employees the story noted in Finding of Fact 8. Leber added that Complainant had organized a meeting with a union the prior evening to try to shield himself. Winkler had no knowledge of the rumors or of the organizational campaign prior to this conversation. He was astounded, and contacted Wiedenhoeft and Tesmer. He saw Wiedenhoeft in a Utility truck, and stopped him. Winkler perceived Wiedenhoeft's response to be that he was not inclined to credit much of what Complainant said, and that he was not willing to supply detail regarding the rumors relayed by Complainant. Tesmer responded in a similar fashion. On Friday, July 16, Winkler phoned Bauman. Bauman relayed a more graphic description of the rumor than Tesmer or

Wiedenhoeft had. Bauman also supplied more detail on what Complainant had said regarding the organizational campaign. Bauman informed Winkler that Complainant argued that LAW offered protection for "the little guys." Winkler responded that he did not want to pressure Bauman, but was interested in any detail Bauman was willing to offer regarding Complainant's assertion that he had seen Winkler and Twist in a sexual embrace. He then phoned a representative of LAW. Winkler asked the representative questions about the union, and observed that he did not know what he had done to merit an organizing drive. The LAW representative referred him to the WERC. Winkler then phoned the WERC's General Counsel and asked a series of questions regarding the election process. During the conversation Winkler indicated that one of the employees involved in the campaign had made improper allegations of sexual misconduct regarding him and was attempting to use LAW to shield his misconduct. Winkler understood the General Counsel's response to be that an employee cannot use a union as a shield from misconduct, but that Winkler needed to apply uniform, rigorous standards to relate any discipline to the misconduct. Winkler then contacted Love, who supplied little information regarding the rumors. After work, Winkler phoned Eckert, who was on sick leave, but not at home when Winkler called. When Eckert returned the call, Winkler asked about the rumors of sexual misconduct relayed by Complainant. Eckert informed Winkler that Complainant had called him repeatedly on the weekend of July 10, while Eckert was not home. Eckert stated that when he and Complainant spoke, Complainant relayed his account of seeing Winkler and Twist in a compromising position. After they had discussed the rumors, Winkler indicated to Eckert that whether on not Eckert was the source of the contact with LAW, Winkler could deal with employees with or without a union.

13. On July 16, 2004 Winkler contacted the Lake Geneva Police Department to determine if it would conduct an investigation regarding the rumors relayed by Complainant. On July 18, Complainant called Kurpeski to request a day of sick leave for July 19. Complainant consulted his doctor on July 19, and the doctor told him to take one week off of work. Sometime during the day on July 19, Kurpeski phoned Complainant to advise him that Winkler and Brellenthin wanted him to report to work, and that the police were there. Complainant asked if the matter was disciplinary, Kurpeski responded in the affirmative, and Complainant stated he was going to call LAW, then hung up. Complainant did not report for work on July 19. Respondent did not discipline him. On July 19, Brellenthin assumed responsibility for the investigation. On July 20, Winkler left Lake Geneva to vacation in Mexico. He did not return to the Utility office until July 28.

14. Brellenthin obtained Winkler's view of the allegations and a statement from Winkler's wife. Those accounts indicated that Winkler and his wife had been at Utility offices on the morning of July 5; that Winkler disarmed the security system, left his wife to use a copy machine then went on an errand until he returned to pick her up; that Winkler saw a light on in the office and called to whomever was in to rearm the security system. Between July 20 and July 22, 2004, Brellenthin personally interviewed or received statements from Bauman, Eckert, Leber, Twist, and Twist's fiancée. Twist's and her fiancé's accounts indicated they had gone on a shopping trip that day to Sturtevant and to Kenosha before returning to Lake Geneva late in the afternoon. They supplied receipts to document their account. Brellenthin issued a letter dated July 22 to Complainant, which states:

> This is to advise you that I am ordering you to meet with me on Monday, July 26, 2004, at 1:00 p.m.
>
> Do not report to work before this meeting. The purpose of this meeting is to investigate reports of certain representations you have allegedly made about top administrative personnel.

Complainant, on July 22, phoned Kurpeski to advise him that he had a doctor's appointment on July 26, a day he was scheduled to work. Sometime after this on July 22, law enforcement officers delivered the July 22 letter to Complainant's home. Sometime after this, Complainant phoned LAW, informing a LAW representative that he had a doctor's appointment set for July 26. Complainant understood the LAW representative's opinion to be that if Complainant's supervisor had approved the sick leave, Complainant was not bound to report to the meeting, but should supply a doctor's statement excusing him from attending the meeting. Complainant did not report for the meeting of July 26, but did report to his doctor. He did not tell the doctor about the meeting. The doctor faxed a document from his office to the Utility offices on July 26. Brellenthin could not read the doctor's name on the fax, did not see any description of symptoms or a course of treatment; and concluded that there was no medical reason for the Complainant's non-attendance. He responded by issuing a letter dated July 26, which states:

> This letter is to inform you of the conversion of your sick leave status to an unpaid leave status. I ordered you to attend a meeting with me to wind up my investigation of your allegations against certain administrative personnel of the Commission. You failed to attend.
>
> My investigation indicates you have been lying and spreading ma1icious rumors about innocent co-workers. If you had attended the meeting today, and my preliminary finding were confirmed, we would have ended your employment with the Commission.
>
> If, later, it turns out your allegations were bonified, we will return you to pay status from 7/26/04. In the meantime, complete the enclosed Release so that we can consult your doctor as to the particulars of your use of sick leave. I still want to hear your side of the story; if you wish to tell me, call my cell . . . or home . . . I plan to make my final determination on or about 7/29/04.

Brellenthin left a copy of this letter with Complainant's check at the Business Office. Complainant did not collect them. Brellenthin or Winkler requested law enforcement officers to deliver the July 26 letter to Complainant's home. They did so at roughly noon on July 28. Complainant's mother received the letter. Complainant did not respond to it, but Complainant's mother submitted a request for Family and Medical Leave on Complainant's behalf at the Business Office on the morning of July 29. Brellenthin issued a letter of termination dated July 29, which states that Complainant's "employment . . . is hereby

terminated as of July 27, 2004." Law enforcement officers delivered the letter to Complainant's mother at his home on July 29. Complainant did not respond to it. His mother was watching his home because Complainant was staying in Illinois with his brother.

16. On or about July 30, Winkler addressed Water and Wastewater Department employees. He noted Complainant's discharge and stated that the discharge was not related to the organizational campaign. He represented that he could work with or without a union. After that date, Winkler discussed the organizational campaign with several employees, making similar representations. During those discussions, he also stated that if employees organized, existing levels of wages and benefits could not be taken as a given, but would have to be bargained. Certain Department of Public Works employees of the City of Lake Geneva who are supervised by Winkler are represented by a union. Prior to the merger of the Water and Wastewater Departments into a single utility, Wastewater employees were represented by a union. Respondent's employees perceived Complainant's termination to be tied to his relaying of the account noted in Finding of Fact 8 and not to his contact with LAW.

17. Winkler did not discipline Leber for falsifying time records because he believed Leber left work for medical reasons related to high blood pressure, and had neglected to note the absence on his time records. He understood Leber to have apologized to Tesmer when informed of the problem. Winkler was not aware at any time prior to Complainant's discharge that employees believed that Leber was using the internet or Utility automotive supplies for personal reasons. Discussion between LAW representatives and Respondent's employees concerning the formation of a union is lawful, concerted activity. As of the issuance of the July 29 letter of termination, Respondent had substantial evidence indicating Complainant had misrepresented fact regarding the events of July 5 and regarding subsequent events. Respondent's discharge of Complainant rests on that evidence and not on hostility toward employee exercise of lawful, concerted activity.

CONCLUSIONS OF LAW

1. Complainant, while employed by Respondent, was a "Municipal employee" within the meaning of Sec. 111.70(1)(i), Stats.

2. Respondent is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

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

4. The misconduct for which Respondent discharged Complainant does not constitute lawful, concerted activity within the meaning of Sec. 111.70(2), Stats.; Respondent's termination of Complainant's employment was not based on hostility toward the exercise of rights set forth in Sec. 111.70(2); and Respondent's discharge of Complainant did not interfere with the formation of any labor organization. Thus, Respondent's discharge of Complainant does not constitute a violation of Sec. 111.70(3)(a)1, 2 or 3, Stats.

ORDER

The Complaint is dismissed.

Dated at Madison, Wisconsin this 31st day of March, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

CITY OF LAKE GENEVA UTILITY COMMISSION

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE PARTIES' POSITIONS

The Complainant's Brief

Complainant argues that analysis of the record must focus on three aspects: "the credibility of the witnesses, the intent of Birdell Brellenthin and Dan Winkler, and more importantly the precedents in discipline set forth by management". After an extensive review of the testimony, Complainant concludes that Respondent has been unable to prove it discharged Complainant for lying and has been unable to prove it "applied a uniform standard of discipline amongst its employees".

More specifically, Complainant contends that its assertion Complainant lied during Brellenthin's investigation cannot support his discharge unless it can "show to the WERC that it enforces its discipline evenly and uniformly." The evidence shows, however, that Brellenthin, while accusing Complainant of lying, perjured himself. Beyond this, the evidence shows that Love spread rumors regarding a sexual relationship between Winkler and Twist, yet Respondent neither investigated the rumors nor disciplined Love. Similarly, Respondent ignored employee complaints that Leber had falsified time records and used Respondent property for personal and illegitimate use. When Leber assaulted one of his accusers, Respondent responded with no more than placing Leber on probation.

Respondent showed no such restraint regarding Complainant. Three weeks prior to his termination, Respondent suspended him and threatened him with discharge for "requesting to speak with an attorney before writing down his verbal grievance". At hearing, Respondent supplied no fewer than three explanations to account for the suspension. None reflect an investigation and none is supported by the evidence. Brellenthin refused to speak with Complainant's representative and acted to schedule an investigatory meeting at a time he knew Complainant could not attend. The evidence collected by Brellenthin cannot prove Complainant lied regarding the events of July 5, 2004. In any event, Respondent never informed Complainant of the reason for the suspension until after he had served it.

Winkler's conversation with the WERC establishes that Respondent must enforce its discipline uniformly. The evidence establishes it has not, and has consistently treated Complainant unlike any other employee. That the termination came "one day before being required to turn in a list of employees to the WERC" cannot be dismissed as coincidental. The rush to discharge Complainant can be accounted for only by concluding the "big hurry was to terminate his employment before giving the WERC the list of full time employees." The pattern of singling out Complainant for discipline cannot be explained by any rationale asserted by Respondent. It follows that Respondent discharged him "because of his involvement with organizing a labor union."

The Respondent's Brief

After an extensive review of the record, Respondent argues that the evidence supports none of Complainant's allegations. The alleged violation of Sec. 111.70(3)(a)2, Stats., "is inapplicable to the record." The complaint and the evidence focus solely on Complainant's conduct and there is no "testimony whatsoever that the Utility Commission threatened the independence of a labor organization."

Nor will the evidence support finding a violation of Sec. 111.70(3)(a)1, Stats. Complainant, after his termination, cannot be considered a party in interest and thus the Commission "is jurisdictionally barred from hearing" post-termination evidence. To the extent the evidence was permitted to be connected up to the discharge under Sec. 111.7(3)(a)3, Stats., it must be rejected because it was never "connected up." In any event, it can have no bearing on the alleged violation of Sec. 111.70(3)(a)1, Stats.

The record cannot be interpreted to indicate any evidence of Respondent coercion of Sec. 111.70(2), Stats., rights. The evidence shows that Winkler took no action and made no statements to employees that could chill their exercise of the right to unionize.

Nor will the evidence support a finding that Respondent violated Sec. 111.70(3)(a)3, Stats. Brellenthin made the decision to discharge, and he had no knowledge that Complainant was supporting an organizational campaign. Even if it could be shown that he had such knowledge, he had no hostility toward it. In fact, the "evidence shows that key Utility Commission management employees were decidedly neutral toward union activity." Complainant's assertion that the timing of the discharge was suspect ignores that this is legally insufficient to establish proscribed hostility. If this was not the case Complainant could "avoid his legitimate termination by hiding behind the shield of union activity."

The evidence establishes Complainant "created the circumstances of the timing of his termination by perpetrating a lie about . . . Winkler and . . . Twist and then engaging in union organizing activity as a way to protect himself". That he testified that he was less than positive that he saw Twist and Winkler in a compromising position on July 5 cannot obscure that he told other employees the lie "without any qualification". His lack of judgment prompted the termination. Applicable case law demands that his conduct not be rewarded. Beyond this, the record as a whole demands that Complainant's "charges should be dismissed."

The Complainant's Reply Brief

To show it did not discharge Complainant for union activity, Respondent must show "a uniform standard form of discipline, handed out to all employees on an even scale." The absence of Respondent argument that it has met this standard is telling. Beyond this, Respondent cannot deny it refused to contact Complainant's union representative. Nor can Respondent deny that its suspension of Complainant manifests hostility toward his request for representation. Respondent's interrogation of unit members regarding LAW establishes anti-union hostility.

The assertion that Brellenthin was unaware of Complainant's concerted activity at the time of the discharge "is just a complete lie." Respondent contact with the WERC concerning its authority to discipline confirms this.

The evidence supports a conclusion that Complainant's testimony was fully credible. The receipts submitted to show Winkler and Twist could not have been together on July 5 in fact prove nothing. Respondent's investigation was a pretext and reflects no meaningful effort to obtain Complainant's view of the facts.

The evidence establishes that Complainant informed Kurpeski of the events of July 5 on July 6. Respondent did nothing. Nor did Respondent do anything when Leber reported to Winkler on July 15 concerning an organizational meeting. This contrasts starkly to Winkler's immediate suspension of Complainant when Twist complained of him on July 8. Against this background, Respondent's commencement of an investigation after receiving the WERC letter of July 16 is inexplicable, except by inferring anti-union hostility. Complainant's termination on July 29 was effected to avoid disclosing him as a full time employee to the Commission.

Evidence of disparate imposition of discipline on Respondent employees confirms this. Respondent singled Complainant out for discipline, and did so because he "is involved in organizing a labor union." The rationale offered for Complainant's termination is also dubious, since lying among Respondent employees produced no discipline against anyone but Complainant. That Complainant did not lie shows the pretext.

The Respondent's Reply Brief

Rather than addressing the law, Complainant "spends many pages excitedly claiming that certain witnesses were liars and that discipline . . . was unfairly dispensed." The record will not support this, but the fact remains that Complainant's arguments miss the point.

That Complainant offered no meaningful argument regarding alleged violations of Secs. 111.70(3)(a)1 and 2, Stats., demands their dismissal. Nor did Complainant establish credible evidence of a Sec. 111.70(3)(a)3, Stats, violation. Unsubstantiated assertions regarding Leber cannot obscure that there is no proof Leber was anti-union. More to the point, the record establishes that Respondent based its disciplinary decisions on its understanding of the circumstances. Unlike Complainant, Leber "admitted and apologized for his behavior." Past that, Complainant's allegations regarding Leber involve facts never revealed, prior to the hearing, to Respondent. Point-by point analysis of Complainant's allegation that Respondent witnesses lied establishes that the allegations are baseless. Beyond this, the evidence "overwhelmingly supports" Respondent's determination of fact regarding July 5.

It follows that the discharge decision rests on valid, employment-based fact. There was no anti-union hostility. Complainant's assertion of discrimination is a futile attempt to shield the impropriety of his own conduct.

DISCUSSION

The complaint alleges Respondent violations of Secs. 111.70(3)(a)1, 2 and 3, Stats. Sec. 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer "to interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed" by Sec. 111.70(2), Stats., which grants them "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." A violation of Sec. 111.70(3)(a)1, Stats., can be independent or be derived from employer violation of another prohibited practice.

Sec. 111.70(3)(a)2, Stats., makes it a prohibited practice for a municipal employer to "initiate, create, dominate or interfere with the formation or administration of any labor organization". Broadly speaking, a violation of this statute requires employer conduct that undermines a union's ability to represent employees independently of the employer's interests, see WAUKESHA COUNTY, DEC. NO. 30799-B (WERC, 2/05).

Complainant's argument and evidence focus on Sec. 111.70(3)(a)3, Stats. There is no evidence of employer conduct rising to the level of a Sec. 111.70(3)(a)2, Stats., violation and no persuasive argument of a violation of Sec. 111.70(3)(a)1, Stats., which can exist independently of Sec. 111.70(3)(a)3, Stats., cf. CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03).

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

From Complainant's perspective, the operation of the first two elements is not in doubt, leaving the operation of the third and fourth at issue. This perspective has some merit. There is no dispute that Complainant's contacts with LAW represent lawful, concerted activity, and no dispute that Respondent was aware of those contacts prior to the termination. Respondent argues that Brellenthin made the discharge decision independently, and acted without knowledge of Complainant's contact with LAW. These contentions, however, pose little doubt regarding the operation of the first two elements. The evidence will not support either the assertion that Brellenthin was unaware of the Complainant's contacts with LAW or that Winkler played no effective role in the process leading to Complainant's discharge.

From Respondent's perspective, the dispute turns on the first, third and fourth elements. This perspective has some merit. The conduct at issue cannot persuasively be restricted to Complainant's contacts with LAW. If he used those contacts to shield his culpability in spreading malicious lies about Winkler and Twist, there is no persuasive reason to characterize his conduct as the formation of a union or as lawful, concerted activity. If Respondent acted to sanction that conduct and not to sanction the contacts with LAW, there is no hostility within the meaning of the third and fourth elements.

The merit in each perspective demands a review of the disputed elements. That analysis starts with a review of whether Complainant's conduct represents activity protected by Sec. 111.70(2), Stats. That section protects employee efforts to form a union, so there is a legal basis to find his conduct protected. The determination whether his conduct in fact should be protected poses a more difficult issue.

Respondent's arguments question whether Complainant's conduct viewed as a whole can be considered lawful, concerted activity. Whatever motivated Complainant's observations of July 5 or his actions after that date cannot obscure that Respondent reasonably concluded the observations he relayed to other employees misrepresented fact. By July 22, Brellenthin had secured denials from Twist, her fiancée, Winkler and Winkler's wife. No evidence adduced at hearing, including the demeanor of the witnesses, undercuts those denials. Complainant correctly notes that the receipts supplied by Twist cannot, standing alone, refute his assertions. They do not, however, stand alone. They confirm her own credible testimony, which supports the receipts, establishing that July 5 was a day of shopping for her fiancé and for her outside of Lake Geneva until the late afternoon. Other credible testimony bears on this point. Winkler's testimony accounts for Complainant's perception of someone in the office, and for Complainant's observation that there were no cars in the parking lot. This accounts for facts common to Complainant's and Winkler's testimony. Complainant's testimony cannot account for any evidence outside of his testimony. At a minimum, it is difficult to understand how Winkler and Twist could successfully turn to their partners to cover their own illicit behavior. More significantly, Complainant's testimony is internally inconsistent. At hearing, he testified to some uncertainty regarding who was in the office, basing his conclusion that it was Twist on the sound of her voice. There was no such uncertainty in the account he relayed to fellow employees. Eckert's, Kurpeski's, and Bauman's testimony establish that there was no ambiguity in what he passed on to others.

Whether Complainant's account constitutes libel as a legal matter is not posed for Commission decision. This cannot obscure that it was libelous in the commonly used sense of that term. Sec. 111.70(2), Stats., protects "lawful" conduct and Complainant's conduct does not fit well within that term. Even if his conduct is considered lawful, the evidence will not establish it was concerted. The Commission in CITY OF LACROSSE, DEC. NO. 17084-D (WERC, 10/83) AT 4-5, AFF'D, CIR. CT. CASE NO.-83-CV 821 (1985), as cited more recently in VILLAGE OF STURTEVANT ET. AL., DEC. NO. 30378-B (WERC, 11/03) AT 24, stated the determination of concerted activity thus:

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

Complainant's account of the events of July 5 manifests no more than his own concern with Twist and Winkler. None of the employees he relayed the account to saw the matter as anything more than gossip. Whatever workplace issues Complainant shared with others, this gossip manifests nothing beyond his own interest. In my view, Complainant's conduct in relaying his account of the events of July 5 was not lawful. Even if the term "lawful" is read broadly enough to include his conduct, it was not concerted. In either event, the conduct is not protected by Sec. 111.70(2), Stats.

This leaves the question whether his contacts with LAW otherwise invoke the protection of Sec. 111.70(2), Stats. The considerations underlying that determination underlie the application of the third and fourth elements, and will be addressed with them.

These elements demand a determination whether Respondent was hostile to Complainant's contact with LAW and acted in part based on that hostility. On the broadest level, there is no persuasive evidence of overt hostility toward a union on Winkler's or Brellenthin's part. Winkler regularly deals with a union through his position with the City of Lake Geneva DPW. The Wastewater Department was once unionized, and there is no evidence to indicate Brellethin or Winkler had difficulty dealing with that union. There is evidence Winkler was disappointed to learn of the contact with LAW, but no evidence of hostility. What evidence there is regarding Winkler's discussion with Utility employees concerning the organizational effort indicates that when he spoke regarding his concerns with a union, he tempered the remarks with a statement that he could deal with employee choice, whatever it might be.

Viewed more specifically, the evidence links anger on Brellenthin's and Winkler's part to Complainant's misconduct rather than to any contacts with LAW. Winkler learned of the LAW contacts at the same time he learned of the gossip being spread by Complainant. His evident anger was related to the gossip and to its effect on him, his family and his standing in the workplace and in the community. His initial contact with LAW was not coercive, and when a LAW representative directed him to the WERC, he phoned the WERC. His contacts with LAW, the WERC's General Counsel and with Utility employees show a pattern. He did not hesitate to voice his anger over what he viewed as a malicious lie, but did not link that anger to the LAW contacts. The record is less clear on when Brellenthin learned of the LAW contacts, but a similar pattern is evident. Brellenthin and Winkler were each approaching the end of their rope regarding Complainant's conduct in the workplace with other employees prior to any LAW contact. Their concerns had roots spreading through Complainant's inability to control his temper; through his disregard of Kurpeski's instructions regarding the fountain; through his usage of vacation and sick leave; and through his longstanding antipathy

toward Twist. The shredder suspension could be viewed as a pretext if viewed as the making of a mountain of a molehill. The evidence establishes, however, that it represents the steady accumulation of misconduct toward Twist. Complainant's moving files used by Twist without any regard to where they were moved or how they were stored is inexplicable except as a gesture of personal contempt. Giovannoni's and Kolb's credible testimony underscores that these gestures were long-standing and protracted.

Nor is there evidence to correlate Winkler's and Brellenthin's concerns with Complainant's misconduct with his contacts with LAW. Their concerns, steadily growing over time, culminated in the disclosure of Complainant's misrepresentation to Utility employees of the events of July 5. There is no evident relationship between their concerns on that issue with any organizational campaign. It cannot be inferred that Respondent sought to rid itself of an active union campaigner. There is little evidence Complainant played such a role. This point prefaces the examination of Complainant's testimony concerning the contacts with LAW.

Complainant's testimony affords no persuasive basis to infer Respondent acted in part based on hostility to his contact with LAW. Under any view of the facts, his contacts followed the events of July 5. Their timing has some significance regarding whether Complainant was attempting to organize employees or to shield himself. More significant is testimony at hearing. Without regard to other witness testimony, Complainant's testimony and argument treats the contacts with LAW as a postscript to a litany of inter-personal conflicts with others. It is impossible to construct the sequence of LAW contacts from his testimony. Complainant asserts that Respondent actions can be linked to the processing of the election petition, but his testimony affords little support for the assertion. The record will not support his assertion that his discharge was correlated with a significant event in the processing of the election petition. At best, the record manifests some testimony that Complainant may have mentioned a union's ability to afford employees some protection. The absence of any significant discussions among employees concerning organizational issues makes a stark contrast. Beyond this, none of the testifying witnesses other than Complainant viewed the discharge as related to LAW. Those who addressed the point traced it to the gossip surrounding July 5. Even Kurpeski, who thought the discharge was excessive punishment, related his concern to Complainant's work ethic and to Respondent favoritism toward Twist.

Nowhere in the testimony is there a reliable link between the discharge and Respondent hostility toward Complainant's contact with LAW. Complainant's testimony will not supply it. The events surrounding the July 26 meeting underscore this. Examination of his testimony indicates he manipulated the information he supplied to those he chose to speak with. He received sick leave approval from Kurpeski who knew nothing of the July 26 meeting. He then contacted LAW representatives, asserting he had supervisory approval to miss the meeting, without highlighting any information which might highlight the problems that obviously lay ahead. He made no attempt to contact Brellenthin on the weekend preceding the meeting. Even assuming Brellenthin was attempting to set him up cannot obscure Complainant's manipulation of those he chose to speak with.

This highlights a fundamental theme underlying the evidence of hostility. Complainant's competence as a worker coexisted with a pattern of manipulation and interpersonal conflicts with fellow employees. That manipulation is evident regarding his use of contacts with LAW, through which he attempted to shield himself from his inexplicable misrepresentation of the events of July 5. The discharge is traceable to misconduct, not to hostility toward the exercise of protected activity.

In CLARK COUNTY, the Commission noted that "concerted activity can go beyond the pale of statutory protection in some circumstances" (DEC. NO 30361-B AT 12). The Commission added that "the manner in which an employee undertakes concerted activity is indivisible from the activity itself and thus is also protected, provided the employee does not exceed the law's liberal parameters" (DEC. NO 30361-B AT 14). In the same decision, the Commission cautioned against applying the statutes enforcing the rights of Sec. 111.70(2), Stats., in a fashion that "would constructively establish a higher hurdle for disciplining union activists than for other employees" (DEC. NO 30361-B AT 15). Here, Complainant's contacts with LAW do not reflect conduct protected by Sec. 111.70(2) Stats., because this otherwise protected activity is part of a pattern of misconduct that does not manifest lawful, concerted activity. To the extent that misconduct is viewed as indivisible from the LAW contact and thus protected, the record will not support a conclusion that Respondent discharged Complainant, even in part based on hostility toward his contact with LAW. Thus, the record will not support the four elements necessary to the operation of Sec. 111.70(3)(a)3, Stats. As noted above, the record will support neither an independent violation of Sec. 111.70(3)(a)1, Stats., nor a violation of Sec. 111.70(3)(a)2, Stats. Thus, the complaint has been dismissed.

Dated at Madison, Wisconsin this 31st day of March, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

RBM/gjc
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