

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**BRIAN L. DZBINSKI and the STURTEVANT PROFESSIONAL FIRE FIGHTERS
ASSOCIATION UNION LOCAL 3914, IAFF, AFL-CIO, Complainants,**

vs.

VILLAGE OF STURTEVANT, Respondent.

Case 43
No. 63821
MP-4076

Decision No. 31139-A

Appearances:

John Kiel, Attorney, Hawks, Quindel, Ehlke & Perry, SC, 700 West Michigan Street (#500), Milwaukee, WI 53201-0442, appearing on behalf of the Complainants.

William Halsey, Attorney, William Halsey Law Office, 8330 Corporate Drive, Racine, WI 53406-3759, appearing on behalf of the Respondent.

EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On July 6, 2004, the above-named Complainants filed with the Commission a complaint, alleging that the above-named Respondent violated Secs. 111.70(3)(a)1 and 3, of the Municipal Employment Relations Act (MERA) by terminating Complainant Dzbinski in whole or in part for his protected concerted activities and violated Sec. 111.70(3)(a)1 by offering a pretextual reason to support the termination. Complainants amended the complaint by a motion dated July 30, 2004 and by a motion on the record on July 13, 2005. On November 15, 2004, the Commission appointed the undersigned Marshall L. Gratz to act as Examiner in the matter. Respondent filed its answer to the complaint on January 5, 2005.

The Examiner noticed and convened a hearing in the matter on January 18, 2005, (at which no testimony was taken), and then on July 13 and 14, 2005, at the Racine County Courthouse. Following distribution of the hearing transcript, the parties submitted initial briefs, agreed to reopen the record for purposes of receipt of two additional documentary exhibits, and submitted reply briefs. The parties' reply briefs were exchanged by the Examiner on December 12, 2005, marking the close of the hearing.

Based upon the record, the Examiner issues the following Findings of Fact, Conclusion of Law and Order.

No. 31139-A

FINDINGS OF FACT

1. Complainant Brian Dzbinski (Dzbinski) is an individual who currently resides in Florida, but who resided, at various material times in Sturtevant, Wisconsin.

2. Complainant Sturtevant Professional Fire Fighters Association, Union Local 3914, IAFF, AFL-CIO (Local) is a labor organization with a mailing address for purposes of the instant proceeding of c/o Hawks, Quindel, Ehlke & Perry, SC, 700 West Michigan Street (#500), Milwaukee, WI 53201-0442. At various material times, Thomas Clausen has been the Local's Vice President and later its Acting President and Jack Jasperson has been the Local's Secretary-Treasurer.

3. Respondent Village of Sturtevant (Respondent or Village) is a municipal employer with offices at 2801 - 89th Street, Sturtevant, WI 53177. The overall governance of the Village is the responsibility of the Village's Board of Trustees and its various committees. At various material times, the Village's officers and agents have included Director of Public Safety Arthur Scola and Village Administrator Stephen Compton (employed by the Village from October, 2003 to February, 2005). Among the Village's operating departments are its Fire, Police and 911 Call Center Departments, all three of which are managed by Scola. At various material times, the Village has employed Roger Freiburger as its Village Accountant, Barbara Pauls as its Village Clerk, Sean Marschke as a Sergeant and later Captain in its Police Department, outside labor relations attorney William Halsey, outside insurance representative James Veltman, and Fire Department Lieutenant and bargaining unit member Brian Pagliaroni.

4. At all material times, the Local has been the exclusive representative of a bargaining unit consisting of ". . . all regular full-time sworn employees of the Sturtevant Fire Department, but excluding supervisory employees . . ." At all material times, that bargaining unit has ranged in size from seven to nine employees. The Local and Village have been parties to a series of collective bargaining agreements covering that bargaining unit, including one with a term of calendar years 2000-03 (Agreement). The Agreement, in Art. III, Sec. 1, recognizes that, subject to certain stated limitations, the rights of the Village "which are normally exercised by the Director of Public Safety of Sturtevant Fire Department, include, but are not limited to, the following: . . .D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause pursuant to WI. Stats. Sec. 62.13." The Agreement, in Art. XVIII, Hospital//Surgical Care, Dental and Life Insurance, provides as follows: Section 1 - Hospital/Surgical, The Village shall provide a base medical plan that provides the benefits in effect on the date of ratification of this agreement. Employees shall contribute the sum of \$50.00 per month toward the cost of the health insurance premiums effective on the date of ratification of this agreement."

5. Dzbinski was employed by the Village as a fire fighter, first on a part-time basis beginning on or about February 14, 1999, and then on a full-time basis beginning on or about November 21, 2001. On March 11, 2005, Dzbinski's Village employment was terminated on bases stated in the following memorandum issued to him by Scola on that date:

According to your request, this is a written record of the termination of your employment with the Village of Sturtevant's Fire Department.

As we had discussed, the Village is taking this action as a result of your application for insurance benefits that you were not entitled to. You applied for family insurance coverage for individuals that were not family members. This falsification of the application resulted in you receiving these benefits for approximately two years at considerable expense to the Village.

You were offered the opportunity to resign and arrange for repayment to the Village. However, you declined the offer to resolve the matter in that fashion.

The Village has also informed you that this issue has been reported to the insurance company.

6. Dzbinski submitted his applications for Village insurance benefits on January 7, 2002. Pauls had requested that he do so as he approached the date on which he would become eligible for medical, dental and vision insurance coverage under the Agreement. In response to Pauls' request, Dzbinski conferred with Pauls across the Village Clerk's counter, received application forms for health, vision and dental insurance, and completed, signed and returned those forms to Pauls. At the time he submitted those applications, Dzbinski was unmarried, had for several years been living with and financially supporting a minor biological son of his (J. Dzbinski), his fiancée (Hope Andresen) and her minor daughter (K. Jackson), and had -- based on advice from the IRS -- been listing all three as dependents on his income tax returns. During the course of his interaction at the counter with Pauls, Dzbinski told Pauls that he and Hope Andresen planned to be married within a month or so, and Dzbinski asked whether he should fill out the forms as if he were married or fill them out as if he were single and then come back in a month or so to revise them. Pauls told Dzbinski that in the circumstances he should fill out the forms as if he were married, and Dzbinski did so. On the health insurance form, under "Employee Information" Dzbinski checked "Married," rather than "Single," "Divorced" or "Widow or Widower." Under "Enrollment Information: Complete For All Family Members Who are Applying For Coverage" he listed "Hope Dzbinski" as his "Spouse" and K. Jackson and J. Dzbinski as "Dependents." Under "Check the Types of Coverages You are Applying For," regarding both "Medical" and "Dental" insurances, Dzbinski did not check any of the four boxes provided on the form, which were labeled, "Employee Only" "Employee & Children" "Employee & Spouse" and "Employee, Spouse & Children." The health insurance form called for signatures of both the applicant and spouse beneath a statement that read as follows:

I HAVE READ THE STATEMENTS AND ANSWERS RECORDED ON THIS APPLICATION. THEY ARE, TO THE BEST OF MY KNOWLEDGE AND BELIEF, TRUE, COMPLETE AND CORRECTLY RECORDED. I AGREE THAT THEY WILL BECOME PART OF THIS APPLICATION AND ANY CONTRACT ISSUED ON IT.

Dzbinski signed as applicant and Dzbinski entered a signature that read "Hope Dzbinski" in the spouse signature blank, in a more legible handwriting than he used for his own signature. On his separate dental and vision insurance applications, Dzbinski listed Hope Dzbinski, J. Dzbinski and K. Jackson as "family members" to be covered, and he checked the "family" rather than "single" box regarding "vision coverage type requested," and he checked the "entire family" box rather than those for "employee only," "employee & spouse," "employee & one child," "employee & children" or "none," on the dental insurance application.

7. At all material times, the Village's medical insurance carrier's dependent eligibility guidelines provided as follows:

Dependents who are Eligible for coverage include:

1. Your legal spouse;
2. Your or Your insured spouse's unmarried children who are unable to provide their own support. This includes legally adopted children, and children for whom You or Your insured spouse is the legal guardian; and
3. Your Dependent child's children (i.e., Your grandchildren) until Your Dependent child reaches age eighteen (18).

8. At all material times, the following four classifications of insurance coverage were in effect as regards at least the Village's medical insurance:

COMPCARE HEALTH CLASSIFICATIONS DEFINITION SECTION

Single male or single female

This is an employee of the village, married or not who has elected to select medical coverage for themselves only. If they have a spouse or children, they have waived this coverage.

Member/Spouse

This is an employee who has elected medical coverage for themselves and their spouse. If they have dependent children, they have waived this coverage.

Member/Dependents

This is an employee who has elected medical coverage for themselves and their dependents. If they have a spouse, they have waived this coverage.

Family

This is an employee who has elected medical coverage for themselves, their spouse, and their children.

The Village pays varying amounts for those four categories of coverage: most for family, least for single, and an equal amount somewhere in between for the other two categories. The Agreement contains no reference to types of coverage. The Village Personnel Policy Manual as revised May 7, 2002, states, "Full-time employees shall be eligible for health insurance coverage. The health insurance plan shall be as established by the Village and shall be provided to full-time employees. Each married employee or an employee with children as dependents shall be covered by the family plan." Although Compton, during his tenure as Village Administrator beginning in October of 2003, personally met with and informed employees newly eligible for insurance about the nature of the Village's insurance coverages and benefits, neither Pauls nor any other Village agent has been shown to have similarly informed Dzbinski as to the definitions of dependents or as to the existence of coverage categories besides single and family.

9. On the basis of Dzbinski's insurance applications, the Village took the steps necessary to provide and pay premiums (except for the employee contributions provided for in the Agreement) for family coverage. The Examiner infers (from ex. 15 para. M.1.) that, as a result, insurance cards bearing the names of Dzbinski, Hope Dzbinski, K. Jackson and J. Dzbinski were issued to Dzbinski sometime shortly after he submitted his applications.

10. Dzbinski and Hope Andresen were not married until February 20, 2004. At no time did Dzbinski take any steps to revise his previously submitted insurance forms or to otherwise inform Pauls or the Village that he remained unmarried through February 20, 2004. Prior to that date, various claims for Village health insurance benefits were submitted and paid as regards K. Jackson, but none were submitted or paid as regards Hope.

11. During the course of his employment as a full-time fire fighter for the Village, Dzbinski engaged in a variety of lawful concerted activities (protected activities) on behalf of the Local, himself and other members of the Local's bargaining unit, as follows:

a. Dzbinski was elected and served as Local secretary-treasurer beginning in September of 2003 and then as Local president beginning in December of 2003 until his termination on March 11, F2004.

b. Beginning on December 12, 2003, Dzbinski repeatedly requested of Compton and Freiburger that the Village increase the amount of Local dues deductions taken from pay checks of members with dues deduction authorizations on file with the Village; he ultimately hand delivered to the Village Board finance committee Chair, Dwight Wendt, on February 9, 2004, a letter addressed to the Village Board of Trustees, critical of, among other things, the Village's improper administration of the Local's dues deduction request; he delivered copies of that letter on February 10, 2004, to Scola and Freiburger; and he filed a grievance on March 11, 2004, (prior to his being terminated later that day) objecting to the Village's failure to honor the Local's dues deduction increase request.

c. Beginning on January 23, 2004, Dzbinski variously challenged Scola's and the Village's termination on that date of Fire Fighter Stephen Raclaw for unfitness for duty. Raclaw had been reinstated earlier that month by order of the WERC affirming its examiner's decision that Scola's and the Village's termination of Raclaw in January of 2002 had been unlawfully motivated in part by protected activities of Raclaw and the Local. At a January 23, 2004, meeting with Dzbinski present as Local representative, Scola informed Raclaw that, although Raclaw had submitted his personal physician's letter stating that he meets the minimum vision requirements for a Wisconsin Driver's license, he was being terminated because his visual acuity did not meet the minimum departmental standard as expressed in the National Fire Protection Association (NFPA) Standard 1582, 3-3 Eyes & Vision and because other testing indicated an apparent lack of depth perception. Dzbinski objected to the termination, pointing out that the Village Fire Department had no established fitness-for-duty standards and had not adopted NFPA 1582, 3-3. Scola responded, "It's in the books over there." Dzbinski asked "What books over there?" Scola responded "the books over there" and Dzbinski again asked "What books over there," at which point Compton said "That's enough," which brought the meeting to an end. Later that day, Dzbinski and Clausen brought the Village Fire Department Standard Operating Procedure Manual and Fire Department Officer's Handbook to Scola's office and asked Scola to identify where the NFPA standards were adopted by the Village. Scola referred them to the NFPA manuals. Dzbinski asked if the Village followed all NFPA standards. Scola answered that the Village follows as many of them as possible and stated that he did not want to discuss the matter further, suggesting instead that the Local take the matter to the Local's attorneys. Dzbinski audio recorded that conversation without telling Scola that he was doing so. After leaving Scola's office, Dzbinski played the recording over the telephone to Raclaw from a Fire Department room with the door closed. Scola entered the room, pointed at Dzbinski and angrily stated, "How dare you record me. I know it's against the law. You have no right to record me. I'm going to press whatever charges I can against you." Dzbinski replied that Scola should do whatever he felt he needed to do. Scola became more upset and stated that he was going back to his office to call the DA's office and further stated that he was going to have Dzbinski's job. On January 27, 2004, Dzbinski filed with Scola a grievance challenging Raclaw's termination, signed by both Dzbinski and Raclaw. That grievance remained unresolved at the time of Dzbinski's termination and as of the date of the complaint hearing in this matter. The parties notified Arbitrator Clair A. Manning of her selection in that matter on March 17, 2004; the case was heard on July 19, 2004; and the Arbitrator's award was issued on July 19, 2005. In that award, Arbitrator Manning granted the grievance and ordered Raclaw reinstated and made whole, based in part on the following rationale: "If he [Scola] had a concern about Grievant's eyesight, that concern should have been addressed when Grievant had his standard fitness exam upon becoming a full-time employee. That the Village chose to address it only after (and immediately after) reinstatement resulting from a WERC unlawful termination determination suggests that the Village's claimed motives are pretextual."

d. Beginning in February of 2004, Dzbinski variously insisted that the Village completely and properly repair its fire apparatus before placing it in service. Dzbinski informed Lt. Pagliaroni that Dzbinski objected to restoration of Engine 126 to service, asserting that its condition -- brake light not repaired, and Quint not properly licensed -- posed safety and legal liability/employment hazards to bargaining unit employees. When Pagliaroni reported Dzbinski's

objection to Scola, Scola replied, "You guys are going to spend yourselves out of a job" and ordered that Engine 126 be taken out of service. When Engine 126 was later placed back into service, Dzbinski inspected it, discovered a throttle problem and told Scola that he objected to its use in that condition. Scola personally verified that the throttle was not working and again removed Engine 126 from service. In late February of 2004, Dzbinski reminded Pagliaroni of problems with the Quint's hydraulic pump. On February 17, 2004, Dzbinski contacted the Wisconsin Department of Commerce (DOC) to obtain a Complaint Registration form in order to file a complaint concerning unsafe condition of the Village's fire apparatus, among other matters. Dzbinski received a complaint form on February 18 and, with other members of the Local, began preparing a complaint regarding the unsafe condition of the Village's fire apparatus, lack of safety technique training, outdated turnout gear, firehouse air quality issues and improperly fitted breathing masks. Dzbinski filed the complaint form along with a supporting letter by fax on March 10, 2004, and DOC's receipt was acknowledged on March 11, 2004. The DOC conducted a surprise inspection of the Village's apparatus, facilities and other equipment on March 24, 2004 and notified the Village in writing that DOC had found five workplace violations.

12. Scola, Compton and the Village Board of Trustees each knew to varying extents of Dzbinski's protected activities noted in Finding of Fact 11. As of the time when they participated in the March 9, 2004, decision to terminate Dzbinski, Scola knew of most of those protected activities, Compton knew of some but not all of those activities, and the Village Board knew that Dzbinski had sent the letter dated February 9, 2004, referred to in Finding of Fact 11.b. However, the record does not establish that any of them knew of the preparation or submission of a complaint to the DOC before Dzbinski was informed on March 11, 2004 that he was terminated. The record also does not establish that any of them knew of the preparation or submission of the March 11, 2004 grievance referenced in Finding of Fact 11.b. before they participated in the March 9, 2004, decision to terminate Dzbinski referred to in Finding of Fact 5.

13. Scola was hostile to various of Dzbinski's protected activities at the time he participated in the decision to terminate Dzbinski, as evidenced by the following:

a. The Examiner infers that Scola was angry that Dzbinski was aggressively challenging Village's January 23, 2004, termination of Raclaw from Scola's complaint hearing admission that he disagrees with the WERC decision that Raclaw's January 9, 2002, termination was unlawful and from Scola's repeated non-specific responses "it's in the books over there" to Dzbinski's assertions that the Village had never adopted the vision standards on which it was basing its termination of Raclaw.

b. Scola was angry that Dzbinski had recorded their conversation in Scola's office regarding where the NFPA standards were adopted by the Village, and Scola threatened adverse action against Dzbinski, including termination, for what were lawful recording activities.

c. The Examiner infers that Scola was angry that Dzbinski objected to returning Engine 126 to service on account of the unrepaired brake light and the improperly licensed Quint from Scola's statement to Pagliaroni that "You guys are going to spend yourselves out of a job," noted in Finding of Fact 11.d.

d. The Examiner infers that Scola was hostile to Dzbinski's protected activities generally from the fact that Scola's evaluation of Dzbinski dated March 2, 2004, rated Dzbinski's performance regarding "Shows proper respect and demeanor toward superior officers" as "needs to improve" and listed "Respect for Command Officers" as a short term goal for improvement, whereas Dzbinski's performance had previously been rated as "outstanding" or "above average" as regards "Respect for Authority" or "Maintains Effective Working Relationship With Superiors" on Dzbinski's four previous evaluations regarding the three month periods ending on February 21, May 21, August 21 and November 21, 2002.

14. On March 2, 2004, a Village employee complained to Scola that, according to the newspaper, Dzbinski had become married only recently, even though office scuttlebutt had it that the Village had been providing Dzbinski with family insurance coverage for a long time. The complaining employee stated that that was not fair because she could not obtain Village health insurance coverage of her fiancé until after she married him.

15. On March 2, 2004, after conferring with Compton, Scola assigned police Sgt. Marschke to determine Dzbinski's marital status. Marschke reported that Dzbinski had been issued a marriage certificate on February 17, 2004 to marry Hope Andresen on February 20, 2004. Shortly thereafter, the Village obtained a copy of the marriage certificate showing that Dzbinski had married Hope Andresen on February 20, 2004.

16. Scola next obtained from Compton a spreadsheet showing calculations of the differences between what the Village paid for family coverage for Dzbinski and what the Village would have paid either for single male coverage or for member/dependents coverage for the period since the Village began providing Dzbinski with coverage in 2002. The amounts for members/dependents coverage were labeled variously as "empl+1" and "married+1" on that spreadsheet.

17. On March 5, 2004, Scola called Dzbinski to a meeting also attended by Compton and Pagliaroni. Dzbinski did not request to have a Local representative (besides himself) present with him during that meeting, and no Local representative (besides Dzbinski himself) was present at the meeting. At that meeting, Scola questioned Dzbinski regarding his relationships to the spouse and dependents he had listed on his insurance applications. Dzbinski confirmed that he had recently been married, that J. Dzbinski was his son, and that K. Jackson was his step-daughter from Hope Dzbinski. Scola then asked Dzbinski to explain why his January 7, 2002, insurance applications stated that he was already married at that time. Dzbinski responded that, at the time he applied for insurance, he told Pauls that he and Hope Andresen planned to be married in the next month or so and asked whether he should fill out the forms accordingly or come back in a month or so to revise them; that Pauls told Dzbinski that in the circumstances he should fill out the forms as if he were married; and that Dzbinski did so. In response to other questions from Scola, Dzbinski admitted that he knew he was receiving family plan coverage from the Village, but he asserted that he was nonetheless eligible for the family plan because J. Dzbinski and K. Jackson were both "dependents" of Dzbinski's and that the application form referred to "dependents." Finally, Dzbinski stated that Hope had never used any of the insurance because Dzbinski and Hope were not married.

18. On March 9, 2004, Scola reported the results of his investigation to the Village Board Personnel Committee and the Village Board meeting as a Committee of the Whole with Compton, Attorney Halsey and insurance representative Veltman present. Scola and Compton recommended that Scola be authorized to terminate Dzbinski (Tr.I, 30 and 53-54), and the Village Board decided to authorize Scola to do so.

19. On March 10, 2004, Compton prepared a letter to Veltman requesting that Veltman notify the Village's insurance carriers that the Village had terminated an employee in response to a complaint about a potential insurance fraud and requesting that Veltman cause a fraud investigator to look into the matter.

20. On March 11, 2004, Scola called Dzbinski to a meeting also attended by Compton and Pagliaroni. Dzbinski asked if the meeting was "disciplinary" in nature and Scola said it was. Dzbinski asked to have a Local representative present at the meeting besides Dzbinski himself. The meeting was adjourned until later that day at which time Clausen and Jasperson attended the meeting as Dzbinski's Local representatives. When the meeting resumed, Dzbinski again asked for Dzbinski's explanation of his insurance application in light of his not being married until February of 2004. Dzbinski gave the same explanation as at the March 5 meeting noted in Finding of Fact 15. Scola responded that the Village Board and its Personnel Policy and Legal Committee and its attorney had considered the matter and decided that Dzbinski could either resign and pay back \$7,667.14 or Dzbinski would be terminated and the Village would refer the matter to the District Attorney's office for possible criminal charges. Dzbinski asked on what basis the dollar figure had been calculated, and Scola responded, "That's based off single plus one and um single versus family." Dzbinski again asserted (as he had on March 5) that he qualified for the family plan because he had two dependents. Scola replied "That's not what was determined" and reiterated that the Village Board was giving Dzbinski the choices of resigning and paying back the money "or you're going to be terminated and this is going to go into the DA's office." Dzbinski replied that "the information apparently wasn't forwarded correctly to the Village. I do qualify for the family plan. I have two dependents. That qualifies me for the family plan so for me to accept resignation and pay back \$7,000 stating that I wasn't eligible for the family plan isn't acceptable. So I guess the only alternative left is termination." Scola then informed Dzbinski that he was terminated. Dzbinski again asked if the dollar figure was "the difference between the single versus the family that was paid?" Compton answered that it was the difference between "the family and the one dependent." Dzbinski again asserted that "there should be two dependents." Compton replied that the insurance carrier had determined that "the blood relative, your son, is the one that qualifies you for the single plus dependent rate which is a different rate than family." Dzbinski replied that the insurance application form says "dependent" and does not specify "blood relative." One of the Local representatives asked for the Village's formal reason for Dzbinski's termination. Compton replied that it was "dishonesty." Dzbinski replied that other Village employees have been dishonest under oath without being terminated from Village employment. Dzbinski requested a copy of the paperwork related to the discharge, and the Village subsequently provided Dzbinski with the termination memo quoted in Finding of Fact 5.

21. Dzbinski's attorney negotiated an agreement with the Village's medical insurance carrier concerning the carrier's payments of claims submitted regarding K. Jackson. The insurance carrier's May 24, 2004, letter confirming the settlement read, in part, as follows: "As we discussed, since it has been determined that [K.] is not the natural child of our subscriber we are not responsible for her claims. At this time we have agreed to accept a refund of \$814.78 as settlement for the claims we paid in error for [K.]." Dzbinski reimbursed the carrier in that amount.

22. On August 3, 2004, the Racine County District Attorney's office issued a separate summons and criminal complaint to Dzbinski and to Hope Dzbinski accusing each of them of felony insurance fraud regarding an amount in excess of \$2500. On September 27, 2004, following various off-the-record discussions with defense Counsel and Village representatives, the Assistant District Attorney (ADA) moved to dismiss both complaints without prejudice to reissuance. The ADA explained on the record that she was doing so based on newly-discovered information leading her to believe that the only types of coverage offered to Village Fire Department were family and single. The ADA further stated that if those are the only types of coverage available, Dzbinski was eligible for family coverage regarding himself and his son, such that the information entered on the insurance application did not cost the Village more than it would have paid had the application been limited to a request for coverage of Dzbinski and his son. For that reason, and because Dzbinski had settled with the insurance company by reimbursing it for claims improperly submitted and paid, there appeared to the ADA to be no remaining victim and no basis for concluding that anyone had experienced the loss in excess of \$2500 that constitutes a necessary element of the prosecutor's case in order to prove the felony insurance fraud charged. The ADA asked the Court to dismiss without prejudice so that the prosecutor could reissue the charges "if they show me that this other classification . . . existed." The Presiding Judge granted the ADA's motion to dismiss without prejudice. Sometime thereafter, at a time not specified in the record, the Village supplied the District Attorney's office with additional insurance invoice information. As of the date of the instant complaint hearing, no criminal charges had been reissued in the matter against Dzbinski or Hope.

23. At a time not revealed in the record, the Village initiated a small claims civil action in an effort to recover \$5,000 from Dzbinski. As of the date of the instant complaint hearing, that civil action was pending and had not been resolved.

24. Scola's recommendation to Compton and the Village Board that Dzbinski be terminated (rather than subjected to a lesser penalty) was motivated, at least in part, by Scola's hostility to Dzbinski's protected activities, as evidenced by the following:

a. Scola's statement to Pagliaroni that "You guys are going to spend yourselves out of a job" noted in Finding of Fact 11.d.

b. Scola's statement to Dzbinski that he was going to have D's job noted in Finding of Fact 11.c.

c. Scola's failure, prior to recommending and imposing termination, to question Pauls regarding Dzbinski's March 5, 2004, explanation that Pauls told Dzbinski to include Hope and her daughter on his insurance application forms.

d. Although Dzbinski committed serious dishonesty-related misconduct in failing to correct the untruthful information he put on his applications while receiving health insurance coverage (of K and Hope) and benefits (payment of K's claims) to which he was not entitled, and although the record does not establish that the termination of Dzbinski constitutes disparate treatment relative to similar misconduct on the part of other Village employees, termination is too severe a penalty in the circumstances of the case because the Village contributed to Dzbinski's misconduct by:

(1) causing family insurance to be provided to Dzbinski despite (Pauls') having been informed by Dzbinski at the time he submitted the application to her that Dzbinski was not then and would not be married for a month or so thereafter;

(2) failing to provide Dzbinski with information that would put him on reasonable notice as to which dependents are and which are not eligible for coverage under the Village's health insurance plans; and

(3) failing to provide Dzbinski with information that would put him on reasonable notice as to the existence and nature of single plus non-spouse dependent(s) coverage as distinct from family and single coverages.

25. The Village Board of Trustees' decision to approve Scola's and Compton's recommendation that Scola be authorized to terminate Dzbinski resulted, in part, from Scola's hostility to Dzbinski's protected activities.

CONCLUSION OF LAW

By terminating Dzbinski (rather than imposing a lesser disciplinary penalty) at least in part because of Dzbinski's lawful, concerted activities, the Village of Sturtevant discriminated against Dzbinski in regard to tenure in his employment and committed a prohibited practice within the meaning of Secs. 111.70(3)(a)3, and derivatively (3)(a)1, of the Municipal Employment Relations Act.

ORDER

1. Respondent Village of Sturtevant, its officers and agents, shall immediately:

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

b. Cease and desist from discriminating against Brian Dzbinski or any of its employees for engaging in lawful concerted activity.

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

(1) Immediately offer to reinstate Brian Dzbinski to his former position without loss of seniority, but without back pay.

(2) Notify all of its employees in the Village of Sturtevant Fire Department by posting in conspicuous places where employees are employed in that Department, copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by Director of Public Safety Scola and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Village of Sturtevant that those notices are not altered, defaced, or covered by other material.

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

2. The requests by Complainants and Respondents for attorneys fees and costs are denied.

3. The Complainants' request for relief in addition to that set forth in 1, above, is denied.

Dated at Shorewood, Wisconsin, this 20th day of December, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/

Marshall L. Gratz, Examiner

APPENDIX "A"

**NOTICE TO ALL EMPLOYEES
OF THE VILLAGE OF STURTEVANT
FIRE DEPARTMENT**

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Municipal Employment Relations Act, we hereby notify our employees that:

1. WE WILL immediately offer to reinstate Brian Dzbinski to his former position in the Village of Sturtevant Fire Department, without loss of seniority, but without back pay.

2. WE WILL NOT interfere with, restrain or coerce Brian Dzbinski or any other employees in the exercise of their rights pursuant to the Municipal Employment Relations Act.

3. WE WILL NOT discriminate against Brian Dzbinski or any other employees because of their having exercised their rights pursuant to the Municipal Employment Relations Act.

Dated this _____ day of _____, 2005.

VILLAGE OF STURTEVANT

Arthur M. Scola
Director of Public Safety

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

VILLAGE OF STURTEVANT

**MEMORANDUM ACCOMPANYING EXAMINER'S FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER**

Pleadings and Parties' Arguments

Complainants allege that the Village violated Secs. 111.70(3)(a)1 and 3, of MERA by terminating Complainant Dzbinski in whole or in part for his protected concerted activities and that the Village violated Sec. 111.70(3)(a)1 by offering a pretextual reason to support the termination of Dzbinski. The Village denies that its termination of Dzbinski was related in any way to Dzbinski's protected concerted activities and denies that its termination of Dzbinski for dishonesty regarding his application for Village insurance was pretextual.

In their post-hearing arguments, the Complainants assert that Dzbinski engaged in zealous and aggressive protected activities, that Scola and other Village officers and agents knew of and were hostile toward Dzbinski's protected activities, and that Scola caused the Village to terminate Dzbinski's employment as a fire fighter in whole or in part because of Dzbinski's protected activities. Complainants argue that the Village's claim that Dzbinski committed dishonesty-related misconduct is a pretext for the Village's true anti-union motives for terminating Dzbinski, which pretext the Examiner should reject just as the Circuit Court dismissed the criminal complaints against Dzbinski and Hope. Complainants acknowledge that Dzbinski submitted insurance applications stating that he was married when he was not, but they assert that Dzbinski was expressly authorized to do so by Village Clerk Barbara Pauls when Dzbinski informed Pauls that he planned to marry Hope within a month or so. Complainants also acknowledge that Dzbinski's insurance applications listed as a dependent K. Jackson to whom Dzbinski was not related until he married Hope, but they argue that Dzbinski reasonably believed that K. Jackson was a proper dependent to include because she lived with and was financially dependent on Dzbinski, and that Dzbinski reimbursed the insurance carrier as regards all of K. Jackson's paid claims once he learned that his understanding in that regard was disputed by the insurance carrier. Complainants also acknowledge that Dzbinski failed to modify his insurance applications when he remained unmarried for 25+ months after applying for the insurance, but they assert that was an inadvertent oversight, that Dzbinski saw to it that no claims were processed regarding Hope, and that Dzbinski reasonably and correctly believed that the Village would have been paying family premiums even if Dzbinski and his son were the only covered persons. Complainants also argue that Dzbinski's termination for dishonesty constitutes disparate treatment as compared with the Village's failure to take any disciplinary action in response to knowledge on the part of Scola, Compton and other Village officials that another Village fire fighter had falsified a payroll record and had given related false testimony under oath in a previous WERC complaint proceeding. On those bases, Complainants request declaratory, notice-posting, reinstatement, and back pay remedies as well as an order requiring the Village, Scola and Compton to reimburse Complainants for their attorneys fees and costs.

In its post-hearing arguments, the Village argues that the Complainants have not met their burden of proving that Scola was hostile to Dzbinski's protected activities and that Dzbinski's termination was motivated in whole or in part by that hostility to Dzbinski's protected activities. The Village argues that Dzbinski is guilty of dishonesty in applying for and receiving insurance coverage (of Hope and K. Jackson) and benefits (for K. Jackson) to which he was not entitled. The Village argues that Marschke's police report of his interview with Pauls should be credited over Dzbinski's improbable assertion that Pauls authorized him, even for a month or so, to apply as if he were married with knowledge that Dzbinski was not married. In any event, the Village asserts that Dzbinski engaged in dishonesty by his subsequent failure for 25+ months to correct the untrue application information on the basis of which the Village was paying for family insurance rather than the less expensive member/dependents coverage (of the employee plus one or more non-spouse dependents). The Village argues that its treatment of the other fire fighter cited by Complainants as an example of alleged disparate treatment is not evidence that its termination of Dzbinski was based on anti-union bias. Finally, the Village argues that discharge is the commonly accepted response to employee dishonesty and that Dzbinski's dishonesty for over two years cannot be excused because he may have been engaged in protected activity when the Village discovered his misconduct. The Village argues that "to overturn the discharge decision and return Dzbinski to employment with the Village would send an ominous message to employees and employers that you can engage in dishonest conduct and be protected from discipline if you are fortunate enough to be engaged in protected activity when the employer discovers your pattern of dishonesty." On those bases, the Village requests that the complaint be dismissed in its entirety and that Complainants be ordered to pay the Village's attorneys fees and costs.

Applicable Legal Standards

Section 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 in sub. (2)." Under Section 111.70(2), Stats., the rights protected by Sec. 111.70(3)(a)1, Stats., include, among others, "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. . . .".

The Commission has held that allegations of independent violations of Sec. 111.70(3)(a)1, Stats., are to be analyzed by use of the four-part test outlined below regarding violations of Sec. 111.70(3)(a)3, Stats., in cases where, as here, ". . . the essence of the violation lies in the employer's motive for taking adverse action against one or more employees, such as claims of retaliation. In such cases, if lawfully motivated, adverse actions will not be found violative of (3)(a)1 "simply because it could be perceived as retaliatory." CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03) AT 15.

Section 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer "To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; but the prohibition shall not apply to a fair-share agreement." Under the four-part test to establish a violation of Sec. 111.70(3)(a)3, Stats., it must be proved by a clear and satisfactory preponderance of the evidence that the municipal employee was engaged in protected, concerted activity; that the municipal employer's agents were aware of that activity; that the municipal employer, or its agents, were hostile towards that activity; and that the municipal employer's actions toward the municipal employee were motivated, at least in part, by its hostility toward the municipal employee's protected, concerted activity. *MUSKEGO-NORWAY SCHOOLS V. WERB*, 35 Wis.2d 540 (1967); *EMPLOYMENT RELATIONS DEPARTMENT V. WERC*, 122 Wis.2d 132 (1985).

As the key element of proof involves the motivation of [the employer] and as, absent an admission, motive cannot be definitively demonstrated given the impossibility of placing oneself inside the mind of the decisionmaker, [the employee] must of necessity rely in part upon the inferences which can reasonably be drawn from facts or testimony. On the other hand, it is worth noting that [the employer] need not demonstrate "just cause" for its action. However, to the extent that [the employer] can establish reasons for its action which do not relate to hostility toward an [employee's] protected concerted activity, it weakens the strength of the inferences which [the employee] asks the [WERC] to draw.

Additionally, in dual-motive cases, evidence that legitimate reasons contributed to the employer's decision to discharge the employee can be considered by the WERC in fashioning an appropriate remedy. For example, to remedy the violation of SELRA in this case, the examiner ordered the State to reinstate Hartberg but, because there was evidence that Hartberg failed to comply with work procedures, declined to credit the time Hartberg was laid off toward the remaining training period.

EMPLOYMENT RELATIONS DEPARTMENT V. WERC, SUPRA, AT 143.

Application of Legal Standards

Applying those principles in this case, the Examiner has found ample evidence, as noted in Finding of Fact 11, that Dzbinski engaged in activities protected by MERA. While Dzbinski's tenure as a union officer prior to his termination was relatively short, his protected activity was frequent and zealous.

The Examiner has also found ample evidence, as noted in Finding of Fact 12, that Dzbinski's activities were known to Scola, Compton and other Village decisionmakers involved in Dzbinski's termination prior to their March 9, 2004, decision to authorize Scola to terminate Dzbinski. However, the Examiner has found that the Complainants have failed to meet their burden of proving that Scola or other Village decision makers knew about Dzbinski's

preparation of a complaint to the DOC prior to Dzbinski's termination on March 11 or that they knew of the March 11, 2005, grievance concerning dues deductions when the decision was made on March 9, 2004, to authorize Scola to terminate Dzbinski. Dzbinski testified that he submitted that grievance to Scola on March 11, 2005, prior to the meeting at which Scola informed him of his termination. (tr.I, 70)

The Examiner has also found that Scola was hostile to Dzbinski's protected activities in the several respects noted in Finding of Fact 13. Two of the items listed in that Finding warrant emphasis. First, while that evidence is not limited to Dzbinski's involvement in the Village's 2004 termination of Stephen Raclaw, the contentious history of Raclaw's previous termination and WERC-ordered reinstatement is significant in assessing the Village decisionmakers' and particularly Scola's attitudes toward Dzbinski's protected activities. Scola and the Village were required to reinstate Raclaw on the grounds that his termination was motivated in part by Raclaw's and the Local's protected activities. At both the examiner and Commission review levels, Raclaw's termination was a hotly-contested dispute in which the termination imposed by Scola was overturned and in which Scola's complaint hearing testimony was discredited in certain respects. Scola admitted in his testimony in the instant case that he disagrees with the examiner and Commission decisions that Raclaw was terminated in part on account of protected activities. (tr.I, 214-216). In those contexts, the Examiner finds it reasonable to infer that Scola was resentful of and hostile regarding Dzbinski's aggressive and serious challenge of the propriety of Scola's and the Village's efforts in 2004 to terminate Raclaw. Second, an important basis for concluding that Scola was hostile toward Dzbinski's protected activities is the Examiner's finding that Scola angrily threatened Dzbinski with adverse action including discharge for having recorded without Scola's knowledge the conversation they had concerning the source of the vision requirement on the basis of which Raclaw had been terminated. Scola testified that he did not threaten Dzbinski's job during that interchange. (tr.I, 218). Scola further testified that he was frustrated and angry with himself (not with Dzbinski) because (after having completed law enforcement certification coursework) he (Scola) should have but did not know whether it was unlawful for Dzbinski to record the conversation without Scola's knowledge. (tr.I, 216-217). The Examiner finds that Scola's testimony in the latter regard was not a credible explanation either for Scola's undisputed anger or for Scola's undisputed threats to go to the DA and to press charges against Dzbinski for having made the recording. Scola's lack of candor and truthfulness regarding the reason why he was frustrated and angry on that occasion have also led the Examiner to discredit Scola's denial that he threatened Dzbinski's job during that exchange. It can also be noted that, in its Answer on this point (in response to Complaint paragraph 34), the Village responded as follows: "Admit the allegations that Director Scola was upset with being recorded without his consent and admit that he stated he would press charges and take any disciplinary action that would be possible for illegal activity." Even that explanation of Scola's anger is not persuasive because the record establishes that Scola had previously received complaints that Dzbinski was recording conversations involving members of the Fire Department, but Scola only expressed anger and threats and investigated the lawfulness of Dzbinski's recording activities when Scola discovered Dzbinski using a recording in opposition to Scola's and the Village's January 23, 2004, termination of Raclaw. (tr.I, 160-162).

The Examiner has also found, on the bases noted in Finding of Fact 24, that Dzbinski's termination was motivated, in part, by Scola's hostility toward Dzbinski's protected activities. The record establishes that Scola recommended that Dzbinski be terminated (tr.I, 53-54), and that Compton and the Village Board concurred in that recommendation and the Village Board authorized Scola to impose termination. In that regard, a central issue is whether the Village's reasons for terminating Dzbinski were legitimate or a pretext for unlawful retaliation against Dzbinski for his protected activities. For reasons outlined in Findings of Fact 6-9 and 24.d.(1)-(3), the Examiner has found that the Village had legitimate reasons for taking disciplinary action against Dzbinski as regards dishonesty in applying for and receiving Village insurance coverage and benefits, but that there are mitigating factors that make termination too severe a penalty in the circumstances.

The Village has persuasively shown that Dzbinski committed serious dishonesty-related misconduct by failing to correct untruthful information he supplied on that application while receiving health insurance coverage (of K and Hope) and benefits (payment of K's claims) to which he was not entitled. The Examiner has credited Dzbinski's testimony regarding his conversation with Pauls at the time Dzbinski prepared the applications at issue.¹ At most, Dzbinski's version of the conversation with Pauls explains why he identified himself as married on the forms and why he listed "Hope Dzbinski" as his spouse and requested coverage of her. It does not, however, explain why he failed to correct that information when it turned out he was not married within a month or so after submitting the applications. The Complainants' amended complaint allegation that this was an inadvertent oversight is unpersuasive. Dzbinski would have received insurance cards bearing the names of the spouse and dependents he listed on his application. Those cards would have served as a reminder that the Village and its insurance carrier were operating on the basis of untrue information supplied to them by Dzbinski. Similarly, if, as Dzbinski asserts (tr.I, 39, 116-118; and ex. 40 at p.3), Hope incurred various expenses for which insurance company payment was consciously not sought because Dzbinski and Hope were not yet married, each such expense would have been an additional reminder that the Village and its insurance carrier were operating on the basis of untrue information supplied to them by Dzbinski.

The Examiner finds it quite plausible that Dzbinski believed that the Village had only family and single coverage and that he therefore believed that the Village would incur no additional premium cost by reason of his continued listing of Hope as his spouse. The evidence establishes, however, that Dzbinski was mistaken in both respects because the Village has four

1 The Examiner has done so because Dzbinski's testimony was subject to cross-examination whereas Pauls' hearsay statements to Marschke as reflected in Marschke's testimony and report regarding his interview with Pauls were not. While the record establishes that Pauls retired from Village service sometime prior to December of 2003, (tr.I, 116) and that after retiring she has experienced health problems of an unspecified nature (tr.II, 18), there is no showing that she was unavailable to testify first-hand and thereby be subject to cross-examination. In that regard, Marschke's report notes that, as of May 17, 2004, (the date Marschke interviewed her) Pauls was willing to testify on the subject if called upon to do so.

categories of coverage², such that it was paying more in premiums because of Dzbinski's identifying himself as married and listing his spouse as a person for whom he was applying for coverage.³ Those additional premium costs (totaling in excess of \$7,000 by Village calculations) were the direct result of Dzbinski's entering and leaving in place untrue application information regarding his marital status. Thus, while Dzbinski has not been shown to have known that his misrepresentations were costing the Village additional premium dollars each month, it was nonetheless Dzbinski's allowing those untrue entries to remain in effect that caused the Village to experience significant unnecessary costs.

Dzbinski also left unchanged his listings of K. Jackson as a person for whom he sought coverage. Each of the three application forms called for a listing of "family member(s)" to be covered. The Examiner therefore finds unpersuasive Dzbinski's explanation that he mistook the additional references to "dependent name" on one of the forms to mean that the forms were calling for "dependents" broadly defined. K. Jackson was not a member of Dzbinski's family until Dzbinski and Hope were married in February of 2004. Dzbinski's inclusion of K. Jackson as a person for whom he sought coverage did not increase the Village's premium costs, but it did enable Dzbinski to receive insurance benefits in the form of payments regarding K. Jackson

2 The record reflects considerable misunderstanding and confusion on the part of many people regarding the available categories of Village insurance coverages. The Examiner has based Finding of Fact 8 in that regard on Exhibits 27 and 39. Those exhibits make clear that, at least as regards medical insurance, in addition to family and single coverage, the Village makes available "member/dependents" coverage (employee plus one or more non-spouse dependents) and "member/spouse" (employee plus spouse and no other dependent), and that the premiums paid for the latter two coverages are the same, with the family costing more and the single costing less. In contrast, the Village Personnel Policy Manual as revised May 7, 2002, states "The health insurance plan shall be as established by the Village and shall be provided to full-time employees. Each married employee or an employee with children as dependents shall be covered by the family plan," and the Agreement makes no reference to types of coverages. The Village's cost calculation spreadsheet (ex. 20) compares premiums paid for family plan coverage for Dzbinski with the costs for single and the costs for what is variously referred to in that document as "Emp+1 and "Married+1." Similarly, at the March 11, 2005 termination meeting, Compton described the \$7,667.14 as the difference between "the family and the one dependent" coverages and Scola ambiguously stated that that dollar amount was "based off of single plus one and um single versus family." (ex. 40 at pp.6,7). Indeed, part of the basis for the ADA's request that the criminal complaints against Dzbinski and Hope be dismissed (without prejudice to reissuance) was because of confusion regarding what insurance coverage alternatives were available to employees of the Village fire department. (ex. 26 at 12-14). Other examples of uncertainty and/or confusion as to the exact nature of the various coverages can be found in the testimony of Compton (tr.II, 29), Clausen (tr.II, 61) and Scola (tr.I, 157, 159 and 172).

³ In their reply brief, Complainants contend that the record does not establish that Dzbinski's insurance applications caused the Village any unnecessary expense. On the contrary, Exhibit 27 is an insurance company invoice to the Village for March of 2003. Its authenticity is not disputed (tr.I, 11). It shows that the Village was billed a "current premium" of \$1184.37 for a "family" type of insurance contract for Dzbinski, and that the Village was billed current premium amounts of \$911.05 for both "mbr/spouse" and "mbr/dep(s)" types of insurance contracts as regards other Village personnel listed on the invoice. The balance of the record -- including the facts that the Village offered only one example invoice into evidence at the complaint hearing and that the District Attorney's office had not, as of the date of the complaint hearing, refiled fraud charges against Dzbinski or Hope after receiving additional information from the Village regarding the nature of the Village's loss (tr.I, 159) -- does not persuade the Examiner to disregard the clear implication of Exhibit 27: that Dzbinski's untrue statements on his insurance applications caused the Village to experience a substantial and unnecessary monetary expense.

totaling \$814.78 to which Dzbinski was not entitled. The fact that Dzbinski reimbursed the Village's medical insurance carrier for those claims sometime after May 24, 2004, is not a factor that could have been known to the Village at the time it was determining what penalty to impose on Dzbinski for his misconduct in this matter.

The Examiner does not find persuasive the Complainant's contention that the Village's decision to take disciplinary action of any kind against Dzbinski for dishonesty constitutes disparate treatment when compared with its failure to take any disciplinary action with respect to another Village employee who falsified a payroll record and was found by the WERC and its examiner to have testified untruthfully under oath in the Raclaw complaint hearing. Dzbinski's misconduct was engaged in over a long period of time; it cost the Village significant amounts of premium dollars unnecessarily spent; and it enabled him to obtain benefits of significant value to which he was not entitled. In contrast, the other employee's untruthful testimony was a one-time occurrence, and there is no showing that the other employee's untruthful testimony caused the Village significant financial harm or enabled that employee to be unjustly enriched in any significant way.

The Examiner also does not find the Circuit Court's September 27, 2004 dismissals of the criminal insurance fraud complaints against Dzbinski and Hope to be a persuasive basis on which to reject the legitimacy of the Village's stated reasons for terminating Dzbinski. As a general matter, criminal proceedings involve a higher standard of proof and different elements of proof than those applicable in complaint proceedings under MERA. Moreover, in the instant case, the dismissals were without prejudice to reissuance, and the record establishes that the ADA told the Court that she was basing her request for dismissal in part on her understanding that the Village only offers family and single insurance. On that basis, the ADA told the Court that she concluded that Dzbinski's misrepresentations on the insurance applications did not cause the Village or anyone else to lose the requisite dollar amount (more than \$2500) necessary to support the felony insurance fraud charges that were then pending before the Court. Contrary to the ADA's stated understanding, the Examiner has found that the Village offers the four categories of insurance coverage described in Finding of Fact 8, such that Dzbinski's application misrepresentations did cause the Village to pay significantly more in premiums than it otherwise would have for the coverage to which Dzbinski was entitled prior to his marriage to Hope in February of 2004.⁴

While the Examiner has therefore found that the Village had legitimate reasons for taking disciplinary action against Dzbinski as regards dishonesty in applying for and receiving Village insurance coverage and benefits, the Examiner is also persuaded that there are mitigating factors that make termination too severe a penalty in the circumstances.

The Village contributed to Dzbinski's misconduct by causing family insurance to be provided to Dzbinski despite (Pauls') having been informed by Dzbinski at the time he submitted the applications to her that Dzbinski was not then and would not be married for a month or so thereafter. As noted above, the Examiner has credited Dzbinski's first-hand testimony about his

⁴ See Note 3, INFRA.

application-time conversation with Pauls over the second-hand testimony and report of Marschke concerning his interview with Pauls on that subject. Had Pauls not authorized Dzbinski to submit his January 7, 2002, applications in what they both knew would only become accurate in a month or so, the applications Dzbinski submitted would not have identified Dzbinski as married and would not have claimed "Hope Dzbinski" as a spouse entitled to coverage.

The Village also contributed to Dzbinski's misconduct by failing to provide Dzbinski with information that would put him on reasonable notice as to which dependents are and which are not eligible for coverage under the Village's health insurance plans. Had Compton's predecessor met with Dzbinski as Compton testified was something he routinely did during his tenure⁵ as regards employees newly eligible for Village insurance (tr.II, 35), to provide information needed by an insurance applicant regarding the nature of the Village's plans and coverages, or had the Village otherwise had in place a procedure that made sure applicants for insurance received the eligible dependents guidelines,⁶ Dzbinski would probably have learned that K. Jackson would not become an eligible dependent until Dzbinski became married to Hope. That, in turn, would likely have caused Dzbinski not to include K. Jackson on his applications as a covered person.

The Village also contributed to Dzbinski's misconduct Dzbinski's by failing to provide Dzbinski with information that would put him on reasonable notice as to the existence and nature of employee/dependents (i.e., employee plus one or more non-spouse dependents) coverage. Had Dzbinski known about that coverage, he would not have had reason to believe that the Village was experiencing no financial harm due to its provision of family coverage for him based on his untruthful applications. The variety of coverage option sets listed on the three applications referenced in Finding of Fact 6 might have indicated that more than family and single coverage was available, but the Village Personnel Policy Manual, even as revised May 7, 2002, contains the flat statement (clearly inaccurate at least as to at least the medical) that, regarding the Village's "health insurance plan . . . Each married employee or an employee with children as dependents shall be covered by the family plan," and the Agreement then in effect provided no provision or indication to the contrary.⁷

⁵ As Compton testified, because his tenure with the Village was from October, 2003 to February, 2005, he was not there when Dzbinski became eligible and applied for Village insurance benefits. (tr.II, 35).

⁶ According to Compton, the Village distributed insurance plan documents to affected Village employees when those documents were updated by the insurance carriers involved (tr.II, 38-39), but there is no basis in the record on which to conclude that any such document was distributed to Dzbinski at any time during his employment with the Village.

⁷ While two of the three insurance applications referred to coverage types in addition to family and single, the vision application offered only family and single, and the alternatives besides single and family referred to on the other two applications were not consistent with one another. See Finding of Fact 6.

Those mitigating factors do not excuse Dzbinski's serious dishonesty-related misconduct in this case, but they do support the conclusion that termination was too severe a penalty in all of the circumstances.⁸

For those reasons, and in light of the factors noted in Findings of Fact 13 and 24, the Examiner has concluded that the Village's imposition of termination (rather than a lesser penalty) was motivated, in part, by Scola's hostility toward Dzbinski's protected activities. The Examiner has therefore concluded that, by terminating Dzbinski, the Village violated Sec. 111.70(3)(a)3, Stats., and derivatively violated Sec. 111.70(3)(a)1, Stats.

Remedy

By way of remedy for that violation, the Examiner has ordered some but not all of the conventional remedies in a case of this kind: declarative, cease-and-desist, reinstatement, and notice posting, but not back pay. Because the Examiner has found that this is a dual-motive case (i.e., one in which the Village has been shown to have acted for both legitimate and unlawful reasons), the evidence discussed above that legitimate reasons contributed to the Village's decision to terminate Dzbinski can be considered by the Examiner in fashioning an appropriate remedy. *Id. EMPLOYMENT RELATIONS DEPARTMENT V. WERC, SUPRA*, AT 143.

In the instant case, the Examiner finds it appropriate not to provide back pay relief because Dzbinski's misconduct was serious, dishonesty-related, engaged in over a lengthy period of time, costly to the Village in terms of unnecessary insurance premiums paid, and beneficial to Dzbinski (until restitution was made) as regards insurance carrier payments of K. Jackson claims to which Dzbinski was not entitled.⁹

The Examiner has not ordered the additional relief requested by Complainants in the form of reimbursement of the Complainants' litigation costs and attorneys fees. This case does not fall within the narrow scope of those in which the Commission has found such extraordinary remedies appropriate. *SEE, CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03)*.

The Examiner has also denied the Village's request that the Complainants be ordered to pay the Village's litigation costs and attorneys fees both because a MERA violation by the Village has been found, but also because the Commission has held repeatedly in recent years that it is without statutory authority to grant the relief the Village is requesting in this case.

⁸ Dzbinski's limited length of service and the duration and seriousness of his misconduct render his otherwise unblemished employment record with the Village relatively unpersuasive as a further mitigating factor.

⁹ The Examiner's determination that no back pay is warranted for periods of time prior to the date of the Examiner's issuance of the instant decision is not intended to determine whether back pay with interest is an appropriate remedial element as regards periods of time after the date of the Examiner's decision in this matter. That question would arise, if at all, at the Commission review level.

E.G., MILWAUKEE AREA TECHNICAL COLLEGE, DEC NO. 30254 (WERC, 1/4/02) at 4 ("We deny the Respondents' request for costs and attorneys' fees because we do not have the statutory authority to grant same in complaint proceedings to responding parties. STATE OF WISCONSIN, DEC. No. 29177-C (WERC 5/99).")

Dated at Shorewood, Wisconsin, this 20th day of December, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/

Marshall L. Gratz, Examiner