STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BROWN COUNTY SHERIFF'S DEPARTMENT NON-SUPERVISORY LABOR ASSOCIATION, Complainant,

vs.

BROWN COUNTY, Respondent.

Case 708
No. 64521
MP-4133

Decision No. 31367-E

Appearances:

Cermele and Associates, S.C., by **Attorney Jonathan Cermele**, 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin 53213, appearing on behalf of the Complainant.

Whyte Hirschboeck Dudek, S.C, by **Attorney Thomas P. Godar,** One East Main Street, Suite 300, Madison, Wisconsin 53703-3300, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On February 21, 2005, Brown County Sheriff's Department Non-Supervisory Labor Association filed a complaint against Brown County, alleging that the County violated Sec. 111.70(3)(a)1, Wisconsin Statutes, by interfering with, restraining and/or coercing municipal employees in the exercise of their rights to bargain collectively, growing out of the County's response to a confrontation between Union Bargaining Team Member George Gulczynski and County Bargaining Representative Donald Vander Kelen on January 17, 2005. The Commission appointed John Emery, a member of its staff, as Examiner to issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07 and 111.70(4)(a), Wis. Stats. On June 29, 2005, the County filed an Answer to the Complaint seeking, among other things, dismissal of the Complaint for failure to include a statement referencing an accompanying filing fee, as required by Wis. Admin. Code Sec. ERC 12.02(2)(e). On July 7, 2005, the Complainant filed an Amended Complaint containing the specified filing fee reference. The matter was heard in Green Bay, Wisconsin on July 13, 2005, July 28, 2005, September 1, 2005, August 3, 2006 and August 29, 2006, including an eleven-month hiatus

necessitated by a dispute between the parties regarding the Complainant's duty to respond to a *subpoena duces tecum* issued by the Respondent. The proceedings were transcribed and the final installment of the transcript was filed on September 8, 2006. The Complainant filed its initial brief on October 2, 2006. The Respondent filed its reply briefs November 13, 2006. The Complainant filed a responsive reply brief on November 22, 2006, whereupon the record was closed.

The Examiner, having considered the evidence, the applicable law and the arguments of the parties and being advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. Brown County Sheriff's Department Non-Supervisory Labor Association, the Complainant herein, is a labor organization maintaining offices at 300 East Walnut Street, Green Bay, Wisconsin.

2. Brown County, the Respondent herein, is a municipal employer maintaining its principal place of business at 300 East Walnut Street, Green Bay, Wisconsin.

3. At the time of the events referenced herein, the collective bargaining agreement between the parties covering the period January 1, 2002 to December 31, 2003 had expired and the parties were in negotiations over a successor contract.

4. Article 2 of the expired agreement recognized the Union as "…the sole and exclusive bargaining agent with respect to hours, wages and other conditions of employment for all regular law enforcement employees employed by Brown County that have the power of arrest including Patrol Officer and Sergeants, but excluding the Sheriff, Chief Deputy, Captains and Lieutenants and all other department supervisors."

5. At all times pertinent hereto, George Gulczynski was employed by the County as a Deputy Sheriff, and was a member of the Union bargaining team with respect to the ongoing contract negotiations between the Union and the County.

6. At all times pertinent hereto, Donald Vander Kelen was retained by the County to act as its chief negotiator respect to the ongoing contract negotiations between the Union and the County.

7. On January 17, 2005, the parties' respective bargaining teams met for a negotiation session. The Union bargaining team at the meeting consisted of Deputy Gulczynski, Sergeant Greg Rabas, Sergeant Alan Phillips, Sergeant Patrick Gilson, Deputy Kevin Pawlak, Attorney Rachel Pings and Attorney Laurie Eggert, who was the Union's chief negotiator. The County's bargaining team consisted of Mr. Vander Kelen, Chief Deputy John Gossage and County Human Resources Director Richard Gschwend.

8. Early on during the meeting, while Gulczynski was discussing an outstanding grievance with Gschwend, a verbal altercation arose between Vander Kelen and Gulczynski when Vander Kelen interrupted the conversation between Gulczynski and Gschwend and Gulczynski, in a forceful tone, told Vander Kelen to "shut up." Vander Kelen took exception to Gulczynski's remark and threatened to leave the meeting, whereupon Gulczynski gestured toward the door and invited Vander Kelen to do so. Vander Kelen demurred and the bargaining session continued. Later in the session Vander Kelen made disparaging comments about Gulcyzinski and at some point Gulczynski commented to Rabas that Vander Kelen was a "bullshit artist," which Vander Kelen overheard and which further angered him, but there were no further confrontations between them. At no time did the confrontation between Gulczynski and Vander Kelen become physical, nor did the other participants, including Chief Deputy Gossage, intervene.

9. Later that day, after the bargaining session had ended, Vander Kelen and Gossage met with Sheriff Dennis Kocken and reported on the incident between Vander Kelen and Gulczynski. Gossage expressed concerns over what he characterized as Gulczynski's explosive and inappropriate behavior and Vander Kelen strongly recommended that Gulczynski have a fitness for duty examination. Gossage was not asked, nor did he explain, why he did not intervene with Gulczynski immediately.

10. Also on January 17, Vander Kelen reported to the Executive Committee of the County Board on the negotiations and told them he was disturbed by disquieting influences within the Union bargaining team. The Executive Committee made no decision on further action at that time.

11. Vander Kelen's report to the County Board Executive Committee after the January 17, 2005 bargaining session did not have a reasonable tendency to interfere with, coerce or restrain the Association members in the exercise of their protected rights.

12. Still later on January 17, Vander Kelen called Sergeant Phillips, who was also the Union President, and told him that he needed to control his people and suggested that Gulczynski might need a referral to the Employee Assistance Program. He also told Phillips that the confrontation had been reported to the Executive Committee of the County Board.

13. At a later date, the Sheriff also spoke to Sergeant Phillips and Sergeant Rabas about the incident. Both of them indicated that they did not believe Gulczynski's behavior at the meeting was a matter for concern. In the meeting with Rabas, the Sheriff indicated he had been urged by Vander Kelen to have Gulczynski relieved from duty and have a fitness-for-duty evaluation performed on him and that Vander Kelen was considering referring the matter to the County Board. The Sheriff told Rabas that he had no intention of disciplining Gulczynski, but would have him meet with Gossage and Patrol Captain Schultz and that Gulczynski should be cooperative but not worry about it.

14. At some point after the January 17 meeting, and subsequent to his conversations with Phillips and Rabas, Sheriff Kocken instructed Chief Deputy Gossage to have Gulcynski meet with his Division Commander, Captain Randy Schultz, to address the concerns raised by his behavior at the January 17 meeting. Kocken testified that, based on the reports of the altercation from Vander Kelen and Gossage, he had a concern that Gulczynski may have an anger management problem which could affect his job performance and wanted Gossage to inquire further to determine whether the concern was valid.

15. On January 26, 2005, in response to Sheriff Kocken's directive, Gossage sent the following memorandum to Schultz:

To: Captain Randy Schultz

From Chief Deputy John Gossage

Re: Patrol Deputy George Gulczynski

On Monday, January 15, 2005, the Brown County Management Team met with the Non- Supervisory Union at the Northern Building for grievance hearings and contract negotiations. During the course of this meeting, Deputy Gulczynski had a heated verbal exchange with the Brown County Negotiatior, Don Vander Kelen. During the exchange, Gulczynski told Sergeant Rabas that vander Kelen was a "Bullshitter" and later instructed Vander Kelen to "Shut-up." My concerns regarding this letter to you is not disciplinary in nature, as any complaints from the Executive Committee or Negotiatior Vander Kelen can be addressed in the proper arena.

My concern is that his explosive behavior as well as his perceived, threatening conduct far exceeded his role in the protective bargaining negotiation. This was a controlled environment that affords interaction, in a civil manner, between both the County and the Non-Supervisory Union. Negotiator Vander Kelen was representing the "voice" of Brown County and Attorney Laurie Eggert was representing the Non-Supervisory Union.

I highly recommend that you address this issue with Deputy George Gulczynski in an effort to rectify any future issues regarding his anger. This request is based on his anger exhibited in a controlled environment and I fear that the general public, if disagreeable with Deputy Gulczynski, may be subject to similar mistreatment. Please keep me advised of the situation.

cc: Sheriff Dennis Kocken

16. On January 27, Schultz, in turn, placed a copy of Gossage's memorandum in Gulczynski's mail box with a note asking Gulczynski to meet him to discuss the matter at 6:30 a.m. on January 28.

17. On January 28, Gulczynski met with Schultz and Gossage regarding his confrontation with Vander Kelen. At the outset of the meeting, Gossage told Gulczynski that the meeting was not disciplinary and Gulczynski did not ask for Union representation. Schultz then asked Gulczynski if he was having any personal problems, which Gulczynski denied. Gulczynski also stated that he believed that Vander Kelen was behind the memo and the request for the meeting. After Gossage and Schultz had satisfied themselves that there was no need for concern about Gulczynski's behavior or potential future outbursts, Gossage told Gulczynski that the meeting was at an end, whereupon Gulczynski stated, "this isn't over." Gossage then warned Gulczynski that Vander Kelen was very influential and that "he had better make sure the juice was worth the squeeze," at which point the meeting broke up. Gossage and Schultz subsequently reported the substance of the meeting to Sheriff Kocken and gave their opinion that Gulczynski's behavior was not a matter for concern. Kocken took no further action regarding the January 17 incident.

18. Other than the meeting on January 28, 2005, no other action was taken by the County or the Sheriff's Department concerning the altercation between Gulczynski and Vander Kelen, no formal discipline was issued to Gulczynski and no record of the incident or January 28 meeting was placed in Gulczynski's personnel file.

19. The meeting between Gulczynski, Gossage and Schultz on January 28, 2005 had a reasonable tendency to interfere with, coerce or restrain Gulczynski and the other Association members in the exercise of their protected rights.

20. The County did not have a legitimate business purpose for the January 28 meeting.

21. On February 11, 2005, the parties were scheduled to have another bargaining session. Prior to commencement of the meeting Chief Deputy Gossage asked the Union's attorney, Rachel Pings, to meet with him beforehand. Thereafter, Pings, along with Union President Todd DeLain and Vice President Greg Rabas, met privately with Gossage and Vander Kelen. In the meeting, Vander Kelen told the Union representatives that he had reported the January 17 incident to the Executive Committee and that he did not know if it would result in discipline for Gulczynski. He further stated that the employer/employee relationship does not end during bargaining and that the Union members should watch their behavior in the future. He also stated his preference that only the chief negotiators for each side speak during the bargaining session to avoid further confrontations. Pings responded to the effect that Union bargaining team members were all free to participate in negotiations and would do so as they saw fit. Thereafter, the parties went into their negotiating session, which was conducted without further incident.

22. The meeting between Vander Kelen, Gossage and the Union leadership before the bargaining session on February 11, 2005 had a reasonable tendency to interfere with, coerce or restrain the Association members in the exercise of their protected rights.

23. The County did not have a legitimate business purpose for the February 11 meeting.

CONCLUSIONS OF LAW

1. The Complainant, Brown County Sheriff's Department Non-Supervisory Employees Labor Association, is a labor organization within the meaning of Section 111.70(1)(h), MERA.

2. The Respondent, Brown County, is a municipal employer, within the meaning of Section 111.70(1)(j), MERA.

3. George Gulczynski is a municipal employee, within the meaning of Section 111.70(1)(i), MERA.

4. Vander Kelen's report to the County Board Executive Committee after the bargaining session on January 17, 2005 did not interfere with, restrain, or coerce municipal employees in the exercise of rights guaranteed in Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

5. The meeting between Gulczynski, Gossage and Schultz on January 28, 2005 did interfere with, restrain, or coerce municipal employees in the exercise of rights guaranteed in Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

6. The meeting between Vander Kelen, Gossage and the Union leadership prior to the bargaining session on February 11, 2005 did interfere with, restrain, or coerce municipal employees in the exercise of rights guaranteed in Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

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

ORDER

1) Brown County, it officers and agents shall immediately take the following actions consistent with the Findings of fact and Conclusions of Law set forth above:

a) Cease and Desist from questioning the professional fitness of members of the Brown County Sheriff's Department Non-Supervisory Labor Association as a means of interfering with, restraining, or coercing municipal employees engaging in lawful concerted activity;

b) Cease and Desist from requiring deference from bargaining unit negotiators during negotiations and a higher degree of civility from bargaining unit negotiators than it requires of its own and then intimating that bargaining unit members who do not meet the County's standards of deference or civility during contract negotiations may be subject to discipline.

c) Post the notice attached hereto as "Appendix A" in conspicuous places in the County's buildings where notices to Sheriff's Department employees represented by the Association are posted. The Notice shall be signed by a representative of the County and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

d) Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

2) The Association's claim that Vander Kelen's report to the County Board Executive Committee constituted a violation of Sec. 111.70(3)(a)1, Wis. Stats. is dismissed.

Dated at Fond du Lac, Wisconsin, this 30th day of March, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/
John R. Emery, Examiner

APPENDIX

NOTICE TO ALL EMPLOYEES REPRESENTED BY THE BROWN COUNTY SHERIFF'S DEPARTMENT NON-SUPERVISORY LABOR ASSOCIATION

Pursuant to an Order of the Wisconsin Employment Relations Commission and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employees represented by the Brown County Sheriff's Department Non-Supervisory Labor Association that:

> WE WILL NOT violate Section 111.70(3)(a)1 of the Municipal Employment Relations Act by questioning the professional fitness of members of the Brown County Sheriff's Department Non-Supervisory Labor Association for the purpose of interfering with, restraining, or coercing municipal employees in the exercise of rights guaranteed in Sec. 111.70(2), Stats.
>
> WE WILL NOT violate Section 111.70(3)(a)1 of the Municipal Employment Relations Act by requiring deference from bargaining unit negotiators during negotiations and a higher degree of civility from bargaining unit negotiators than we require of our own and then intimating that bargaining unit members who do not meet the County's standards of deference or civility during contract negotiations may be subject to discipline.

Dated this _____ day of _____, 2007.

By: _____
BROWN COUNTY

THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES FOR A PERIOD OF THIRTY (30) DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED OR OBSCURED IN ANY WAY.

BROWN COUNTY (SHERIFF'S DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

This complaint arises out of an incident that occurred on January 17, 2005 during a bargaining session between Brown County and the Brown County Sheriff's Department Non-Supervisory Labor Association. The County bargaining team included Chief Negotiator Don Vander Kelen, Chief Deputy John Gossage and Human Resources Director Richard Gschwend. The Union bargaining team included Attorney Laurie Eggert, Attorney Rachel Pings, Union President Al Phillips, Union Vice President Greg Rabas and bargaining unit members Pat Gilson, Kevin Pawlak and George Gulczynski. Vander Kelen is not a management employee of Brown County, but is an independent labor relations specialist whom the County retained to handle its labor negotiations with its various bargaining units. Likewise, Eggert and Pings are attorneys in private practice whose law firm was retained by the bargaining unit to represent it in labor relations matters.

At the outset of the January 17th meeting Deputy Gulczynski began discussing an outstanding grievance with Mr. Gschwend. While they were talking, Vander Kelen began interrupting them and making sarcastic comments to Gulczynski. At some point Gulczynski, using a forceful tone, told Vander Kelen to "shut up." Vander Kelen was offended by Gulczynski's comment and threatened to end the meeting and leave, whereupon Gulczynski pointed to the door and invited Vander Kelen to do so. Vander Kelen did not leave and the meeting continued. Later, Gulczynski was heard to remark to Rabas that Vander Kelen was a "bullshitter," which further annoyed him, but otherwise the meeting proceeded without further incident. At no time during or immediately after the meeting did the Chief Deputy intervene or approach Gulczynski to express concern about his conduct.

After the meeting, Vander Kelen, Gossage and Gschwend reported to Sheriff Dennis Kocken about the negotiations, at which point Vander Kelen told Kocken about the incident and urged him to have a fitness for duty evaluation performed on Gulczynski due to anger management issues. Gossage likewise indicated that he thought Gulczynski's reaction was inappropriate to the provocation, although he had not intervened at the time. Vander Kelen also reported the incident to the Executive Committee of the County Board when he met with them regarding the status of negotiations. Meanwhile, Kocken met with Sergeants Phillips and Rabas regarding the confrontation and they told him that in their opinion Gulczynski had not behaved inappropriately. Nonetheless, Kocken instructed Gossage to follow up with Gulczynski to determine if he had any personal problems that would affect his job performance or warrant a referral to the Employee Assistance Program (EAP).

On January 26, 2005, Gossage sent a memorandum to Gulczynski's direct supervisor, Captain Randy Schultz, describing the incident at the January 17 meeting and setting forth his

concerns about Gulczynski's behavior. He requested that Schultz follow up with Gulczynski to ascertain if there were underlying problems that needed to be addressed. Schultz forwarded the memo to Gulczynski and requested that they meet on January 28th to discuss it. On January 28th, Gulczynski met with Gossage and Schultz. Gulczynski was told the meeting was not disciplinary in nature, but was intended to determine whether the department had reason to be concerned due to his outburst. Gulczynski denied that there was need for concern and Gossage and Schultz were satisfied with his responses. Gulczynski also stated his belief that Vander Kelen was behind the meeting and stated that the matter was not over. Gossage denied Vander Kelen's involvement and warned Gulczynski against proceeding against someone with Vander Kelen's influence.

On February 11, 2005, the parties met for another bargaining session. Prior to the meeting, Gossage and Vander Kelen met with Pings, Rabas and Officer Todd Delain, the new Union President. At that time, Vander Kelen told the Union representatives that he did not want a repeat of the occurrence at the January 17 meeting and, to that end, he wanted only himself and Pings to speak at the meeting. He further took the position that employees had to demonstrate a proper employer/employer attitude during negotiations and that the Association members should watch themselves in the future. He also told them that he had reported the January 17 incident to the Executive Committee of the County Board, but did not know if the Board would take action against Gulczynski. Pings told Vander Kelen and Gossage that the Union members would participate in bargaining as they chose and the meeting broke up. The bargaining session took place without incident and the Union bargaining team participated without hindrance or objection.

The Union filed this complaint on February 21, 2005, alleging that the County had interfered with or coerced Union members in the exercise of their collective bargaining rights by trying to restrict the participation of Union members in contract negotiations on February 11 and by exerting pressure on Gulczynski by requiring him to meet with Gossage and Schultz to discuss his confrontation with Vander Kelen and suggesting that his actions could result in discipline. The hearing in this matter was commenced on July 13, 2005 and was continued on July 28, 2005, September 1, 2005, August 3, 2006 and August 16, 2006. The lengthy hiatus between September 2005 and August 2006 was occasioned by a dispute between the parties over the County's asserted right to access to the bargaining notes of the Union's attorneys, which ultimately led to an interlocutory appeal to the Commission. At the close of the hearing, the Union moved to amend its pleadings to conform to the evidence regarding additional allegations arising out of Vander Kelen's discussions with the County Board Executive Committee and Union President Al Phillips. The Examiner initially granted the motion, but agreed to permit the parties to submit additional arguments on the motion in their briefs.

POSITIONS OF THE PARTIES

The Complainant

Amendment of Pleadings

The Complainant asserts that Administrative Rule ERC 12.02(5) permits the amendment of pleadings any time prior to the issuance of a final order. It notes that, inasmuch as the record is complete, permitting amendment would not unduly delay the proceedings. Under Commission case law, the right to amend is to be broadly construed and should be permitted here.

The Merits

The Complainant asserts that the County's actions in response to the altercation on January 17, 2005 between Don Vander Kelen and George Gulczynski constitute prohibited practices. It maintains that Gulzynski was engaged in concerted activity during the bargaining session and that his actions in that meeting were protected under MERA. See, CLARK COUNTY, DEC. NO 30361-B (WERC, 11/03), VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03). Furthermore, Vander Kelen testified that bargaining sessions can be antagonistic and profane, sometimes deliberately, and Sergeant Rabas testified that Vander Kelen, himself, often uses profanity during bargaining. Gulczynski's act of telling Vander Kelen to "shut up" or calling him a "bullshit artist," therefore, were not out of line within the context of bargaining. Rather, Vander Kelen's, and the County's, objection was to Gulczynski's standing up to Vander Kelen and not letting himself be pushed around. MERA assumes that each party is permitted to bargain from a position of equal strength. Thus, the Employer should not be allowed to bargain in a more aggressive or assertive manner than the Union. That the exchange was not outside the norm is evidenced by the fact that bargaining continued afterward without interruption.

In responding to the confrontation, the County, through its agents, violated Sec. 111.70(3)(a)1 Stats. in a number of ways because its actions had a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their statutory rights. See, ST. CROIX FALLS SCHOOL DISTRICT, DECISION NO. 27215-B (Burns,1/93). First, the meeting between Gulczynski, Chief Deputy Gossage and Captain Schultz on January 28 was a thinly veiled attempt to intimidate Gulczynski and send a message to him and the rest of the bargaining team that vigorous bargaining tactics would not be tolerated. It is clear from Vander Kelen's testimony that he was not threatened by Gulczynski, but was merely irritated by his willingness to confront him. Had Gossage truly thought that Gulczynski's behavior was a concern he would have addressed him immediately, but instead he waited ten days. Vander Kelen, however, immediately pressured the Sheriff to conduct a fitness for duty review on Gulczynski and told Sergeant Philips that he "needed to control his people," and that he had reported the incident to the Executive Committee, in a clear attempt to intimidate the Union. This timeline shows that the Sheriff was not concerned about Gulczynski's ability to do his job,

but that the County only wanted to avoid another confrontation in bargaining. The January 28 meeting was mandatory and had disciplinary overtones, as the Sheriff conceded, and Gulczynski could also have been disciplined for failing to attend. Even questioning an employee about his conduct during the course of protected activity is a violation of MERA, unless the employer has substantial and reliable evidence of misconduct, which was not the case here. SCHOOL DISTRICT OF NEW BERLIN, DEC. NO. 31243-B (WERC, 4/06). Further, Gossage admitted that on January 28 he quickly satisfied himself that Gulczynski had no problems that would affect his job performance, but then went on to warn him against taking on Vander Kelen, which had nothing to do with the stated purpose of the meeting. Thus, the purpose of the January 28 meeting was to intimidate Gulczynski and the rest of the Union bargaining team, which was a violation of 111.70(3)(a)1, Stats.

The County also committed prohibited practices in the pre-bargaining meeting on February 11, 2005. By that point, the County was already satisfied with Gulczynski's fitness for duty, so the only point of the meeting was to chill bargaining unit members in the exercise of their MERA rights in subsequent bargaining sessions. Vander Kelen admitted he wanted the meeting to "stave off trouble." To that end, he told the Association members that he had reported Gulczynski's actions to the Executive Committee and that they might take action against him or the Association. The implication was that the Association members should be careful in future meetings. He also scolded the members and told them that they were still employees and should act like it at the table. Finally, he tried to designate who from the Association bargaining team could speak during negotiations. Even though the Association members were not intimidated by his tactics, Vander Kelen's attempt to do so was a violation of Sec. 111.70(3)(a)1, Stats. because it had a reasonable tendency to interfere with the Association bargaining team's exercise of their rights, even if it did not ultimately do so.

The Respondent

Amendment of Pleadings

The Complainant should not be allowed to amend its pleadings. The complaint in this case was filed a year and a half before the final day of hearing. At the outset of the hearing, the Union demonstrated a clear appreciation of the facts it wanted to elicit. No surprises or new revelations occurred during the course of the hearing that would justify an amendment of the complaint. By seeking to amend it pleadings at the end of the hearing on two points that were addressed in depth, the Union puts the County at a serious disadvantage. Under Commission precedent, this should not be allowed. See, VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03).

The Merits

The County's actions following Officer Gulczynski's outburst do not constitute prohibited practices. It is the Union's burden to prove by a clear and satisfactory preponderance of the evidence that the County's actions had "a reasonable tendency to

interfere with, restrain, or coerce employes in the exercise of their Sec. 111.70(2) rights." ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-B (BURNS, 1/93) Further, an employer's legitimate business interests may at times limit protected activity. SCHOOL DISTRICT OF NEW BERLIN, DEC. NO. 31243-B (WERC, 4/06) On this basis, the examiner must conclude that the Union has failed to meet its burden.

The County's actions did not have a reasonable tendency to interfere with Union members' rights. The complaint focuses on two incidents. The first was a meeting between Gulczynski, Captain Schultz and Chief Deputy Gossage. The meeting lasted only a few minutes and Gulczynski was informed it was not disciplinary. No record of the meeting was placed in Gulczynski's file. No attempt was made to threaten or coerce Gulczynski and Gossage's remark that the "juice wasn't worth the squeeze" was well-intentioned advice in response to Gulczynski's threat to pursue the matter against Vander Kelen. The second meeting was equally benign. Vander Kelen met with the Union representatives before the February 11 session and merely advocated for more civil discourse to avoid another incident such as the one on January 17. He did not try to limit who could participate in bargaining, but merely stated the employees should not call him names. He also denied knowing anything about possible disciplinary action. Ms. Pings defended the Union's position and the parties then moved into negotiations without further incident. Vander Kelen merely sought to defuse the situation, which apparently worked. There is nothing in either of these meetings that would constitute a prohibited practice.

There is also no evidence that any employees felt coerced by the County's behavior. This is a necessary element to a finding of a violation. ST. CROIX FALLS SCHOOL DISTRICT, ID. All the Union witnesses testified that they were not intimidated by the behaviors they complained of and the record indicates that Union bargaining team members participated freely in bargaining sessions without interference. There is nothing to suggest that the Union members were influenced in any way by Vander Kelen's warning or the meeting between Gulczynski and his superiors. Gulczynski, himself, stated that he was not disciplined, nor was he intimidated by Vander Kelen. Given those facts, the Union suggests that at one time Gulczynski feared possible discipline, but Gossage and Schultz were clear that discipline was never contemplated. WERC precedents establish that such a scenario is not a prohibited practice. See, SCHOOL DISTRICT OF NEW BERLIN, DEC. NO. 31243-B (WERC, 4/06); BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84)

The record shows that the County had legitimate business interests in meeting with Gulczynski after the January 17 session and in meeting with the Union representatives before the February 11 session. The County may legitimately inquire into violent or threatening behaviors by its employees even in the context of otherwise protected activity. During the January 17 session, witnesses describe Vander Kelen as doing nothing out of the ordinary to justify Gulczynski's outburst. On the other hand, all witnesses agreed that Gulczynski's reaction was not typical. Sheriff's Deputies are required to maintain calm in emotionally charged situation and must not give vent to their anger. Part of Gossage's concern was that this outburst was atypical for Gulczynski, who had no past record of temper issues. Under the

circumstances, he was justified in bringing his concern to the Sheriff, who was likewise justified in having Gossage and Schultz follow up with Gulczynski to make sure he wasn't experiencing any personal or emotional problems. The meeting was not confrontational and ended with Schultz being satisfied that Gulczynski had no problems to be concerned about.

The February 11 meeting was merely an attempt to keep bargaining on track and avoid further confrontations. The County was within its rights to urge the Union to bargain in an appropriate manner and avoid offensive behavior. The result was that bargaining thereafter proceeded in an appropriate manner with positive results, which shows that the County's goal was accomplished. There was no attempt to intimidate the Union, nor was that the result.

In the event the Union is allowed to amend its pleadings, the County feels the additional incidents do not constitute prohibited practices. Vander Kelen's report to the Executive Committee did not center on Gulczynski. He described "disquieting influences" during bargaining generally, but did not refer to the Gulczynski incident at all. This was his duty as the negotiator for the County and could not have had the effect of intimidating the Union. Vander Kelen's conversation with Al Phillips also does not constitute a violation. Vander merely told him he needed to control his people and that he should consider referring Gulczynski to the EAP. This reflects a candid expression of concern for the bargain process, not an attempt to intimidate the Union. To the extent that any intimidation was attempted, it was the Union, by the actions of Gulczynski, which attempted to intimidate Vander Kelen and the County on January 17.

The Complainant in Reply

Amendment of Pleadings

The Respondent gives no convincing reason not to allow amendment of the pleadings. The only additional matters not contained in the complaint are the conversations between Vander Kelen and Philips and the Sheriff and Rabas. The County has not indicated how it would have approached the case differently had those incidents been raised in the complaint and the amendment should be allowed. Even if they are not allowed as separate violations, they still add context to the violations already alleged.

The Merits

The County does not dispute that Gulczynski was engaged in lawful concerted activity, so the only remaining questions are whether the County's actions had a reasonable tendency to restrain further protected activity and, if so, whether the County had a legitimate business interest in so doing. On this record, at least two violations of Sec. 111.70(3)(a)1, Stats. must be found.

Under WERC precedents, violations may occur even if there was no specific intent to interfere with protected activity and if no Union member actually felt coerced or restrained.

ST. CROIX FALLS SCHOOL DISTRICT, SUPRA. The key factor is only whether the County's behavior had a reasonable tendency to coerce or restrain. The January 28, 2005 meeting between Gulczynski, Gossage and Schultz was not the pleasant chat the County describes, but was threatening and intimidating and would have had a reasonable tendency to retrain or coerce Union members in the exercise of their MERA rights. By that time, the Sheriff and Vander Kelen had already spoken to Rabas and Phillips, so the Union knew that discipline was being contemplated. Gossage's memo makes it clear that the meeting was mandatory and, whether discipline actually resulted is irrelevant to the question of whether there was a reasonable tendency to coerce or restrain. Likewise, Gossage's advice to Gulczynski, that he tread lightly around the County's lead negotiator, certainly meets that standard.

As to the February 11 meeting, the County argues that the meeting was not intended to be coercive. Again, intent is not dispositive, but rather whether the County's conduct had a reasonable tendency to coerce or restrain. Whether or not Vander Kelen tried to restrict who from the Union could speak during negotiations, he clearly mentioned the fact that the Executive Committee was aware of the situation and that Gulczynski could possibly be disciplined for his conduct on January 17.

The County had no legitimate business purpose for its actions. The dealy in the County's reaction to the January 17 confrontation shows that the Sheriff, Gossage and Vander Kelen were not truly worried about Gulczynski's stability. Had they been Gossage would have intervened immediately and the Sheriff would have pulled Gulczynski from patrol duty until his stability and fitness for duty were established. Instead, Vander Kelen resented the fact that Gulczynski wouldn't let him dominate the meeting and used his influence to see to it that it didn't happen again. He and the Sheriff spoke to Phillips and Rabas. Then, they used Gossage and Schultz to make the point directly to Gulczynski. Finally, Vander Kelen took it up directly with the Union's bargaining leadership. The County asserts that its conduct on February 11 was privileged, but its privileges are no greater than the Union and there is every reason to believe that the success of the meeting had as much to do with the fact that it was recorded for posterity as with anything Vander Kelen said beforehand.

DISCUSSION

Amendment of Pleadings

At the end of the hearing on August 29, 2006, the Complainant moved to amend its pleadings to include additional alleged violations of Sec. 111.70(3)(a)1, Stats. based upon the statements of Don Vander Kelen about his confrontation with George Gulczynski to Union President Al Phillips and the County Board Executive Committee. At that time I granted the motion over the Respondent's objections on the basis of Chapter ERC 12.02(5), Wis. Adm. Code., which states:

> Any complainant may amend the complaint upon motion, prior to the hearing by the commission; during the hearing by the commission member or examiner

> authorized by the board to conduct the hearing; at any time prior to the issuance of an order based thereon by the commission, or commission member or examiner authorized to issue and make findings and orders.

The County objected and requested that the decision be held in abeyance pending an opportunity for the parties to brief the issue, which request was granted.

In its briefs, the Association reiterates its request to amend and extends the request to encompass the conversation between Sheriff Kocken and Sgt. Rabas after the January 17 meeting. The County opposes the request on the basis that to allow the Association to amend at such a late stage of the proceedings would be unjust inasmuch as perhaps the County would have addressed those incidents differently had it known they would be the basis for further allegations of misconduct.

As I stated on the record, under the WERC administrative rules permission to amend pleadings is generally liberally granted. However, permission to amend may be denied where to do otherwise would work an injustice on the Respondent. The County cites VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03) as an instance where the Commission denied permission to amend a complaint at the end of a hearing to include allegations based on certain statements by a Respondent which were raised in testimony. The Commission reasoned that the Respondent did not have sufficient notice that the statements would be a basis for further allegations of wrongdoing and that had such notice been provided the Respondent might have presented its case differently.

Here, I note, as the Complainant pointed out in its briefs, that the statements made by Vander Kelen to the County Board Executive Committee were referenced in paragraph 12 of the Amended Complaint. I consider these allegations to have been raised in the Amended Complaint, therefore, and any additional request to include them to be superfluous. The conversations between Vander Kelen and Phillips and between Kocken and Rabas, however, were not referenced in the Amended Complaint and, in fact, as noted above, the Kocken – Rabas conversation was only first referenced as a separate violation in post-hearing briefs. Upon considering the parties' arguments and the relevant case law, it is my opinion that permitting amendment at the end of the hearing to include additional allegations based on these statements would, under the circumstances, be unjust to the Respondent and the motion is denied. I particularly note in this regard that Phillips testified about his conversation with Vander Kelen on July 13, 2005 and that Rabas testified about his conversation with Kocken on July 28, 2005. The motion to amend, however, was not made until after the close of the hearing on August 29, 2006, over thirteen months later. It is one thing to move to amend pleadings at the end of a one day hearing after new evidence has come to light. Here, however, the record upon which the allegations are based was created long in advance, giving the Complainant more than sufficient time to put the Respondent on notice that the statements would be the basis for additional allegations of wrongdoing in order to give the Respondent a reasonable opportunity to defend against them without additional time or delay. As in VILLAGE OF STURTEVANT, I am persuaded that had the County been put on notice that the referenced

conversations would be the basis for additional allegations, it might well have treated them differently in the presentation of its case and therefore the motion is denied. This does not mean, however, that the testimony about the conversations may not be probative as to the other allegations.

Alleged Violations of Sec. 111.70(3)(a)1. Wis. Stats.

The complaint, as amended, alleges that the County violated Sec. 111.70(3)(a)1, Wis. Stats. on three separate occasions – first, on January 17, 2005 when Don Vander Kelen reported his January 17, 2005 confrontation with George Gulczynski to the County Board Executive Committee; second, when Chief Deputy Gossage and Captain Schultz met with Gulczynski on January 28, 2005; and third, when Vander Kelen and Gossage met with the leadership of the Association bargaining team prior to negotiations on February 11, 2005. It is the Association's contention that, in one way or another, each of these events had a reasonable tendency to impermissibly interfere with, coerce, or restrain Association members in the conduct of concerted activity protected under Sec. 111.70(2).

Under Sec. 111.70(3)(a)1, it is a prohibited practice for a municipal employer "(t)o interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2). Referring back to that statute, the operative language provides to municipal employees "...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..." It has been held that "(i)n order to prevail upon the allegation that an employer has violated Sec. 111.70(3)(a)1, Stats., the complaining party must demonstrate, by a clear and satisfactory preponderance of the evidence, that an employer has engaged in conduct which has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. A violation may be found where the employer did not intend to interfere and an employe did not feel coerced or was not, in fact, deterred from exercising Sec. 111.70(2) rights. A finding of anti-union animus or motivation is not necessary to establish a violation of Sec. 111.70(3)(a)1." ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-B (Burns, 1/93), citing CITY OF EVANSVILLE, DEC. NO. 9440-C (WERC, 3/71); BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84); JUNEAU COUNTY, DEC. NO. 12593-B (WERC, 1/77)

It should also be noted that the WERC has also held that "(a)n employer's legitimate business interests can sometimes justify rules that have a limiting effect on protected activity." SCHOOL DISTRICT OF NEW BERLIN, DEC. NO. 31243-B (WERC, 4/06) Whether such interests exist, and the extent to which they can justify limiting protected activity, is determined by a two-part analysis, which first assesses whether the employee was engaged in protected activity and, if so, whether the employer's action in limiting it was supported by a legitimate business interest and did not reach beyond the extent necessary to protect that interest. STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, DEC. NO. 30340-B (WERC, 7/04) Thus, while

the County does not concede that its actions had a limiting effect on protected activity, it asserts that if such effect is established it was justified by legitimate business interests.

Here, the altercation between Gulczynski and Vander Kelen occurred during contract negotiations when Gulczynski, a member of the Union bargaining team, was discussing a contract grievance with the County Human Resources Director. The Association asserts, and the County does not dispute, that Gulczynski was engaged in protected concerted activity, satisfying the first prong of the analysis. I agree. Gulczynski was acting in his capacity as a designated representative of the bargaining unit and was engaged in the process of contract negotiations and grievance resolution, which are part and parcel the type of activities that are protected by Sec. 111.70(2), Stats. Furthermore, the fact that an argument arose between himself and Vander Kelen in that context does not take his actions or comments out of the realm of protected activity. Contract negotiations frequently can become adversarial. As Vander Kelen, himself, testified, "This is not a honeymoon thing. This is a bargaining session." (Tr. p. 581, line 13-14) Further, the Commission has held that acrimonious behavior is not inherently inconsistent with protected activity. (See: VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03) Thus, I find that Gulczynski's comments to Vander Kelen, albeit contentious, were legitimately within the realm of protected, concerted activity. Thus, it remains to determine whether the subsequent actions of the County's representatives in response thereto a) had a reasonable tendency to impermissibly interfere with, coerce, or restrain Association members in the conduct of protected, concerted activity and, if so, b) whether that limiting behavior was justified by an overriding legitimate business interest. I will address each separate alleged violation individually.

Vander Kelen's January17, 2005 meeting with the Executive Committee

On January 17, 2005, subsequent to the bargaining session, Vander Kelen met with the Executive Committee of the County Board to report on the status of negotiations with the various County bargaining units. Of all the witnesses who testified at the hearing, only Vander Kelen was present at the meeting with the Executive Committee. Vander Kelen's testimony about that conversation was as follows:

> Q: When you discussed issues with the executive committee, did you discuss the strategy of the negotiations?
>
> A: I discussed the strategy I put together and then I talked to them, but there is not really a whole lot of strategy in negotiations, but I have to report to them on what I think the tenor of the negotiations are with their employees who are performing the duties that they're hired to do, and I remember what I said because I waited all my life to use this word and I finally was able to, and I said, "I've noticed disquieting influences."
>
> Q: Is this the meeting following the January 17th bargaining session?

A: That's what I thought you were asking.

Q: Okay. What were the disquieting influences that you discussed?

A: I said, "I had noticed attitudes at the bargaining table that I hadn't seen in previous years or anywhere." And I didn't refer specifically – this was – there was one with the county, the hospital unit; there was one with a representative of the highway unit; and there was one with Mr. Gulczynski, so it was not a singular report. It was a group report.

Q: And did you receive any direction from the executive committee as a result of this discussion?

A: They wanted to terminate anybody that did that. I thought it was best they didn't. I advised them that I didn't think it was the thing to do.

Tr. pp. 593-594

The foregoing testimony being the only evidence in the record regarding what Vander Kelen said to the executive committee, it may be taken as uncontroverted. This testimony is insufficient to find a violation of Sec. 111.70(3)(a)1 by a clear and satisfactory preponderance of the credible evidence based on that interchange alone. On this record, nothing Vander Kelen said to the committee could be construed as having a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their MERA rights. In the first place, no member of the Association was privy to the meeting. In the second place, Vander Kelen stated that, rather than provoke the committee to take action against Gulczynski or the Association, he exercised a restraining influence. And while one may wonder what conduct he reported to the committee that would induce them to consider terminating an employee, the record is silent in that regard, so that any inferences drawn in that regard would be pure speculation. I find, therefore, that the Complainant has failed to sustain its burden with respect to this allegation of the complaint.

Gulczynski's January 28, 2005 meeting with Gossage and Schultz

After the January 17 bargaining session, Chief Deputy Gossage and Vander Kelen met with Sheriff Kocken to discuss the meeting. At that meeting, Gossage and Vander Kelen described Gulczynski's behavior at the bargaining session and Vander Kelen urged the Sheriff to order a fitness-for-duty evaluation on Gulczynski to determine if he posed a potential danger to the general public. (Tr. pp. 704, ln. 1 – 705, ln. 4; 706, ln. 21 – 707, ln. 23) Kocken subsequently met with Sgt. Rabas and discussed Vander Kelen's concern about Gulczynski's behavior to him. He told Rabas that Vander Kelen wanted a fitness-for-duty evaluation done on Gulczynski, which Rabas thought was inappropriate. (Tr. pp. 212, ln 2-15; 213, ln 14-24; Assoc. Ex. #2). According to Rabas, however, the Sheriff was not overly concerned about Gulczynski and was primarily concerned with mollifying Vander Kelen. To that end, he was

going to have Gulczynski meet with Gossage and Patrol Captain Schultz and wanted Gulczynski to know that he didn't need to be worried. (Tr. pp 213, ln 24 -214, ln 10; Assoc. Ex. #2)

The Sheriff subsequently directed Gossage to arrange a meeting between Gulczynski and Schultz. On January 26, Gossage sent Schultz the memo set forth in Finding of Fact #13. Schultz, in turn, passed the memo on to Gulczynski and asked him to meet with him on January 28. Pursuant to that directive, on January 28, 2005 Gulczynski attended a meeting with Chief Deputy Gossage and Captain Schultz. Ostensibly, the meeting was intended to address what Gossage characterized as Gulczynski's "anger" and "explosive behavior" to see if there was reason to be concerned that it would affect his job performance. At the outset of the meeting, Schultz informed Gulczynski that the meeting was not disciplinary in nature and asked him if he was having any problems that would affect his job performance, which Gulczynski denied. Gossage testifed that at that point he was satisfied and terminated the meeting. (Tr.pp 527, ln18 – 528, ln 4) At that point, Gulczynski told Gossage and Schultz that he believed the memo and the meeting had been prompted by Vander Kelen, to which Gossage and Schultz did not respond. (Tr. pp. 516, ln 23–517, ln 5; 528, ln 5–14) There is a dispute between the witnesses about whether at that point Gulczynski stated "This isn't over," Gossage and Schultz asserting that he did so and Gulczynski denying it. (Tr.pp. 427, ln 23-25; 528, ln 13-21; 650, ln 17-24) Gossage and Schultz also agreed that at that point Gossage warned Gulczynski about taking on someone as influential as Vander Kelen, but Gulczynski didn't recall it. (Tr. pp. 429, ln 3-10; 528, ln 20 – 529, ln 9; 651, ln 3-6) The meeting then broke up and no further action was taken by the Sheriff's Department toward Gulczynski about the incident.

Applying the test set forth above, the first question is whether Gulczynski was engaging in protected activity in the January 17 meeting. I have already found above that he was. The next question, then, is whether, under the circumstances, the meeting with Gossage and Schultz would have a reasonable tendency to interfere with, restrain, or coerce Gulczynski and/or other members of the Association in the exercise of their Sec. 111.70(2) rights, remembering that such a determination requires neither a finding of intent nor actual effect under ST. CROIX FALLS SCHOOL DISTRICT, SUPRA. Given those parameters, I think it is clear that the meeting did have such a reasonable tendency. Gulczynski was summoned to a meeting with two of the top three officers in his chain of command to address concerns about his behavior at the January 17 meeting and he knew from the notation on the memo that the Sheriff was also aware of the situation. Despite the fact that he was told the meeting was non-disciplinary, he was also aware that Gossage felt his temper was a concern and could affect his job performance. It would take no stretch of the imagination for Gulczynski to perceive that one possible outcome of the meeting would be a fitness for duty evaluation that could result in him being relieved from duty as a result of his confrontation with Vander Kelen. There is no question that this could have a chilling effect on Gulczynski and other Association members in the exercise of their Sec. 111.70(2) rights in the future, especially since, to a man, the Association bargaining team members did not see Gulczynski's reaction to be inappropriate to the provocation from Vander Kelen. If, therefore, they gained the impression that any

perceived challenge to Vander Kelen in the future could result in further inquiries into their job fitness they might well be hesitant to challenge him in future bargaining sessions.

Having found that summoning Gulczynski to the January 28 meeting did have a reasonable tendency to interfere with, restrain, or coerce the Association members, the question then becomes, "Did the County have a legitimate business interest that justified restricting Gulczynski's rights and, if so, was the County's action no greater than that necessary to protect its interest.?" The interest asserted by the County is its need to be sure that Gulczynski had no underlying emotional problems that would affect his performance of his job duties. This is no small concern inasmuch as Gulczynski is a Deputy Sheriff who is required to deal with volatile situations in the normal performance of his duties, carries a firearm and is authorized to use deadly force, if necessary. Gossage testified that this concern was raised in his mind by Gulczynski's outburst on January 17. (Tr. p. 503, ln 9-18) Gossage and Vander Kelen, in turn reported their concerns to the Sheriff, who testified that he ordered the meeting to determine whether Gulczynski had an underlying anger management problem. (Tr. pp. 696, ln 15 – 697, ln 2) To my mind, however, the question is not whether the County has a legitimate business interest in assuring that its deputies are emotionally stable, which could, under certain circumstances, justify limitations on otherwise protected activities. Rather, the question is whether in this case the assertion of that interest was pretextual. For the reasons set forth below, I find that it was.

As stated above, the accounts of Gulczynski's behavior on January 17 vary among the witnesses from assertive to explosive, aggressive and threatening, which was Gossage's assessment. Nevertheless, Gossage, who was Gulczynski's superior, and who was most concerned about his confrontation with Vander Kelen, did not intervene in the situation or speak to Gulczynski about it after the meeting, although he testified that he should have done so. This suggests that his concern about Gulczynski's emotional state was not as grave as he later testified. Instead, Gossage and Vander Kelen reported their concerns to the Sheriff, who was, likewise, not concerned enough to take immediate action notwithstanding that a potentially emotionally unstable officer would be on duty. Instead, the Sheriff spoke further with Sgt. Phillips and Sgt. Rabas to obtain their perspectives on the event. Notably, although the Sheriff did not recall the specifics of his conversation with Rabas, Rabas took notes on the conversation and recorded that the Sheriff's concern had less to do with Gulczynski's emotional state than with pressure he was getting from Vander Kelen to do something about him. (Assoc. Ex. #2) Gossage was aware that Vander Kelen intended to report Gulczynski's behavior to the Executive Committee. (Tr. 509, ln 4-7) and the Sheriff testified that Vander Kelen wanted a fitness for duty evaluation performed on Gulczynski, which he acknowledged sharing with Rabas. (Tr. pp. 704, ln 15 – 705, ln 4) The Sheriff wanted Rabas to convey to Gulczynski that he shouldn't be concerned about the meeting with Gossage and Schultz and that it wasn't disciplinary. (Tr. pp. 713, ln. 19 – 714, ln. 3)According to Rabas, the Sheriff was ordering the meeting between Gulczynski, Gossage and Schultz primarily as a means to mollify Vander Kelen to avoid having him pursue further action against Gulczynski with the County Board Executive Committee. To my mind, the lack of urgency displayed by management in waiting more than 10 days to address Gulczynski's "explosive" and

"threatening" behavior lends credence to the notion that concern for Gulczynski's emotional stability was not the primary impetus for the meeting.

The way the meeting was conducted is also instructive. Gossage's testimony as to the purpose of the meeting was to ask Gulczynski if he was having any problems and if he denied it the issue would be closed. (Tr. 525, ln. 8-13) According to Gossage, this was also the directive of the Sheriff (Tr. 526, ln. 8-15) As previously noted, the meeting wasn't held until 11 days after the event and this was management's first direct communication with Gulczynski about the event. Yet, Gulczynski was provided a copy of Gossage's memo making it clear that the reason for the meeting was to address concerns about his "explosive behavior" and "threatening conduct" in his January 17 exchange with Vander Kelen, albeit in a non-disciplinary forum. The meeting, as described by Gossage, was *pro forma*, with Schultz asking Gulczynski if he was having any problems, Gulczynski denying it and Gossage declaring his satisfaction and bringing the meeting to a close. (Tr.pp 527, ln 18 – 528, ln 4) There was additional colloquy at that point about whether Vander Kelen had prompted the meeting and whether Gulczynski would or should pursue the matter further, but essentially the interview was over after Gulczynski denied needing assistance. This underscores the impression that the motivation for the meeting was something other than its stated purpose. What the underlying purpose was is open to speculation. It may have been intended to satisfy Vander Kelen that Gulczynski had been dealt with. It may have been to avoid action against Gulczynski by the Executive Committee. It may have been a means of sending a message to the Association that such confrontations during bargaining were unacceptable. It may have been a combination of the above or something else entirely, but it clearly was not, at least primarily, an intervention with a potentially troubled officer. Thus, the County did not have an overriding business purpose for the meeting that outweighed its potential to restrain Association members in the exercise of their Sec. 111.70(2) rights and, therefore, did violate Sec. 111.70(3)(a)1.

Vander Kelen's February 11, 2005 meeting with the Association bargaining team

On February 11, 2005, prior to a scheduled bargaining session, Don Vander Kelen and Chief Deputy Gossage met with Attorney Rachel Pings, Union President Todd Delain and Union Vice President Greg Rabas at Vander Kelen's request. At the meeting, Vander Kelen expressed his view that in order to avoid another confrontation such as occurred on January 17, he would prefer if only the chief negotiators at the table spoke during the bargaining session. He also said the Association members should remember that the employer/employee relationship is not suspended during bargaining and that they should act accordingly. Attorney Pings replied that the members of the Association bargaining team would all participate as they saw fit. Vander Kelen also told the Union representatives that he had reported the January 17 confrontation to the Executive Committee of the County Board and that he didn't know whether further action might be taken against Gulczynski. Thereafter, the meeting broke up and the parties convened the bargaining session. I find that, taken as a whole, this meeting did constitute a violation of Sec. 111.70(3)(a)1.

Here again, the critical inquiry is whether the County's actions in that meeting had a reasonable tendency to impermissibly interfere with, coerce, or restrain Association members in the conduct of protected, concerted activity, not whether or not they actually had that effect, or whether that was the County's intent. By all accounts, Vander Kelen sought the meeting and initially intended to speak privately with Attorney Pings outside the presence of the rest of the Union bargaining team. Delain and Rabas, however, as Association officers, chose to attend, as well. In the meeting, Vander Kelen made three points, which taken together constitute a violation. They were: 1) that the confrontation on January 17 was unacceptable, 2) that the employer/employee relationship is not suspended during negotiations and the employees had to watch how they acted, and 3) that he had reported the January 17 incident to the Executive Committee and could not say whether Gulczynski would be disciplined because of it. (Tr. pp. 538, ln 8-15; 540, ln 8-11; 596, ln 1-20) The tenor of Vander Kelen's comments regarding unacceptable behavior at the January 17 meeting was clearly a reference to Gulczynski's conduct, rather than his own. Likewise his comments that the Union members should watch themselves and behave appropriately in recognition of their status as employees. Pings and Rabas had both attended the January 17 bargaining session. Pings described Vander Kelen's behavior as disruptive, sarcastic and nasty. This is consistent with Rabas' recall of the meeting, as well as with the recollections of Pat Gilson, Kevin Pawlak and Al Phillips, who also attended. (tr. pp. 83, ln 10-20; 125, ln 14 – 126, ln 2; 162, ln 4-19; 164, ln 10 – 165, ln 3) Vander Kelen, himself, acknowledged that agitating the other side's negotiators is a tactic he employs to get them to make mistakes. (Tr. p. 581, ln 9-11) From Vander Kelen's statements on February 11, it would be reasonable to infer that he applied different standards of conduct to management and labor in negotiations and that the employer/employee relationship required a degree of deference from the bargaining unit that was not expected of management. It would also be reasonable to infer that if his standards were not met he was prepared to recommend sanctions against the offending employees and that his principals on the County Board and in the Sheriff's Department were prepared to take action based on his recommendations. Even though the intervention with Gulczynski did not result in discipline or a referral to the EAP, it was still an uncomfortable experience that might make another employee think twice before confronting the County's bargaining team in negotiations.

The County counters that there was a legitimate business purpose to the meeting that overrode any potential interference with the employee's rights, that being an interest in keeping negotiations on track and avoiding future unpleasantness in bargaining sessions. I concur that these are legitimate interests, but do not concur that the most reasonable way to achieve them is to advise the employees that if they cross some ill-defined line in negotiations they may have

their emotional stability questioned or be subject to sanctions by the employer. Attempting to limit employees' exercise of their Sec. 111.70(2) rights may be an effective means of keeping negotiations civil, but it is not a permissible one absent a more compelling basis than appears in this record.

Dated at Fond du Lac, Wisconsin, this 30th day of March, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/
John R. Emery, Examiner

JRE/gjc
31367-E