

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**LOCAL 311, INTERNATIONAL ASSOCIATION
OF FIREFIGHTERS, AFL-CIO, Complainant,**

vs.

MIDDLETON FIRE PROTECTION DISTRICT, Respondent,

Case 572
No. 64884
MP-4166

Decision No. 31428-C

Appearances:

Mr. Bruce F. Ehlke, Hawks, Quindel, Ehlke, & Perry, S.C., Attorneys at Law, 222 West Washington Avenue, Madison, Wisconsin 53703, appeared on behalf of Local 311, International Association of Firefighters, AFL-CIO.

Peter L. Albrecht, Albrecht Labor & Employment Law, S.C., 131 West Wilson Street, Suite 1202, Madison, Wisconsin 53703, appeared on behalf of Middleton Fire District.¹

**FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER**

On May 19, 2006, Local 311 of the International Association of Firefighters (herein Union) filed a complaint of prohibited practices with Wisconsin Employment Relations Commission (herein "Commission") wherein it alleged that the Middleton Fire District (herein either "District" or "Employer") engaged in actions which interfered with their employees' exercise of rights protected under Section 111.70(2), Stats, and discriminated against an employee for having engaged in the exercise of protected rights, all in violation of Section 111.70(3)(a)1 and 3, Stats.

The Commission appointed Stanley H. Michelstetter II of the Commission staff on July 17, 2006, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Orders in this matter. On July 12, 2006, the Employer filed an answer wherein it admitted

¹Mr. Albrecht changed law firms during this proceeding.

certain allegations, denied others and asserted various affirmative defenses. The Examiner held a hearing in the matter on July 19 and 27, 2006, in Madison, Wisconsin. The parties consented to mediation by the Examiner during the course of which the matter was tentatively resolved. The parties notified the Examiner that they were no longer in agreement on, or shortly before, January 5, 2007. The hearing then resumed January 29, 30, and 31, 2007. Each party filed a post-hearing brief, the last of which was received May 30, 2007. The Union moved to reopen the record to take into account the decision in Case 2 by Examiner Houlihan and subsequent filings in that case. The Examiner granted that motion on September 25, 2007.

The Examiner has considered the evidence and arguments of the parties and now makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Middleton Fire Protection District is a municipal employer, which provides fire protection services to communities in the vicinity of the City of Middleton in the State of Wisconsin. They are the City and Town of Middleton, Town of Westport and Town of Springfield. The Employer's offices are located at 7600 University Avenue., City of Middleton, Wisconsin. The foregoing is the sole fire station involved in this proceeding and is the main office of the Employer. The Employer is overseen by the Middleton Fire District Fire Commission (herein "Fire Commission") pursuant to Sec. 62.13, Stats. At all material times there were five Fire Commissioners.

2. Local 311, International Association of Firefighters, AFL-CIO, herein Union, is the certified collective bargaining representative of all regular full-time and all regular part-time and regular part-time paid Code Enforcers of the District. The Union was certified as the representative on July 5, 2005.

3. The Employer's firefighting function is performed by a volunteer fire company. The fire company is organized as a non-profit Wisconsin corporation which maintains its offices at the fire station. The volunteers generally make themselves available at the call of the Employer. They are paid for their services by the Employer for each time they are called to duty (herein "on-call"). Paid on-call firefighters receive training through the Employer and perform direct fire fighting functions at fire scenes. They are municipal employees of the Employer. Firefighting is conducted in a paramilitary fashion. Fire fighting can involve considerable danger to firefighters and firefighters must be able to unquestionably rely upon each other in life-threatening situations. There is considerable camaraderie among the paid on-call firefighters.

4. The Employer also has regular employees. As of the spring of 2004, there were three full-time employees and one part-time employee. They were Mr. Bradley Subera, Mr. Thomas Weber and Mr. Robert Weber (Thomas Weber's brother) and Mr. Andrew Brandl. At all material times until the modifications listed below, Mr. R. Weber was the administrative

officer for the Employer. He was not a supervisor or a managerial employee. Mr. Subera was the Chaplain and was responsible for conducting the Employer's education programs. Mr. Subera assisted Mr. T. Weber in fire code enforcement and fire inspections. Mr. Brandl was the part-time employee. He assisted Mr. T. Weber in fire code enforcement and in performing fire inspections. He worked 20 hours per week. At all material times, Mr. Brandl was regularly employed full-time at another fire department in the area. This was common knowledge to everyone employed by the Employer. The Employer prefers, but does not require, that its full-time employees also be paid on-call firefighters of the department. It prefers paid on-call firefighters when selecting full time employees. Except as noted, all of the full-time employees are paid on-call firefighters of the department. Being a paid on-call firefighter is not, however, essential duty of regular employees of the Employer. Mr. T. Weber was first employed as a paid on-call firefighter with the department in 1983. He remained a paid on-call firefighter until May 12, 2006. The Employer hired him full-time in February, 1987. Mr. T. Weber's full-time position has remained essentially the same and his current title is Fire Marshall. His duties included at all material times, but were not limited to, reviewing building plans, performing fire inspections of buildings, inspecting sprinkler and fire protection systems, and certified underground petroleum tanks, suggested changes to and reviewed fire protection codes and public education. At all material times, Mr. T. Weber worked without direct supervision. His job required that perform inspections outside the fire station. He set his own schedule within working hours and was free to take breaks of reasonable length at any time he chose. Greeting people who enter the fire station during the day was not part of Mr. T. Weber's duties.

5. At the material times, the sole executive officer of the Employer is the Fire Chief who is a paid on-call firefighter. The Fire Chief is also the commanding officer of the fire company. Prior to January 1, 2003, the Fire Chief was elected by the paid on-call volunteers and then was routinely appointed as Fire Chief by the Fire Commission. Aaron Harris was elected Fire Chief and took office effective January 1, 2003, and remained in that position at all material times thereafter. The Employer made the Fire Chief's position a permanently appointed position effective on that date and selected Chief Harris for that position. This effectively ended the practice of having the fire company elect the Chief. When the Fire Commission appointed Chief Harris, as Fire Chief it was their mutual understanding that Chief Harris in that capacity would make extensive changes in the structure and functioning of the Employer to improve its efficiency and lower its cost of operation. Many employees and paid on-call firefighters including Mr. Brandl, Mr. R. Weber, and Mr. T. Weber opposed the election of Chief Harris and some employees continued to oppose him at all material times thereafter. They also sought to have the Fire Commission reinstate the system of electing the Chief as it had previously existed.

6. In April, 2004, Mr. T. Weber contacted the Union about whether it could represent full-time employees of the Employer.

7. Robin Englebrecht is the wife of on-call firefighter Tom Englebrecht. Chief Harris hired Mrs. Englebrecht to become the paid on-call Rehabilitation Officer for the

Department in December, 2003. The Rehabilitation Officer is responsible to monitor the vital signs and health of firefighters as they perform their duties on the scene at fire drills, actual fires, or other emergency scenes. In that regard, it was her responsibility to understand the physical situation of firefighters and take appropriate action to reduce physical risk to them. As a result of her tenure in the position, she concluded that Chief Harris had failed to adequately provide funding for resources for the rehabilitation function that Chief Harris had failed to establish minimum qualifications for her position and any assistant she might have, and hired an unqualified person to be her assistant based upon personal loyalty to Chief Harris. Thereafter, she came to believe that Chief Harris lacked leadership skills and generally was not adequately concerned with the safety of firefighters. She began to investigate her concerns prior to August, 2004. In about August, 2004, Ms. Englebrecht resigned from that position, but Chief Harris convinced her to stay. She then quit effective October 21, 2004.

8. Other firefighters, primarily those who had opposed the election of Chief Harris, learned that Mrs. Englebrecht was investigating her concerns listed in Finding of Fact 7 and that she intended to present them to the Fire Commission. They began to provide her information about their concerns about safety issues, personnel matters, disciplinary issues, and other matters affecting their working conditions, to have her investigate them and present them to the Fire Commission. Mrs. Englebrecht began to catalogue her concerns and those of firefighters in a record she ultimately called the “red book.”² The membership in this amorphous group changed over time, but continued to at least July 15, 2005. Mrs. Englebrecht became the representative of this organization.

9. As of October 21, 2005, the red book ultimately included the following concerns in addition to those about the rehabilitation function:

- a. Chief Harris allowed fires used in training exercises to get to be too hot.
- b. Chief Harris held a live fire training exercise when there was severe weather.
- c. Chief Harris maintained total unilateral control over the hiring and firing process. He relied upon cronyism as a means for selecting and replacing employees. Chief Harris did not recruit the most qualified persons for regular full and part-time positions. Chief Harris did not apply progressive discipline policies in the discharge of employees.
- d. Chief Harris was not sufficiently concerned about the safety of firefighters in the performance of their duties.
- e. On September 5, 2004, Chief Harris reported to the station and then went to a fire while under the influence of alcohol

²The Employer kept track of other matters referred to in a red binder. Those matters are entirely separate.

- f. Chief Harris did not require that those firefighters who were driving fire equipment be adequately trained.
- g. Chief Harris failed to appoint a “safety officer” pursuant to NFPA 1521.
- h. The Department had inadequate standard operating procedures.
- i. Chief Harris deliberately manipulated the availability of funds for the rehabilitation program.
- j. Chief Harris ignored safety rules regarding oxygen supply while at a live-fire training exercise.
- k. Chief Harris hired an unqualified person to be Public Fire and Safety Educator.
- l. Chief Harris made allocations of the Fire Department budget in some minor instances based upon personal whim or upon loyalty to him. Chief Harris did not employ the proper accounting practices with respect to the Department budget. Chief Harris may have had a conflict of interest in making certain equipment purchases.
- m. Chief Harris received expense reimbursement from the Employer while being paid to teach a class at Madison Area Technical College.

All of the foregoing materially relate to the wages, hours and working conditions of on-call firefighters, except item 13, which involved allegations of waste, fraud, or abuse affecting total funds available for the fire program.

In addition to the foregoing Mrs. Englebrecht believed and communicated to others, including, but not limited to, on-call employees, Union adherents, the Fire Commission, local press and others the following:

- a. That Chief Harris retaliated against those who brought issues or concerns to him.
- b. Chief Harris committed prohibited practices within the meaning of Sec. 111.70(3)(a), Stats.
- c. Chief Harris allowed a firefighter to have his ten year old son ride on a fire truck and participate in fighting an actual fire.
- d. Chief Harris gave the “guns and bullets” speech in which he threatened firefighters during a required on-duty assembly that he would, in essence, “fight back” against his critics.

- e. The choice to replace Mr. Brandl as a part-time fire inspector with a full-time employee, and the hiring of Casey Kakuske for that job. In this regard, the hiring was both viewed as cronyism and, later, as a prohibited practice under Sec. 111.70(3)(a)3, Stats.
- f. Chief Harris threatened to replace the full-time employees performing inspection work with an outside contractor on or about September 30, 2004.
- g. Chief Harris takes matters personally and “shoots from the hip.” He has an explosive temper. He uses threats and intimidation to control those under his direction.

All of the foregoing materially relate to wages, hours and working conditions of on-call firefighters.

Mrs. Englebrecht did independent research to determine what the prevailing standards were for the operation of volunteer fire departments. She met with various employees and investigated some of these concerns for accuracy, but did not investigate the issue concerning whether Chief Harris had reported to a fire under the influence of alcohol. At all material times, all relevant employees, including Mr. T. Weber, in good faith believed these concerns to be true at the time they lent support to them.³ At all material times Robin Englebrecht, Tom Weber, Robert Weber and various others believed that the Fire Commission should remove Chief Harris as Chief for the foregoing reasons and because they wanted the fire company and the Union to have a greater say in the running of the Department. The effort to have the Fire Commission remove Chief Harris for the foregoing reasons materially relates to the wages, hours and working conditions of paid on-call firefighters. The effort to have the Fire Commission remove Chief Harris because some firefighters wanted to return to the elected chief system does not materially relate to the wages, hours and working conditions of paid on-call firefighters. The two goals are inextricably intertwined.

10. Mr. T. Weber became interested in Mrs. Englebrecht’s concerns and was one of the members of the group identified in Finding of Fact 8. He began an e-mail correspondence with her on or before August 26, 2004, using his work computer and a private, Internet-based e-mail account. He believed that by using the private, Internet-based e-mail account that the Employer would not be able to read this correspondence. He also believed that this correspondence would essentially otherwise be private between himself and Mrs. Englebrecht. Mr. T. Weber assisted Mrs. Englebrecht in preparing information which ultimately went into the red book. He gave her access to the Employer’s library on insurance standards for fire

³ The Examiner notes that these are allegations and there is no inference that these concerns were, in fact, accurate. Specifically, and without limitation, the evidence in this case demonstrates that Chief Harris did not go to a fire under the influence of alcohol as alleged. There is no conclusion expressed or implied that Chief Harris ever engaged in any financial impropriety with respect to the Employer. The finding here is not meant to conclude that there is probable cause to believe that these allegations are true.

departments. He provided Mrs. Englebrecht with access to the Employer's photo-copier to make copies of documents. He looked at Employer records to determine if they showed that Chief Harris was in paid status on September 5, 2004, the night Chief Harris allegedly reported to a fire under the influence of alcohol. Mr. T. Weber also agreed to obtain information from the Employer's files on September 13, 2004, as to whether Chief Harris was paid by the Employer while he was paid by MATC for teaching at MATC. He assisted Mrs. Englebrecht in researching other allegations of misconduct by Chief Harris by looking at relevant Employer records, including an incident of September 14, 2004. Mrs. Englebrecht discussed the contents of her red book with various Fire Commission members prior to their meeting September 15, 2004. Mrs. Englebrecht presented her red book to the Fire Commission on or about September 15, 2004. Mr. T. Weber distributed copies of the red book to public officials at the City of Middleton shortly prior to that meeting. His purpose in doing so was to put pressure on the Fire Commission to accept and act upon those concerns. He also expressed his sincere hope that the revelation of these concerns would cause extreme emotional stress to Chief Harris. Mr. T. Weber gave encouragement and emotional support to Mrs. Englebrecht and others advancing those concerns. Mrs. Englebrecht resigned from her position before the Fire Commission the September 15, 2004, or the one in the following month.

11. In the period August, 2004, to at least the end of February, 2005, Mr. T. Weber and Mrs. Englebrecht e-mailed each other in support of the activities on behalf of the on-call firefighters. Mr. T. Weber used the employer-provided desktop computer to compose and send these e-mails. It is unclear whether the two continued to e-mail each other after Mr. T. Weber changed to using an Employer-provided laptop computer. The laptop computer was damaged beyond use in April, 2006, before the Employer could review its contents. Mrs. Englebrecht intended that all of the e-mail communications be private between her and Mr. T. Weber be private communications between the two of them and, where listed, other intended individual receivers. Those e-mail communications remained confidential from the Employer until the discovery of some of the e-mail communications as specified in the Findings of Fact below. The e-mail between Mrs. Englebrecht and Mr. T. Weber involved her efforts to get the red book concerns before the Fire Commission, to get the Fire Commission to act on them, and to get the local press to publicize them. After the Fire Commission heard, but failed to act on them, the e-mails focused on Mrs. Englebrecht's effort to publicize the concerns and to get the elected officials of the communities served by the Employer to act upon them. Some of these e-mails expressed Mrs. Englebrecht's view that the concerns were so well documented and so monumental that they would result in the Fire Commission dismissing Chief Harris. Mrs. Englebrecht referred to these concerns as explosive, "Kabooms." She frequently expressed her belief in colorful terms analogous to explosives and fire works that her revelations of the concerns listed above and similar concerns would cause stress to Chief Harris and lead to his discharge as Chief. Mrs. Englebrecht also expressed hostility toward Chief Harris and others who did not support her efforts. This was done by using derogatory nick names, characterizing their actions in negative terms and occasionally expressing a wish that bad things would happen to them. None of the e-mails suggested that any person take violent action or fail to properly perform their duties affecting

the safety of anyone. Additionally, Mrs. Englebrecht schemed to make Mr. Subera look bad by responding to his e-mail with a copy to everyone at the Department. While these e-mails expressed a hope or desire that bad things would befall Chief Harris, none of these mails suggested that anyone take any steps to engage in violent behavior toward Chief Harris. In one e-mail Mrs. Englebrecht suggested making a false report of having overheard the September 5, 2004 situation in which she believed Chief Harris reported to the station and to a fire intoxicated. Mr. T. Weber could be viewed as approving that idea; however, there is no evidence that anyone followed through on that approach. She also suggested making a similar false report in another incident. In another e-mail, Mrs. Englebrecht circulated "red book" concerns to TriData Corporation in response to their e-mail inviting members of the Department to contact them. TriData Corporation is a consultant to the Department about its new fire station. The purpose of the e-mail was to advance the safety concerns. Some e-mails involved providing red book concerns to Madison Area Technical College which employed Chief Harris as an ad hoc fire instructor. Mr. T. Weber provided support and encouragement in an effort to provide information to MATC apparently for the purpose of having them choose to not have Chief Harris continue as an instructor in their program. Part of the motivation was to inflict economic harm on Chief Harris and part of the motivation was to protect the safety of other firefighters in any live fire training exercise Chief Harris would conduct on behalf of MATC. Mrs. Englebrecht referred in some e-mails to buying a voodoo curse on the Internet against Chief Harris in her e-mails and otherwise referred to a voodoo curse. She did so only jokingly and no such action was actually undertaken. The following is the e-mail exchange involving the fact that Firefighter Maasch was trapped at the New Orleans airport in the aftermath of Hurricane Katrina:

From: Thomas Weber arcsoftware1@yahoo.com
To: Robin Engelbrecht robinengelbrecht@hotmail.com
Subject: Re: NFPA 1451
Date: Wed, 15 Sep 2004 06:18:23 - 0700 (PDT)

We might be able to set you up at EMS with paper so you could do it at your pace. Let me know I will get you set up, I have a 9:30 meeting with the schools but after that I am free. call my cell.

P.S. Maybe Maasch should get a snorkel, if he can't get out of New Orleans

Reply From: Robin Engelbrecht robinengelbrecht@hotmail.com
To: arcsoftware1@yahoo.com [Mr. T. Weber]
Subject: Re: NFPA 1451
Date: Wed, 15 Sep 2004 09:45:58 - 0500

Maybe I should just invite Aaron down there and both can snorkel south. I would be happy to pick up the stuff at EMS and sort through the stuff. I'll give you a call now. Lotsa energy building up for tomorrow. Was Andrew surprised how much we had accomplished????? He owes us lunch.

The following relevant portions of an e-mail sent by Mrs. Englebrecht to Mr. T. Weber on September 21, 2004, included a joke by Mrs. Englebrecht about purchasing a "voodoo curse:"

From: Robin Engelbrecht robinengelbrecht@hotmail.com

To: arcsftware1@yahoo.com

Subject: Our main man

Date: Tue, 21 Sep 2004 17:34:51 - 0500

I hate to keep dragging you into this mess, do you think it would be worth sending out a letter to the members regarding the info that the commission received? I will email to you in a separate email. I think I would ask Boo also before I send it. Mike Davis assures me that they will keep fighting. I think some members should attend the city council meeting to make Aaron more nervous. I have to be on call in Cross Plains, or I would go and eat lemons during his presentation and make disgusted faces. Robin, P.s., if it helps, I did find a voodoo website and cast a spell on him, that he would be his own demise and his lies would make him powerless....best \$20 I ever spent!!!

Mr. T. Weber did not solicit or participate in the "voodoo" joke.

12. The e-mails listed above are not of such quantity or required composition time, that they would necessarily have taken work-time for their reading or response.

13. During the period August 20, 2004, to December 4, 2004, Mr. T. Weber used his Employer assigned desktop computer to communicate with various World Wide Web-based commercial astrological services and psychic services. He testified at the hearing that he believes in astrology and psychics. He intended that those communications be private between him and provider. He believed those communications were going to be kept confidential by the web-based service. He sought personal advice from these providers, including, but not limited to advice as to how to handle various issues in the workplace. He also sought predictions from those providers as to how certain situations would turn out. These included, but were not limited to, making statements characterizing Chief Harris' actions in unflattering terms. In these e-mails he used terms describing Chief Harris such as, but not limited to:

- "My boss is being a real jerk."
- "My boss is a pain in the ass . . . "

- My boss is a complete jerk and on a power trip . . . “

He also sought predictions about the future of the employees' attempt to have the Fire Commission remove Chief Harris based upon Mrs. Englebracht's presentation of the red book. He asked advice as to whether he should quit or stay in his current job.

The relevant overall nature of the e-mails was that he was unhappy with Chief Harris and that he supported the efforts of Mrs. Englebrecht and others to have the Fire Commission remove Chief Harris. These e-mails did not become known to the Employer until the occurrences stated in Finding of Fact 34 and 35 below.

The Internet psychic service provider used one of Mr. T Weber's e-mails in its advertising. That e-mail is quoted in the Findings of Fact below. Mr. T. Weber never intended that any of his e-mails to psychic or astrologer services become public or available to Mrs. Englebrecht or any other person in the employ of the Employer.

14. Mr. T. Weber wrote a letter dated September 24, 2004, and received by the Fire Commission shortly thereafter informing them that they considering seeking representation from the Union and stating, in relevant part:

. . . We honor the commitment and dedication to better serve our communities with a strong sense of responsibility and motivation to serve. Most of all we respect our leaders, followers, and fellow peers.

We strongly feel that our positions are (sic) potential danger from the current upheaval with (sic) in the members of the Fire District. We understand the very strong commitment and fairness set forth by members of the Fire Commission, however in order to maintain balance and stability with (sic) n our positions and in (sic) and in no way wish to imply discontent. We, the full-time and Permanent Part Time Staff of the Middleton Fire District, wish to preserve and protect the right to bargain collectively for a better tomorrow and are concurrently investigating IAFF Local 311's consideration.

The original letter was signed by Mr. T. Weber, Mr. Robert Weber and Mr. Bradl. There was a signature blank for Mr. Brad Subera, but he never signed the letter. Chief Harris may not have seen the signatures, but he was aware of specifically who had signed the original letter.

15. Chief Harris first learned of the Union organizing drive on September 27, 2004.

16. Employees Brandl, T. Weber and R. Weber signed a request dated September 29, 2004, for membership in the Union.

17. On November 1, 2004, Mr. T. Weber wrote a confidential e-mail to Scott Sordahl in Viroqua seeking information about an undisclosed incident involving Chief Harris' father, Mr. Ted Harris. It stated in relevant part:

. . . . My boss is Aaron Harris. I am attempting to find out what happened in Viroqua with a Mr. Ted Harris. I was interested if you might be able to enlighten me about some of the issues. Your response is very much confidential, as I hope you might be able to maintain my confidence. It appears that you may have some issues with Ted as I do with his son. Would you be interested in comparing notes?

Some of the e-mails which are the subject of this case indicate that Chief Harris' father was involved in assisting his son with matters at the Department. The e-mail was unrelated to the wages, hours or working conditions of Employer's employees.

18. On November, 15, 2004, Joseph Conway, President of the Union sent a letter to Joseph Ripp, Chairman of the Middleton Fire Commission, asking that the Employer voluntarily recognize the Union as the collective bargaining representative of its code enforcers. The Employer did not respond to the letter.

19. The Union filed a Petition for Election with the Wisconsin Employment Relations Commission. On January 4, 2005, Peter Davis, General Counsel of the WERC served the Petition on the Employer with a cover letter encouraging the parties to stipulate to the appropriate unit and those who would be eligible to vote.

20. At some time after November 15, 2004, the Employer reorganized the Department. Previously Mr. R. Weber had been the administrative assistant to the Chief. The Employer created a new secretarial position and hired Ms. Della Bloom to be administrative assistant to the Chief. Mr. R. Weber was then assigned to a new position as Head of Preplanning. The purpose of this position was to make fire fighting plans for major buildings in the District. Mr. T. Weber was assigned the title Fire Marshall; however, his job duties did not not significantly change. Mr. Subera continued as Head of Education. The Employer created a new full-time position as a Fire Service Technician. It hired an on-call firefighter, Casey Kakuske, to fill that position after March 1, 2005. At all material times, Mr. T. Weber viewed Ms. Della Bloom as someone loyal to the Chief.

21. On January 27, 2005, The Employer and Union stipulated to a collective bargaining unit consisting of "All full-time paid Code Enforcers employed by the Middleton Fire District" and agreed that Mr. T. Weber, Mr. R. Weber and Mr. Subera would be eligible to vote in the election.

22. On February 1, 2005, the WERC wrote the parties and told them the WERC had decided to modify the unit to include "regular part-time paid Code Enforcers."

23. On February 3, 2005, Chief Harris terminated Mr. Brandl's regular part-time employment.

24. On February 21, 2005, the WERC sent the parties a notice of election with ballots to be mailed to employees and opened on March 21, 2005. It directed Fire Commission Chairman Ripp to provide the home addresses of eligible employees.

25. On February 25, 2005, Chief Harris sent a list to the WERC of purported eligible voters including the three stipulated eligible voters and Mr. Kakuske. He did not provide a copy to the Union. Mr. T. Weber viewed the hiring of Mr. Kakuske and the attempt to make him eligible to vote as an anti-union action of the Employer and an "unfair labor practice."

26. The Union lost the election and filed an objection to the election with the WERC. A hearing on that objection was held May 3, 2005. The WERC set aside the election and the Union won the new election. The Union was certified as the representative of the bargaining unit on July 5, 2005.

27. On May 13, 2005, Mr. Kakuske sent an e-mail to Chief Harris which reads in relevant part:

Regarding the current office arrangement, I feel the front office is the ideal place to be for myself in order to greet the public and respond to calls. The overall mood of the office however, is less than enjoyable and communication with the current occupants is nonexistent. It is my desire to stay in the front office but I would hope personnel (sic) could be rearranged in the future to promote a more positive work environment.

Lastly looking further into the future and a new facility I would like it if the option of having an individual office could be explored. This would be ideal for the meetings with sales representatives, privacy, individual organization of files and literature, security, as well as the ability to work without distractions when needed. An individual office would insure your desk and office would not be disturbed while you are not around. This is not a request to be antisocial. I would anticipate doors being open all of the time.

At all material times thereafter Mr. Kakuske continued to privately voice a concern to Chief Harris that he did not want to be in the same office with Messrs. Weber. The reasons for his concern were unrelated to Messrs. Weber's exercise of rights protected under Sec. 111.70(2), Stats.

28. Mr. T. Weber, Mr. R. Weber, Mr. and Mrs. Englebrecht, and many other on-call firefighters wrote to the Fire Commission on July 15, 2005, and received by the Fire Commission shortly thereafter, expressing their concerns about a number of matters. The letter states in relevant part:

To whom it may concern:

July 15th, 2005

We the undersigned have serious concerns regarding the current operations of the Middleton Fire Department. Several of us have voiced these concerns to the Fire Commission through the Assistant Fire Chief. As of yet, there have been no apparent actions taken to investigate or correct these issues. We are therefore left with the option of going outside of our chain of command to notify people that we believe hold a vested interest in the Middleton Fire Department and the community that we serve. We are not a group of disgruntled employees. We already have our careers. Being a firefighter is something we have chosen to do to serve our community. We have each sworn to protect our neighbors. We do not just serve this community, we are part of it. It is our home. Our tax dollars are being spent along side of yours. We could easily stay quiet or even quit the department and go elsewhere, but instead we choose to honor our commitment to the community, not by seeking to place blame, but by addressing these serious issues and attempting to find solutions.

Our concerns can be divided into three areas; safety, fiscal responsibility, and fair labor practices.

Safety

We believe the safety of our firefighters and the public is being compromised by current practices within the Middleton Fire Department. The following are a few specific examples:

- On more than one occasion untrained firefighters, some without equipment, have been allowed to respond to structure fire calls in the first arriving truck which significantly limits the number of trained and equipped firefighters that could respond.
- Firefighters without proper training have been allowed to drive fire apparatus in emergency mode to fire calls contrary to our insurance carrier's requirement.
- The Town of Middleton station responds to non-emergent City calls leaving the Town of Middleton less protected.
- We no longer have an ambulance standing by during live training burns.
- A recent training burn was allowed to get hot enough to melt a firefighter's face shield.

- A training burn was allowed to continue even though the training officer was notified twice of impending severe weather. A tornado struck the nearby Midvale Road area and equipment had to be abandoned on scene.
- We have no written Standard Operating Procedures. The operating guidelines were supposed to have been ready by February 1, 2005 per the Fire Commission. No guidelines have been approved by the Fire Commission or disseminated to the members.
- Fire officers are allowed to respond directly to calls with no protective gear and enter burning buildings alone.

Fiscal Responsibility

The current spending practices of the department do not appear to be subject to any kind of review, internally or externally. We believe this leads to a situation where unnecessary expenditures are allowed. During current times, fiscal 'tightening of the belt' should be occurring. The following are a few examples of expenditures that may warrant further explanation:

- The District paid to have fire vehicles painted a new color. A few of the vehicles were in need of painting. The rest of the vehicles were painted for aesthetic purposes only.
- One District employee alone was given a \$9000 pay raise.
- The District paid for a firefighter to be sent to chaplain school when local clergy had been willing to fill that roll (sic) at no cost.
- The District paid for a firefighter to go to a week long clown school.
- Three sets of turnout gear have been purchased for one person in the past two years.
- District equipment is being used for private, non-District purposes by people drawing salary from other entities, sometime leaving the District less protected.
- Family health benefits have been provided for one firefighter.
- District employees were given raises even though City employees agreed to not take raises because of a tight budget.

Fair Labor Practices

We believe that the current practices of the Middleton Fire Department add up to an atmosphere of general unfair labor practices. While most, if not all, of these practices *may* be legal, we certainly do not believe they are *fair* or *right*.

- The Assistant Fire Chief was asked to resign or face termination for “having an irreparable relationship with the Fire Chief”.
- The Assistant Fire Chief was one of four people to apply for the position of Chief when it was opened up to appointment by the Fire Commission. Somehow the application was ‘lost’ and he was never considered for the job.
- The job description for Fire Chief was written *after* the applicants had been identified and it was written by one of the candidates, giving that person an unfair advantage.
- The part-time Inspector was fired because his position was ‘eliminated’; however, within 2 months another person was hired to do the same work. The approved 2005 budget has both the ‘new’ full time inspector position AND the ‘eliminated’ part-time position in it.
- The Inspector that was fired was let go within 30 days of a union vote. He was vocally in favor of joining a union. The employee that was hired afterwards voted against the union.
- The employee that was hired was approached by the Chief *during* the hiring process and was ‘talked to’ about the union vote.
- Our right to choose our officers by the election process was taken away by the Fire Commission with the support of the Fire Chief that was appointed by the Fire Commission.
- Specialized training is given to only a few with no explanation.
- Training and special drills are announced with such short notice that most people cannot attend.
- Certain firefighters are paid up to \$15.00/hr do extra work around the station and public education events while others have to volunteer their time.

- There is no written policy or procedure for almost everything we do. Currently everything is at the discretion of the Chief, without any reason or review. We currently work under verbal instructions that are applied at the discretion of the Chief.

These issues and others were brought to the Fire Commission's attention during an open session in September in great detail. We, the membership, have not seen or heard of any official response other than Commission member Doug Tufree coming to a meeting and telling us we had no choice but to support the current Fire Chief. We have, however, been threatened by the Fire Chief with being sued for slander for saying anything against him. The Fire Chief has repeatedly said during meetings that he will "attack anything that threatens this department". Many firefighters share our concerns but are afraid to speak out for fear of retaliation, including termination. The Assistant Fire Chief who brought these concerns to the Fire Commission has now been asked to resign his command, under duress. For some of us our work environment has become hostile.

We cannot say that everything listed here is absolutely wrong. In some cases we simply do not know because of a shroud of secrecy that has recently enveloped our department. We are now divided into those who are informed and those who are not. Anyone who raises questions or who holds an opinion different from the Chief is in danger of being terminated. We respectfully ask for these issues to be openly investigated so we can have answers, not assumptions; reasons, not rumors.

We do not pretend to have all of the answers, but we do have ideas. We would like to see the Fire Commission create more of a balance by reinstating elections for fire officers, Lieutenants, Captains, and Battalion Chiefs. We would like to see minimum qualifications created for these positions. We would like to see a Safety Officer and/or Safety Committee that answers only to the Fire Commission. We would like to see the creation of a Financial Officer and/or Financial Board that can review purchases and answer only to the Fire Commission. We have allowed our department to become a dictatorship with only one person in charge and with no checks and balances. Only a select few have a say over what happens. We have no recognized grievance procedure. This department was built by the hearts and souls of ALL its members, once proud to serve the community in a volunteer capacity. Now, we are no more than part-time, at-will employees. Who would you rather have protecting your life and your community?

We know that change comes slowly, but we respectfully ask that our concerns be *acknowledged* a minimum of 6 weeks after this notice is dated. We can be collectively contacted through e-mail at chemming@cityofmadison.com.

Thank you for your time and efforts.

[The letter was signed by Firefighters Cotter, Zander, Tom Englebrecht, Cotter, Tom Weber, Wolf, Stevens, Shawn Shiveler, Robin Englebrecht, Paul Shiveler, Robert Weber, Bill Byers, Cheryl Byers, Hellenbrand, Elliott, Bruenig, Rauls, Braubender, Downey, Eslinger, Versteegen, and Craig Geick.]

29. Thereafter, the memorandum became a matter of discussion in the local press.

30. Thereafter in July, 2005, Chief Harris made a statement in a speech to paid on-call firefighters at a training drill at which he stated that he was getting a lot a heat about the things which were in the July 15 letter. He stated that people were taking “shots” at him and effectively stated he was going to “shoot back” with “guns and bullets.” The speech was figurative and not literal, but it was intended to impress on those who opposed him that he would respond to their actions through appropriate means, including, but not limited to, legal action.

31. On August 4, 2005, Fire Commission member Ken Sipsma wrote an e-mail addressed to fellow Fire Commissioners, Chief Harris, the Mayor of Middleton and others in response to the firefighters letter to the Fire Commission of July 15, 2005. The e-mail stated in relevant part:

It has been nearly three weeks since the “To whom it may concern” document was disseminated by certain members of the Middleton Fire Department. Most of you are likely aware of the subsequent reporting in various media sources which, it would seem, was instigated by these same members of the Department. As you are also aware, I am the Town of Westport representative to the Middleton Fire District and its Commission. I believe my service to the Commission is in the range of eight (8) years and I am a past chairman of the Commission. Because of the continuing upset these matters are causing to members of the Department, the Commission, elected officials, public servants and the public-at-large, I feel it is necessary to make a record of my opinions as they now stand. As such, please note the following:

1. The majority of the allegations set forth in the July 15, 2005 document are a retread of issues previously addressed and resolved by the Commission and the leadership of the Department. The allegations appear to be an attempt to sensationalize in order to advance its proponents’ agenda of disgruntlement and subversion.

2. The members of the Department who associated themselves with the July 15, 2005 document show a fundamental misunderstanding of their role in the Department. They are firefighters; they do not oversee the operation of the Department except to the extent authority may be delegated to them by an

officer of the Department through the chain of command. The charge of the firefighters is to serve and protect the public. They are to follow the procedures of the Department and the orders of their superiors. If a member feels he or she cannot do so, that member should resign from the Department.

Likewise, members of the Department do not oversee the duties and activities of the Commission. The members of the Commission are elected or appointed public officials. In the event some members of the Department believe there is mismanagement of the Department by the Commission, their recourse is to seek, as a member of the public-at-large, the replacement through election or the recall of the elected official(s) or the removal of the appointed official(s).

3. The members of the Department who associated themselves with the July 15, 2005 document appear to have engaged in gross misconduct by participating in the preparation, sanctioning and dissemination of the document as well as the subsequent publicity. Some of these members are likely more culpable than others in their participation in these misdeeds. An investigation into these matters will reveal such information. It appears insubordination, subversion of authority, conduct unbecoming of a firefighter and derogation of the Department and Commission has occurred. To the extent such misconduct has occurred, discipline consistent with each member's actions should be imposed.

4. The current leadership of the Department has brought a new and higher standard of professionalism and competence to the Department. The safety of the firefighters and the public is not being compromised by the current practices of the Middleton Fire Department. The safety of the firefighters and the public is being enhanced by the current practices of the Middleton Fire Department. A change in the leadership of the Department is not required, nor is it desirable. Likewise, the present policies of the Commission and the Department are consistent with the operation of a professional and competent fire department. Reversal of direction will truly degrade public safety.

Given the present circumstances, you may expect my actions as a Commission member to be consistent with that set forth above. [emphasis in original document]

32. On August 12, 2005, the Union filed a complaint with the Wisconsin Employment Relations Commission alleging, in relevant part, the Employer discriminated against Mr. Brandl by discharging him on February 3, 2005 in violation of Section 111.70(3)(a)1,3, Stats. and that the Employer interfered with employee rights within the meaning of Section 111.70(3)(a) 1 by having effectively offered Casey Kakuske full-time employment in the bargaining unit based upon discussions that he would vote against the Union, and that as a result of that action the Union lost the election by a vote of 2 to 2.

33. On November 7, 2005, Mr. T. Weber wrote an e-mail to Robert Kissler who was the Fire Chief at the De Pere Fire Department. The e-mail concerns the computer program Fire House which is a computer program which Ms. Bloom used in her work and is essential to Ms Bloom's position. It is a program which Mr. T. Weber regularly uses with respect to recoding fire inspections.

I am asking your help, someone in our department is helping our Administrative Assistant [Ms. Bloom] with Fire House. Right now, we are having a major problem here with our Chief and she is working with him to interfere with the program. Can you find out who, and have them stop. And then what report or program they sent her. She is trouble with a capital T. Anything like this makes her look good, and we can't have that."

Mr. T. Weber assisted Ms. Bloom in her work at all time thereafter and took no further action to physically interfere with her work. He wrote one e-mail to Mr. Brandl concerning interfering with Ms. Bloom's participation in a professional organization, but Mr. Brandl took no action with respect thereto.

34. The WERC by its Examiner William Houlihan held a hearing on said complaint on January 18 and 20, 2006 and February 15, 2006. Examiner Houlihan issued a decision thereon on August 28, 2007.

35. On or about March 30, 2006, Chief Harris did an Internet search using his own name and incidentally found a communication between Mr. T. Weber and the Internet psychic services provider referred to in Finding of Fact 13, above, publicly available.⁴ The e-mail exchange occurred on or about February 26, 2006, and read in relevant part:

My boss is **Aaron Harris**, January 27, 1968 Brown hair Brown Eyes. Our union has filed grievances with the WERC. He is on a major power trip and has been treating us like trash, will our union obtain a favorable outcome at the hearing.⁵

Chief Harris was disturbed by seeing his personal information publicly posted on the Internet.

36. Chief Harris contacted paid on-call firefighter Jeff Nelson that same day or the next day. Mr. Nelson is a battalion chief in his fire fighting responsibilities. Mr. Nelson also acts as the Employer's information technology resource person and, as such, can access all areas of the Employer's computers in his capacity as "network administrator." Chief Harris

⁴ Documentary evidence and Mr. T. Weber's testimony indicate that the psychic service gives the subscriber the choice to keep e-mails private or not. Mr. T. Weber testified it was his understanding that the e-mail was to have been confidential between him and the provider.

⁵ The psychic gave her answer. The answer is omitted. The psychic's answer is not an official decision of the Commission. The Examiner is unaware at this time if anyone took an appeal of that decision to a higher authority. Excluding the decision is necessary to avoid having it appealed to a secular authority.

told Mr. Nelson that he found something “disturbing” on the Internet and wondered if it had come from the Employer’s computers. Mr. Nelson found the e-mail to which Chief Harris referred on the Internet and proceeded to come into the fire station that evening. Mr. Nelson investigated the matter that evening and in the following days by looking first at the web cache of the computer previously used by Mr. T. Weber and others, but now assigned to Chief Harris’ secretary, Ms. Bloom. The web cache is a place reserved on certain computers to temporarily store pages which the computer user viewed over the Internet. He at first viewed only Mr. T. Weber’s files with the assistance of Chief Harris. The e-mails which were the subject of this case were largely discovered as a necessary result of the search for the e-mail specified in Finding of Fact 26. Thereafter, Mr. Nelson searched all of the Employer’s computers which could be accessed by any employee (“open access”) for e-mails which related to activities of a similar nature to those which are the subject of this proceeding. Thereafter, he looked at the computers assigned to anyone who was involved in the correspondence he had discovered and who had communicated with Mr. T. Weber. Mr. Nelson did not look at the other of the Employer’s computers which were not potentially involved with the e-mails which are the subject of this proceeding. The Employer did not tell employees it was making this investigation although there were rumors about this investigation among employees. The sole purpose of the investigation was to determine if employee misconduct had occurred.

37. Shortly after Mr. Harris began searching computers, Mr. T. Weber took his Employer-assigned laptop computer in for a repair from a legitimate repair place. He had been using the computer as his sole Employer-assigned computer for about the prior year. The re-programming process left the computer unusable. The Employer never was able to review the contents of that computer’s hard drive.

38. At all material times before April 6, 2006, Chief Harris shared an office in a room called the “existing office”⁶ with Mr. Subera, Mr. Giltzer and four on-call fire officers. The office has two doors one which led through the mechanical room to the engine room and the other which led to the meeting room. Mr. T. Weber and Mr. R. Weber had an office in the “communication room” which was located near the front door of the fire station and on a hallway leading to both the engine room and the meeting room. Chief Harris directed that the fire station offices be rearranged on April 6 to move Mr. T. Weber and Mr. Robert Weber out of the communication room and to place his office in that room together with Mr. Kakuske. The sole reasons that Chief Harris directed that move were; 1 to have an office in which he could reasonably conduct confidential discussions, including, but not limited to those involving labor relations, without having to ask the other people he share an office with to leave during the discussion; and 2 to have an office next to that occupied by his administrative assistant, Ms. Bloom. On April 7, 2006, Chief Harris made the decision to have Mr. T. Weber and Mr. R. Weber’s office moved to the “existing office” he formerly occupied. The sole reason for that decision was that it was a most efficient use of space possible in the fire station. Chief Harris did not consider whether the change would have any impact on Messrs. Weber to communicate with those people who visited the fire station. The relocation of Messrs.

⁶ Union ex. 10

Weber's office slightly reduced their visibility to those who entered the fire station. Meeting and greeting those who enter the station is not part of Mr. T. Weber's duties. Chief Harris made no effort to otherwise restrict Mr. T. Weber from conversing with those who entered the fire station and the change did not significantly reduce the contact between Mr. T. Weber and those who entered the fire station during his working hours. Chief Harris made the decision to move the Messrs. Weber's office based, in part, on the recommendation of Mr. R. Weber, but Chief Harris did not consult Mr. T. Weber about the change prior the decision having been made. Mr. T. Weber expressed the desire that Mr. Kakuske share offices with him because they performed similar duties. Chief Harris made the decision to put Mr. Kakuske in a separate office near the "existing office" because Mr. Kakuske expressed a desire to have an office separate from that of Messrs. Weber. Chief Harris made the decision with respect to Mr. Kakuske solely based upon factors unrelated to Messrs. Weber's exercise of rights protected under Sec. 111.70(2), Stats. Chief Harris directed that the files of the Department be moved to the "mechanical room" and that they henceforth be locked. The choice to move them to the "mechanical room" was solely based on his judgment about the most efficient use of space. The reason he directed that they be locked was to insure that they were secure. The changes with respect to the files had the effect of making Mr. T. Weber's job slightly more difficult, but those decisions were not made for the purpose of causing his job to be more difficult.

39. Chief Harris never took any action which restricted Mr. T. Weber's access to the Internet from his employer-assigned computer at any time.

40. Mr. T. Weber was subject to discharge for misconduct in his full-time position only through the procedures of Sec. 62.13, Stats., which statute requires that the Fire Commission make the final decision as to discharge. Sec. 62.13, Stats, requires that in order for the Chief to recommend the discharge of an employee protected by the statutes, that he prepare and file a statement of charges with the Fire Commission to initiate the process of discharge. Established case law requires that the Chief give the employee an opportunity to respond to proposed charges, before those charges are filed with the Fire Commission.

41. On April 25, 2006 or shortly thereafter, Mr. T. Weber received a notice from Chief Harris the substance of which reads as follows:

This is to inform you of a mandatory meeting on Wednesday, April 26, 2006 at 1:00 PM. The meeting will be conducted at the Middleton Fire Department, Station 1. Your presence is mandatory. This letter also serves to advise you of your rights to have Union representation at the meeting. We will be discussing at a minimum:

- Your decorum as it relates to the recent office reconfiguration.
- Your absence from work on the afternoon of Friday, April 7, 2006.
- Your absence from work on Monday, April 10, 2006 and statements made about your absence as they pertain to the first bullet point.

- Your absence from work on Tuesday, April 11, 2006 with failure to notify.
- Your decorum and potential inappropriate behavior in the public and workplace as a representative of the Middleton Fire District.

Any information you can provide in the above matters will be greatly appreciated. I look forward to our upcoming meeting.

42. Chief Harris conducted the meeting specified in the notice in Finding of Fact 40 on May 12, 2006. The Employer required Mr. T. Weber to attend. Mr. T. Weber was represented with the Union's counsel. Chief Harris' purposes for the meeting were; 1 to give Mr. T. Weber a "due process" opportunity to respond to potential charges which Chief Harris intended to file with the Fire Commission seeking Mr. T. Weber's discharge; and 2 to surprise Mr. T. Weber with the e-mails which are the subject of this case and to require or allow him to respond thereto. Mr. T. Weber explained his decorum with respect to the office move and his absences of April 7, 10 and 11, 2006, to Chief Harris' satisfaction. Mr. T. Weber refused to answer any other questions from Chief Harris during that meeting.

43. On May 12, 2006, Chief Harris placed Mr. T. Weber on paid administrative leave and removed him from active fire fighting duties.

44. On June 8, 2006, Chief Harris filed charges with the Fire Commission pursuant to Sec. 62.13, Stats, seeking the dismissal of Mr. T. Weber for the following stated reasons:

2. As an employee of the District, Weber is subject to the rules and procedures of the District, is required to abide by those rules and procedures, and owes a duty of loyalty to the Chief.

3. The District maintains rules and procedures, including but not limited to the District's "Policies and Suggested Operating Guidelines." Weber has received copies of these rules and procedures and is responsible for abiding by them.

4. The District maintains a personnel policy manual which includes, but is not limited to the district's "Firefighter Handbook." Weber has received a copy of this manual and is responsible for abiding by it.

5. In addition to the aforementioned rules, procedures and manual, Weber owes to the Chief a duty of loyalty.

6. In addition to the rules, procedures and manual referenced above, Weber has the general obligation to use his working time in the best interests of the District.

7. Weber has breached these obligations and duties by engaging in the following conduct:

A. By engaging in a pattern of conduct, through emails and other communications, with the intent of bringing discredit to the Chief and/or having the Chief fired;

B. By misusing the District's computer and email systems by using the same for improper and personal purposes;

C. By conspiring with members of the community have the Chief fired and to damage the Chief's reputation in the community;

D. By harassing and interfering with the Administrative Assistant, Della Bloom, personally and in the performance of her job-related duties;

E. By conspiring with others to harass and interfere with the Administrative Assistant, Della Bloom's, job performance;

F. By misusing the District's computers and email systems to consult a psychic for purposes of divining Chief Harris' fate, in terms of retaining his job with the District and in divining whether the efforts of Weber and others will be successful in their goal of removing the Chief;

G. Through the misuse of District computers and email systems by conspiring with others to purchase a "voodoo curse" with the intent of harming Chief Harris;

H. By engaging in bizarre, inappropriate and threatening behavior through his role in purchasing, attempting to purchase or supporting the purchase of said "voodoo curse."

I. Generally, by breaching his duty of loyalty, by attempting to damage the Chief's reputation in the community, by attempting to have him fired and by engaging in a campaign designed to discredit and disparage the Chief; and

J. Engaging in all, or substantially all, of the above behavior while on working time and through the use of the District's resources.

Items 7B, 7F, 7 G and 7H, therein were pretexts for the recommendation for discharge and were not part of the real reason for discharge.

The real reasons for Chief Harris preferring charges against Mr. T. Weber were that he had been disloyal to Chief Harris and the Employer because:

1. Mr. T. Weber engaged in a purported conspiracy with Mrs. Englebrecht to undermine him as Chief.
2. Mr. T. Weber conspired to interfere with Chief Harris' secretary, Della Bloom's, work.
3. Mr. T. Weber engaged in a pattern of conduct, through emails and other communications, for the purpose of conspiring with others for the purpose of bringing public discredit to the Chief and/or having the Chief fired;

45. On or about March 16, 2007, Mr. T. Weber and the Employer entered into a settlement agreement under which Mr. T. Weber resigned his full-time employment and his part-time on-call fire position with the Employer effective March 31, 2007. Under the terms of the settlement agreement, Mr. T. Weber released the Employer from any and all claims arising his employment relationship with the Employer and arising from any alleged violation of any state statute. The Employer and Chief Harris released Mr. T. Weber from any and all actions, causes of action, suits, charges, complaints or claims of any nature whatsoever.

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

CONCLUSIONS OF LAW

1. Local 311, International Association of Firefighters, AFL-CIO is a labor organization within the meaning of Section 111.70(1)(h), Stats.
2. Middleton Fire District is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.
3. The regular full-time, regular part-time and on-call firefighters are municipal employees within the meaning of Section 111.70(1)(i), Stats.
4. The unnamed organization of employees who supported Mrs. Englebrecht is a labor organization within the meaning of Section 111.70(1)(h), Stats.
5. The Employer did not interfere with, restrain or coerce municipal employees within the meaning of Sec. 111.70(3)(a)1, Stats, in their enjoyment of rights protected by Sec. 111.70(2), Stats, by searching its own computers for e-mails and documents stored in its Internet cache.

6. The Employer did not interfere with, restrain or coerce municipal employees within the meaning of Sec. 111.70(3)(a)1, Stats, in their enjoyment of rights protected by Sec. 111.70(2), Stats, by rearranging the District offices, moving Mr. T. Weber and Mr. R. Weber's office and making other related changes on April 6 and 7, 2006.

7. The Employer interfered with, restrained or coerced municipal employees within the meaning of Sec. 111.70(3)(a)1, Stats, in their enjoyment of rights protected by Sec. 111.70(2), Stats, by conducting the "due process" and investigatory meeting of May 12, 2006.

8. Mr. T. Weber engaged in concerted activity protected by Section 111.70(2), Stats, by working with and supporting Mrs. Englebrecht's efforts to present on-call firefighters concerns to the Fire Commission.

9. The Employer through its Fire Chief Aaron Harris filed charges with the Fire Commission on June 8, 2006, seeking the dismissal of Mr. T. Weber based in part on his having engaged in the protected concerted activity noted in Conclusions of Law 9 and 10 and, therefore, it committed a prohibited practice within the meaning of Sec. 111.70(3)(a)3 and, derivatively, Sec. 111.70(3)(a)1, Stats, when it filed charges against Thomas Weber.

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

ORDER

Respondent Middleton Fire District, its officers and agents shall immediately:

- (a) Cease and desist from interfering with, restraining, or coercing any of its employees in the exercise of their rights guaranteed in Sec. 111.70(2), Stats.
- (b) Cease and desist from discriminating against 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) Notify all of its employees in the Middleton Fire District by posting in conspicuous places where employees are employed in its Fire Department copies of the notice attached hereto and marked "Appendix A." That notice shall be signed by Fire Chief Aaron Harris and shall remain posted for thirty (30) days thereafter. The Middleton Fire District shall take reasonable steps that said notices are not altered, defaced, or covered by other material.

- (2) 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 herewith.

Dated at Madison, Wisconsin, this 10th day of October, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Examiner

APPENDIX "A"

**NOTICE TO ALL EMPLOYEES REPRESENTED BY
LOCAL 311, INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, AFL-CIO**

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

- (1) The Middleton Fire Protection District will:
 - (a) Cease and desist from interfering with, restraining or coercing employees in the exercise of their rights protected by Sec. 111.70(2), Wis. Stats.
 - (b) Cease and desist from encouraging or discouraging membership in any labor organization by discrimination with regard to hiring, tenure or other terms or conditions of employment.

MIDDLETON FIRE PROTECTION DISTRICT

Fire Chief

Date

THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES REPRESENTED BY DCETA FOR A PERIOD OF SIXTY (60) DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED OR OBSCURED IN ANY WAY.

MIDDLETON FIRE PROTECTION DISTRICT

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

The Union filed this complaint to supplement a complaint it filed against the Employer in MIDDLETON FIRE DISTRICT, Case 2, No. 65048 on August 12, 2005. That case was heard by Examiner Houlihan. The complaint herein alleges that after the close of the hearing in the foregoing matter, the Employer continued to engage in prohibited practices by rearranging the Fire Department offices in a way that discriminated against those who had voted in favor the Union, engaging in surveillance of their activities, threatening employees, and discriminating against employees in violation of Sections 111.70(3)(a)1, 3, Stats. As of the end of the hearing the complaint involved the following four specific allegations:

1. The Employer interfered with the employees' protected rights in violation of Sec. 111.70(3)(a)1, Stats, by reviewing documents stored in the Internet web cache of the District-owned computers assigned to Mr. T. Weber and others who communicated with him by e-mail.
2. The Employer interfered with the employees protected rights in violation of Sec. 111.70(3)(a)1, Stats, in the manner in which it rearranged District offices to on April 6 and 7, 2006, among other things, by moving Mr. T. Weber and Mr. R. Weber to a new office and removing his access to the Internet to isolate him from other employees, and locking files to make his job more difficult.
3. The Employer interfered with the employees' protected rights in violation of Sec. 111.70(3)(a)1, Stats, by requiring Mr. T. Weber to submit to an interview on or about May 12, 2006.
4. The Employer discriminated against Mr. T. Weber within the meaning of Sec. 111.70(3)(a)3 and derivatively interfered with his exercise of protected rights by filing charges with the Middleton Fire Commission seeking his dismissal on June 8, 2006.

POSITIONS OF THE PARTIES

Union

The reorganization of the Employer's offices was an "adverse employment action." The only employees affected by the April, 2006, office reorganization were the two union adherents. They were assigned to the smaller back room office. They were isolated from all of the other regular employees and the paid on-call firefighters who came to the station. Their mentoring relationship with Mr. Kakuske was effectively terminated. Their link to other

office computers was terminated in a way which made their access to information they use in their jobs more difficult. Paper filing cabinets which they routinely used were locked and placed in a room different than the one they worked in. Chief Harris' testimony was that he assigned Mr. Kakuske to a different location at Mr. Kakuske's request. However, Mr. Kakuske's request had been articulated over a year earlier when he 'illegally' voted against the Union in the representation election. Therefore, Chief Harris' decision to isolate them was inextricably intertwined with his consideration of Mr. Kakuske's earlier anti-union motivation. The Employer offered no other plausible reason for the change.

Chief Harris' reason for his "surveillance" of the Mr. T. Weber's e-mail makes no sense. There was no nexus between finding Chief Harris' name on a website and the need to review his work place computer. This is so because all of the e-mails sent to the psychic website were sent by Mr. T. Weber from his personal home computer through his personal e-mail account. Further, this does not explain why he reviewed only Union adherents' accounts, Mr. R. Weber and Mr. Brandl's. Chief Harris himself provided the answer. The only thing that was of interest to him was the content of the communications. The inference to be drawn here is that his surveillance was motivated by the employees' pro-union sympathies.

The interrogation of Mr. T. Weber on May 12, 2006 was intended to, and had the effect of, interfering with his exercise of rights protected by Section 111.70(2), Stats. The interrogation of an employee will engender anxiety in the employee. There is no reason why, absent a "substantial and reliable basis for its suspicion," an employer's questioning of an employee regarding his protected activity that is not "aimed at "seeking information that the employer does not already possess," should not be considered merely punitive and *per se*, an unlawful interference with protected activity. Chief Harris' interrogation of Mr. T. Weber on May 12, 2006, was not designed to obtain information which it did not already have. It already had the e-mail concerning his absence on April 10th, the time sheets for April 11 and he easily could have asked Mr. Subera about his conversation with Mr. T. Weber late on April 7. As of the meeting on May 12, the Employer concedes that the charges based on the absences were improper, but no effort was made to inform Mr. T. Weber of this concession. The "rolling the eyes" allegation is obviously minor and a pretext. The e-mails and Internet communications were protected activity.

The Employer engaged in unlawful surveillance of Mr. T. Weber's private e-mail and Internet communications. Mr. T. Weber had a reasonable expectation of privacy in those communications. The Employer did not have any workplace policy prohibiting employees from using its computers for personal communications. The employees were not informed and were not aware that the Employer had in place a computer program that automatically recorded and stored all of their e-mail and Internet communications. Mr. T. Weber never gave Chief Harris permission to view his private e-mails.

The Employer retaliated against Mr. T. Weber because he engaged in labor speech. "Labor speech" which is made in the context of a "labor dispute" is protected. Any difference of opinion between labor and management is sufficient to constitute a "labor dispute." The

paid on-call firefighters are “municipal employees” within the meaning of MERA. All of the communications between Mrs. Englebrecht and Mr. T. Weber involve the concerns of paid on-call firefighters for whom Mrs. Englebrecht was the spokesperson for the concerns of the employees of the Employer. All of Mr. T. Weber’s speech with her is protected activity. Mr. T. Weber’s speech with the psychic is protected. It involves the proceedings before the WERC, the wages hours and working conditions of employees subject to those proceedings. Chief Harris claimed that Mrs. Englebrecht’s private e-mail communications with Mr. T. Weber were threatening or designed to discredit him and cause him to lose his employment. This is overheated palpable nonsense. Two years had elapsed since those e-mails had been sent out and there were no ill effects from them. The e-mails could not have affected Chief Harris’ reputation. The disciplinary action initiated by the Employer was based entirely on Mr. T. Weber’s exercise of protected speech. Accordingly, the Union requests that the Commission find the above conduct constitutes prohibited practices within the meaning of Sections 111.70(3)(a)1,3 of MERA and order the Employer to cease and desist from said conduct. It should order such other and further relief as it may deem appropriate.

Employer

The Employer did not interfere with Mr. T. Weber’s exercise of protected rights by the three actions alleged. The office reorganization was undertaken solely for legitimate business reasons. The Chief shared offices with others. The Chief could not use his office for confidential meeting without asking the other to leave. That office was too small for the number of people using it. Mr. R. Weber admitted that this was true. Mr. R. Weber and his brother Mr. T. Weber were to move to, and share, the rear office. The Union does not object to this location for their office. Instead, the Union focused on the fact that the Chief did not move Mr. Kakuske and Mr. Suberra to share the same office with them. The Chief did not do so because Mr. Kakuske and Mr. Suberra had confidentially asked the Chief to not put them in the same office with Mr. R. Weber and Mr. T. Weber. Mr. Kakuske testified at the hearing that he did not want to be in the same office with Mr. R. Weber and Mr. T. Weber because he believed they were surreptitiously going through his things. In any event, the Chief told everyone that the move was not necessarily permanent and that he would consider making changes if the arrangement did not work out. The Union organizing efforts occurred in 2004 and the office reorganization was in 2006. There is no nexus between the two activities. The Union’s witnesses did not confirm the Union’s trial theory that tensions were high in the office because of the Union organizing drive. There is no evidence that the office move was designed to isolate Mr. R. Weber and Mr. T. Weber. The offices had been previously occupied by the Chief. The offices are pleasant. The Chief offered to buy whatever was necessary to make the offices adequate and sought input from Mr. R. Weber and Mr. T. Weber, among others, about the office arrangement. Visitors to the building usually come in the rear door and pass by the rear office: thus, it is not physically isolated. The location of the office did not make more it difficult for Mr. R. Weber and Mr. T. Weber to communicate with Mr. Kakuske. The Chief had always been in an office separate from their office.

The search of the Employer's computers was lawful. Chief Harris accidentally learned that e-mails were sent by Mr. T. Weber to an on-line psychic. These e-mails were public and contained personal information about the Chief. The e-mails also raised questions as to whether Mr. T. Weber was taking improper actions to get the Chief fired. The "search" was done by the Employer's computer expert who obtained copies of the e-mails which were sent by Mr. T. Weber from the Employer's computer from the Employer's server. The Employer has not created any expectation in its employees about privacy in using its computers. The Employer searched computers of other employees as well and found no improper use of those computers.

Chief Harris had legitimate reasons for filing charges with the Fire Commission. He found the e-mails disturbing. The e-mails contained violent references, hostility to the Chief and fellow employees and references to things such as explosions and the Chief having a heart attack. He also discussed the idea of "setting up" the secretary, Ms. Della Bloom, in one e-mail.

The Chief gave Mr. T. Weber a due process opportunity to explain the e-mails which Mr. R. Weber declined to do. He also consulted with the Employer's attorney before filing charges. Chief Harris has no anti-union animus. He is a union member himself. He owns a video production company which performs services for unions, including the union involved herein. During the election, he did not campaign against the Union and even told some employees that the Union might be in their interest.

Chief Harris did not file charges in retaliation for the "safety" complaint. Those false charges were filed against him over a year earlier. The two are unrelated. Any reasonable supervisor would have done the same.

Union Reply

As to the office change, the Employer argues that Chief Harris had not felt isolated when in the back office, that Mr. T. Weber and Mr. R. Weber had provided input into the move and that the reorganization did not make the performance of their duties more difficult. In fact, neither Mr. R. Weber, nor Mr. T. Weber had any input into the office change before it was made. Chief Harris' reaction to the office is irrelevant since he had a different relationship to the fellow employees and visitors. It is not the magnitude of the difficulty. The evidence is undisputed is that it made the performance more difficult. The evidence is that during the weeks and months after the representation election Chief Harris regularly snubbed the Union supporters. The employee who voted against the Union, Mr. Kakuske was given a choice of where he wanted to be. His request had occurred eleven months earlier. The decision was inexorably intertwined with the position of the employees *vis a vis* the representation election. Given the disparate, adverse impact that the office reorganization had on the employees who had voted in favor of the Union, and given the anti-union sentiment that was at the heart of the move, the conclusion must be made that it was motivated by the employees' exercise of protected rights.

Chief Harris claimed that he was prompted to look at the computers because he found his name on the psychic website. There is no logical connection between finding one's name on an Internet website and the need to review workplace computers of the employee who put the name on the website. This is true because the e mail from the employee was sent to the psychic from the employee's own personal e-mail account from his home. Further, even if there was a reason, there was no reason why the employer would review the computers of Mr. Brandl and Mr. R. Weber. This also does not explain why he would chose not to investigate the computers of non-union adherents. Further, Chief Harris admitted that his decision to investigate was based upon the "content" of the e-mails. The only content Chief Harris was interested in reviewing was that of Union adherents.

The Employer's argument that Chief Harris was not hostile toward the Union falls short of the mark. Chief Harris' statements that he was not anti-union are self-serving. The argument that he could not be motivated by Mr. R. Weber's protected conduct since it had been a year since Mr. R. Weber had last made any public statement overlooks that at the time the second petition was submitted to the Fire Commissioners the representation election was still pending before the Commission. The better view is that Chief Harris and the Fire Commission were bidding their time until they could retaliate against the Union supporters.

The Employer retaliated against Mr. T. Weber because he engaged in protected "labor speech." The only purpose of the May 12 meeting was to intimidate Mr. T. Weber. The disciplinary action threatened against Mr. T. Weber was based on protected "labor speech." Almost all of the e-mails were written by Mrs. Englebrecht. The Employer's arguments concerning the content of this speech are "frivolous." Unless the speech is made with actual malice, it is protected. Mrs. Englebrecht believed that what she had was reliable. The fact that Mr. R. Weber expressed an interest in seeing Chief Harris fired does not make the speech unprotected. Even if some of the speech was unprotected, the discipline was based on all of the speech and, thus, the discipline is motivated at least, in part, by Mr. T. Weber' protected speech. There is no evidence that Mr. T. Weber ever acted to give practical effect to ideas concerning Chief Harris' employment future. Thus, it was nothing more than an expression of opinion. The only thing Mr. T. Weber did was to assist in the prosecution of prohibited practice complaints with the WERC. This is protected activity.

Moreover, even if some of Weber's e-mail communication, standing alone, may be argued to be inappropriate, the great bulk of them are protected labor speech. Therefore, the Employer's actions are at least, in part, motivated by retaliation against protected conduct under the MUSKEGO-NORWAY, *infra*, test.

The almost naively conciliatory conciliatory responses to Mrs. Englebrecht and his understated communications with the psychic website pale in comparison to the virulently hostile memorandum that was the subject of VILLAGE OF STURTEVANT (FIRE DEPARTMENT), DEC. NO. 30378-B (WERC, 11/03). Accordingly, Mr. T. Weber's conduct is protected labor speech.

All of the e-mails in this case related to employment concerns of the paid on-call firefighters and the regular employees of the Employer. They were, therefore, protected labor speech. Chief Harris attempt to discipline Mr. T. Weber based on that conduct is a per se violation of Section 111.70(3)(a)1 and 3.

Beyond this, Chief Harris' inherently coercive and threatening May 12, 2006, interrogation of Mr. T. Weber where there was no "substantial and reliable basis" for him to do so, constituted an interference with his protected rights.

Chief Harris' over-the-top, feigned, "drama queen" reaction to the content of the e-mail communications are not reasonable. The WERC should determine and declare that the conduct of the Employer, acting through its Fire Chief constituted prohibited practices in violation of Sections 111.70(3)(a)1,3, Stats. The WERC should order the Fire District to cease and desist from such conduct and grant such relief as may be appropriate. The Union attached a copy of the Mr. T. Weber's settlement agreement wherein he resigned from employment to its reply brief.

Employer Reply

The allegations in case 2 before the Commission are not relevant. In any event, the Union's position relating to those allegations is incorrect. Mr. Brandl's position was eliminated because the Employer needed a full-time employee. Mr. Brandl was part-time. His union activities were not any part of the consideration. The change leading to the elimination of his position was being considered before the organizing campaign started. Even the Union recognized the need for the change. The sole purpose was to make the Code Enforcement Bureau more efficient and timely. Mr Brandl was invited to apply for the full-time position, but chose not to apply. There is no evidence that Chief Harris knew that Mr. Brandl supported the Union. The decision to reorganize was made before the Employer became aware of the union organizing drive. The decision to eliminate Mr. Brandl's position was made before Chief Harris knew that he would be eligible to vote in the representation election. The inclusion of Mr. Kakuske on the voting list was an honest mistake. The Employer did not try to "rig" the representation election.

The office reorganization was neither retaliatory, nor did it interfere with employees' exercise of protected rights. The office reorganization was not an "adverse employment action" as that term is used in employment discrimination cases. No reasonable person would be adversely affected by the action. The filing cabinets over which the union makes much of its arguments, were moved to make more room in the Webers' office. It was Mr. R. Weber's idea to move the filing cabinets. The office provided greater confidentiality and increased efficiency. The real reason that the Union objects to the office move is that Mr. Kakuske was not moved into the same office with them. However, the fact is that Mr. Kakuske told Chief Harris that he did not want to be in the same office. The Union could have asked him in its cross-examination if that was true, but chose not to ask that question when he testified. There is no evidence that Chief Harris made his decision based on any other concern. Mr. Kakuske's

reason was that he thought they were monitoring or spying on him. He did not testify about any union-related issues.

The Employer had the right to search its own computers. It had no special spying program but merely looked in the cached files. The Employer did not search anything other than its own computers. The Union showed nothing to support its right-to-privacy argument. In fact, the information on the computers may have been open as public records. The Union also incorrectly argued that the Employer searched only Union adherents' computers. That assertion is contradicted by the testimony of Employer computer expert Jeff Nelson. The reason for searching the computers makes total sense. Along the way, Chief Harris came across the other, damaging e-mails, the Union is trying so hard to suppress and dismiss as euphemistically referring to as "labor speech."

The May 12 meeting was not an interrogation but, rather, a "due process" opportunity to respond to the proposed charges to be filed with the Fire Commission prior to the Chief filing charges under Sec. 62.13, Stats. The meeting was a required step in the process. The Union's brief admits that "interrogation" is proper when the employer has a "sufficient concrete and reliable basis . . . to evoke a reasonable suspicion that misconduct had occurred." The Employer had such evidence, over 100 pages of disturbing e-mails. The May 12 meeting was not a "sham." The Employer decided to not proceed on charges before the Fire Commission with respect to absences April 7, 10 and 11.

The Union contends that all of the e-mails constitute protected "labor speech." We wonder if the Union is looking at the same e-mails as the rest of us. For the sake of argument assuming that some of it is protected, it is undeniable that the majority of the e-mails are not protected. Where communications contain a mixture of protected and unprotected speech, it is permissible for the employer to take disciplinary action based upon the unprotected speech, CITY OF OSHKOSH, DEC. NO. 28971-A (WERC, 8/97). The Union cannot credibly claim that comments about "tweaking" Chief Harris until he explodes are protected. How about the attempt to dig up dirt on Chief Harris' father or the admission that anything that makes Ms. Bloom look good makes him look bad? How about the disgusting exchange that Chief Harris and John Maasch should "swim up stream?" The e-mails and correspondence with the psychics are a 10,000-pound elephant in the room which the Union is asking us to ignore.

In any event, labor speech is not protected if it is done with malice, which can be defined as reckless disregard to the truth of what is being stated. Mr. T. Weber and Mrs. Englebrecht cooked up an accusation that Chief Harris responded to a fire call under the influence of alcohol. This allegation was completely false and they made no effort to find this out. They accused Chief Harris of conducting unsafe training at which a "flashover" occurred, but Mrs. Englebrecht could not even define what a "flashover" was. She accused the Chief of allowing a 10-year old child to be on a fire scene, but she admitted that this was not improper on cross-examination.

The malice of the two is demonstrated by their lack of credibility in their testimony at hearing. Their e-mails directly contradict their testimony.

Chief Harris also had a right to be concerned about the communications with a psychic. He did not violate anyone's rights by investigating these concerns.

The Union has blown Chief Harris' "guns and ammo" speech all out of proportion. These may not have been the wisest analogy, but Chief Harris was well within his rights to state he would defend himself from these baseless allegations. Chief Harris expressed no anti-union animus at all in that speech and just stated that he was tired of the false accusations.

Finally, the Employer argues that it had no anti-union animus. The both Mr. Kakuske and Mr. Subera testified in Case 2 that Chief Harris told them to vote their conscience in the Union election. In short, they testified that the Union allegations were false.

DISCUSSION

I. Interference

A. Applicable Legal Standards

In NEW BERLIN SCHOOL DISTRICT, DEC. NO. 31243-B (WERC, 4/06) the Commission summarized the law governing independent allegations of interference as follows:

The Commission has long adhered to the following standards for assessing whether employer conduct has violated Sec. 111.70(3)(a)1, Stats.:

Violations of Sec. 111.70(3)(a)1, Stats., occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Sec. 111.70(2) rights. If, after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employee(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights.

JEFFERSON COUNTY, DEC. NO. 26845-B (WERC, 7/92), aff'd 187 Wis. 2D 647 (Ct. App. 1994), at 12-13, Citing, WERC v. EVANSVILLE, 69 Wis. 2D 140 (1975) and BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84). On the other hand, the Commission has recognized that an employer's legitimate business interests can sometimes justify rules that may have a limiting effect on protected activity. For example, in RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29074-B (Gratz, 4/98), aff'd DEC. NO. 29074-C

(WERC, 7/98), an employer's need to ensure the availability of its telephones for business purposes was held sufficient to warrant a general rule prohibiting personal use of the telephone during work hours, even though that rule somewhat limited employees' ability to communicate with each other and the union about union business. The Commission has recently characterized this balancing test as "permitting an employer to 'interfere with its employees' lawful concerted activity to the extent justified by the [employer's] operational needs.'" STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, DEC. NO. 30340-B (WERC, 7/04), at 13.

B. Office Reorganization and Alleged Internet Denial

The Examiner now turns to the office reorganization issues. Chief Harris had the offices rearranged on April 6 and 7, 2006, shortly after he learned of the contents of Mr. T. Weber's computer files. There is no dispute in this case that the current fire station is inadequate for the needs of the Employer and that the Employer is planning and building a new fire station. The relevant change is that Chief Harris moved Messrs. Weber out of the radio room⁷ and into the "existing" office.⁸ Chief Harris previously had shared offices in the existing office with Assistant Chief Gillitzer, Mr. Subera and 4 other on-call fire officers. He took the radio room for himself and Assistant Chief Gillitzer. Chief Harris credibly testified that the reason he chose to move into that office was to have more privacy when conducting confidential matters. The timing of the situation indicates to the Examiner that this confidentiality included matters dealing with labor relations. He previously was crowded with the other officers and had to ask them to leave when he needed to have a confidential discussion. The Examiner is satisfied that this is a legitimate management decision and no part of that decision related to displacing Messrs. Weber.

Similarly, there is little doubt that placing Messrs. Weber in the "existing office" was a logical and efficient use of space. This decision was made the day following the move of Chief Harris' office. Mr. R. Weber wrote an e-mail to Chief Harris prior to his decision to move offices suggesting that the move would be efficient and Mr. T. Weber testified that the move was more practical.

The Union's main complaint is that Chief Harris did not put Mr. Kakuske in the same office with Messrs. Weber. Chief Harris credibly testified that he did not put Mr. Kakuske in with Messrs. Weber because Mr. Kakuske had requested to be in a separate office. Mr. Kakuske privately told Chief Harris that he had seen Messrs. Weber suspiciously at his desk when Mr. Kakuske unexpectedly returned to the office. Although this request was first articulated in an e-mail over a year earlier, Chief Harris credibly testified that Mr. Kakuske continued to privately repeat that concern until the offices were moved. Mr. Kakuske credibly

⁷ This office is labeled "communication" on Union exhibit 10, but is known as the "radio room" because it had been used for that purpose at some time in the past.

⁸ This office is labeled as the "existing office" on Union exhibit 10.

confirmed his position during his testimony that he did not want to be in the same office. Mr.

Page 37

Dec. No. 31428-C

Kakuske testified starting at tr. p. 143, that he thought the two were spying on him. The Examiner is satisfied that Chief Harris made the decision to not include Mr. Kakuske in the same office with Messrs. Weber for legitimate management reasons unrelated to protected activity.

The Union also cited as an example of Chief Harris' alleged attempt to isolate Messrs. Weber the fact that they were no longer near the front door and could not greet those who came into the station. The Examiner concludes that there was no significant change in their access to others. The radio room is near the front door and far away from the back door. The existing office is centrally located to people entering by the back door whereas it is more isolated from the front door. Testimony indicates that most of the firefighters with whom Messrs. Weber normally converse came in the back door near their new office. Theoretically, those employees would walk past a door to the existing office. However, that door may be blocked as a result of decisions made unilaterally by Messrs. Weber to place material or a desk in front of it. The Examiner is satisfied that the increase in potential isolation was an unintended consequence of Chief Harris' legitimate reasons for the moves. Additionally, the job function of neither of Messrs. Weber involved greeting the public as they entered. Chief Harris made no effort to restrict anyone who entered from talking to Messrs. Weber at any time, nor did he make any effort to restrict Messrs. Weber from ever engaging in casual conversation during their work hours. The Examiner concludes that the change did not have the impact of interfering with protected rights.

Next, that Union complains that Chief Harris deliberately moved the files out of Messrs. Weber's new office and into the mechanical room and had them locked in order to make their job more difficult. The Examiner is satisfied that the moving of the files was solely to make the best use of cramped working spaces. There is some suggestion that the files were changed from normally unlocked to locked. The evidence is clear that one of the Employer's concerns was security of those files. The evidence is insufficient to establish that the change, if it occurred at all, had any unreasonable effect on the employees' ability to perform their work. In any event, it was necessitated by legitimate management reasons.

The Union contends that the Employer deliberately denied Mr. T. Weber access to the Internet after it discovered the e-mails in question. The Examiner concludes that the evidence is insufficient to establish that the Employer ever deliberately denied Mr. T. Weber access to the Internet prior to his being placed on administrative leave May 12, 2006. Mr. T. Weber originally used a desktop computer, but over the last few years the Employer transitioned him to a tablet laptop computer. Mr. T. Weber acknowledged that his tablet laptop computer connected to the WiFi wireless network and that the employee who had it before him had successfully used it that way. He acknowledged that he was unable to do this and the Examiner is satisfied that this was a result of his inexperience with computers. He did state that when he was in the station he could connect it to the Internet by plugging it into the network at the station. The tenor of his testimony suggests that he was able to do so until the

computer was damaged.⁹ The damage occurred as a result of a repair to the computer and through no fault of the Employer. There is no credible evidence he was denied the use of his password and it is unlikely that the Employer would have done so. Accordingly, the Examiner finds no merit to this allegation.

C. Examination of Computer Internet Cache

The Examiner now turns to the Employer's investigation of the Internet cache of Mr. T. Weber's computer and those of employees who communicated with him. There is a dispute in the record as to the scope of the Employer's investigation of the computers. The Union suggested that the Employer somehow looked at Mr. T. Weber's home computer. The Examiner credits Mr. Nelson's testimony as to the scope of the investigation. He was the person who conducted it. He is the only relevant person with the technical knowledge to engage in that investigation. Further, he was an entirely credible witness. The Examiner is satisfied that the investigation by Mr. Nelson involved only those of the Employer's computers which were generally available to all employees and those of the employees who communicated with Mr. T. Weber. Mr. Nelson did not examine any other computer.

Mr. T. Weber did not have any expectancy of privacy in using the Employer's computers. While the computers were password protected, the nature of the passwords was such that each employee would know every other employee's password. The purpose of the passwords was to access separate desktop displays and files for each employee on shared computers. Mr. T. Weber acknowledged that in engaging in the e-mails from his employer-provided computer which were the subject of this dispute he used an "offshore" personal e-mail account because he did not want the Employer to discover what he was writing. This shows that he understood that the he understood that the Employer's e-mail system was not private. The mere fact that Mr. T. Weber did not know what a "cache" was does not mean that he expected privacy. The Examiner further concludes that this is not a matter of surveillance of on-going activity as the Union appears to contend, but instead an investigation into past usage of the Employer's computers.

Contrary to the position of the Union, Chief Harris had good reason to have Mr. T. Weber's computer inspected. He discovered that he had been publicly identified in an e-mail from Mr. T. Weber to his on-line psychic/astrologer and believed that Mr. T. Weber might have chosen to have the e-mail made public for the purposes of deliberately humiliating or harassing him.¹⁰ As the investigation unfolded there was even more than substantial evidence that Mr. T. Weber expressed a desire to publicly embarrass Chief Harris and to interfere with his work place changes. He also expressed an interest in interfering with the work of those employees who cooperated with Chief Harris or filled positions he created, including the

⁹ See, tr. pp. 893 et seq.

¹⁰ However, the Examiner has found herein that Mr. T. Weber did not intentionally seek to have that e-mail made public.

possibility of deliberately interfering with their work. The Employer had a clear right to determine if its computer system was being abused in some way, to determine if unprotected

Page 39

Dec. No. 31428-C

interference with other employees' work had occurred, and to find out if substantial work time was involved in these efforts. Additionally, it had a right to do so to determine if it needed to otherwise make changes in its rules, policies, or procedures.

II. Discrimination

A. "Due Process" Investigatory Meeting

There is no dispute in this case about whether Mr. T. Weber's position is subject to the protections of Section 62.13, Stats. The parties agree that it is. Under Sec. 62.13(5)(m), Stats, the Chief lacks the authority to discharge employees for misconduct. Instead he must follow the procedures of Sec. 62.13, Stats. As it relates to this case, the statute requires that Chief Harris file charges of misconduct with the Fire Commission.¹¹ The due process considerations of Sec. 62.13(5)(em)3, Stats, require that Chief Harris give the employee notice of, and an opportunity to respond to, potential charges before they are filed.

The Union has alleged that the "interrogation" by the Chief violated Sec. 111.70(3)(a)1, Stats. It is not necessary to present a lengthy analysis of the notice of April 24, 2006, and opportunity Chief Harris gave Mr. T. Weber on May 12, 2006. The Examiner is satisfied that if the decision made by the Chief to file charges violates Section 111.70(3)(a)3, Stats, then the notice and opportunity to respond to those charges derivatively violates Sec. 111.70(3)(a)1, Stats. The Examiner finds below that the charges filed in this case violate Sec. 111.70(3)(a)3, Stats. Accordingly, the Examiner finds that the notice and opportunity to respond to the charges derivatively violated Sec. 111.70(3)(a)1, Stats. No opinion is expressed as to whether the notice and opportunity which occurred in this case would have been unlawful if the charges were not improperly motivated. As the notice relates to the use of the Internet, it only asks him to respond to a potential charge relating to: "Your decorum and potential inappropriate behavior in the public and workplace as a representative of the Middleton Fire District." Because the questioning relating to the e-mails involves a substantial amount of protected activity, there is a serious question as to whether this notice would otherwise interfere with the exercise of protected rights. See, for example *JOHNNIE'S POULTRY CO.*, 55 LRRM 1403 (NLRB, 1964); *DEPARTMENT OF CORRECTIONS*, DEC. NO. 30340-B (WERC, 7/04).

B. Recommendation for Discharge

The Employer has attempted to minimize the impact of the Chief's decision to seek Mr. T. Weber's removal by the Fire Commission. The decision to file charges seeking dismissal effectively subjects an employee to defending himself or herself before the Fire Commission. Further, the standards of Sec. 62.13(5)(em) essentially require that Fire

¹¹ The charges are specified in Finding of Fact 44.

Commission give great deference to the decision of a chief to seek an employee's removal.¹² Thus, the decision to file charges seeking Mr. T. Weber's dismissal is a change in Mr. T. Weber's tenure of employment. Accordingly, the proper analysis of this issue is under Sec. 111.70(3)(a)3, Stats. See, CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03) at note 2.

C. Legal Standards

Sec. 111.70(3)(a)3, Stats., which makes it a prohibited practice for a municipal employer:

To encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure, or other terms of conditions of employment. . .

In order to establish a violation of this section, the Union must establish, by a clear and satisfactory preponderance of the evidence, under Sec. 111.07(3), Stats., made applicable by Sec. 111.70(4)(a), Stats., each of the following elements:

1. Municipal employee exercise of lawful, concerted activity protected by Sec. 111.70(2), Stats.; and
2. Municipal employer awareness of that activity; and
3. Municipal employer hostility to that activity; and
4. Municipal employer conduct motivated, in whole or in part, by hostility toward the protected activity. MUSKEGO-NORWAY C.S.J.S.D No. 9 v. WERB, 35 Wis. 2D 540 (1967).

Evidence of hostility and illegal motive may be direct, such as with overt statements of hostility, or, as is usually the case, inferred from the circumstances. See TOWN OF MERCER, DEC. NO. 14783-A (Greco, 3/77). If direct evidence of hostility or illegal motive is found lacking, then one must look at the total circumstances surrounding the case. In order to uphold an allegation of a violation, these circumstances must be such as to give rise to an inference of pretext which is reasonably based upon established facts that can logically support such an inference. See, COOPERATIVE EDUCATION SERVICE AGENCY #4, ET AL., DEC. NO. 13100-E (Yaffe, 12/77), *aff'd*, DEC. NO. 13100-G (WERC, 5/79).

It is irrelevant that an employer has legitimate grounds for its action if one of the motivating factors was hostility toward the employee's protected concerted activity. See,

¹² See, the interim arbitration award in CITY OF GREEN BAY WERC no. MA-13075 (Michelstetter, 8/07).

subject an employee to adverse consequences when one of the motivating factors is his or her union activities, no matter how many other valid reasons exist for the employer’s actions. See MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. W.E.R.B., 35 Wis. 2D 540, 562 (1967). Although the legitimate bases for an employer’s actions may properly be considered in fashioning an appropriate remedy, discrimination against an employee due to concerted activity will not be encouraged or tolerated. See EMPLOYMENT RELATIONS DEPT. V. WERC, 122 Wis. 2D 132, 141 (1985).

As noted above, the Employer’s real reason for recommending Mr. T. Weber’s discharge was, in summary, his purported “disloyalty.” The concept of the right of an employer to discharge an employee engaged in protected activity was first recognized by the U.S. Supreme Court in NLRB V. IBEW, LOCAL 1229, 346 U.S. 464, 33 LRRM 2183 (1953). Justice Frankfurter’s dissent in that case aptly notes at 2189 that judgments about disloyalty require a case-by-case analysis. In CLARK COUNTY, *supra* and VILLAGE OF STURTEVANT, *supra*, the Commission recognized the concept. In STURTEVANT @ pp. 25-6, the Commission summarized its case law on the point as follows:

Concerted activity by its nature often occurs in tense, confrontational, or chilly atmospheres, and some intemperance is to be expected in those situations. A mild-mannered complaint is likely to aggravate an employer less than a harshly-worded one, and sometimes it is the vehemence itself that renders concerted activity effective; certainly Section 2 cannot be read to protect only ineffective concerted activity. See CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03). Thus, unless concerted activity is marked by flagrant misconduct, it does not lose its protection. In addition, what constitutes “flagrant misconduct,” will depend upon the nature of the work place and the effect on the employer’s authority. For example, in CKS TOOL & ENGINEERING, 332 NLRB No. 162, 168 LRRM 1047 (2000), the NLRB deemed protected an employee’s obscenity-laden speech during a management presentation at a staff meeting, because the employee was deemed to be implicitly acting on behalf of his co-workers and because his language was commonly tolerated by management at such meetings. Some measure of “disloyalty” and “disparagement” are tolerated, even if the employer arguably has suffered some harm to its business. See, e.g., ALLSTATE INSURANCE CO., 332 NLRB NO. 66, 165 LRRM 1293 (2000) (insurance agent’s activity was protected, where she gave interview to a magazine, in which she complained about the company’s working conditions); ARLINGTON ELECTRIC, INC., 332 NLRB No. 74, 166 LRRM 1049 (2000) (it was protected for an employee to distribute literature to the public urging them not to use a hospital that subcontracted with a company that did not provide family health insurance). Hence, unless the form of expression exceeds the law’s liberal parameters, the law does not distinguish between hostility towards the subject

D. Recommendation for Discharge

The charges filed on June 8, 2006 by the Chief state his purported reasons for recommending the discharge. Those charges are stated in Finding of Fact 44. The Examiner is satisfied that factual basis for Chief Harris's recommendation for the discharge of Mr. T. Weber was the e-mails submitted by the Employer in evidence herein.¹³ It concluded thereon that Mr. T. Weber engaged in disloyalty which included conspiring with Mrs. Englebrecht in a campaign to harass Chief Harris and undermine his efforts to make changes at the Department (including undermining the work of those who cooperated with Chief Harris' changes). The following were mere pretext and not real reasons for the decision to seek Mr. T. Weber's discharge:

1. The misuse of Employer e-mail (Charge 7 B)
2. The misuse of the Employer's computer to consult with a psychic (7F), except by allowing the Chief's name and personal information to be publicized on the World-Wide Web.
3. Engaging in "bizarre, inappropriate, and threatening behavior through his role in purchasing, attempting to purchase or supporting the purchase of "said voodoo curse." (7H)
4. Conspiring to purchase a "voodoo curse."

1. Misuse of the Employer's E-Mail

As to the misuse of the Employer's e-mail, Chief Harris testified that when he asked Firefighter Nelson who acted as the Employer's computer consultant to look at Mr. Weber's computer it was not only to determine the extent of the disloyal behavior done on Employer time with Employer equipment, but to evaluate in general whether employees were abusing the Employer's computer. Chief Harris admitted later in his testimony that he was more concerned about the content of the e-mails than the fact that they were sent on the Employer's system.¹⁴ Mr. Nelson credibly testified that the extent of his investigation was to trace the disloyal e-mails through other recipients in the office to determine the extent the others were involved. The Employer disregarded e-mails by one employee using the Employer's computers to contact women for dating purposes. No action was taken against that employee at the time. The Employer did not check computers that were not possibly linked to the actions it deemed disloyal.

¹³ Tr. pp. 872, 883

¹⁴ Tr. pp. 829, 862

The Employer never had a policy restricting or controlling the employees' use of Internet access and e-mail. There is no evidence that one was adopted after this incident. The credible testimony indicates that employees have freely used the Employer's computers and e-

mail system for personal purposes and do so with the acquiescence of Chief Harris and supervisory firefighters. Accordingly, the fact that Mr. T. Weber used the Employer's e-mail system for these communications was not part of the real reason for the recommended discharge.

2. Consultation with On-Line Psychics/Astrologers

Chief Harris credibly testified that he was offended by the fact that the e-mail sent by Mr. T. Weber which became public on the Internet effectively resulted in Chief Harris' personal information being publicly displayed on the Internet. He believed that Mr. T. Weber had authorized for the purpose of humiliating Chief Harris the Internet-provider to make this communication public, for the purpose of humiliating Chief Harris. Other than that, the Examiner is satisfied that the fact that Mr. T. Weber consulted with on-line psychics and similar conduct was not any part of the real reason for Chief Harris' decision.¹⁵

3. Voodoo Curse

The Examiner is also satisfied that the voodoo curse e-mail in which Mrs. Englebrcht jokingly referred to having obtained a voodoo curse on the Internet against Chief Harris was not part of any of the real reasons for Chief Harris' charges. In any event, the same was intended to be a private e-mail between an employee and the representative of employees in the course of communication for the purpose of mutual aid within the meaning of Sec. 111.70(2), Stats. It was used in the context of a communication relating to protected activity. It is no different that any other form of private expression of negative thoughts about a manager or supervisor between employees. The same is well within the range of protected labor speech.¹⁶

4. Other Minor Items

The Examiner finds that the fact that Mr. T. Weber engaged in these function during the work day was not a significant part of the reason for the Employer's actions. The Examiner has reviewed the work involved in writing the e-mails and their quantity. Mr. T. Weber

¹⁵ The extent to which the content of those e-mails constituted a threat of violence, tendency toward violence or disloyalty is discussed below. Mr. T. Weber testified that he honestly "believed in" the psychics. The Examiner notes that Article 1, Sec. 19 of the Wisconsin Constitution prohibits the use of religious tests to affect the competency of witnesses. Section 906.10, Stats, provides that evidence of beliefs or opinions of witnesses on matters of religion is not admissible for impeaching the credibility of a witness. The Examiner declines to draw any inference about the legitimacy of the psychic consultations. Further, the Examiner doesn't believe that Chief Harris, who is represented by counsel, would attempt to discharge an employee on the basis of his or her religious belief. The Examiner is satisfied that the real reason for including the consultations in the statement of charges was to sensationalize the case against Mr. T. Weber and to humiliate him. See the analysis in U.S. EX REL. GERALD MAYO, V. SATAN AND HIS STAFF, 54 F. R. D. 282 (W.D. Pa., 1971).

¹⁶ See, for example CKS TOOL & ENGINEERING, 168 LRRM 1047 (2000); VILLAGE OF STURTEVANT, *supra*.

alleged that he did this on authorized break time. Mr. T. Weber works independently with little immediate supervision and without structured break times. The Employer provided no evidence which would show that time involved in the research of issues and e-mails necessarily

Page 44

Dec. No. 31428-C

would have exceeded his authorized non-work time. The Examiner, therefore, concludes that these actions were taken within Mr. T. Weber's authorized non-working time.

E. Disloyalty v. Protected Conduct

The core of Chief Harris's reason to recommend Mr. T. Weber's discharge was Chief Harris' belief that he had engaged in a "conspiracy" against him and fellow employees. There is no dispute that Mr. T. Weber and Mr. R. Weber sided with those who had voted against Chief Harris for his position and who opposed the changes Chief Harris was in the process of making. This included working together with Mrs. Englebrecht and other on-call firefighters. The main issue with respect to this activity is whether the "conspiracy" was activity protected under Sec. 111.70(2), Stats. The Examiner finds that some of the activity is protected and some is not protected. The Examiner concludes that the charges are based on the protected conduct and not solely (or even substantially) on the unprotected conduct. Accordingly, the Examiner concludes that the Employer violated Section 111.70(3)(a)3, Stats, when Chief Harris filed charges with the Fire Commission seeking Mr. T. Weber's dismissal.

As noted above, the analysis of whether conduct is "disloyal" requires a close factual analysis. Unfortunately, the Employer's investigation of the facts was largely confined to discovering the e-mails and assuming the conduct stated therein actually occurred. There are obvious evidentiary issues in relying upon the e-mails without direct testimony, but given the circumstances of this case, the Examiner is forced to make findings based on the best available evidence.

1. **Conspiracy v. Labor Organization**

The main focus of the conspiracy theory relates to Mr. T. Weber's work with Mrs. Englebrecht to further the on-call's opposition's efforts. The Employer's argument assumes that working with Mrs. Englebrecht is not protected activity. This is not correct. Paid on-call firefighters are "municipal employees" within the meaning of Sec. 111.70(1)(i), of MERA. Participation in the paid on-call ranks is not formally required to be full-time employee, but historically Messrs. Weber were paid on-call firefighters and both were paid on-call firefighters at all relevant times. The Examiner concludes that the amorphous group of on-call firefighters (generally Chief Harris' opposition) became a nascent labor organization in late 2004.¹⁷ This group existed in whole or in part to identify the concerns of firefighters with respect to job safety, job security and discipline, and other matters concerning wages, hours and working conditions and presenting these issues or grievance to the Fire Commission in the

¹⁷ See, Mrs. Englebrecht's testimony at tr. p. 287, 305-07. The number of signatures on the letter in Finding of Fact 28, on July 15, 2005, indicates that a large number of on-call firefighters continued to see her as a representative.

absence of a formal grievance procedure.¹⁸ Mrs. Englebrecht became the self-anointed, but nonetheless accepted, representative of the opposition firefighters. The right to work with chosen representatives is at the heart of protected activity.

Page 45
Dec. No. 31428-C

2. Protected Activity

One of the Employer's main arguments is that the actions of the two were intended to harass Chief Harris with repeated false charges into being fired or quitting. The Examiner concludes the better view of the evidence is that the two erroneously believed that Chief Harris' actions with regard to safety, personnel relationships and matters, and fiscal management were so seriously flawed that the Fire Commission would suspend or remove Chief Harris and/or that he would be publicly embarrassed and humiliated by the public revelation of his own actions. The two wanted to have this effect. Viewed in this light, the Examiner concludes that the conduct is primarily, but not entirely, protected. The unprotected conduct is discussed further below.

The Examiner finds that Mr. T. Weber and Mrs. Englebrecht's efforts to catalogue this group's concerns and present them forcefully to the Fire Commission was generally done in good faith. They relate to safety, discipline, selection for promotion. Concerns about the existence of standard operating procedures in a fire department materially relate to job safety. One of the main concerns involved the standards for hiring, budget, and job responsibilities of the rehabilitation position formerly held by Mrs. Englebrecht. The e-mails reveal that Mrs. Englebrecht, with Mr. T. Weber's assistance, clearly researched the nature of her job and the nature of the insurance standards for the rehabilitation position. These concerns relate to job safety for firefighters.

Contrary to the position of the Employer, Mr. T. Weber's actions with respect to his belief as to Chief Harris being at a fire under the influence of alcohol was initially based upon firefighters' reports of having seen him at the station after having had some alcohol on September 5, 2004. Mr. T. Weber researched Employer records to see whether Chief Harris was in pay status for having done so and clearly made efforts to reconcile the fact that he wasn't in pay status with the eyewitness accounts and the fact that he was in pay status for the next fire call shortly thereafter.¹⁹ The tenor of his e-mails indicates that he believed Chief Harris had used command influence to cover up the fact that he reported to a fire under the influence on September 5. Chief Harris admitted being at the station after having had some drinks at dinner at a local restaurant. After reviewing the testimony at tr. p. 110, the Examiner is satisfied that there was a reasonable question about command influence for the purpose or with the result of covering this up.

The Employer's argument in this matter tends to demonstrate that its motive is largely based on the concerted nature of Mr. T. Weber's actions with Mrs. Englebrecht. It uses its

¹⁸ See, MT. NEBO FUR FARM, Case No. 6898 (WERC, 10/64); CLARK COUNTY, *supra*, where an employee was acting as the representative of fellow employees.

¹⁹ Firefighter Kemp testified to the events of that evening. He was reluctant witness. See, tr. p. 110.

“conspiracy” theory to punish Mr. T. Weber for Mrs. Englebrecht’s actions. At page 22 of the Employer brief it essentially argues that Mr. T. Weber acted with malice and thereby lost the protection of Sec. 111.70(2), Stats, because Mrs. Englebrecht acted with malice in pursuing the allegation that Chief Harris reported to a fire under the influence of alcohol. As noted in the paragraph above, Mr. T. Weber’s conduct with respect to that issue was always

Page 46
Dec. No. 31428-C

pursued in an honest belief in the truth of the charge. [The Employer also did the same thing when it attributed Mrs. Englebrecht’s conduct to Mr. T. Weber and when it attributed the language which Mrs. Englebrecht used in her e-mails to Mr. T. Weber as evidence of his tendency toward violent conduct. One of the main purposes of Sec. 111.70(2), Stats, is to allow employees to work in concert with chosen non-employee representatives without fear of reprisal.²⁰

The Examiner finds that the presentation of the July 15, 2005, memorandum to the Fire Commission was protected activity and that Mr. T. Weber’s conduct with respect thereto was protected. The Examiner finds that the concerns about the safety of training burns, a crucial issue to firefighters, were based upon reliance upon information from firefighters. The Examiner finds unpersuasive that Mrs. Englebrecht could not define a “flashover” in her testimony. For example, the absence of operating procedures relates to employee safety. Improper allocation of funds or disproportionate financial treatment of employees relates both to wages and working conditions. Complaints about discipline of employees or poor working relationships between supervisors and employees relate to discipline and working conditions. The presentation of the concerns themselves to the Fire Commission constitutes a grievance in the absence of an established grievance procedure. The Examiner finds that virtually all of the July 15, 2005, memorandum to the Fire Commission materially relates to wages, hours and working conditions or other labor disputes within the meaning of Section 111.70(1)(g), Stats.

Mr. T. Weber’s e-mails reflect that he distributed the red book to public officials of the communities comprising the fire district. The Examiner is satisfied that these actions were taken on behalf of fellow on-call firefighters in an effort to have the Fire Commission recognize the seriousness of those concerns. This was undertaken on behalf of fellow firefighters. Accordingly, the relevant e-mails in this case largely relate to protected concerted activity and are protected conduct. His conduct in this regard is entirely protected activity. See, CLARK COUNTY, *supra*; and VILLAGE OF STURTEVANT, *supra*.

3. Specific Allegations of Unprotected Conduct

a. Undermining Employees

Mr. T. Weber’s statements and conduct with respect to Ms Della Bloom did form a part of the basis of the reason for Chief Harris decision to recommend discharge. The only

²⁰ For example, Mrs. Englebrecht unilaterally sent an e-mail involving the “voodoo curse” joke. Mr. T. Weber did not solicit the joke or participate in it. However, the statement of charges, item 7H attributes participation therein in to Mr. T. Weber.

evidence in this case concerning what occurred with respect to Mr. T. Weber's actions with respect to Ms. Bloom is the e-mails. They show a potential willingness or interest in interfering with Ms. Bloom's work, a discussion about possibly interfering with Ms. Bloom's activity in a professional organization and an e-mail apparently seeking to have another fire department stop cooperating with Ms. Bloom. Mr. T. Weber's and Mr. Brandl's testimony concerning "setting" Ms. Bloom up with the secretary's association was that they meant

Page 47
Dec. No. 31428-C

"getting her in touch with" the association. Mr. T. Weber's testimony about this e-mail is incredible. Nonetheless, Mr. Brandl's testimony is credible that he never understood any action of Mr. T. Weber to intend that Mr. Brandl interfere with Ms. Bloom's participation in that professional organization. It was credible that Mr. Brandl took no action to interfere with Ms. Bloom's participation in any way. Mr. Brandl wasn't active in the organization at that time. The evidence is insufficient to demonstrate that this e-mail conversation was anything more than "trash talk." This is protected "labor speech" under Sec. 111.70(2), Stats.

The crucial e-mail is the e-mail to Fire Chief Kiser of the De Pere Fire Department on November 7, 2005. Mr. T. Weber's explanation of this e-mail is that he was trying to help Ms. Bloom with the Fire House computer program and her going outside interfered with that help is entirely unbelievable and inconsistent with the text of the e-mail. The attempt to interfere with another employee's performance of her required duties is not activity protected under Sec. 111.70(2), Stats.

There is no evidence that the Employer investigated this. There is no evidence that any action was taken by anyone in De Pere or that Mr. T. Weber took any further action to further his request. It is unlikely that Chief Kiser, himself a management official, would have complied with this request even though he had ties to the rank and file.

The evidence is insufficient to show that Mr. T. Weber ever did anything to interfere with her work or that of anyone else after or before the e-mail to Chief Kiser. There is some evidence in the e-mails of hostility toward employees who were viewed as helping Chief Harris and thoughts about making their jobs difficult, but there is no evidence that anything was done in that regard Mr. T. Weber credibly testified that he was cooperative with her. Some of the e-mails after that time suggest that he did cooperate with Ms. Bloom in showing her various aspects of the Fire House computer program. Accordingly, there is no evidence that Mr. T. Weber did anything which actually interfered with Ms. Bloom's work.

There was another incident of alleged interference with an employee. Mr. Brandl was replaced by Mr. Casey Kakusky. Mr. Brandl and opponents of Chief Harris, including Mr. T. Weber honestly believed it was an effort to replace those who favored the old elected-chief system and the Union with people loyal to Chief Harris. In that regard, Mr. Brandl worked full-time in Fitchberg and Mr. Kakuske also worked as a volunteer firefighter. Mr. Brandl arranged to have Mr. Kakuske receive the silent treatment for having accepted a job displacing Mr. Brandl. The silent treatment by cooperating employees is generally protected concerted

activity and this is no exception.²¹ Mr. T. Weber was aware of this and supported the same (union ex 5 p. 1.) There is no indication in this record that Mr. T. Weber instigated the silent treatment incident. Mr. T. Weber's involvement in this was based upon his concurrence in the belief that Mr. Kakuske's acceptance of this full-time position under these circumstances was improper. In any event, his participation was limited to being supportive of this conduct. Mr. T. Weber's involvement was clearly protected activity.

Page 48
Dec. No. 31428-C

In summary, I conclude that Mr. T. Weber did attempt to interfere with Ms. Bloom's work and that the same was unprotected by Sec. 111.70(2), Stats. This was an isolated incident and was a minor part of Chief Harris' reason for recommending discharge.

b. Hostility to Chief

Mr. T. Weber expressed extreme hostility to the Chief and his proposed changes in the e-mail exchanges with Mrs. Englebracht and others who shared the same views. Mr. T. Weber intended that the e-mail exchanges with Mrs. Englebracht and the others were private. He took the step of using his own private e-mail account rather than the Employer's for this purpose. Mr. T. Weber honestly believed and intended that the e-mail exchanges with the psychic over the Internet were "private," as that term is used in doing business on the Internet. Those e-mails essentially remained private in that way with the exception of the one which was used publicly by the psychic provider. Mr. T. Weber is entirely believable that he never intentionally gave the provider permission to use the e-mail in its Internet advertising. It does not surprise this Examiner in his 30 plus years of experience dealing with labor disputes that employees might privately harbor ill thoughts of management and their supervisors. Indeed, it is not unheard of for employees to privately express wishes that various and sundry specified or unspecified evils befall management. Mr. T. Weber certainly did this by privately wishing that Chief Harris go to New Orleans during Hurricane Katrina and swim out to sea. He also did so by repeatedly stating that Chief Harris was being a "jerk" in his e-mails to the on-line psychic. Similarly, he approvingly joined in many e-mail conversations in which he and Mrs. Englebracht wished that the revelations of the red book or other matters would embarrass and humiliate Chief Harris. Labor strife is not congenial and often leads to intemperate speech. The Union has correctly characterized Mr. T. Weber's e-mail wording as labor speech. The Examiner concludes that the speech is tame by comparison to much labor speech and falls well within the ambit of protected labor speech. See, *VILLAGE OF STURTEVANT, supra*.

c. Threat or Violence

Mr. T. Weber, the "conspiring" employees, and Mrs. Englebracht expressed their hostility to management by using explosive terms in an incendiary manner by analogy to combative and violent actions. The following are some examples:

- "It is time to have feathers fly!"

²¹ See, *NORDSTROMS*, NLRB DEC. No. 19-CA-29 729 (5/06).

- “BOOM the first round has landed.”
- “HOLY MOLY!!! Man, that is a huge kaboom. Let me know what happens.”

[In response to the fact that a firefighter was stuck at the New Orleans Airport during Katrina, Mrs. Englebrecht replied with the following.]”

Page 49
Dec. No. 31428-C

- “Maybe he should just invite Aaron [Chief Harris] down there and both can snorkel south.”

These e-mails contain other allusions to explosive and violent terms. These terms were used to characterize Mrs. Englebrecht’s assumption that Chief Harris’s management of the fire department was so bad that the Fire Commission would take action to remove him once she revealed those actions to the Fire Commission. The Employer essentially argued that these phrases were violent conduct or indicated that Mr. T. Weber could not be trusted to protect fellow firefighters in emergency circumstances.²² The Examiner notes that the above language was intended to be used only among the employees engaging in concerted activity. No one at any time ever suggested or implied that anyone take any violent action. No one suggested that anyone fail to perform any work duty. Chief Harris also used the same type of analogy in his infamous “guns and bullets” speech. The Employer cannot remove the protection of the use of explosive labor speech and its analogies to violent actions by miss-characterizing them as evidence of a violent intent.

d. Participation In Contact with MATC

The e-mails reflect that Mr. T. Weber and Mrs. Englebrecht questioned whether Chief Harris was in pay status from the Employer when he taught fire courses at MATC and was paid by MATC. They concluded that he was not, but that his travel expenses were paid or bourn by the Employer. To this extent, their activity was protected concerted activity of reporting possible misconduct to the Fire Commission.

However, Mr. T. Weber assisted Mrs. Englebrecht in contacting MATC in her effort to discourage MATC from continuing to employ Chief Harris. The Examiner finds that the real purpose of this was to attempt to inflict economic harm on Chief Harris. The same is not protected concerted activity. Mr. T. Weber’s conduct in this regard was a small part of the activity. The Examiner concludes that this was a minor part of Chief Harris’ seeking to have Mr. T. Weber dismissed.

e. Investigation of Chief’s Father

²² The Examiner notes that Mr. T. Weber was removed from active fire fighting. Fire fighting duties involve substantial interdependence and require that firefighters take action to protect each other at a fire ground. No decision is expressed or implied with respect to the fire fighting duties.

Mr. T. Weber's e-mails reflect an understanding the Chief Harris' father, also a fire chief elsewhere, was involved in helping him write operating procedures. Mr. T. Weber wrote an e-mail to find "dirt" on Chief Harris' father. The Union has not demonstrated that this was conduct protected under Sec. 111.70(2), Stats. There is no evidence that the information sought related to employee legitimate concerns about wages, hours, or working conditions, collective bargaining or lawful concerted activities. The same was unprotected conduct. There is no evidence that the Employer investigated this conduct. The Examiner is satisfied that this is a minor part of Chief Harris' effort to have Mr. T. Weber dismissed.

Page 50
Dec. No. 31428-C

4. Summary of Discriminatory Actions

The Examiner is satisfied that the Chief Harris' main motive in this case for the recommendation for discharge was Mr. T. Weber's protected activity and, therefore, that action violated Sec. 111.70(3)(a)3 and derivatively, Sec. 111.70(3)(a)1, Stats. In D.C. EVEREST AREA SCHOOL DISTRICT, DEC. NO. 29946-M (WERC, 6/04), the school-employer laid off a teacher who had engaged in litigation against fellow teachers and exceedingly contentious, but unprotected, conduct in advocating his views about the school-employer's French program. The Commission reversed the Examiner's decision and concluded that because a small, but "legally significant" part of the hostility was based upon the fact that the employee had engaged in protected conduct in filing grievances that the Employer unlawfully discriminated against the employee in violation of Section 111.70(3)(a)3, Stats. In this case, a major part of the hostility of the Employer is directed to Mr. T. Weber's protected activity, even though Mr. T. Weber engaged in significant unprotected activity. Thus, under MUSKEGO-NORWAY, *supra*, the Union has shown by clear and convincing evidence that the Employer's actions are at least motivated in part by Mr. T. Weber's protected concerted activity.

III. REMEDY

The Examiner has ordered the conventional remedies which he finds will effectuate the policies of MERA, with the exception that he will not order a remedy directed at reinstating and making Mr. T. Weber whole. Mr. T. Weber was placed on administrative leave with pay effective May 12, 2006. He was removed from fire fighting duties at that time and, presumably lost pay with respect to those activities.

The Examiner notes that the Employer delayed and then went forward with scheduling the Fire Commission hearing on the merits of the disputed charge. Mr. T. Weber resigned effective March 31, 2007, pursuant to a settlement agreement between himself individually and the Employer. He also resigned as an on-call firefighter. Mr. Weber was in paid status in his full-time position until March 31, 2007. The agreement provides for a complete release of all causes of action of any and all claims. . . arising from any alleged violation of . . . state statute . . . " Mr. T. Weber had access to the Union's attorney prior to entering into the decision to

resign. The Examiner is satisfied that the settlement was made with Mr. T. Weber having full knowledge of the potential remedies which could be afforded as a result of this case and

voluntarily chose to enter into the forgoing settlement. The Union has not specifically sought a further remedy for him. The Examiner is satisfied that a further remedy for Mr. T. Weber would not be necessary to effectuate the policies of the MERA.

Dated at Madison, Wisconsin, this 10th day of October, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Examiner

