

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 2
No. 65048
MP-4181

Decision No. 31528-A

Appearances:

Mr. Bruce F. Ehlke, Hawks, Quindel, Ehlke & Perry, S.C., Attorneys At Law, 222 West Washington Avenue, Suite 705, P.O. Box 2155, Madison, Wisconsin 53701-2155, appeared on behalf of the Complainant.

Mr. Peter L. Albrecht, Albrecht Labor & Employment Law, S.C., Attorneys at Law, 131 West Wilson Street, Suite 1202, Madison, Wisconsin 53703, appeared on behalf of the Respondent.

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

On August 12, 2005 Local 311, International Association of Firefighters, AFL-CIO filed a complaint of prohibited practice alleging that the Middleton Fire Protection District had violated Sec. 111.70 (3)(a)1 and 111.70(3)(a)3, Wis. Stats., by terminating Andrew Brandl for engaging in protected concerted activity, and for engaging in other activities which discriminated against and interfered with other employees rights to engage in protected concerted activity. The Commission, on November 17, 2005 appointed William C. Houlihan, a member of its staff, to act as Examiner. A hearing on the matter was conducted on January 18, 20, and February 15, 2006 in Madison, Wisconsin. A transcript of the proceedings was taken and distributed by March 24, 2006. Post-hearing briefs and reply briefs were filed and exchanged by June 9, 2006. On or about September 14, 2006 the Examiner was advised that the matter was resolved, and that no decision should issue. On January 5, 2007 the parties advised the Examiner that settlement efforts were not successful, and that the matter should proceed to decision.

No. 31528-A

FINDINGS OF FACT

1. Local 311, International Association of Firefighters, AFL-CIO is an employee organization in which employees participate and which exists for the purpose, in whole or in part, of engaging in collective bargaining with municipal employers concerning grievances, labor disputes, wages, hours or conditions of employment.

2. Middleton Fire Protection District is duly organized and existing pursuant to the Wisconsin Statutes as a combination volunteer and paid on call Fire Department, and engages the services of employees. At all times material to this dispute, Douglass Tuffree and Jim Ripp were members of the Fire Commission. At all times material to this dispute, Aaron Harris was the Chief of the Middleton Fire District.

3. The Middleton Fire Protection District employs regular full-time and regular part-time employees as well as a number of volunteer paid on call employees. In September, 2004 the District employed three full-time non-supervisory employees: Thomas Weber, Robert Weber and Bradley Subera. In September, 2004 the District employed one part-time non-supervisory employee, Andrew Brandl.

4. Andrew Brandl began employment with the Middleton Fire Protection District on or about April 10, 2000 as a part-time employee conducting routine fire code inspections. Brandl averaged working 20 hours a week. In 2002 Aaron Harris, then-Assistant Fire Chief, asked Brandl if he would be willing to respond to Fire calls that arose during his work shift. Harris advised Brandl, who was at all times relevant to this dispute a full-time Firefighter with the Fitchburg Fire Department, that he would have to attend training sessions. Brandl indicated that he would consider the offer, and subsequently, in July 2002, responded that he would be interested in responding to Middleton calls. Brandl was outfitted and began responding to calls.

5. In December of 2002 Aaron Harris was elected Fire Chief, in a vote of Departmental members. At the time all command officers were elected to their respective positions. Harris won the election by one vote.

6. In 2003 Harris was appointed Chief by the Fire Commission, and was authorized to appoint subordinate officers, and to hire and fire, subject to Fire Commission review and approval. From the time he was appointed Fire Chief, Harris contemplated departmental reorganization.

7. In a meeting conducted in either December, 2003 or January 2004 Assistant Fire Chief Brian Zander asked Chief Harris why Andrew Brandl was being allowed to respond to Fire calls when he was not participating in training or drills. Brandl had responded to Fire calls while on duty since mid-year 2002. Brandl did not attend many, if any, of the required training sessions.

8. In early 2004 Bradley Subera received a \$9,000 pay raise following a compensation study. The raise was to bring his pay in line with the pay of other full-time Departmental employees.

9. In April, 2004 Tom Weber wrote Harris to express concerns over the status of the inspection program. It was his observation that it was inefficient to use part-time inspectors, that training required a significant investment in time and effort and that turnover was high, given the cost of training. He noted: "Andrew's (Brandl) pace is concurrent with past years and I feel comfortable with his past progress". The memo further indicates that "I will begin ramping up Andrew's time...".

10. In May, 2004 Thomas Weber sent Harris the following;

Subject: Inspection Program
From: "Thomas Weber"
Date: Tue. 4 May 2004 10:23:39
To: "Aaron Harris"

Chief:

Attached is the updated time log from January 2004 to the end of April 2004, as you may see we are severely lacking in hours from the participating members. As I eluded (sic) to in the March 2004 E-mail I feel that something needs to be restructured in order to meet the completion requirements for the first half inspections.

With the complete redirection of Brad's time, and the lack of response from the volunteer inspectors we appear to be short about 52 hours per week. The part time inspections being completed by Andy have been stepped up and he has been assigned the remainder of the strip malls and some of the multifamily units.

The prevention program is suffering, and at this point in time I do not feel comfortable with the level, consistency or quality of inspections being conducted. I feel that the program is being severely compromised at its present level of performance. The lack of program effectiveness will not be seen for couple of years or so, and based upon the past year and a half I feel that some change in direction is required to bring the program back to the standards that we previously held.

As the chief you need to establish a level in which inspections shall be completed to, at that point in time we can assign the number of inspectors to perform the inspections. Prior to establishing that level, I have made Five recommendations that I feel will start the rebuilding program to pre July 2003 levels.

1. Hire 3 Limited Term Employees 20 hours each, to fill the 60 hours of time to complete the 2004 inspection year.
2. In 2005 hire one full time, 40 hour per week Inspector, and one 20 hour per week Inspector, with these additions this should bring our staff level back to what the July 2003 levels were to be.
3. Using the Limited Time Employees who have designated work times, we can train and potentially select the full time and part time employee's from this potential group. (why train additional persons if you don't need to)
4. Look further into the tablet PC units, so that the inspectors can input their own inspection violations in "real time" thereby stream-lining the input. No longer do we write the violation on paper and then return to the station and type the notice up, doing twice the work to record the violation. The tablets also would allow the inspectors to have and update all contact information and the ability to have the ability to update any pre-plan information that is noted during an inspection, thus jump starting Bob's pre-plan information.
5. With the implementation of self input I feel Bob's time can then be redirected to the pre-plan implementation, and then potentially into the inspection/preplan arena, but with the amount of clerical effort required to fulfill commission and budget tracking in the day to day operations Bob's time may be about 50% Preplan. But at this time I feel I cannot loose (sic) Bob's computer input time since I do not see the benefit of training volunteer inspectors to input violations since the amount of technical information, they need to learn about just performing basic inspections this is quite complex and I feel that I need them to concentrate on the completing of the inspections.

The above mention tablets would free up any potential input from both Andy and myself reducing Bob's input by about 60% at this time. As the volunteer inspectors are brought up to the comfort level they also would be able to utilize a tablet PC this will be completely inspector specific. But the cost is holding us back I have some people looking into the options available and they should be getting back to us soon with some recommendations.

I personally reduced my programs to approximately the following levels Petroleum Tank program to about 5%, Construction Inspections 5%, Training new Inspectors 5%, Ordinance Development 5%, Letters/Complaint follow-ups 5%, New program Implementation programs 0%, while my Field Inspections will be increased to 75%.

Respectfully,

Thomas Weber

11. Chief Harris and the Fire Commission were concerned about, and attempting to address concerns over the inspection program. At the May 20, 2004 Fire Commission meeting part-time inspectors pay was raised. At that same meeting Commissioner Tuffree asked Chief Harris if a full-time inspector should be added to the 2005 budget.

12. Some time in June, 2004, Tom Weber and Robert Weber contacted Local 311, IAFF to inquire if they qualified for membership. No one in the management of the Fire Protection District was aware of this communication.

13. On August 9, 2004 Harris met with former Fire Chief Robert Busch to discuss a number of departmental issues. The two talked about how to handle the discipline/suspension of on-call and part-time Firefighters who were not attending drills. They further discussed Harris' ideas on reorganizing the department, including the concept of Planning, Inspection and Education (PIE). They also talked about the idea of outsourcing the inspection work.

14. Later in the afternoon of August 9, 2004 Chief Harris convened a meeting with Andrew Brandl. Harris advised Brandl that things weren't working out in that Brandl hadn't been to training in approximately a year and one half, and that Brandl needed to come to the required 50% (12 meetings) of the trainings per year. Brandl asked to see the requirement in writing, and Harris said "no". Brandl repeated the request, and indicated that he would attend training when he saw the requirement in writing. The conversation ended with Harris demanding Brandl's pager. The effect of Harris taking Brandl's pager was that Brandl would not be called to fires. Brandl did not respond to any fires after August 9, 2004.

15. On, or about, September 8, 2004 Harris solicited and received a quote to have all inspections contracted out.

16. On September 15, 2004 Harris met with Doug Tuffree to discuss his reorganization plan (PIE), the budget, the contracting out of inspections quote, and Harris conclusion that under either scenario, there would be no need for Brandl.

17. On September 24, 2004 the following letter was given to the Middleton Fire Commission;

Middleton Fire District
7600 University Ave.
Middleton, WI 53562

September 24, 2004

Kenneth Sipsma

...

Dear Mr. Sipsma,

SUBJECT: ORGANIZATION OF FULL-TIME AND PERMANENT
PART-TIME STAFF

The full-time and permanent Part-Time Staff of the Middleton Fire District have been approached by the International Association of Fire Fighters Local 311, representing the City of Madison and Middleton Paramedics, with the opportunity to be considered for membership. As full-time and Permanent Part-Time providers we value, honor and respect the rights and privileges associated with our profession. We value our health and safety, wages and benefits, and outstanding work conditions. 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 potential danger from the current upheaval with in the members of the Fire District. We understand the very strong commitment and fairness set forth by members of our Fire Commission, however in order to maintain balance and stability with in our positions 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 currently investigating IAFF Local 311's consideration.

Respectfully,

Full Time and Part-Time Staff of the Middleton Fire District

cc: James Ripp, Howard Teal, Ken Sipsma, Frank Acker, Doug Tuffree,
Doug Zwank

Though not identified by name, the sponsors of the September 24 letter were Tom Weber, Bob Weber, and Andrew Brandl.

18. On September 27, 2004 Tom Weber approached Brad Subera with an authorization card, seeking to have Subera sign the card to be sent to Firefighters Local 311. Subera declined to sign the card. Later that day, Subera approached Chief Harris with a heads up as to the organizing effort. The two talked, with Harris expressing "...if they're asking you to join, it's not a bad thing or a good thing. You've got to do what you need to do..." This was the first time Harris was aware that employees were seeking Union representation or collective bargaining rights.

19. On September 29, 2004 the Middleton Firefighters sent a letter to Firefighters Local 311, seeking to be admitted to the Local, and to have Firefighters local 311 represent them in collective bargaining. The letter was signed by Tom Weber, Robert Weber, and Andrew Brandl. There was a signature line for Brad Subera, but no signature.

20. On November 1, 2004 Harris and Ripp sent Brandl, and four other firefighters the following letter:

Date: November 1, 2004

Dear Mr. Andrew Brandl,

This letter will serve to clarify your status as a Paid on-call Firefighter with the Middleton Fire Department. You are currently suspended from duty and not authorized to respond to calls of any nature. This suspension will continue in effect for a 6 month time period. If during that time, you attend 6 regularly scheduled Middleton Fire Department trainings, you will be eligible for reinstatement to duty, barring any intervening factors. If you fail to comply with the above requirements, you will be subject to termination of employment by the Middleton Fire Department as a Paid on-call Firefighter.

The Middleton Fire Department requires that you attend fifty percent (50%) of the regularly scheduled trainings as a minimum standard. As clarified during your initial MFD orientation, there are 2 regularly scheduled trainings each month. (1) The second Sunday of the month from 8:00 AM – 10:00 AM (2) The fourth Monday of the month from 7:00 PM – 9:00 PM. Ongoing attendance to these trainings are important to your safety, along with the safety of other Firefighters and the constituents of the communities we serve.

Jim Ripp /s/
Jim Ripp
Chairperson – Middleton Fire District

Aaron Harris /s/
Aaron Harris
Chief – Middleton Fire Dept.

Harris did not take the pagers from the other firefighters, none of whom questioned his decision to suspend them from responding to calls.

21. On November 15, 2004 Joseph Conway, President of Firefighters Local 311 sent Mr. Ripp the following:

November 15, 2004

James Ripp, Chairperson
Middleton Fire Protection Dist. Comm.
Middleton, WI

Dear Mr. Ripp:

The full-time code enforcers of the Middleton Fire District have elected Local 311 to be their bargaining representative. Fire Fighters Local 311 is seeking voluntary recognition from Middleton Fire Protection District as their code enforcers' authorized bargaining agent.

In addition, at your earliest convenience, I would like to meet with you to discuss the various issues of representation for the Middleton Fire Protection District Code Enforcers. Please advise me of any dates that you may be available to meet.

Sincerely,

Joseph M. Conway, Jr. /s/
Joseph M. Conway, Jr.
President

It is the policy of the Firefighters Union that they do not represent part-time employees unless required to do so by applicable law. That is why Conway's letter was limited to full-time Code Enforcers.

22. The District did not respond to the request for voluntary recognition. The union subsequently 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 District over a cover letter encouraging the parties to stipulate the appropriate unit and the eligibility list.

23. The Departmental re-organization was continued with the 2005 budget. In 2004 Bob Weber was an Administrative Assistant, Tom Weber was Head of Fire Inspections, Brad Subera was Head of Education and Andrew Brandl averaged 20 hours per week doing inspections. In 2005 Bob Weber became Head of Preplanning, Tom Weber continued as Head of Fire Inspections, Brad Subera continued as Head of Education, a new employee, Della Bloom, was hired as Administrative Assistant. A new full-time position, Fire Service Technician, was created.

24. On January 27, 2005 the parties stipulated to the following collective bargaining unit: "All full-time paid Code Enforcers employed by the Middleton Fire Protection District, excluding the Fire Chief, Assistant Fire Chief, Volunteer Firefighters, supervisory, managerial, executive and confidential employees." They further stipulated to the following eligibility list:

Tom Weber
Bob Weber
Brad Subera

25. The signed stipulations were forwarded to the WERC.

26. On February 1, 2005 Peter Davis sent the following electronic memo to Conway and Ripp:

To: Joe Conway, James Ripp
From: Peter Davis
Date: 2/1/2005
Re: Middleton Fire Protection District

I have received the Stipulation for Election. As I have indicated to you both, the WERC has a legal obligation to limit the number of potential bargaining units that might exist for any one employer. Therefore, we will modify the existing "full-time" only unit description to read:

All regular full-time and **regular part-time** paid Code Enforcers. . . .

to make sure that sometime in the future we are not asked to create a unit of part-time Code Enforcers if the District were to employ such individuals.

As I understand it, there is a regular part-time Code Enforcer position now but that position is being converted into a full-time job and has not yet been filled. Therefore, only the three employees you have listed are eligible to vote. If the Union wins the election and if the new full-time job is filled, the Union will represent that new employee as well as the three current employees.

27. On February 3, 2005 Harris met with Brandl, in the presence of Battalion Chief Gary Gillitzer, and terminated Brandl's employment. Harris advised Brandl that his position was being eliminated, and that his hours were needed for other tasks. Harris advised Brandl that a new position, Fire Service Technician, was being created, and welcomed his application. Harris advised Brandl that he would have to clear out his things and leave that day, and that he (Harris) would recommend two weeks severance pay.

28. Harris had not forewarned Brandl that his position or employment were in jeopardy. Before meeting with Brandl, Harris had called the Police Department and expressed concern that Brandl could react violently. Harris' concern was prompted by having read of an incident involving Brandl that occurred in 2000. Brandl had never exhibited violent behavior in Harris' presence.

29. On February 21, 2005 Peter Davis sent the parties the following letter:

Mr. James Ripp
Chairperson
Middleton Fire Protection District
7600 University Avenue
Middleton, WI 53562

Mr. Joseph M. Conway, Jr.
President
Fire Fighters Local 311, IAFF
821 Williamson Street
Madison, WI 53703

Re: Middleton Fire Protection District
Case 1 No. 64341 ME-4017

Gentlemen:

Please find enclosed a copy of the Direction of Election issued by the Commission in the above-entitled matter and copies of the signed Stipulation for Election and the eligibility list.

This will confirm that the election in the above-entitled matter will be conducted by mail ballot. The ballots will be mailed to the eligible employees on February 28, 2005. Will Mr. Ripp please provide us with the home addresses of the eligible employees by February 25, 2005, either by regular mail, fax, or e-mail to Georgann.Kramer@werc.state.wi.us.

Also enclosed for your information is a copy of the Notice which will be sent to each employee as well as a sample of the ballot. You will note that the ballots will be opened and counted in the Commission's Madison office on Monday, March 21, 2005, beginning at 11:00 a.m.

Very truly yours,

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis
General Counsel

30. On February 25, 2005 Chief Harris responded electronically to Georgann Kramer with the following:

From: "Aaron Harris"
To: georgann.kramer@werc.state.wi.us
Sent: Friday, February 25, 2005 4:06 PM
Subject: Middleton Fire Dept. Case 1 No. 64341 ME-4017

Peter,

This is in reference to Middleton Fire Protection District Case 1 No. 64341 ME-4017. The following are the home addresses of the eligible employees. If you have any questions feel free to give me a call at 576-1416.

Tom Weber (**Fire Marshal**)

...

Bob Weber (**Administrative Assistant**)

...

Brad Subera (**Community Education Specialist**)

...

Casey Kakuske (**Regular Part-time employee**) (**Averages 30 hours/week**)

...

No one was copied on the correspondence to the WERC.

31. Chief Harris' February 25 eligibility list added Casey Kakuske. Mr. Kakuske began employment with the Middleton Fire District in December, 1999 as a paid on-call Firefighter and code inspector. Mr. Kakuske always wanted full-time employment with the Middleton Fire District. Kakuske and Harris had a series of conversations in passing, the sequence of which is not clear from the record. At some point in time, Kakuske had a conversation with Harris where he expressed an interest in regular full-time or regular part-time employment with the Fire District. In a separate conversation with Harris, Kakuske indicated that he did not support the Union. Harris did not express an opinion relative to the Union, and at some point indicated that the Union could be a good thing. During a subsequent conversation Harris indicated that there was the potential for a full-time job to be created. In yet another conversation, Harris told Kakuske that he would be receiving a ballot to vote in the representation election, and Chief Harris said "Vote the right way." Kakuske understood that

to mean he should vote in his own self interest. This exchange was when Kakuske first became aware that an election was to occur.

32. On March 4, 2005 the Fire District posted a new position: Fire Service Technician. Among other places the posting went up in the station house and was distributed electronically, including to Brandl. The deadline for responding was March 11, 2005. When Brandl did not respond, the posting was revised to reflect a deadline of March 21, 2005 and was sent certified to his last known address. The certified letter was ultimately returned undelivered.

33. On March 21, 2005 the WERC opened and counted the mail ballots. The ballot count resulted in a 2-2 tie. The results and modified eligibility list were sent to the parties. When advised of the ballot count on March 21, Conway called to inquire how 4 votes could have been counted from a three person eligibility list.

34. On March 24, 2005 IAFF Local 311 filed an objection to the conduct of the election, specifically objecting to the inclusion of Casey Kakuske on the eligibility list.

35. Sometime in March or April, 2005, Casey Kakuske was selected from an applicant pool of two to fill the newly-created position of Fire Service Technician. Andrew Brandl did not apply for the position.

36. A hearing on the objection was held on May 3, 2005, the objection was sustained, and the election was re-run. At hearing, Peter Davis apologized for the role the WERC played in creating additional expense and delay.

37. The Union prevailed in the subsequent election, and was certified on July 5, 2005.

38. On a Sunday in May, 2005 Brian Zander and Casey Kakuske had a conversation over the Union election, where Kakuske indicated that he "...was kind of in a pickle, because...I had to go vote, and...I was told to make sure you vote a certain way." Zander understood Kakuske to mean that Harris had directed him to vote in a certain way, and communicated that impression to Tom Englebrecht, a volunteer Firefighter with the Middleton Fire District.

39. On May 20, 2005 Englebrecht had a conversation with Kakuske where he said; "it's too bad that you got put into this position from the chief and it's too bad that he had to put a gun to your head to make you vote for a certain way to get the full-time position." Kakuske nodded his head and said "yep".

CONCLUSIONS OF LAW

1. Complainant, Local 311, International Association of Firefighters, AFL-CIO is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats.

2. Respondent, Middleton Fire Protection District, is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats.

3. Thomas Weber, Robert Weber, Bradley Subera, Andrew Brandl and Casey Kakuske are municipal employees within the meaning of Sec. 111.70(1)(i), Wis. Stats.

4. Aaron Harris is a supervisor within the meaning of Section 111.70(1)(o), Wis. Stats.

5. The November 1, 2004 letter sent by Harris and Ripp to Brandl and others, confirming their suspension from duty as paid on-call firefighters did not interfere with, restrain or coerce Brandl or any other municipal employee in the exercise of rights guaranteed in Sec. 111.70(2), Wis. Stats., and so did not violate Sec. 111.70(3)(a)1, Wis. Stats., nor did it encourage or discourage membership in any labor organization by discrimination, and so did not violate Sec. 111.70(3)(a)3, Wis. Stats.

6. The termination of Andrew Brandl on February 3, 2005 was timed to deny Brandl the right to vote in the pending representation election and discouraged his membership in Local 311, IAFF in violation of Section 111.70(3)(a)3, Wis. Stats., and further interfered with the rights of Brandl and other municipal employees to form, join or assist a labor organization in violation of Sec. 111.70(3)(a)1, Wis. Stats.

7. Complainant has not established by a clear and satisfactory preponderance of the evidence that Chief Harris conditioned Casey Kakuske's future employment on Kakuske voting against union representation, and so did not establish a violation of either Sec. 111.70(3)(a)1 or Sec. 111.70(3)(a)3, Wis. Stats.

8. By inserting Casey Kakuske's name on the voting eligibility list the Middleton Fire Protection District interfered with the rights of municipal employees to form or join a labor organization, to bargain collectively through representatives of their own choosing and to engage in lawful concerted activities, in violation of Sec. 111.70(3)(a)1, Wis. Stats.

9. Complainant has not established, by a clear and satisfactory preponderance of the evidence, that Chief Harris caused either Bradley Subera or Casey Kakuske to vote against the Union or that either Kakuske or Subera acted at the direction of Chief Harris in voting against the Union, and so did not establish a violation of either Sec. 111.70(3)(a)1 or 111.70(3)(a)3, Wis. Stats.

ORDER

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

(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.

(c) Pay Andrew Brandl at the rate of pay he was earning at the time of his termination, for twenty hours per week for all weeks between February 3, 2005 and the day Casey Kakuske began full-time employment with the Middleton Fire Protection District.

(d) 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 Protection District by posting in conspicuous places where employees are employed in that Fire District, copies of the Notice attached hereto and marked "Appendix A". That Notice shall be signed by Fire Chief Aaron Harris and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Middleton Fire Protection District that those 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 with this Order.

Dated at Madison, Wisconsin, this 28th day of August, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

William C. Houlihan /s/

William C. Houlihan, 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.
 - (c) Pay Andrew Brandl, at the rate of pay he was earning at the time of his termination, for twenty hours per week for all hours between February 3, 2005 and the day Casey Kakuske began full-time employment with the Middleton Fire Protection District.

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

The Complaint

The Complaint asserts five separate violations of Sec. 111.70 (3) (a) 3, each of which is alleged to also constitute a violation of Sec. 111.70 (3) (a) 1, Wis. Stats. In the view of the Complainant, the November 1, 2004 letter suspending Brandl constitutes the first violation. The second violation occurred on February 3, 2005, when Brandl was terminated. The Complainant contends that Chief Harris improperly influenced the vote of Casey Kakuske through the promise of future regular employment, constituting a third violation. The Complainant argues that the February 25, 2005 e-mail adding a fourth employee, Casey Kakuske, to the stipulated eligibility list, constituted a fourth violation. Finally, the Complainant asserts that Subera and Kakuske acted at the direction of Harris in voting against union representation.

Each of these contentions is denied by the Respondent.

The Applicable Law

Examiner David Shaw, in a decision involving MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT) WERC DEC. NO. 31428-A, 7/19/06 summarized the law applicable in this proceeding. That decision set forth the following:

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

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

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

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

In order to establish a violation of Sec. 111.70(3)(a)1, Stats., a complainant must establish by a clear and satisfactory preponderance of the evidence that the respondent's conduct contained either some threat of reprisal

or promise of benefit which would tend to interfere with, restrain or coerce employees in the exercise of their Section (2) rights. BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84). It is not necessary to demonstrate that the employer intended its conduct to have such effect, or even that there was actual interference; instead, interference may be proven by showing that the conduct has a reasonable tendency to interfere with the exercise of protected rights. WERC v. EVANSVILLE, 69 Wis. 2D 140 (1975); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84). However, employer conduct which may well have a reasonable tendency to interfere with an employee's exercise of Sec. 111.70(2) rights will generally not be found to violate Sec. 111.70(3)(a)1, Stats., if the employer had valid business reasons for its actions. CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91).

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

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

In order to establish a violation of this section, a complainant must establish by a clear and satisfactory preponderance of the evidence all of the following elements: (1) the employee was engaged in lawful and concerted activities protected by MERA; (2) the employer was aware of those activities; (3) the employer was hostile to those activities; and (4) the employer's conduct was motivated, in whole or in part, by hostility toward the protected activities. MUSKEGO-NORWAY C.S.J.S.D. No. 9 v. WERB, 35 Wis. 2D 540 (1967); EMPLOYMENT RELATIONS DEPARTMENT v. WERC, 122 Wis. 2D 132 (1985); CITY OF MILWAUKEE, ET AL, DEC. NO. 29270-B (WERC, 12/98).

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

The Commission has concluded that in cases such as this, where the alleged violations are based upon alleged retaliation for engaging in lawful, concerted activity, it is appropriate to apply the traditional four-part analysis under Sec. 111.70(3)(a)3 to the alleged violation of Sec. 111.70(3)(a)1, as well:

Because retaliation for lawful, concerted activity inherently discourages other employees from engaging in concerted activity, a violation of Section (3)(a)3 is also a violation of Section (3)(a)1.

...

In our view, a Section (3)(a)3 type analysis is sufficient and appropriate to apply to alleged violations of Sec. 111.70(3)(a)1, Stats., in cases like the present one, where the essence of the violation lies in the employer's motive for taking adverse action against one or more employees.

...

CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03) at p. 15.

DISCUSSION

On August 9, Harris took Brandl's pager, effectively suspending Brandl from responding to fire calls. In its post-hearing brief the Complainant describes this as a "shot across the bow" aimed in the direction of the most vulnerable of the employees supportive of the Union. The record does not support such a conclusion. Nothing in the record indicates that Harris was aware of the organizing initiative until September 27. The record indicates that sometime "...probably June-ish that we contacted Dan Williams to see if we qualified for eligibility to be covered under their union, and I think then we started proceeding once we got

the word back mid-August to late August when we started looking for the cards.” There is no indication this contact was shared with Harris or anyone else in the organization. To the contrary, in a meeting that preceded the September 24 letter, Conway advised the Webers not to attempt to keep their efforts secret, but rather to let the Fire District know they were organizing. It was that advice that prompted the September 24 letter.

The matter of Brandl’s participation in training or drills was raised in January, 2004. All witnesses testified that it was important for those responding to fire calls to participate in the drills. Brandl had not participated, and Zanders’ question singled Brandl out. There is no explanation as to why Brandl was singled out in this manner, though Zander testified that he opposed Brandl’s initial hire, and supported the elimination of Brandl’s position. There is no explanation as to why Harris did not address Brandl’s attendance until August, but it does appear that the meeting with former Chief Busch prompted him. Once again it appears that Harris singled Brandl out on August 9. The Complainant infers that it must have been related to the Union organizing effort, though as of August 9 that effort appears to have consisted of a telephone call, by Weber, to Local 311 to inquire whether or not the Middleton inspectors would be eligible for membership. There is no indication that the existence of that call was made known to anyone. There is no evidence that Brandl played any meaningful role in the initial organizing steps. Complainant does not allege this to be a violation.

At the August 9 meeting, when Harris told Brandl that he had to attend training to be called to fires, Brandl challenged him, demanding to see a written policy. Harris contemporaneous notes of the meeting describe Brandl’s “negative attitude”, and quote him as saying “As leadership of this Dept. I feel you have failed me and that’s what I am going to tell my Legal Council (sp).” That, in the context of Harris indicating that things are not working out suggests that the men had a less than ideal relationship entering the meeting.

The context of this dispute was framed by the September 24 letter to the Fire Commission. The signatories felt “. . .our positions are in potential danger from the current upheaval within the members of the Fire Department.” Some, like Brandl were unhappy with Harris’ leadership. Others, like Subera, felt rewarded. The organizing drive was a reaction to what was going on, and the perceived threat felt by some employees. That perception was not universally shared.

Allegation 1

I do not regard the November 1 letter as either discriminatory or as an act that would encourage or discourage membership in a labor organization. The letter was given to five paid on call Firefighters. Brandl was not singled out to receive this notice. Each letter is identical. As to Brandl, the letter had no adverse impact. He had effectively been suspended from duty on August 9. This letter did no more than confirm that status. It may have had more significant consequences for the other recipients. As to all recipients it offered the opportunity for reinstatement if the individuals would attend the minimum number of training sessions.

On its face the suspensions had a legitimate business purpose. All witnesses testified that the training was necessary for the effective operation of the department. Brandl, and apparently others, had not attended. Former Chief Busch had recommended that those who were not fulfilling the training requirement be treated equally, and that they must be suspended. Harris followed up immediately with Brandl. There was delay in following up with the others. While the delay is not explained, neither is it particularly suspect. There was great delay between the January staff meeting where Brandl's non-training was noted and the August follow-up.

As a practical matter the letter had no impact on the potential bargaining unit. It was directed at on call Firefighters. The code inspectors were not impacted. Brandl's status as a code inspector was not impacted.

The Complainant makes much of the fact that Harris took Brandl's pager, and did not do so with the other suspended Firefighters. Harris uncontradicted testimony is that only Brandl challenged his directive to attend training. It forms a reasonable basis to explain why Harris would take Brandl's pager and not do so to the others.

Allegation 2

I believe the record establishes that Harris wanted to reorganize the Fire Department. He discussed and began to implement his P.I.E. initiative before the Union appeared on the scene. He went to the Fire Commission in search of an additional position, and was given one, effective with the 2005 budget. I believe there were two camps in the Fire Department, and that Brandl was not in Harris camp. It appears that a number of on call Firefighters had not attended required training, and Harris pursued the matter with Brandl long before he did so with the others. The August 9 exchange, which Harris felt a need to document, was anything but cordial. I would not find it surprising that Brandl would not be Harris top candidate for the full-time opening. The sentiment was mutual. Brandl, a full-time firefighter in Fitchburg, did not apply for the new position.

What is noteworthy is the timing of Brandl's termination. Peter Davis' February 1 memo expanded the bargaining unit to include regular part time paid Code Enforcers. On February 1, the sole part time Code Enforcer was Brandl. Davis' memo goes on to address the "...regular part-time Code Enforcer position now but that position is being converted into a full-time job and has not been filled." Harris testified that he and Mr. Davis had talked on the phone relative to the staffing levels and direction of the Department. From this memo, it is unclear whether the WERC was aware of whether or not the part time position was filled. What is clear, is the directive; "Only the three employees you have listed are eligible to vote."

Brandl was terminated two days later. Chief Harris testified that the termination was non disciplinary. Thus, there was no progressive disciplinary sequence leading to the termination. Rather, the termination was an element of the reorganization. That said, there was no notice of the termination. It does not appear from the record that the termination was

scheduled. Brandl was not previously advised that the position would be eliminated. The termination was summary. Brandl was approached, terminated, and told to gather his personal property and leave.

Harris was asked to explain the termination of Brandl. He indicated that the money paid Brandl would be needed to fund the newly created position. While the underlying concept is understandable, it does nothing to explain the timing of the termination, nor the summary way in which it was handled. Harris indicated that he was concerned that Brandl might sabotage a computer project he had worked on. That concern, which has no record basis of support, does not address the timing. When asked what the hurry in terminating Brandl's employment was, Harris replied there was no hurry. Harris called the police to stand by during the termination process. He expressed concern that Brandl might become violent. His concern was the product of an incident he had heard about. That incident occurred in May, 2000. Harris indicated that he had never observed Brandl display aggressive tendencies.

A significant part of what prompted the re-organization was the concern over getting the Fire Code inspections handled timely. Harris testified that the number of Code inspections handled by Brandl had declined. He acknowledged that Brandl could do the inspections. From the record, it appears that Brandl was given other assignments that took him away from the inspection work.

The Respondents' explanation as to the timing and summary character of the termination is not persuasive. There is at least a colorable explanation for the lack of notice and summary character of the termination. There is no explanation for the timing.

The timing of the termination is subject to a heightened level of scrutiny. It occurred in the course of a Representation Election proceeding, and has an inherent potential to chill employees in the exercise of guaranteed rights. STATE OF WISCONSIN, DEC. NO. 30340-A, 8/15/03. Here, employees were engaged in the process of self-organization, the core right protected by Sec. 2, of the Act. The employer was aware of the activities and was participating in setting up the election. There is little evidence that Harris or other agents of the District were overtly hostile to those activities. The District had declined to voluntarily recognize the Union, preferring instead to allow the employees to vote. That alone, is not evidence of animus.

However, the timing of the termination is not explained. In the absence of any alternative explanation, I believe it is a reasonable inference to conclude that the timing of the termination was tied to Mr. Davis' February 1 memo, amending the unit to include Brandl's position. Davis' memo raised the question as to whether or not Brandl would be permitted to vote. Harris eliminated that possibility. He acted with great dispatch. This stands in contrast to the eight months it took to confront Brandl over his lack of training, and the three months it took to send the confirming suspension letter. I believe Harris acted knowingly to keep Brandl from voting, which served to discourage his membership in the Union in violation of Sec. 111.70(3)(a)3 and which further interfered with all of the employees rights to vote on the

question of representation in violation of Sec. 111.70(3)(a)1. CITY OF MADISON, DEC. NO. 30472-A (Nielsen, 2/4/03), WISCONSIN DEPARTMENT OF COMMERCE, DEC. NO. 30738-A, (Houlihan, 11/23/04).

Allegation 3

Complainant contends that Chief Harris met with Kakuske and tied his future employment to his “no” vote on the Union. Complainant points to the series of conversations between Harris and Kakuske and to the subsequent conversations between Kakuske and Zander and Engelbrecht and concludes that Harris held open the offer of a job if Kakuske voted against the Union. I do not arrive at the same conclusion. Both Harris and Kakuske deny that any such arrangement existed or was discussed. Both indicate that Harris remarks were neutral toward the Union. All testimony in the record relating to Harris comment on the Union is to the effect that he took no position.

The various conversations between Harris and Kakuske occurred at different times. The conversation about the job possibility was a different conversation than those relative to the Union. There is little evidence tying them together. The record is not clear as to when the various conversations transpired, but it appears they occurred over time. Until February 1, there was no reason to believe Kakuske might be entitled to vote. Kakuske was subsequently awarded the job, but he was selected from an applicant pool of two. Harris’ comment to “vote the right way” is suggestive, and in connection with Harris’ insertion of Kakuske on the ballot is suspect. I do not regard it as independently violative in that Harris believed he was talking to someone who had already indicated he was against the Union. He wasn’t attempting to persuade Kakuske how to vote.

I have given little weight to the testimony of Mr. Kakuske. He struggled to recount and convey the substance and detail of the conversations that are critical to the Union’s theory in this claim. On direct exam, Kakuske could not recall discussing his vote with anyone after voting. He recalled conversations with Zander and Engelbrecht but believed they occurred before the vote. On cross-examination he denied that he had ever been told how to vote, or that Harris had tried to influence his vote. He testified that his response to Engelbrecht was not intended to reflect agreement with what Engelbrecht had said, but was rather his effort to dismiss the remarks. On redirect exam he agreed that both Zander and Engelbrecht could have understood him to say that he had voted against the Union at the encouragement of the Fire Chief. It is difficult to harmonize all of this. Mr. Kakuske was a very pliant witness. He was willing to tell people what he believed they wanted to hear. I believe this attribute may have pervaded his conversations with Harris, Zander, and Engelbrecht.

To find for the Complainant on this claim requires that I credit the substance and accuracy of the Harris/Kakuske conversations as described by Kakuske in his subsequent conversations with Zander and Engelbrecht. I am not willing to do so.

Allegation 4

Complainant claims that Harris act of sending the amended eligibility list to the WERC constituted a separate violation. What Chief Harris did was to send a list which added Casey Kakuske's name to a previously stipulated eligibility list. At the time he added Kakuske's name, he knew Kakuske to be a "no" vote. He further knew Subera to be a "no" vote. He understood the addition to be consequential. In context, his addition of an ineligible voter to this list would directly "interfere" with the "right of self-organization".

In essence, the defense to this claim is that Harris was attempting to respond to the February 21 directive to send the home addresses of the eligible employees. It was Harris' belief that the expansion of the bargaining unit to include part-time employees made Kakuske eligible to vote. Having so concluded, Harris added the name.

The explanation does not withstand scrutiny. The February 21 letter had a signed eligibility list attached. That list contained three names. Harris had assembled that list, and was aware that all parties had signed off on the list as appropriate. It is in that context that Davis' February 21 letter requested the home addresses of the "eligible employees".

Chief Harris testified that he discussed whether or not to include Kakuske on the eligibility list with James Ripp, and Ripp agreed that he should. Ripp was not called to testify. In adding Kakuske's name, Harris identified him as a "Regular Part-time employee", reflecting the terms used in the unit description. In fact the only regular part time employee, defined as such by the Fire District was Brandl. I believe the term was used to promote the claim that Kakuske should vote.

In response to Davis' February 21 directive, Harris assumed he could treat Kakuske as a regular part-time employee, for purposes of voting eligibility. This is in contrast to the reaction to Mr. Davis' February 1 memo which amended the bargaining unit to include regular part-time paid Code Enforcers. At the time Brandl was the sole regular part-time code enforcer. Harris read that memo to permit him to terminate Brandl. Harris testified that he spoke with Peter Davis relative to eliminating the part time position, and that Davis said that was okay. Davis' memo refers to the part-time Code Enforcer position which is being converted into a full-time job and has not yet been filled. It is unclear whether Davis understood that the part-time position was occupied as of Feb. 1. Davis was not called to testify. Whatever that discussion, Davis February 1 memo directs; "Therefore, only the three employees you have listed are eligible to vote." Kakuske's hours did not change between February 1 and February 21. Harris testified that Davis "understanding" was incorrect in light of Kakuske's hours. Harris decided to correct Davis misunderstanding. Though he had previously called Mr. Davis to discuss how to proceed in this matter, there is no indication he called Mr. Davis to clarify Kakuske's status.

Harris did not send the modified list to the Union. He testified that he was not directed to do so. This ignores the attachment which contained the signed, stipulated list. There were

two signatories to the stipulated list, Ripp and Conway. Harris testified that he discussed modifying the list with Ripp. He mailed the modified list to the WERC on Friday, February 25 at 4:06 P.M. for a Monday, February 28 mailing. He was uncertain enough of the modification to discuss the matter with Ripp. There was no call to Davis, or notice to Conway because Harris knew, or at least feared, that such notice would bring an objection. His decision to forward Kakuske's name was a conscious decision to modify the election process.

Respondent contends that if the WERC had done its job in policing the election this would have been a tempest in a teapot. Had the Commission caught and rejected the addition of Kakuske, the impact of Harris actions would have been minimized. That does not alter the fact that the objectionable behavior was inserting the name. The Commission's failure to proof the eligibility list occurred after the objectionable conduct. Harris cannot be heard to complain that if only the WERC had been more vigilant, his unlawful act would have been less consequential. Harris submitted Kakuske's name so that Kakuske could vote. Harris told Kakuske that he would be getting a ballot. The Commission's lack of oversight allowed Kakuske to vote. Respondents' contention goes more to remedy, than to the substance of the claim.

The behavior does not fit the classic 3(a)3 analysis. It does represent a literal "interference" with employees attempting to exercise the rights guaranteed in Sec. (2) of the act.

Allegation 5

Complainant contends that both Subera and Kakuske were encouraged by and acted at the direction of Chief Harris in voting against the Union in the March 21 election. There is no evidence in the record to support this allegation as it pertains to Subera. As noted above, I do not believe the evidence sufficient to support the claim as it relates to Kakuske.

REMEDY

Two acts have been found violative. With respect to Harris' modification of the eligibility list, much of the meaningful remedy has occurred. The Commission voided the first election and conducted a second, with the appropriate voting list. Kakuske's unit status has already been clarified. There is little administrative relief available for the delay and expense incurred.

With respect to the termination of Brandl, the traditional remedy would be reinstatement with make whole relief. That is complicated here, because I believe Brandl's days were numbered. Additionally, Brandl did not apply for the full-time position. It is not possible to identify when the reorganization would have resulted in Brandl's termination. I believe it reasonable that when the position was filled on a full-time basis, the Fire District

would have terminated Brandl to save the money and have his successor perform the work. I would direct the Respondent to pay Brandl for the time between his last day of work and Kakuske's first day of full-time employment.

Dated at Madison, Wisconsin, this 28th day of August, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

William C. Houlihan /s/

William C. Houlihan, Examiner

