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-B

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, appearing on behalf of Local 311, International Association of Firefighters, AFL-CIO.

Mr. Peter L. Albrecht, Albrecht Labor & Employment Law, S.C., Attorneys at Law, 131 West Wilson Street, Suite 1202, Madison, Wisconsin 53703, appearing on behalf of Middleton Fire Protection District.

ORDER ON REVIEW OF EXAMINER'S DECISION

On August 28, 2007, Commission Examiner William C. Houlihan issued Findings of Fact, Conclusions of Law and Order in the above-captioned matter, holding, inter alia, that the Middleton Fire Protection District (District) had terminated Andrew Brandl (Brandl), a part-time employee of the District who had sought representation for collective bargaining purposes by Local 311, International Association of Firefighters, AFL-CIO (Union), in violation of Secs. 111.70(3)(a)3 and 1, Stats.

On September 18, 2007, the District filed a timely petition with the Wisconsin Employment Relations Commission (Commission or WERC) seeking review of the Examiner's decision, pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. Thereafter both parties submitted written argument in support of their respective positions, the last of which was filed on November 27, 2007.

For the reasons set forth in the accompanying Memorandum, the Commission largely affirms the Examiner's Findings of Fact, affirms the Examiner's Conclusions of Law, and modifies his remedy to include the standard remedial elements of reinstatement and back pay for Brandl with an opportunity for the District to limit that remedy at a subsequent evidentiary hearing.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. The Examiner's Findings of Fact 1 through 15 are affirmed.

B. The Examiner's Finding of Fact 16 is modified to read as follows and as modified is affirmed:

16. On September 15, 2004, Harris met with Doug Tuffree to discuss his reorganization plan (PIE), the budget, and the quote regarding contracting out of inspections.

C. The Examiner's Findings of Fact 17 through 22 are affirmed.

D. The Examiner's Finding of Fact 23 is modified to read as follows and as modified is affirmed:

23. In 2004 Bob Weber had been 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. As part of the 2005 budget, which was approved at the Fire Commission's September 2004 meeting and by the member municipalities on or before November 30, 2004, the District implemented a departmental reorganization. Bob Weber became Head of Pre-incident Planning, Tom Weber continued as Head of Fire Inspections, and Brad Subera continued as Head of Communications/Education. To accommodate Bob Weber's relinquishing of administrative duties, the budget provided for a new position, Administrative Assistant. The budget also provided for a new full-time inspection position, entitled Fire Service Technician. In addition to the new full-time inspection position, the budget continued to provide specifically for Brandl's position, entitled "Part Time Inspector," at 20 hours per week.

E. The Examiner's Findings of Fact 24 through 39 are affirmed.

F. The Examiner's Conclusions of Law 1 through 9 are affirmed.

G. The Examiner's Order is set aside and the following Order is made:

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

1. Cease and desist from:

   a. Interfering with, restraining or coercing employees in the exercise of their rights protected by Sec. 111.70(2), Stats.

   b. Encouraging or discouraging membership in any labor organization by discrimination with regard to hiring, tenure or other terms or conditions of employment.

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

   a. Unless the parties agree otherwise, offer Andrew Brandl reinstatement to his previous position as a 20-hour per week inspections employee, and reimburse him for all lost wages and benefits attributable to his unlawful termination on February 3, 2005, plus interest at the rate of twelve percent (12%) per year [1] from February 3, 2005 until the date he is reinstated or refuses reinstatement, or until such date as the District can establish at an evidentiary remedial hearing that Brandl would have been terminated in the absence of the District's prohibited practice.

   b. 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

[1] The applicable interest rate is that set forth in Sec. 814.04(4), Stats., in effect at the time the complaint is initially filed with the agency. WILMOT UHS, DEC. NO. 18820-B (WERC, 12/83), CITING ANDERSON V. LIRC, 111 WIS. 2D 245 (1983), and MADISON TEACHERS, INC. V. WERC, 115 WIS.2D 623 (CT. APP. 1983).

not altered, defaced, or covered by other material.

c. 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

Given under our hands and seal at the City of Madison, Wisconsin, this 5th day of February, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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) Offer Andrew Brandl reinstatement to his previous position as a 20-hour per week inspections employee, and reimburse him for all lost wages and benefits attributable to his unlawful termination on February 3, 2005, plus interest at the rate of twelve percent (12%) per annum from February 3, 2005 until the date he is reinstated or refuses reinstatement, or until such date as the District can establish at an evidentiary remedial hearing that Brandl would have been terminated in the absence of the District's prohibited practice.

MIDDLETON FIRE PROTECTION DISTRICT

_____

Fire Chief Date

THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES REPRESENTED BY LOCAL 311, IAFF, AFL-CIO, FOR A PERIOD OF THIRTY (30) DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED OR OBSCURED IN ANY WAY.

MIDDLETON FIRE PROTECTION DISTRICT

MEMORANDUM ACCOMPANYING ORDER ON REVIEW OF EXAMINER'S DECISION

SUMMARY OF THE FACTS

As indicated in the Order, above, the Examiner's Findings of Fact have been largely affirmed. Those most pertinent to the issue on review are summarized as follows.

At all relevant times prior to February 3, 2005, the Middleton Fire Protection District employed three full-time non-supervisory employees (Thomas Weber, Robert Weber, and Bradley Subera) and one part-time non-supervisory employee (Andrew Brandl). Brandl had been employed in this capacity for over four years and worked an average of 20 hours per week. Firefighting duties were handled by members of an associated volunteer on-call fire department, who were not District employees. Brandl was also a member of the on-call department, as well as a regular full-time firefighter in another community.

In December 2002, Aaron Harris was elected Fire Chief in a vote of the members of the Volunteer Department. In 2003, the District changed its procedures so that the position of Chief would be appointed by the District's Fire Commission (Fire Commission) rather than elected. The Fire Commission then appointed Harris as the Chief.

Prior to a reorganization of services in 2005, Thomas Weber's job was to ensure regular, statutorily-required inspection of various commercial and residential structures in the District. Robert Weber's job (until some time in 2003) was primarily to handle administrative and recordkeeping duties within the District. Until some time in 2004, Subera's job had primarily been to carry out inspections, as was Brandl's.

In 2004, Harris reassigned Subera to perform primarily public education and outreach responsibilities. After Subera's redeployment, the District began using members of the on-call department to perform inspections on a voluntary (but paid) basis. As reflected in at least two memoranda that Thomas Weber sent to Harris in April and May 2004, the new system was inadequate, in Weber's opinion, because of the time needed for training a variety of individuals, many of whom rarely participated afterwards in handling inspections. Weber's memos stated that he was satisfied with Brandl's efforts and was in the process of "ramping up" Brandl's inspection assignments. In his May memorandum, Weber offered several ideas to address the situation, including (among other things) that the District employ a full-time inspector as well as a 20-hour per week inspector (Brandl) and that the District designate a cadre of well-trained volunteers with designated inspection times rather than rely upon the whole volunteer work force on an unpredictable and unreliable basis.

Shortly thereafter, beginning with the May 2004 Fire Commission meeting, the District began investigating options for addressing the inspection problems. The District considered

adding a full-time inspector as well as contracting out some or all of the inspection work. Harris proposed a reorganization plan with the acronym "PIE," i.e., Preplanning, Inspection, and Education. Since he had already redeployed Subera to handle Education, and Tom Weber was handling Inspection, Harris proposed moving Robert Weber from administrative work into "Preplanning," which, among other things, would create more efficiency in the inspection program.

Between May and September 2004, Harris discussed the various options with Fire Commission members and with the prior Fire Chief. In early September 2004, he obtained a quote from an inspection contractor. Contrary to the Examiner's Finding of Fact 16, however, the record does not supply substantial evidence that the reorganization discussions prior to February 1, 2005, included the definite elimination of Brandl's part-time position or any time frame in which Brandl's position might be eliminated. To the contrary, the District's 2005 budget, which was discussed at the Fire Commission meeting in September 2004, and fully adopted by November 30, 2004, implemented a reorganization plan by adding two new full-time positions (an Administrative Assistant and a Fire Service Technician), and re-designating Robert Weber's position to "Pre-incident Planning." Nothing in that budget or the minutes of the November Fire Commission meeting at which it was presented and discussed suggested that Brandl's part-time position was affected by the addition of a full-time inspection position. The documentary record indicates that the Fire Commission decided to follow Thomas Weber's urgings of the previous spring that the District *add* a full-time inspector rather than continue to rely on the unreliable and inefficient system of using volunteer on-calls to supplement Brandl's regular part-time inspection position.

In Brandl's capacity as a volunteer on-call firefighter in Middleton, however, he and Harris had experienced some friction. On August 9, 2004, Harris met with Brandl to discuss Harris' conclusion that Brandl was not complying with the training requirements applicable to the on-call firefighters. Brandl indicated he would comply once he saw the requirements in writing, but Harris refused. The conversation ended with Harris demanding Brandl's pager, without which Brandl could not (and did not) respond to incidents. Four other members of the on-call contingent also had a record of non-compliance with training requirements. In early August, Harris had reviewed the delinquency situation with former Fire Chief Robert Busch, who had advised Harris to treat all offenders the same. Harris did not approach the other noncompliant members until November 1, 2004, on which date he sent them (as well as Brandl) identical letters, suspending them from duty for six months and setting forth the requirements for reinstatement.

In or about June 2004, Thomas and Robert Weber contacted the Union to inquire about membership and representation. On the Union's advice, a letter dated September 24, 2004, and signed as "Full Time and Part-Time Staff of the Middleton Fire District," was sent to all members of the Fire Commission, informing them about the Union organizing drive. Brandl was the District's only part-time employee. On September 17, 2004, Thomas Weber asked Subera to sign a union authorization card, which Subera related to Harris later that day. This was the first Harris was aware of the Union drive. In that conversation, Harris told Subera

that the Union was "not a bad thing or a good thing," but Harris was aware from this and other conversations that Subera did not support the Union.

By letter dated November 15, 2004, Union President Joseph Conway asked the District to voluntarily recognize the Union as the collective bargaining representative for the full-time code enforcers. As a matter of policy, the Union does not represent part-time employees unless compelled to do so as a matter of law. After the District did not respond to the Union's November 15 letter, the Union filed an election petition with the Commission (WERC). On January 4, 2005, the WERC served the petition on the District, with a standard cover letter addressed to both parties encouraging them to stipulate to the appropriate bargaining unit and to the list of eligible voters. Attached to the WERC's letter was a proposed Stipulation that described the bargaining unit as "All full-time Paid Code Enforcers …." On January 27, 2005, the parties filed a Stipulation for Election with the WERC, describing the bargaining unit as "All full-time paid Code Enforcers …." The stipulation included a voter eligibility list containing three names, i.e., Tom Weber, Bob Weber, and Brad Subera.

On February 1, 2005, WERC General Counsel, Peter Davis, sent an e-mail to Union President Conway and Fire Commission Chair Ripp, informing them that, pursuant to WERC policy, the stipulated unit description would have to be modified to include "regular part-time" Code Enforcers. Davis' e-mail also stated:

> 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.

On February 3, 2005, Harris met with Brandl and terminated his employment effective immediately. Harris had arranged for Middleton police to be cruising nearby, expressing concern to them about Brandl's possible violent reaction. Harris had never observed or been apprised of violent behavior on Brandl's part, but, several years earlier and prior to the District hiring him, Brandl had been the subject of media attention – but no arrest -- regarding an off-duty incident. At the February 3 meeting, Harris informed Brandl that he was being terminated because, pursuant to the reorganization plan, the District intended to post a full-time inspection position. Harris encouraged Brandl to apply. Prior to being terminated, Brandl had no knowledge or notice that his position was being eliminated.

On February 21, 2005, Davis sent the Union and the District a letter with a copy of the Direction of Election, and a copy of the stipulated eligibility list that included the names of the three full-time employees (Subera and the two Webers). Since the election would be by mail ballot, the letter requested the District to provide the WERC's election specialist, Georgann Kramer, with "the home addresses of the eligible employees" by February 25, 2005. On February 25, 2005, Harris sent an e-mail to Georgann Kramer's e-mail address, with the salutation, "Dear Peter," supplying names and home addresses for four employees. In

addition to the names on the stipulated eligibility list, the list included Casey Kakuske, who was described as a "(Regular Part-time employee) (Averages 30 hours/week)." Kakuske was a member of the paid on-call fire department, who, like some other on-call firefighters, had voluntarily contributed a relatively large number of hours performing fire inspection and prevention duties for the District on a volunteer, but paid, basis. Prior to including Kakuske's name on the list, Harris was aware from conversations with Kakuske that he was likely to vote against the Union and that he was interested in full-time employment in the District.

Harris did not send a copy of his February 25 e-mail or the amended list of voters and their addresses to the Union or to anyone other than the WERC. WERC agents did not notice the discrepancy between the stipulated eligibility list and the list submitted by Harris, and, accordingly, sent a ballot to Kakuske as well as Subera and the two Webers. The Union was not aware that four ballots had been sent. When the Commission tallied the mail ballots on March 21, 2005, the tally was 2-2, resulting in a loss to the Union. Having thus become aware about the fourth voter, the Union filed formal Objections to the Election based on the deviation from the stipulated eligibility list. After a hearing, the election results were set aside, a new election was conducted among the three voters on the original stipulated eligibility list, the result was a 2-1 tally, and the Union was certified to represent the bargaining unit.

In the meantime, on March 4, 2005, the District posted both new budgeted positions, Administrative Assistant and Fire Service Technician, with a response deadline of March 11, 2005. The District also distributed the posting electronically to some individuals, including Brandl. When Brandl did not respond, the District sent a copy of the posting to him by certified mail, extending the application deadline to March 21, 2005. Brandl, a full-time firefighter in another city, did not apply. From an applicant pool of two, the District hired Kakuske, who began full-time employment in the new position in late March or April 2005. The District did not fill the Administrative Assistant position until the following July.

The Examiner's Decision and the Issues on Review

The Union's complaint alleged that the District retaliated against and/or interfered with protected activity in violation of Secs. 111.70(3)(a)3 and 1, Stats., in five ways: (1) by suspending Brandl from on-call firefighter duties on November 1, 2004; (2) by terminating Brandl's employment on February 3, 2005; (3) by promising Kakuske full-time employment in order to secure a vote against the Union in the election; (4) by unilaterally adding Kakuske to the voting eligibility list; and (5) by encouraging Subera and Kakuske to vote against union representation.

The Examiner dismissed the first, third, and fifth of the foregoing prohibited practice claims. The Union did not file a petition for review on those issues, and the Commission is satisfied that the Examiner correctly dismissed them for the reasons set forth in his decision.

As to the fourth allegation, the Examiner found that Harris made a "conscious decision to modify the election process" by adding Kakuske's name to the voter eligibility list without

seeking advice from WERC General Counsel Davis (as Harris had done previously) and without notifying the Union that he was amending the list. The Examiner held, therefore, that adding Kakuske's name was a "literal 'interference' with employees attempting to exercise the rights guaranteed in Sec. (2) of the act." The District has not sought review of the Examiner's conclusion in this regard, and the Commission is persuaded that the Examiner correctly decided this issue, for the reasons articulated in his decision.

In the instant appeal, the District challenges the Examiner's conclusion regarding the second alleged prohibited practice, i.e., that Harris terminated Brandl on February 3, 2005, in order to prevent him from voting. The Examiner's conclusion was based primarily upon his view that, even if Brandl's position had been in jeopardy because of the reorganization, the District offered no plausible explanation for the abrupt timing of the dismissal, coming only two days after the February 1 e-mail from Peter Davis that "raised the question as to whether or not Brandl would be permitted to vote." The District advances four arguments against the Examiner's conclusion, each of which is addressed in context in the below discussion.

DISCUSSION

The Examiner accurately set forth the well-settled legal principles in cases, such as this one, where the essence of the claim is that the employer took adverse action against an employee in order to discourage union activity. In order to prevail, the Union must establish that (1) Brandl and other District employees were engaged in protected activity; (2) the District was aware of that activity; (3) the District was hostile to the activity; and (4) the District terminated Brandl *at least in part* because of the protected activity, even if other, legitimate, factors contributed. MUSKEGO-NORWAY SCHOOL DISTRICT V. WERB, 35 WIS.2D 540 (1967) and EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985).

It is common in discrimination/retaliation cases that both the third (animus) and fourth (motive) elements pose difficult evidentiary hurdles. Both elements relate to the employer's state of mind, which is seldom directly verbalized. See EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985) ("'[A]n employe usually is placed at a distinct disadvantage in challenging the employment actions of a discreet and purposeful employer.'") Hence, discerning animus and motive is an "exercise of examining inferences from the circumstances …," an exercise that "lies squarely within the Commission's specialized expertise." EDGERTON FIRE PROTECTION DISTRICT, DEC. NO. 30686-B (WERC, 2/05), at 28, citing WERC V. EVANSVILLE, 69 WIS. 2D 140 (1975), at 150, and VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03), at 19.

In this case, the District is alleged to have terminated Brandl in order to influence the outcome of the election by preventing him from casting a vote in favor of the Union. As is usually the case, determining whether Harris actually was trying to tamper with the outcome of the election (i.e., was unlawfully motivated), depends upon an experienced assessment of the circumstances surrounding Brandl's termination and drawing reasonable inferences from those circumstances. Circumstantial factors that may influence a finding of improper motive include

timing, failing to follow normal or expected procedures, and/or the insubstantiality of the asserted legitimate motive. See generally, EDGERTON FIRE PREVENTION DISTRICT, *supra*, at 19. Under the Commission's "in part" test for determining unlawful motive, if preventing Brandl from voting played any part at all in Harris' decision to terminate him, the termination will be held unlawful, even if other considerations (such as the reorganization) may have contributed. MUSKEGO-NORWAY SCHOOL DISTRICT V. WERB, *supra*.

Turning to the first two elements in discrimination analysis, the District does not question that the District's staff, including Brandl, were engaged in lawful concerted activity by virtue of the union organizing drive and impending election, and that Harris was well aware of that. In its petition for review, however, the District argues, as to the "knowledge" element, that the Union should have been required to establish that Harris knew for certain that Brandl intended to vote for the Union. We think this overstates the Union's burden. A violation would be established even if Harris wrongly believed that Brandl was a Union supporter but acted on this belief by terminating Brandl's employment in an effort to influence the election result. However, the record supplies ample evidence to support a finding that Harris thought it likely that Brandl would vote for the Union and that Kakuske would likely vote against.

The evidence shows that the organizing drive was prompted by some unhappiness among the staff about how Harris was running the department; Brandl had directly expressed unhappiness with Harris' "leadership" during their August 2004 meeting. In addition, the staff's September 24, 2004 letter notifying the District about the organizing drive was signed "Full Time and Part-Time Staff of the Middleton Fire District." As Brandl was the only part-time staffer, we believe District officials, including Harris, would infer that Brandl supported the Union. Moreover, in a work force of only four individuals, one might expect some common knowledge about the views of various individuals regarding something as significant as a union organizing drive. That expectation is borne out here. The record reflects several conversations with Harris about how various individuals viewed the Union. For example, Subera thought Harris should have a "heads up" when Subera was approached to sign a Union authorization card, and he conveyed his opposition to Harris. Similarly, Kakuske, at least once in the context of a discussion about his desire for full-time employment in the District, had also indicated to Harris that he was opposed to the Union. On this record, it is reasonable (if not compelling) to infer that Harris believed he knew how both Brandl and Kakuske would likely vote, and we are comfortable reaching the conclusion.

As to the third element, the District also challenges the Examiner's failure to have drawn an explicit conclusion that Harris bore the requisite "animus" that might lead him to take steps to influence the outcome of the election. In this case, however, the "animus" and the "motive" are inextricably intertwined, and both elements will be satisfied if the evidence indicates that Harris terminated Brandl on February 3 at least partly in an effort to affect the election.

As is nearly always true in cases depending upon motive and state of mind, this situation requires a close and careful review of the evidence and a seasoned approach to drawing inferences from that evidence. Here the Examiner reached a positive conclusion on this issue primarily because he viewed the timing of Brandl's termination as otherwise inexplicable. The District's primary focus in its petition for review is its challenge to this conclusion.

The District contends that the Examiner's analysis of the timing of Brandl's termination is logically inconsistent with both the record and with the Examiner's other findings. The District points out that the Examiner found that WERC General Counsel Davis' February 1 e-mail clearly stated, "only the three employees you have listed are eligible to vote." According to the District, "It makes no sense … to conclude that the District fired Mr. Brandl to prevent him from voting in the election: at the time Mr. Brandl was fired the District knew that he would *not* be eligible to vote in the election." (Dist. Br. at 3, emphasis in original). Further, argues the District, the Examiner could not logically find both (1) that Davis' e-mail clearly directed that only the three named persons were eligible to vote, and (2) that the e-mail "raised a question" about "whether or not Brandl would be permitted to vote." (Examiner's Decision at 21).

Considered outside of the full context, the District's point seems well-placed. Indeed, even if Brandl's name had been on the stipulated eligibility list, Harris was aware that Brandl's vote for the Union would not have affected the outcome of the election, since both Webers were also likely to vote for the union and only Subera likely to vote against. With or without Brandl's vote, the Union would prevail, had the eligibility list remained as in the Davis e-mail.

As the Union points out, however, removing Brandl was only half of the Chief's strategy. The other piece of the plan was to insert Kakuske – a likely "no vote" – onto the eligibility list. Kakuske's vote against the Union would only make a difference in the result if Brandl was prevented from voting; if they both voted, the result likely would have been three to two in favor of the Union. Thus, contrary to the District, we infer from all the circumstances that Harris gleaned from Davis' February 1 message that part-timers might be eligible to vote if the Commission were aware that any existed. Indeed, at the May 3, 2005 WERC hearing regarding the Union's objection to the election, the District expressly stated that this is just what Harris thought. (Er. Ex. 16 at 57). Hence, we are persuaded, as was the Examiner, that, when Harris became aware on or about February 1, 2005, that part-time employees might be eligible to vote, he conceived the notion that he could add Kakuske as an eligible voter, but that in doing so he would be opening the door to Brandl having a vote, which would cancel any benefit to the District from Kakuske's vote. After all, Harris could not have known that WERC agents would overlook his addition to the eligibility list; if Brandl was still employed, the Union, if not the WERC, would assert his right to vote, as well. It is reasonable to infer, and we do, that, with these thoughts in mind, Harris terminated Brandl two days after receiving Davis' e-mail.

Accordingly, contrary to the District's view, it is apparent simply from the fact that Harris subsequently added Kakuske's name to the voter eligibility list that Harris did not take Davis' February 1 message as an immutable directive that part-timers could not vote. Hence, it is not inconsistent to conclude, on the one hand, that Davis' e-mail stated clearly that only three individuals were eligible voters, and on the other hand that Harris perceived a contingency in Davis' message such that, if any part-timers existed at the time of the vote, they would be eligible.

The District also argues that Brandl's termination could not have been motivated by the impending election, because the District had decided to eliminate Brandl's position before February 1 and, indeed, even before the Union organizing drive became known to the District. The District bases this argument upon two factual grounds: first, that, as the Examiner himself found, eliminating Brandl's position was part and parcel of the departmental reorganization that had been under discussion since at least the previous spring; second, as to the abrupt timing of the termination, the "evidence is clear" that the decision to terminate Brandl in early February had been made prior to Davis' February 1 e-mail, as is apparent even on the face of that e-mail.

The District draws a plausible portrait of the evidence, but, ultimately, not a convincing one. The Examiner accepted the District's claim that Brandl's termination was linked generally to the reorganization, but found that fact insufficient to explain the abrupt timing of the termination, since the full-time position was not even posted until a month after Brandl was terminated. The District justifies the timing by pointing to evidence that the termination decision had been made in January and delayed until February 3 to give Harris time to arrange to be accompanied by the Assistant Chief and to have a police presence in the vicinity.

Like the Examiner, we find the evidence insufficient to support the District's justification for the timing. The record indicates that a conversation occurred prior to the January Fire Commission meeting (a date that is not revealed in the record) between Harris and former Assistant Fire Chief Brian Zander, where Harris broached the topic of a "change" to "Andrew Brandl's position." The testimony does not clearly indicate that the "change" would be an elimination of the position, that Brandl himself would be terminated, nor, importantly, that any such possible termination would be immediate. Importantly, while Harris vaguely testified that the Fire Commission may have reviewed some "options" about handling the inspection work once a full-time position was filled, the record contains no evidence that the Fire Commission itself – which would have to approve both the elimination of the position and the termination of an employee – made a decision at the January meeting to terminate Brandl immediately. Moreover, Harris' assertion that he needed extra time to comply with the Fire Commission's alleged direction that he take safety precautions is not inherently plausible and is unsupported by corroborating evidence. Brandl, who had been hired after the incident that allegedly had caused safety concerns, had never displayed any violent tendencies or given Harris any cause to be concerned about his safety during his four-plus years of employment. The reference in Davis' February 1 e-mail about his "understanding" that the part-time position was "being converted into a full-time job," does suggest that at some point

on or before February 1 someone had suggested to Davis that Brandl's part-time position was in an uncertain state. Absent further context, such as who said what and when and to whom it was said, this statement is far too vague to conclude that the District had already decided to eliminate the part-time position, that this elimination would occur even before the full-time position was filled, that Brandl would not be offered the full-time position, or that Brandl was on the brink of being terminated.

Given the primacy of the timing issue in this case, and the ready availability to the District of corroborating documents or testimony on this crucial point, we are unwilling to reach the factual inferences that would be necessary to accept the District's explanation for the abruptness of the decision. In addition to the insubstantiality of any affirmative evidence supporting the District's suggested inferences, we also note that Brandl was given absolutely no prior notice that his position was being eliminated or that he was being terminated. Since, as the District asserts, the termination was not based upon misconduct but was strictly a function of the reorganization, this harsh treatment seems unwarranted and inconsistent with what might normally be expected in a reorganization situation. We agree with the Examiner that the default explanation for the abrupt timing lies in Harris' perception, on or about February 1, that he could influence the election if he terminated Brandl and hired Kakuske.

In sum, the Commission agrees with the Examiner that Brandl was terminated on February 3, 2005, at least in part to prevent him from voting in the upcoming election. This action discriminated against Brandl in order to discourage union activity, in violation of Sec. 111.70(3)(a)3, Stats., and interfered with the Code Enforcers' rights to engage in union activity, in violation of Sec. 111.70(3)(a)1, Stats.

Remedy

As the Examiner noted, the standard remedy for an unlawful termination is reinstatement plus make whole relief with statutory interest. The Examiner, however, concluded that "Brandl's days were numbered," because the Examiner accepted the District's argument that Brandl's position would have been eliminated at some point in connection with the departmental reorganization. Hence, the Examiner withheld the traditional remedy and instead ordered Brandl to be reimbursed for his lost wages between February 3, 2005, and the date Kakuske began full-time employment in the newly created Fire Service Technician.

We are not persuaded, on the record as it presently exists, that the reorganization plan definitively included the elimination of Brandl's part-time position. Certainly, as set forth in some detail in our summary of the facts, above, the new full-time position was budgeted independently of Brandl's part-time position. The weight of the evidence indicates that the debate between May and November 2004 was whether to add a full-time position or instead subcontract inspection work. Adding a full-time inspection position – to supplant the inefficient, ad hoc, and unreliable use of on-call firefighters, was the solution initially and consistently promoted by Robert Weber, who was in charge of that segment of the District's work. Nothing in the documentary record, including the 2005 budget itself and the minutes of

any Fire Commission meeting , suggests that Brandl's part-time inspection position was in play in connection with the reorganization – much less than it was an inherent element in that plan. The only evidence that Brandl's position was discussed in connection with the reorganization is Harris' testimony that, during his conversation with Commissioner Tuffree on August 9, 2004, when they discussed the subcontracting vs. the full-time position options, "I had stated to [Tuffree] that in either situation in the budget we would need to – or there would be no longer a need for Andrew Brandl's services if we were to bring on the new individuals." Commissioner Tuffree testified at the hearing but was not asked to corroborate this assertion. It is clear that Brandl was discussed during this meeting, because Harris was seeking Tuffree's advice about approaching Brandl later that day regarding Brandl's on-call status, but nothing in the surrounding context supports Harris' assertion that he and Tuffree discussed Brandl's inspection position. While Harris may have been testifying to the best of his memory at that time (a year after the events in question), we do not find this slim testimony sufficient to overcome the substantial documentary evidence to the contrary, particularly the budget itself. Accordingly, we have set aside the portion of the Examiner's Finding of Fact 16 that finds such discussion with Tuffree occurred.

Although we are not persuaded that the reorganization from its inception included the elimination of Brandl's position, some evidence does suggest that Brandl's position may have been affected at some point in time by the reorganization or other events in the department. Where a decision has been affected by legitimate as well as unlawful factors, it may be appropriate to modify the standard remedy. See EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D, 132 at 143. Accordingly, while we have ordered the traditional reinstatement and make whole remedy, we have made that remedy expressly subject to the District's opportunity to establish that, even in the absence of the District's unlawful interference with the election, Brandl's position would have been eliminated at a particular point in time subsequent to February 3, 2005.

Dated at Madison, Wisconsin, this 5th day of February, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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