

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GREEN BAY PROFESSIONAL POLICE ASSOCIATION, Complainant,

vs.

**CITY OF GREEN BAY AND
JAMES A. ARTS, CHIEF OF POLICE**, Respondents.

Case 380
No. 66429
MP-4309

Decision No. 32107-C

Appearances:

Mr. Thomas J. Parins, Sr., Parins Law Firm, S.C., 422 Doty Street, P.O. Box 817, Green Bay, Wisconsin 54305, on behalf of the Complainant.

Mr. Christopher M. Toner, Ruder Ware, 500 Third Street, Suite 700, P.O. Box 8050, Wausau, Wisconsin 54402-8050 on behalf of the City and its Police Chief.

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

On October 31, 2006, the Green Bay Professional Police Association, hereinafter Complainant, filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Green Bay and its Police Chief, hereinafter Respondents, had committed prohibited practices. Amended complaints were filed on November 29, 2006; May 12, 2008; and September 5, 2008. Respondent filed Answers to the complaint and amended complaints. On May 18, 2007, the Wisconsin Employment Relations Commission (Commission) appointed Sharon A. Gallagher, a member of the Commission's staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(4)(a), Stats., and Sec. 111.07, Stats. Examiner Gallagher held a hearing in Green Bay, Wisconsin on June 26, 2007. On January 17, 2008, Examiner Gallagher issued an Order Granting in Part and Denying in Part Motion to Dismiss Complaint Counts I, IV and XI. On September 2, 2008, the Commission issued an Order in which the Commission substituted Examiner Coleen A. Burns for Examiner Sharon A. Gallagher. Examiner Burns held a hearing in Green Bay, Wisconsin on March 30, 31; April 1, 2, 3; May 4, 5, 6, 11; July 14,

No. 32107-C

15, 16; and September 1, 2009. The hearings were transcribed and the record was closed on February 4, 2010 upon receipt of the party's reply briefs. Having considered the evidence and arguments of the parties, the Examiner hereby makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Green Bay Professional Police Association, hereafter Complainant or Association, is a labor organization and is the representative of a collective bargaining unit of certain law enforcement employees of the City of Green Bay Police Department. At all times material hereto, the Parins Law Firm of Green Bay, Wisconsin has represented the Association. Officer William Resch was President of the Association from 2001 until Officer Ben Allen succeeded Officer Resch as President of the Association in October 2008.

2. The City of Green Bay, hereafter Respondent or City, is a municipal employer and, among its employees, are the members of the collective bargaining unit represented by the Association. At all times material hereto, the City has operated a Police Department. Police Chief James Arts, who is the head of the City's Police Department, represents the City for the purposes of collective bargaining and administering the collective bargaining agreement between the City and the Association.

3. The Association and the City are parties to a 2005-2006 collective bargaining agreement that, by its terms, expired on December 31, 2006. Following the expiration of this agreement, the parties met to negotiate a successor agreement. At all times material hereto, Attorney Dean Dietrich was the principal negotiations spokesperson of the City and Attorney Thomas J. Parins Sr., hereafter Attorney Parins, was the principal negotiations spokesperson of the Association. On or about January 16, 2007, the City provided the Association with a document that states:

INITIAL PROPOSALS OF CITY OF GREEN BAY AND GREEN BAY POLICE DEPARTMENT

1. Revise Article 3 - Grievance Procedures and Disciplinary Proceedings, Section 3.01 - Grievance Definition by amending the first sentence to read as follows:

A grievance is defined as any complaint involving wages, hours and conditions of employment as defined by the provisions of this Agreement, other than proceedings conducted pursuant to Section 62.13, Wis. Stats.

2. Revise Article 4 - Hours, Section 4.03 - Taking of Time Off, subparagraph (4) to read as follows:

Within five days of the day(s) in question, officers may request time off and such time off shall be subject to approval by the supervisor. In no event may an officer request time off without a 48 hour notice to the shift commander or other designated supervisor, but a shift commander or other designated supervisor may, in his sole discretion, waive the 48 hour notice for reasons found sufficient.

3. Revise Article 5 - Shift Assignments, Section 5.07 - Safety Staffing by modifying Paragraph (2) - Staffing Requirements by deleting the entire paragraph and substituting the following:

In order to serve the above general policy, officer safety staffing shall be determined by the shift commander.

4. Revise Article 5 - Shift Assignments, Section 5.07 - Safety Staffing by providing that the limitation on remedy for failure of the City to maintain minimum staffing levels shall apply to instances of overtime assignments and any alleged breach of contract provisions involving call-in or overtime assignments.

5. Revise Article 6 - Overtime, Section 6.03 - Allocation of Overtime by modifying Paragraph 5 - Overall Hour Limitation by deleting reference to "training."

6. The City agrees to negotiate with the Association regarding any impact of the implementation of the TeleStaffing Program and is willing to discuss any changes in the procedure for call-in or overtime assignment as may be appropriate.

7. Revise Article 7 - Selection Procedure for Police School Liaison Program, K-9 Unit and ERU, Section 7.02 - Filling Vacancies and Tenure in School Liaison Program, Paragraph 6 by modifying last sentence to start with "after 30 days."

8. Revise Article 7 - Selection Procedure for Police School Liaison Program, K-9 Unit and ERU, Section 7.03 - Appointments to K-9 Unit, Paragraph 2 by deleting paragraph in its entirety and replacing with, the following:

The K-9 Unit will work a five days on, three days off work schedule with consideration for time off for grooming, kennel care, usual and customary veterinary time and vehicle upkeep.

9. Revise Article 7 - Selection Procedure for Police School Liaison Program, K-9 Unit and ERU, Section 7.03 - Appointments to K-9 Unit, Paragraph 10 by deleting this paragraph in its entirety.
10. Revise title of Article 7 to read as follows: Selection Procedure for Police School Liaison Program, K-9 Unit, Emergency Response Unit, FTO Program and Community Policing Unit.
11. Revise Article 8 - Retirement by adding Section 8.02 to read as follows:

8.02 NEW EMPLOYEES: Employees hired after January 1, 2007, will be required to pay the entire officer contribution to the Wisconsin Retirement Fund.
12. Revise Article 12 - Clothing/Equipment Allowance, Section 12.02 - Allowance to provide for a one time annual payment to employees with the requirement that employees provide a statement that monies are used for clothing allowance purposes. Continue amounts and proration procedure as listed in contract language.
13. Revise Article 16 - Sick Leave, Section 16.04 - Health Insurance Payment Program, Par, Entitled "Catastrophic Illness" to provide that the employee's normal retirement date is age 55.
14. Revise Article 16 - Sick Leave, Section 16.05 - Conversion by deleting this provision in its entirety.
15. Revise Article 17 - Health and Dental Insurance by modifying the health insurance Benefit plan as follows:
 - Add a 90%/10% co-insurance provision which would provide that employees will pay 10% of medical charges for up to \$5,000 of medical claims after the deductible is met. The maximum payment of co-insurance for a single employee will be \$500 and the maximum family co-insurance payment will be \$1,500 which takes effect after the deductible has been met. This applies to in-network claims, but not chiropractic benefits.

- Modify the premium contribution in 2008 to provide that employees will pay 12.5% of the premium and 10% of the premium if the employee has met the requirements for the Wellness Incentive Qualifiers.
 - Provide that the employee will pay 15% of the health insurance premium if the employee is receiving health insurance benefits from the City when the employee is eligible for dependent coverage under the spouse's health benefit.
 - Establish an EAP Gateway Program which provides for the review of usage of the EAP Program and counseling services.
 - Delete the limit of three (3) copays for single and seven (7) copays for family coverage for doctor office visits.
 - Modify the Agreement to provide that spouses shall be required to meet the Wellness Incentive Qualifiers for 2008.
 - Implement a Specialty Pharmacy Program with same copays for injectable drugs.
16. Revise Article 28 - Military Leave, Section 28.01 by adding the following at the end of the first sentence "In accordance with the USERRA requirements."
 17. Revise Article 32 - Advancements and Promotions by deleting Section 32.04 — Promotion to Lieutenant in its entirety.
 18. Revise Article 39 - Term of Agreement to provide for a two year agreement for 2007 and 2008.
 19. Continue payment of salary pursuant to direct deposit procedures.

Between January 16, 2007 and June 12, 2007, the parties met four or five times to negotiate a successor agreement. In a letter dated May 10, 2007, Attorney Parins provided Attorney Dietrich with a copy of an Association total package offer on the K-9 unit. In this offer, the Association proposed, *inter alia*, to change the existing K-9 patrol unit work schedule of ten (10) hour days consisting of four (4) days on followed by four (4) days off to the regular patrol officer schedule of eight and one-half (8 ½) hour days consisting of five (5) days on followed by three (3) days off. On June 12, 2007, the City filed a "Petition for Final and Binding Arbitration Pursuant to Section 111.77, Wis. Stats.," with the Wisconsin Employment Relations Commission, hereafter WERC or Commission. In August 2007, Commissioner Sue Bauman met with the parties for the purposes of mediating the parties' contract dispute. The

parties did not settle their contract dispute at the August mediation session. A letter from Attorney Dietrich to Attorney Parins dated October 30, 2007 includes the following:

...

Re: Negotiation Between City of Green Bay and Green Bay Police Protective Association

Dear Mr. Parins:

On behalf of the City of Green Bay, we are writing to advise you of our thoughts regarding the current negotiations between the City and the Green Bay Police Protective Association.

First, we believe that the parties have reached a point of impasse in the contract negotiations and thus, the City will be filing a Petition for Arbitration with the Wisconsin Employment Relations Commission. We anticipate filing this Petition within the next five work days.

Second, the City has reviewed the language in Section 5.07(2) of the Labor Agreement between the City and the Police Association regarding safety staffing. It is the position of the City that this language is permissive. As a result, the City is evaporating this language from the current Labor Agreement between the City and the Police Association. The City will continue to operate under the current requirements of Section 5.07 as the negotiations proceed through the interest arbitration process; however, the City will evaporate the existing contract language as of the time of settlement of any contract negotiations between the City and the Association.

If the Police Association objects to the determination by the City that this language is permissive, the City will file a Petition for Declaratory Ruling with the Wisconsin Employment Relations Commission.

If you have questions or wish to discuss this further, please contact me directly.

...

Subsequently, one or both of the parties filed a petition for declaratory ruling with the WERC. The parties discontinued contract negotiations pending the resolution of the declaratory ruling(s). In March 2008, the parties met with the mediator in an attempt to resolve their contract dispute. In a letter dated September 16, 2008, the City provided Commissioner Bauman and Attorney Parins with a document identified as "first Final Offer of the City of Green Bay to the Green Bay Professional Police Association." This document included the following sentence:

1. Continue all provisions of the 2005-2006 Labor Agreement except for modification of dates as modified by this Final Offer.

In this document, the City proposed to modify Sec. 4.03, which addresses taking time off, and Sec. 17.01-17.06, involving health and dental insurance. The City also proposed to revise Schedule A-Wage Schedule and identified "Tentative Agreements Regarding Health Insurance Changes." In early 2009, the parties resolved their dispute regarding the terms and conditions of their successor labor contract by reaching a voluntary settlement just prior to the scheduled interest arbitration hearing.

4. The Green Bay Packers contract with the City to provide security before, during and after home football games. For a number of years prior to December 2005, Officer Resch routinely worked Packer games in an assignment that included working the Club Seats section. In early 2005, the Association filed charges against Commander Brodhagen and, in December 2005, these charges were pending before the Police and Fire Commission. At the end of 2005, the Association filed a grievance, known as the "Packer lights" grievance, alleging that Captain Urban, Captain Arts and Commander Brodhagen were performing non-supervisory duties. In a memo to Commander Brodhagen dated December 19, 2005, Officer Resch states:

I NOTICED MY ASSIGNMENT WAS CHANGED AND I WAS ASSIGNED EARLY OT. IF POSSIBLE, I WOULD LIKE TO WAIVE MY EARLY OT FOR BOTH THE 25TH GAME AND THE JAN 1ST GAME. IF THAT WOULD CHANGE MY ASSIGNMENT I WOULD REQUEST MY TRAFFIC/GAME ASSIGNMENT I HAVE HAD PREVIOUSLY.

THANK YOU.

Officer Resch and Commander Brodhagen then exchanged the following:

...

To: Officer William Resch
From: Commander Ken Brodhagen

Ref: Packers vs. Bears football game assignment request.

I got your Packer game time/assignment change request. I did some checking and Detective Tyler would like to take the early overtime. That would free you up for your previous traffic/game assignment.

The only problem is, based on those assignments, I added Officer Duebner to the late overtime assignment at the 6th floor club seats. I do not have enough officers working the game assignments to assign a third officer to the club seats. I want to remove Officer Duebner from the club seat assignment

and the late overtime and then assign you to the club seats and club seat late overtime. But from your WERC filing, doing so may be some sort of violation of an article in the contract (if I remove a person already given an assignment at the game).

Let me know if removing Officer Duebner from the club seat assignment and the late overtime will cause a grievance. If not I have no problem changing the assignments around.

. . .

Commander Brodhagen

I received your response to my request and will do my best to address this matter.

Let me start out addressing your concern about a grievance being filed if you assign me to my previous assignment. First, as a matter of law, I, nor anyone else for that matter, can guarantee that a grievance will not be filed in any matter. The right to file a grievance lies within the State Statutes and applies to individuals as well as Labor Associations. An individual Officer has a right to file a grievance without the Association but I don't recall that ever happening here.

As you are well aware of from serving on this Committee in the past and dealing with labor issues in your current position the Association has generally governed these types of decisions based on seniority issues when all other things being equal. Therefore I personally can't see grounds for a grievance at this time.

I am assuming the WERC case you are referring to is the Liska case. I believe the fact that it was the hours lost and the cancellation of overtime issues that were in question and not the removal from a specific assignment.

I am senior to Officer Duebner and have held my current assignment(s) for several years and request to remain in those assignments. If I understand the situation correctly Officer Duebner will just be given an alternative assignment with comparable hours and will not be removed from the overtime assignment.

I hope this addresses your concerns. If you have any questions please feel free to contact me again.

W.Resch#135

Officer Resch did not work the club seat assignment at the Packer game of December 25, 2005. Commander Brodhagen left the Department at the end of 2005 or the beginning of 2006. At the beginning of 2006, Captain Arts assumed Commander Brodhagen's position. In January 2006, Lieutenant Bongle assumed responsibility for making assignments at Packer games. Officer Resch worked the club seat assignment at the Packer game of January 1, 2006. When Officer Resch signed up for Packer game overtime in the summer of 2006, he indicated a preference for Club Seats duty. The initial duty roster for the August 19, 2006 Packer game showed that Officer Resch was assigned to Club Seats duty, but under the final duty roster, Officer Resch was not assigned this duty. Officer Resch may have worked Club Seats on a few occasions during the 2006 Packer season, but he was not regularly assigned to Club Seats duty. Officer Resch was not assigned to, and did not work, Club Seats during the 2007 or 2008 Packer seasons.

5. In 2003 or 2004, the Association asked the City to provide the Association with access to the daily duty rosters. After this request, Police Chief Van Schyndle permitted the Association to copy these rosters on non-duty time. A letter dated January 19, 2006, from former Police Chief Van Schyndle to Attorney Parins includes:

...

The Green Bay Police Protective Association requested access to the Green Bay Police Department rosters. You, Officers Peters, Dubois and McKeough, made this request stating that the Association would like to have access to the rosters so that when there are scheduling discrepancies, the problems could be ironed out without it going to a grievance.

After I allowed the Association to have access to the rosters in the spirit of cooperation, the Association has filed four grievances that are related to the rosters. Therefore, I have decided to allow the Association to have access to the rosters through the normal open-records procedures. The Association will have to pay the normal processing fee for the records.

...

With the issuance of this letter, Chief Van Schyndle required Association representatives to use the normal open-records procedure to request and receive daily duty rosters. In early 2007, James Arts succeeded Van Schyndle as Chief of Police. In a letter dated February 12, 2007 and addressed to Attorney Parins, Chief Arts states:

The purpose of this letter to advise you and the Green Bay Police Protective Association of the procedure to obtain the daily work rosters. I have spoken with staff and front desk personnel. We will make an extra copy of the daily roster and place it in GBPPA Representative Mike Van Rooy's mailbox. Front Desk personnel have been advised of this new procedure.

If you wish to make copies of 2006 daily rosters, Lt. Bongle will make them available to you for copying. The rosters can be taken to your office for immediate copying but must be returned the same day.

Please contact me if you have any questions.

Following the issuance of this letter, the Association has accessed daily duty rosters under the procedure set forth in this letter.

6. On or about April 29, 2003, the City posted the following notice:

TO: Afternoon Patrol Officers
RE: Police Motorcycle Certification School

We anticipate hosting a Police Motorcycle Certification School in Green Bay running from May 12-21, or May 19-29. This is an 8-day school. To be eligible to attend this school you must already have a current Wisconsin motorcycle endorsement. Attendees must also successfully complete this course to use the police motorcycle. Graduates will be expected to ride the motorcycle on shift on a regular basis.

This posting will be taken down on May 8 at 8 am.

The senior most qualified officers signing this posting will be considered.

On or about April 20, 2006, the City posted the following notice:

DT: April 20, 2006
TO: Afternoon Patrol Officers
RE: Police Motorcycle Certification School

We anticipate hosting a Police Motorcycle Certification School in Green Bay running from May 8-17. This is an 8-day school. To be eligible to attend this school you must already have a current Wisconsin motorcycle endorsement. Attendees must also successfully complete this course to use the police motorcycle. Graduates will be expected to ride the motorcycle on shift on a regular basis.

The senior most qualified officers signing this posting will be considered. This posting will be in the Shift Commanders office and will be taken down at 8:00 am on May 1, 2006.

...

The Department intentionally limited the above posting to afternoon shift officers because the Department did not have a sufficient number of afternoon shift officers certified in motorcycle operations who were available to perform regular motorcycle patrol duties. A number of officers signed the above posting, including at least two day-shift officers. Officer Scott Peters, a member of the Association's governing board, was one of the day shift officers who signed this posting. When Officer Scott Peters informed Lieutenant Wesely that he would like to go to this training, Lt. Wesely responded that he was not eligible because the posting was for the afternoon shift. Officer Scott Peters then informed Lt. Wesely that he would probably file a grievance. Following his conversation with Officer Scott Peters, Lt. Wesely had a conversation with former Police Chief Van Schyndle and Chief Van Schyndle decided to pull the April 20, 2006 posting; thereby cancelling the posted training opportunity.

7. On or about January 1, 2006, Captain James Arts was promoted to Commander. Because of this promotion, Commander Arts had increased responsibility to interact with the Association on grievance issues. On January 9, 2006, Officer Danelski filled out an "Officer's Overtime" card in which he requested payment for 2.8 hours of overtime for January 9, 2006. In a memorandum dated January 16, 2006, Commander Arts states:

Officer Danelski was inadvertently bypassed on an overtime call in. This memo authorizes Officer Danelski to work 2.8 hours of overtime. He must work the 2.8 hours in order to be compensated.

On or about January 16, 2006, Officer Danelski received a copy of his overtime card. This overtime card indicated that Commander Arts had denied his request for 2.8 hours of paid overtime. Attached to this card was a handwritten note from Commander Arts, which stated, *inter alia*, "I sent you a memo authorizing 2.8 hours." and "If you have any questions, please contact me." Officer Danelski contacted Commander Arts because he had questions about the denial. Commander Arts told Officer Danelski that he denied the payment of 2.8 hours of overtime because Officer Danelski did not work the overtime, but that Officer Danelski could make up the overtime. When Officer Danelski told Association President Resch that he had been asked to work the overtime hours, Officer Resch told him not to work the hours. On or about February 3, 2006, the Association filed a grievance requesting that Officer Danelski be paid the overtime. After Jim Arts was promoted to Commander, Association representatives asked to meet with Commander Arts to discuss how to improve the relationship between the Association and the Department. During the ensuing meeting, Commander Arts and the Association's representatives had an informal discussion on a variety of issues, including Officer Danelski's overtime issue. At that meeting, Commander Arts indicated that Officer Danelski would have to work the time; Officer Resch disagreed; and Officer Resch gave examples of officers who received overtime pay without having to work the overtime hours. One of the officers referenced by Officer Resch was Officer Shannon Mulrine. After this meeting, Commander Arts gave Lt. Todd LePine a copy of an "Officer's Overtime" card for Officer Mulrine. This overtime card indicated that there had been an "Error in Scheduling-Safety Violation" and that then Capt. Arts approved the overtime on August 24, 2005. Commander Arts told Lt. LePine to question Officer Mulrine about this overtime card by

asking if Officer Mulrine worked the time; who signed the card; and what the supervisors told Officer Mulrine when they signed the card. Lt. LePine wrote these questions on the overtime card. On January 25, 2006, Lt. LePine approached Officer Mulrine in the parking lot; gave Officer Mulrine a copy of the overtime card and told Officer Mulrine that Commander Arts requested details on answers to the questions on the card. The nature of Lt. LePine's questions, as well as Officer Mulrine's experience with a prior internal affairs investigation, caused Officer Mulrine to become concerned that he was the subject of an investigation that could lead to discipline. Officer Mulrine contacted an Association representative. Within a few minutes of Officer Mulrine's conversation with Lt. LePine, he had a second conversation with Lt. LePine, in the presence of Association Representative Schmeichel. During one of the conversations with Lt. LePine, Officer Mulrine asked if the request for details was an order from Commander Arts. Lieutenant LePine responded "Yes." Before the end of his shift, Officer Mulrine responded to Lt. LePine's order by drafting details. At the time that Officer Mulrine was questioned about his time card, there was no pending grievance on this time card and Officer Mulrine had been paid the overtime that was the subject of this time card. In questioning Officer Mulrine, Lt. LePine was not conducting an internal affairs investigation of Officer Mulrine. Chief Arts did not discipline, or take any adverse action against, Officer Mulrine regarding his time card.

8. In February of 2006, the City posted the following:

DT: February 23, 2006

TO: All Patrol Officers

RE: **Field Training Officer Certification**

Fox Valley Technical College is offering the above training **on May 1-5, 2006, 8:00 am – 4:30 pm.** Upon completion of this course you will assume the position of a Green Bay Police Department Field Training Officer.

Due to recent changes in the work schedule, we are in need of officers from the afternoon, evening and night shifts.

We anticipate sending as many qualified officers to this training as possible. Please sign the attached sheet if you are interested in attending. This posting shall be in the Shift Commander's office and will remain effective until March 17, 2006. If you would like more information about the FTO program, please contact Lt. Balza or Capt. Sterr.

After the posting deadline, then Captain, now Commander Sterr, reviewed the posting and selected the officers who would receive the training. The officers selected received a memo informing them of their selection. When Officer Ramos, one of the officers who signed the posting, learned that he had not been selected for the training, he met with Commander Sterr.

During this meeting, Officer Ramos stated his qualifications for the posting and asked why he could not go to the training. Thereafter, Commander Sterr reviewed his file; determined that Officer Ramos was qualified for the posting and provided Officer Ramos with the opportunity to attend the training school. Officer Wicklund received the memo informing him of his selection for the training. After he received this memo, Officer Wicklund had a conversation with Commander Sterr in which she advised him that his selection might have been a mistake because he had insufficient time in law enforcement; that he might not be going to the training; and that the Department would be looking into the matter. When Officer Wicklund became aware of the fact that the Association might file a grievance on the posting selection process, he asked Lt. Balza if he was going to the FTO training. Initially, Lt. Balza stated that he did not know, but subsequently stated that it was possible that both Officer Ramos and Officer Wicklund would go to the training. Thereafter, either Lt. Balza or Commander Sterr, told Officer Wicklund that both he and Officer Ramos would be sent to the training, but that Officer Wicklund would not be permitted to serve as an FTO until he had worked as a Police Officer for more than four years.

9. Officer Stephanie Thomas has been a Police Officer with the City for approximately ten years. The Cops and Kids Camp is for children who have lost a parent in the line of duty. Officer Thomas asked an unidentified Police Department shift commander to grant her permission to flex her scheduled July 31, 2006 workday so that she could help with the Cops and Kids Camp program. This shift commander approved this request. Officer Thomas flexed her workday on July 31, 2006 to assist with the Cops and Kids Camp program by helping to organize the children as they arrived at the Milwaukee airport. In a letter dated August 18, 2006, Attorney Parins advised Chief Van Schyndle as follows:

. . .

RE: GBPPA - Officer Thomas Overtime Grievance
Our File Number: 06-31

Dear Chief Van Schyndle:

The GBPPA hereby grieves the incident of Officer Stephanie Thomas working outside of her normally scheduled work hours on or about July 31, 2006. We are informed that Officer Thomas was allowed to flex her work schedule to attend to work related matters outside of her normally scheduled hours.

This is in violation of Section 4.04 of the Labor Contract in that there was no required agreement with the GBPPA regarding this flexing of the work day.

Additionally, Officer Thomas performed work related duties outside of her normally scheduled work day.

It appears that Officer Thomas may have turned in a vacation card for the time she missed in her normal work day. The City has no basis to require Officer Thomas to make up the time not worked during her normal work hours by use of vacation or otherwise. If any vacation in fact has been taken by the City it should be restored.

The remedy sought by this grievance is payment to Officer Thomas at the overtime rate for hours worked outside of her normal schedule. Of course, any vacation taken should be restored.

...

On October 30, 2006, the City and the Association entered into the following:

MEMORANDUM OF AGREEMENT

IT IS HEREBY AGREED, by and between the City of Green Bay ("City") and the Green Bay Police Protective Association ("Association") that the following shall constitute the agreement between the parties for resolution of Grievance No. 06-31, as follows:

1. That the City agrees that it failed to comply with the provisions of the Labor Agreement between the parties when it allowed Officer Thomas to change her work hours to attend an event in Milwaukee and have her work hours coincide with attendance at the event based upon the lack of any contract provisions allowing an officer to "flex" their work hours for such purpose.

2. That the Association waives any right to any payment of overtime or any additional compensation to Officer Thomas or any other officer as a result of the failure of the City to comply with the Labor Agreement.

3. That the City agrees that Officer Thomas shall not have any vacation time deducted for the change in hours of work on July 31, 2006, and further, that Officer Thomas shall not be required to work any additional hours as a result of this change in work hours.

4. The remedy agreed to in this Agreement for the failure to comply with the terms of the Labor Agreement shall not constitute a precedent by the City or the Association for a resolution of any other grievances. However, this Agreement may be used by the parties for purposes of identifying the understanding of the parties regarding the right of an officer to "flex" his/her work hours.

5. The Association reserves the right to use the underlying transaction on which this grievance is based in any prohibited practices complaint it might file with the WERC, excepting that the Association may not allege in any such filing a violation of the Labor Agreement under Wis. Stats. 111.70(3)(a)5, nor may it request any pay or compensation remedy for Officer Thomas.

10. A letter dated August 15, 2006, from Association Attorney Parins to City Police Chief Van Schyndle includes the following:

...

RE: GBPPA - Officer Yantes Overtime Grievance
Our File Number: 06-30

Dear Chief Van Schyndle

The GBPPA submits this grievance on behalf of Officer Yantes who was passed over for assignment to work overtime on July 30, 2006. This was not shift overtime but rather overtime under the US 41 speed grant. Officer Yantes was the senior officer signing for this overtime.

Apparently supervisors admit that Officer Yantes was inappropriately deprived of this overtime opportunity. Officer Yantes was given the opportunity to work four hours of overtime. This is not the appropriate remedy. The remedy for a violation in allocating overtime is payment of the overtime hours that would have been earned had the overtime been properly allocated. There is not (sic) requirement to work the overtime.

The only contract requirement to work overtime is the narrow limitation contained in Section 5.07(2)(b) of the Labor Contract. This limitation applies only to situations where the contract violation is that the City failed to have on duty the minimum staffing required under Section 5.07(2)(b) of the contract. This limited exception does not apply to this violation of allocation of overtime.

The remedy sought is payment to Officer Yantes of four hours of overtime.

...

A letter dated August 17, 2006 from Chief Van Schyndle to Attorney Parins includes the following:

...

Thank you for your letter of August 17, 2006, in reference to a grievance on Officer Yantes being passed over for an assignment to work overtime on July 30, 2006. As I understand the situation Officer Yantes had signed the posting, but Officer Yantes, (sic) name was inadvertently missed. Officer Weiss was given the overtime assignment by mistake, therefore, I sustain this grievance and Officers Yantes will be paid the four hours he missed.

...

At the time that Chief Van Schyndle issued this letter, Commander Arts did not receive copies of these letters. A letter dated July 21, 2006 from Attorney Parins to Chief Van Schyndle includes the following:

...

The GBPPA hereby grieves the denial of overtime opportunities to Specialist Yantes from June 25, 2006 to date.

It has been brought to our attention that Officer Yantes has not been called in the process of telephone posting for overtime assignments.

The remedy sought by this agreement is payment to Officer Yantes of all overtime opportunities denied him.

...

A letter dated August 11, 2006 from Chief Van Schyndle to Attorney Parins includes the following:

...

Thank you for your letter of July 21, 2006, in reference to a grievance over Officer Yantes being missed for overtime assignments. In reviewing the information to this grievance, it appears Officer Yantes was not placed on the overtime rosters when he moved from the Drug Task Force to Day Shift Patrol. Therefore I sustain this grievance. We are currently reviewing the potential overtime opportunities that Officer Yantes missed. Once this is determined the city will present an offer for settlement.

...

On October 4, 2006, in response to a request from Commander Arts, Officer Dan Yantes met with Commander Arts. At this meeting, Commander Arts informed Officer Yantes of the status of two grievances that involved Officer Yantes. Commander Arts told Officer Yantes that one grievance had been settled and that Officer Yantes would be receiving four hours of

pay. Commander Arts also told Officer Yantes that the second grievance had not been settled; that Commander Arts wanted to get going on this grievance; that Commander Arts had not heard back from the Association regarding the amount of time owed under the grievance; and that Officer Yantes needed to contact the Association and give them the hours so that the matter could be resolved. The second grievance was Grievance #2006-27. Following this conversation, Officer Yantes had a discussion with Association representatives. During this conversation, the Association representatives told Officer Yantes the number of hours that the Association was requesting. Commander Arts and Human Resources Manager Bastable sent an October 24, 2006 memo to Attorney Parins and Association President Resch that includes the following:

...

Re: 2006 Outstanding Grievances

The City is presenting various proposals for settlement of pending grievances in the spirit of seeking a voluntary resolution of the outstanding disputes between the City and the Association. The City presents a comprehensive proposal involving a number of grievances and requests that the Association withdraw the outstanding grievances that have not been processed to the Personnel Committee level as a showing of interest in working with the City to resolve these pending disputes. Please advise if the Association is willing to withdraw the grievances that are still being processed in recognition of the willingness of the City to resolve those grievances noted.

Following is the status of the grievances outstanding for 2006 as determined by correspondence between the parties:

...

With respect to grievance #2006-27, this memo stated; "To settle this grievance we will pay the officer 8.0 hrs of overtime." With respect to grievance 2006-30, this memo stated: "Officer Yantes will be paid 4.0 hrs OT. Please forward that OT card from our 8/03/06 meeting." A letter dated December 1, 2006 from Association President Resch to Chief Van Schyndle and Human Resources Manager Bastable includes the following:

...

As previously discussed during our grievance settlement talks of December 01, 2006 the Association hereby considers the grievance settled upon payment of 13.5 hrs hours of overtime to Specialist Dan Yantes. The Association is taking steps to obtain a signed overtime card for submittal. If this is not the case please notify Attorney Parins or myself.

...

This above referenced grievance is Grievance #2006-27.

11. On April 18, 2006, Arbitrator Emery issued an Award that includes the following:

AWARD

The City did not violate the Collective Bargaining Agreement when it denied Officer Tracy Liska the opportunity to work overtime at the Packers game on September 19, 2004. Nevertheless, it failed to personally notify Officer Liska of the cancellation more than 24 hours prior to the assignment, in contravention of Section 6.03(3) of the contract and Department policy. Therefore, the City shall pay Officer Liska three (3) hours' call-in pay at her then base rate of pay for the late cancellation of the overtime assignment.

On July 19, 2006, Arbitrator Shaw issued an Award that includes the following:

AWARD

The grievance is sustained and the City of Green Bay is directed to immediately pay Officer Mulrine the overtime pay he would have received under the parties' Agreement for the overtime hours he had been scheduled to work on December 7, December 8 and December 18, 2003, and stand-by pay at the rate provided in Section 6.07 of the parties' agreement for eight (8) hours per day for the following days December 9, December 10, December 11, December 12, December 17, December 18, December 19, and December 20, 2003.

Under Section 3.09 of the parties' 2005-2006 collective bargaining agreement, each of these Awards is final and binding upon the parties. These Awards were issued under the administration of former Police Chief Van Schyndle. When Chief Arts learned that the City had not paid the monies owed under Arbitrator Shaw and Emery's Awards, he met with the City's Attorney and the City decided to pay the monies owed under the Awards. On November 30, 2006, the City paid Officer Mulrine the remedy due under Arbitrator Shaw's Award, together with interest at twelve percent (12%) per annum. On November 30, 2006, the City paid Officer Liska the remedy due under Arbitrator Emery's Award, together with interest at twelve percent (12%) per annum.

12. At a negotiation session on October 13, 2005, the City and the Association agreed upon a Health Risk Assessment (HRA) process to be incorporated into the parties' 2005-2006 contract. The parties further agreed not to change this HRA process without collectively bargaining. The agreed upon HRA process includes one appointment in which the

employee receives a finger stick for a cholesterol panel and glucose. The City used this HRA process to determine Association bargaining unit members' 2006 and 2007 health insurance premium contributions. The City used a different HRA to determine Association bargaining unit members' 2008 health insurance premium contributions. Under this new HRA process, employees were required to have a blood draw from the arm to obtain a more extensive profile, rather than a finger stick for cholesterol and glucose. Additionally, employees were required to participate in a "2-step process" consisting of "one HRA screening appointment and a second appointment for a HRA Review," rather than one appointment. The Association did not agree to the HRA process used by the City to determine the 2008 health insurance premium contributions of its bargaining unit members. Sec. 17.03 of the 2005-2006 contract states:

Employees shall be entitled to reduce their health insurance premium contribution in the year 2006 and thereafter by two and one-half percent (2 ½%) per year by successfully completing the "Wellness Incentive Requirements for Physical Exam" as set forth on the "MD Alert & Sign-off Form" (Attachment A), and by successfully completing the "Wellness Incentive Requirements for PCP, ERA, and Physical/Health Activity" as set forth on the "Employee Sign-off Form" (Attachment B). All wellness incentives must be completed in the year prior to receive the two and one-half percent (2 ½%) reduction to the health insurance premium. This agreement incorporates the "MD Alert & Sign-Off Form" (Attachment A) and the "Employee Sign-off Form" (Attachment B) referenced herein.

At all times material hereto, the City has used an HRA process to determine Association bargaining unit employees' eligibility for the 2½% premium reduction provided for in Sec. 17.03. After completion of the HRA process used to determine Association bargaining unit employees' 2008 health insurance premium contributions, the Association and the City agreed upon an HRA process to be used to determine 2009 health insurance premium contributions.

13. The Association's May 10, 2007 total package offer accepted some, but not all, of the contract language changes sought by the City. The City did not accept this total package offer. On or about June 14, 2007, the City filed a Petition for Final and Binding Arbitration under Sec. 111.77, Stats. At a mediation session held in August of 2007, City representatives, including Police Chief Arts, concluded that the Association had withdrawn all of its proposals except for wages. In late October or early November 2007, Police Chief Arts decided that, as part of his 2008 Department budget proposal, he would propose the elimination of the two K-9 patrol positions. At all times material hereto, Officers Shannon Mulrine and Bill Resch occupied the two K-9 unit positions. The Department had one other K-9 position that was not a patrol position and which was referred to as the passive K-9 position. The passive K-9 officer was assigned to School Resource, which is under the Detective Division. The passive K-9 officer's primary duty was to enforce drug laws. The passive K-9 officer did not work the same schedule or hours as the K-9 patrol positions. Police Chief Arts introduced his 2008

Police Department budget proposal at the November 8, 2007 Finance/Personnel meeting. In this budget proposal, Police Chief Arts proposed the elimination of the two K-9 patrol positions. Police Chief Arts made this proposal because the City had not been successful in obtaining contract concessions that, in the Police Chief's view, were necessary to operate the Department in an efficient manner. During the 2008 budget process, the City Council voted to accept the Police Chief's proposal to eliminate the two K-9 patrol positions. In an email dated December 10, 2007, Commander Sterr notified Officers Resch and Mulrine that their positions would be eliminated, effective January 6, 2008. On or about this date, Attorney Parins received a similar notification. Commander Sterr also notified Officers Resch and Mulrine that, upon elimination of their K-9 patrol positions, they would be placed in regular patrol officer positions unless they posted into another position. Chief Arts made the decision to eliminate the two K-9 unit positions on January 6, 2008 because his 2008 budget did not provide for the two K-9 units positions and it was normal Department procedure to implement changes at the beginning of a pay period. As K-9 patrol officers, Officers Resch and Mulrine worked with their canine partner on a four days on/four days off (4/4) schedule of ten (10) hour days with normal work hours of 7 pm to 5 am. As a regular patrol officer, Officers Resch and Mulrine would work a five days on/three days off (5/3) schedule with an eight and one-half hour workday and normal work hours of 7 pm to 3:30 am. Additionally, they would lose benefits associated with their K-9 work, including the right to pick vacations independent of regular patrol officers. After the Police Chief introduced his budget proposal, the Association and the City exchanged proposals to change contract language affecting the K-9 patrol positions. The parties met on December 26, 2007 to negotiate K-9 patrol unit issues. In an email dated December 28, 2007, Attorney Dietrich advised Attorney Parins that he was working on a draft of an agreement between the City and the Association regarding the continuation of the K-9 patrol program. Attorney Dietrich made a proposal on the one issue that he viewed to be open, *i.e.*, pay for recertification, and stated:

...

In light of the agreements that we have reached thus far, the City will not proceed with the reassignment of the two Canine Patrol Officers to regular patrol duty. The officers will continue to serve as Canine Patrol Officers but will change to working a five on, three off work schedule effective January 6, 2008, in their current work assignment.

If you have any questions about this, please let me know.

...

On that same date, Attorney Parins responded by stating, *inter alia*, that he could not confirm that the proposal was acceptable and that he would forward the proposal to his clients. In an email dated January 2, 2008 and addressed to Attorney Parins, Attorney Dietrich attached a draft Memorandum of Agreement based on the December 26, 2007 discussions. In this email, Attorney Dietrich states that "The two officers are being scheduled to work a 5/3 work

schedule as of January 6, 2008.” In his responsive email of that same date, Attorney Parins states that he is forwarding the proposal to his client and further states:

...

Your email references the January 6, 2008 deadline for the union to act. The GBPPA is well aware that the city (or Chief Arts) has stated that it will eliminate the K9 positions of Officer Resch and Officer Mulrine on January 6, 2008 unless the GBPPA complies with the city’s demands. That is the only reason why the GBPPA governing board has agreed to take this item out of contract negotiations now in arbitration and give the city what it wants.

. . . there is a real logistics issue with the January 6 date. I am not sure whether the board will be able to meet to approve your proposal by that date and know for certain that the general membership will not be able to meet by then. The city knows that contract language changes must be ratified by the membership. The board can only reach TAs.

In short, is there any way that the city would extend its deadline to allow for this process to occur?

In an email of Friday, January 4, 2008 at 8:50 am, Attorney Parins advises Attorney Dietrich that his client has instructed him to reject the City’s last offer on recertification pay. In an email dated January 4, 2008 at 9:38 am, Attorney Dietrich advises Attorney Parins:

...

I received your email on Thursday regarding the change in work schedule for the Canine Patrol Officers from a four on, four off schedule to a five on, three off schedule.

The City will be implementing the five on, three off schedule as of January 6, 2008. As I indicated in the previous email correspondence, I believe that your recent letter accurately summarizes the status of discussions between the City and the Police Association regarding this Program. The City would like to change the hours of work for the Canine Patrol Officer as soon as possible and believes we have an agreement that would allow us to go forward with that change in work schedule as of January 6, 2008.

Attached please find contract language for your review. If you have any questions please let me know.

...

In an email dated January 4, 2008 at 10:18 am, Attorney Parins advises Attorney Dietrich:

...

I am forwarding your language to my client for their review and feedback.

I again reiterate that there can be no agreement by the GBPPA regarding changes in contract language without first a meeting of the governing board and later ratification by the general membership. The governing board may tentatively agree, but that is the extent of its authority.

...

In an email dated January 4, 2008 at 1:32 pm, Attorney Dietrich advises Attorney Parins:

...

This email will confirm our telephone conversation at noon today. The issue of future Canine Patrol Officers being compensated at the straight time rate for recertification training is an important component of any agreement between the City and the Association. If we are unable to resolve this issue along the lines suggested by the City, we will not have an agreement between the parties.

Please be advised that the City intends to proceed with the elimination of the Canine Patrol Officer program as of January 6 absent a tentative agreement between the City and the Association. It will be necessary to schedule another meeting to discuss the impact of the elimination of this program. Please advise of dates you have available for such a meeting.

...

In an email dated January 4, 2008 at 4:35 pm, Attorney Parins advises Attorney Dietrich:

...

The GBPPA will not make the additional concession that future K9 officers perform recertification duties on their off time for compensation at straight time. The contract now calls for compensation at the overtime rate, and the agreement with Commanders Molitor and Sterr was that this would continue.

We have demanded that the city not implement the decision to eliminate the K9 Unit job positions of Officers Resch and Mulrine until the decision is collectively bargained. As previously stated in an earlier email, this subject is on the table as a city proposal in bargaining and bargaining in general for a

successor labor agreement to the 2004-06 agreement is at the interest arbitration step.

If the City nonetheless implements its decision to eliminate these K9 job positions, the GBPPA demands that the city not implement the elimination until after it has bargained the impact on the two officers involved, and also on the working conditions, including officer safety issues, or other officers. We provided you with a listing of these working condition items at our negotiation session of December 26, 2008.

...

Officer Resch, who had posted into another position, completed his regular K-9 patrol shift early in the morning of January 5, 2008 and cleaned out his car because he thought that his position had been eliminated. An email dated Saturday, January 5, 2008 at 1:24 pm, from Attorney Dietrich to Attorney Parins includes the following:

...

. . . If we would receive assurances that no other issues (such as the hours of work for the non-patrol canine officer) would arise whatsoever, the Chief and I would be willing to agree to the time and one-half pay for recertification training on off days for the canine patrol officer position and direct the officer working on sunday to report with the canine Unfortunately, we are not able to get these assurances at the this time (sic) and will have to make the decision as we see best It remains our position that the decision on the elimination of the canine patrol officer program is not a bargainable issue. The City will negotiate over the impact of that decision if necessary and will schedule a date for those discussions in the near future. I will contact your office on Monday about this.

...

On January 5, 2008, the Association board voted on the City's proposal and instructed Attorney Parins to contact the City and advise the City that the Association would accept the City's proposal under protest. The Department instructed Officer Mulrine to report to work on Sunday January 6, 2008 with his canine, on the 5/3 schedule and with regular work hours of 7 pm to 3:30 am. In an email dated January 7, 2008 at 10:48 pm, Attorney Parins responded to Attorney Dietrich's email of January 5, 2008 as follows:

...

It is difficult attempting to carry on collective bargaining by email and individual one on one discussions.

As to getting in touch with me over the weekend, I am not sure what could have been accomplished. I do not have carte blanche to commit for the GBPPA and the board cannot meet at a moments notice. You and Chief Arts may have authority to make immediate decisions; I do not.

It is positive that the city is willing to agree that the overtime rate for recertification will not be eliminated for future K9 officers.

Contract language issues remain. Hopefully these can be worked through (for example, you surprised me when you said on Friday that current K9 officers were not entitled to the overtime rate for recertification under the current contract language).

I am not sure what you are referring to regarding the position that you call the "non-canine" position. Is the city making changes in Officer Swanson's hours?

...

On January 7, 2008, Attorney Dietrich faxed proposed settlement language to Attorney Parins with the following remarks: "Please see attached. If we can get confirmation of the TA by 5:00 today, we have an agreement to move forward while you and I work out contract language. Please call ASAP to discuss" and "City will accept this as tentative agreement subject to ratification by GBPPA. City will operate with 5/3 schedule and continue with canine program pending ratification. Ratification must take place as soon as possible. City needs confirmation of the TA by 5:00 pm today. See attached language changes to discuss." An email dated January 10, 2008 at 5:32 am, from Attorney Dietrich to Attorney Parins, states:

...

Subject: Re: K9 Contract Language

Tom I am not available to call you this am so I am writing this email to you early in the am. I approve of the language changes that have been identified in the draft language from you as well as the draft language. I believe we now have a TA that will be implemented and followed by the City in regard to the canine patrol officer program. I am advising Chief Arts of this communication by ccing him and he can advise the media of the agreement to go forward with the canine patrol officer program under these new conditions

...

In an email dated January 10, 2008 at 12:03 pm, Attorney Parins advises Attorney Dietrich:

...

Thank you for your response. I am sending a letter with the contract language agreed upon and the emails that resulted in the TA so that everything making up the TA is in one letter with attachments. As you know, I am very uncomfortable conducting collective bargaining remotely by email, document exchanges and the like, without meeting face to face at the bargaining table. As to implementation, the city did that even before the TA was reached. Given that you have advised by email that the city intended to implement one way or the other, it would be rather useless to remind the city that it cannot implement terms of an agreement which still is only tentative in nature.

...

In an email dated January 10, 2008 at 5:52 pm, Attorney Parins advises Attorney Dietrich:

...

I have not been able to talk to you since emailing you our proposed contract language. At the same time, someone from the PD dropped off a copy of our proposed language with some minor corrections and which purported to have Chief Arts signature and the notation "OK" I assume from that that the Chief has signed off in approval of our proposed language.

Of course, I am mindful that you are the bargaining representative and that the language needs your approval to become a TA.

In any event, the governing board has given its approval of the same contract language that Chief Arts signed.

If you approve I believe that we have a TA on this issue.

I want to reiterate that the GBPPA is entering into this agreement under protest. It has taken, and continues to take the position that the K9 matter was on the bargaining table and on its way to interest arbitration. The GBPPA is agreeing to the TA on this issue only because the city will otherwise take away the K9 jobs of Officer Resch and Officer Mulrine, and otherwise deprive the officers on the road of the K9 resource.

...

In a letter dated January 10, 2008, Attorney Parins advises Attorney Dietrich as follows:

...

This letter is first to acknowledge receipt of your e-mail of this morning confirming that the Green Bay Professional Police Association and the City of Green Bay have reached a TA regarding changes to Section 7.03 of the Collective Bargaining Agreement. A copy of your email is enclosed for reference.

The TA is based upon new contract language which was approved by Chief Arts on January 9, 2008. Enclosed is a copy of the document which bears the "ok" of Chief Arts. Also enclosed is a "clean" copy of that language which incorporates the written changes that had been made by Chief Arts.

The GBPPA entered into this TA based upon my e-mail to you sent late in the day on January 9, 2008. A copy of that e-mail is also enclosed so as to complete the documentation regarding this TA.

By entering into this TA the governing board of the GBPPA will effectively recommend its adoption by the membership. We trust that you and Chief Arts will do the same regarding the Green Bay City Council.

In your e-mail of January 10, 2008, you indicate that the City will be implementing the changes set forth in the new contract language based upon reaching a TA.

In fact, the City of Green Bay implemented these changes last weekend. By e-mail of myself to you the GBPPA objected to that implementation. In that e-mail I stated that this objection would be formally made in writing. Please accept this letter as the formal objection.

...

The City did not eliminate the K-9 patrol program on January 6, 2008 as announced in Commander Sterr's memo of December 10, 2007. On January 6, 2008, the City continued the K-9 patrol program, but changed the work hours and work schedules of the K-9 patrol officers to a 5/3 schedule with regular work hours of 7 pm to 3:30 am. At the time of this change, the City and the Association had not finalized the settlement agreement that would provide the City with the right to make this change. The settlement agreement that provided the City with the right to make this change in the K-9 patrol officers' work hours and work schedules was finalized on January 10, 2008.

14. The Green Bay Area Public School (District) contracts with the City to provide police services to the District's schools. Members of the City Police Department, known as School Resource Officers (SROs), provide these services. District payments to the City

reimburse the City for SRO wages. Article 4 of the parties' expired 2005-2006 labor contract includes:

...

4.01 NON-SHIFT EMPLOYEES. The work schedule for non-shift employees shall be equalized with that of the shift employees subject to approval of the supervisor. Approval shall not be unreasonably withheld. The workday for non-shift employees shall be a maximum of eight and one-half hours.

4.02 SHIFT EMPLOYEES: The work week for shift employees shall consist of five (5) duty days with three (3) days off in a repeating cycle. The work week for non-shift employees shall be five (5) duty days during the normal work week with weekends off, as modified by the schedule set forth in the departmental reorganization of October, 1986 and shall be administered as to each employee as it now is.

...

4.04 FLEX TIME. Officers will not be allowed to flex their hours in a workday except as explicitly provided for in the labor contract or specifically agreed to in writing between the City and the Association from time to time.

...

Officers who work an administrative scheduled (5-2,4-3) may work on their flex day with supervisory approval during their last five years of work before their declared retirement date.

...

A letter from Attorney Dietrich to Attorney Parins includes the following:

DATE: August 29, 2008

RE: Discontinuance of Past Practice Regarding Hours of Work of School Resource Officer in Green Bay Police Department

Mr. Parins:

This Memorandum is to advise you that the City is discontinuing past practices involving the hours of work for the School Resource Officer position in the Green Bay Police Department. There is no contract language in the Labor Agreement that specifically addresses the hours of work for this position.

The City is therefore proceeding with elimination of certain practices regarding the hours of work for this position. Specifically, the City is notifying the Police Association of the following action:

- School Resource Officers will be expected to work a 5-2, 4-3 administrative schedule. Employees will be allowed to take vacation time off in accordance with the provisions of the Labor Agreement. Employees will not be allowed to accumulate time off for working the fifth day in the 4-3 work week and will expect officers to take off all three days of that 4-3 work week. Employees will continue to earn compensatory time for overtime hours worked in accordance with reasonable expectations of the Green Bay School District and the Department.
- Employees have previously been allowed to take nine work days off with pay and not report to work based upon curriculum development work and school paper work that was to be performed by these officers. Since these officers are no longer required to do curriculum development work or school paper work, this additional time off is no longer necessary or appropriate and is being discontinued. School Resource Officers will be expected to perform work as appropriate instead of taking time off without loss of pay.

The City and the Association have met to bargain over the impact of the discontinuance of these practices. The parties have been unable to resolve differences regarding any potential impact on the elimination of these days off with pay. Each School Resource Officer will be advised of expectations regarding their work hours by the Police Department Administration.

If you have questions or wish to discuss this further, please feel free to contact me directly.

The City implemented the changes referenced in the above letter at the beginning of the 2008-2009 school year and during a contract hiatus period. Immediately prior to this implementation, SROs worked Monday through Friday during the school year. By virtue of this work schedule, SROs were “non-shift” employees. Immediately prior to the implementation of the 5/2, 4/3 work schedule, SROs were credited with nine “paper days” at the beginning of each school year and, during the school year, accrued eighteen flex days. The nine paper days were used to take paid time off during the school year; subject to the proviso that paper days not be used on days that school is in session. The eighteen flex days were used to take paid time off during the following summer. Given the seniority of most SROs and a limited ability to take time off while school was in session, it was common for SROs to use their earned time off in a manner that provided the SROs with a summer of paid

time off. Under the 5/2, 4/3 work schedule implemented at the beginning of the 2008-2009 school year, SROs had a flex day off on one Friday during each pay period. On October 28, 2008, the parties signed the following Memorandum of Agreement:

MEMORANDUM OF AGREEMENT

IT IS HEREBY AGREED by and between the City of Green Bay (“City”), and the Green Bay Professional Police Association (“Association”) that the following shall constitute the agreement between the parties regarding the work schedule of the School Resource Officers in the Green Bay Police Department:

1. The School Resource Officers will work a 5/2 work schedule during the time school is in session. The hours of work of this position will be 7:00 a.m. to 3:30 p.m.
2. Each School Resource Officer will accumulate one (1) work day every other week while school is in session and “bank” that day for off time during the summer months. Accumulated “banked” days cannot be carried over to the next school year.**
3. By agreeing to the above, neither the City or the Association compromise their respective position regarding the School Resource Officer’s wages and work schedule in relation to the collective bargaining agreement and the current litigation (Change in SRO Hours Prohibited Practice filed September 5, 2008).

Dated this day of __ October, 2008.

...

**The position of the GBPPA is that there is no every other Friday to “bank” because SROs never had off every other Friday, and that the work year should be rather equalized under Sections 4.01 and 4.02 as it has been up until the 2009-09 school year. As set forth in the attached letter dated October 9, 2008.

At the bottom of this memorandum, Chief Arts wrote “Changed by Union 10/28/08.” Attached to this memorandum was a copy of a letter dated October 9, 2008 that, in relevant part, states:

...

RE: GBPPA - SRO Work Schedule

Dear Chief Arts:

This is in reference to the discussions and communications we have had regarding the school year work week of the SROs.

The department has ordered SROs to take off every other Friday during the school year as if they were working a 5/3-4/3 work week. The department has also instructed SROs that they will not be given the historical 9 off-days during the school year when students are not in session. The GBPPA has filed prohibited practice charges over both of these changes with the WERC, and has also demanded that the department pay overtime to SROs for all hours worked in excess of the historical work schedule of SROs.

The SROs feel that they should be working these Friday off-days during the school year, and apparently the Green Bay Area School District feels the same way. You indicated that the department also would like the SROs to work these days. You suggested that the City and the GBPPA enter into an agreement to allow the SROs to work these Fridays and take compensatory time during the school summer vacation, and that this agreement not affect or compromise the legal or bargaining position of either the City or the GBPPA in the collective bargaining process or the complaint proceedings before the WERC.

You specifically suggested that we agree that SROs work a 5/2 Monday through Friday work week during the school year. The GBPPA will agree with this.

You specifically suggested that SROs would accumulate one (1) work day every other week during the school year and take these as off-days during the summer school vacation period. The GBPPA will conditionally agree to this, with the condition being that the GBPPA is not agreeing that these off-days adequately compensates SROs for working the 5/2 Monday through Friday work schedule, but is only agreeing that these compensatory off days will go toward compensating the SROs for working the Monday through Friday work schedule.

Please accept this letter as the proposal of the GBPPA for the agreements set forth above, including the proviso that nothing in these agreements will affect or compromise the bargaining or legal positions of either the City or the GBPPA in the collective bargaining process or the complaint proceedings before the WERC. If this proposal is acceptable please advise in writing.

You had also suggested that the Green Bay Area School District be a party to this agreement. The GBPPA does not believe that to be appropriate given that it is not the municipal employer of the SROs.

Thank you for your consideration of this proposal.

...

Because of the above agreements, the SROs returned to the Monday through Friday school year work schedule that existed immediately prior to the implementation of the 5/3, 5/4 administrative schedule. The October 28, 2008 "MEMORANDUM OF AGREEMENT," hereafter MOU, did not restore the nine paper days to the SROs. This MOU allowed SROs to accrue flex days for use in the summer; albeit not in the same manner as had existed prior to the City's implementation of the 5/3,5/4 administrative work schedule.

15. The parties' expired 2005-2006 collective bargaining agreement includes the following contract provisions:

...

7.06 APPOINTMENT TO THE COMMUNITY POLICING UNIT.

...

- (3) Shift Schedule Deviations. CPU Officers may voluntarily deviate from the afternoon shift schedule to accommodate the neighborhood/community needs as long as hours consistent with 5/3 schedule are maintained.

...

31.01 ACTIVITY. The Bargaining Unit agrees to conduct its business off the job as much as possible. This article shall not operate as to prevent a Bargaining Unit representative from the proper conduct of any grievance in accordance with the procedures outlined in this agreement, and shall not work to prevent certain routine business, such as the posting of Bargaining Unit notices and bulletins and like duties. The City agrees to make the necessary space available for the posting of Bargaining Unit notices and bulletins. Business agents or representatives of the Bargaining Unit, having business with the officers or individual members of the Bargaining Unit during the course of the working day for a reasonable time, provided that permission is first obtained from the commanding officer, or superior officer of that Bargaining Unit. (sic)

The President may conduct such activities at reasonable times in a manner which will not interfere with the performance of assigned duties; no inquiry may be made as to the nature of the business being conducted, provided that the President advises the shift commander, who shall not unreasonably deny such permission and if such permission is denied, shall give reason therefore at the

time of denial. The President shall further advise the shift commander that Union business as described in Article 31 is being conducted, the approximate time it will take, and how he/she may be contacted in an emergency. If President goes off road via this procedure, it shall not be considered a violation of minimum staffing.

...

In a letter dated May 8, 2008, the City's Human Resources Department informed Officer Kingston that an internal affairs investigation had provided the City with information that substantiated five allegations. At the time of this letter, Officer Kingston was a Community Police Officer (CPO or CP). Under the subheading "Allegation #5: - Rules of Conduct: Sec. I - Ch.II.B (Theft by Fraud) - VERIFIED," the City included the following paragraph:

...

October 10 and 11 were your regular scheduled days off. On both days you attended a grievance arbitration hearing at city hall, not a negotiation session. You claim that you changed your schedule and made October 10 and 11 your workday. The 2005-2006 GBPPA contract language, 7.06, clearly states that CPO's "may voluntarily deviate from the afternoon shift schedule to accommodate the neighborhood/community needs . . . " The hearings were not a neighborhood/community need.

...

The referenced October 10 and 11 were 2007 dates. At all times material hereto, Officer Kingston was an Association representative. October 10 and 11 were Officer Kingston's regularly scheduled off-days. Officer Kingston flexed his work schedule in order to make October 10 and 11, 2007 workdays and to attend the grievance arbitration hearing that previously had been scheduled for October 10 and 11, 2007. Officer Kingston's primary activity on October 10 and 11, 2007 was attending the grievance arbitration hearing. On July 21, 2008, Chief Arts filed a Statement of Charges against Officer Kingston recommending a disciplinary suspension. The stated conduct serving as a basis for this recommendation included the following:

...

9. Community police officers are permitted by contract to flex their hours, either by working hours outside their core hours (2:15 p.m. to 10:45 p.m.) on a 5-3 schedule in lieu of their core hours or by accumulating CPTe for hours worked on a normal off day to offset time to be taken off from a regularly scheduled work day. Kingston adjusted his shift hours from 2:15 p.m. to 10:45 p.m. to various daytime hours to attend union meetings. In addition, Kingston would accumulate CPTe for union activities on days that would have been normal off days.

...

After these charges were filed, the parties entered into a settlement of these charges. In 2008, Detective Scott Peters was an Association representative who represented Detectives. On one day in August 2008, the Association held two separate sessions of its general membership meeting. The purpose of holding two separate sessions is to provide all of the Association's collective bargaining unit members with an opportunity to attend the membership meeting. The first session of this membership meeting was held during Detective Peters' regular work shift. Detective Peters asked Commander Molitor for permission to attend this first session on work time. Commander Molitor told Detective Peters that he could attend this session during his one-half hour lunch break, but that Detective Peters would need to return to work once his half-hour lunch break was over. Concluding that he had been given a work directive, Detective Peters attended the first session of the membership meeting on his one-half hour lunch break and then returned to work. Detective Peters' one-half hour lunch break was insufficient to permit Detective Peters to attend the entire first session of the membership meeting. Commander Molitor's reason for denying Detective Peters' request to attend the first session on work time was that Detective Peters needed to attend to his workload. If Detective Peters had been permitted to attend the entire first session on work time, his absence from work would not have had a significant impact upon his ability to attend to his workload. At the time that the parties entered into their 2005-2006 collective bargaining agreement, City representatives permitted Association representatives, such as Detective Peters, to attend sessions of the Association's general membership meeting on work time when it was possible to grant such permission.

16. Detectives who work a 5-2,4-3 administrative schedule are "non-shift" employees. At the time that the parties entered into their 2005-2006 collective bargaining agreement, Detectives on this administrative schedule had one regularly scheduled flex day off in each pay period. At that time, Department supervisors had the right to assign the regular flex day off based upon the manpower needs of the Department. Detectives generally, but not always, had a Friday as a regular flex day off. Historically, the goal of the supervisor was to have one-half of the staff off on one Friday within the pay period and the remaining staff off on the other Friday. At the time that the parties entered into their 2005-2006 collective bargaining agreement, Department supervisors had discretion to approve Detective requests to change a flex day off within a pay period, but Department supervisors did not deny such requests without good cause. In 2008, Commander Molitor, as supervisor of Detectives, promulgated a policy in which Detectives could not have a regular flex day off other than a Friday. In 2008, Commander Molitor also promulgated a policy in which Detectives could not change his/her regular flex day off within a pay period, unless the Detective provided the Department with a signed statement of intent to retire within five years. On or about November 2008, Commander Molitor was promoted to Assistant Chief.

17. In his role as Association President, Officer Resch has engaged in protected, concerted activity and, at all times material hereto, representatives of the City, including Commander Brodhagen, Police Chief Van Schyndle, Police Chief Arts, Commander Sterr,

Assistant Chief Molitor and Lieutenant Bongle have been aware of Officer Resch's exercise of protected, concerted activity.

18. Commander Brodhagen did not have a *bona fide* reason for his refusal to return Officer Resch to his club seat assignment on December 25, 2005. Commander Brodhagen's refusal to return Officer Resch to his Club Seat assignment on December 25, 2005 was motivated, at least in part, by hostility toward Officer Resch's exercise of protected, concerted activity. Daily duty rosters include information that is relevant and reasonably necessary to the Association's contract negotiations with the employer or the administration of an existing agreement. By requiring the Association to request duty rosters through the normal open records procedure, Police Chief Van Schyndle imposed a procedure upon the Association that was so burdensome and time consuming as to impede the collective bargaining process. Police Chief Van Schyndle's decision to require the Association to request duty rosters through the normal open records procedure was motivated, at least in part, by Chief Van Schyndle's hostility toward a municipal employee's exercise of protected, concerted activity. Lieutenant Bongle has non-pretextual valid business reasons for his decision to design and implement a new Packer game day assignment process, effective with the 2006 Packer season, and a non-retaliatory explanation of why the implementation of this process did not provide Officer Resch with his preferred Club Seats assignment.

19. Respondent City did not immediately pay Officer Mulrine the monies owed under the arbitration Award issued by Arbitrator Shaw. Respondent City did not pay Officer Liska the monies owed under the arbitration Award issued by Arbitrator Emery within a reasonable time period. By this conduct, Respondent City has failed to accept the terms of the Awards issued by Arbitrator's Shaw and Emery.

20. The City uses the HRA process to determine Association bargaining unit members' contractual health insurance premium contributions and, thus, this HRA process is primarily related to wages, hours and conditions of employment of municipal employees. Under the relevant language from the parties' expired 2005-2006 contract as historically applied and clarified by bargaining history, if any, the *status quo* on this HRA process includes a "finger stick" for cholesterol and glucose and one appointment. During a contract hiatus period and without the agreement of the Association, the City changed this *status quo* when it determined Association bargaining unit members' 2008 health insurance premium contributions by using an HRA process that included a blood draw from the arm to obtain a more extensive profile and a "2-Step process" of one HRA screening appointment and a second appointment for an "HRA Review."

21. Police Chief Arts, who effectively recommended to the City that the two K-9 positions be eliminated, has non-pretextual valid business reasons for his decisions to propose a 2008 Police Department budget that eliminates the two K-9 patrol positions and to implement the City's budget decision effective January 6, 2008. The work hours and work schedules of K-9 patrol officers are primarily related to wages, hours and conditions of employment of municipal employees. Under the language of the parties' expired 2005-2006 collective

bargaining agreement, as historically applied and clarified by bargaining history, if any, the *status quo* on the K-9 patrol officers' work schedule is that these officers work a 4/4 schedule of ten (10) hour days with normal work hours of 7 pm to 5 am. On January 6, 2008, during a contract hiatus period and without the agreement of the Association, the City changed the *status quo* on the work hours and work schedules of K-9 patrol officers by assigning these officers to work a 5/3 schedule of eight and one-half hours days.

22. The SROs' school year work schedule, including their accrual of eighteen flex days to be used as time off during the summer and their receipt of nine paper days to be used as time off during the school year, are primarily related to wages, hours and conditions of employment of municipal employees. Under the language of the parties' expired 2005-2006 collective bargaining agreement, as historically applied and clarified by bargaining history, if any, the *status quo* on the SROs' school year work schedule includes:

- 1) the Monday through Friday school year work schedule that existed immediately prior to the City's implementation of the 5/2, 4/3 administrative school year work schedule;
- 2) the accrual of eighteen flex days during the school year for use as paid time off during the following summer; and
- 3) the crediting of nine "paper days" at the start of the school year for use as paid time off during the school year, subject to the proviso that paper days not be used on days that school is in session.

During a contract hiatus period and without the agreement of the Association, the City changed this *status quo* by implementing a 5/2, 4/3 administrative work schedule during the school year that required SROs to take one day during the pay period as a flex day off; did not allow SROs to accrue eighteen flex days during the school year for use as paid time off during the following summer; and failed to credit SROs with nine paper days at the beginning of the school year for use as paid time off during the school year.

23. The use of work time to attend to Association business is primarily related to wages, hours and conditions of employment of municipal employees. Under the language of the expired 2005-2006 collective bargaining agreement, as historically applied and clarified by bargaining history, if any, the *status quo* on the use of work time to attend to Association business was that the City would grant Association governing board members, such as the Detective representative, permission to use work time to attend sessions of the Association's general membership meeting held during the representative's work time, when it was possible to grant this permission. Commander Molitor denied Association Detective representative Scott Peters permission to use work time to attend a session of the Association's general membership meeting held during Detective Peters work time when it was possible to grant this permission. Commander Molitor has non-pretextual valid business reasons for his decision to deny Detective Scott Peters' request to use work time to attend the first session of the

Association's general membership meeting. Under the language of the expired 2005-2006 collective bargaining agreement, as historically applied and clarified by bargaining history, if any, the *status quo* on the use of work time to attend to Association business did not include a right for Officer Kingston to flex his off day to a work day for the purpose of attending an arbitration hearing. Chief Arts has non-pretextual valid business reasons for his decision to charge Officer Kingston with misconduct for flexing his off day to a work day for the purpose of attending to Association business by attending an arbitration hearing.

24. Detective work schedules, including the selection and changing of flex days off within a pay period, are primarily related to wages, hours and conditions of employment of municipal employees. Under the relevant language from the expired 2005-2006 agreement, as historically applied and clarified by bargaining history, if any, the *status quo* on the selection of a Detective's regular flex day off is that Department supervisors assign a regular flex day off based upon the manpower needs of the Department. Commander Molitor did not change the *status quo* on selecting Detectives' regular flex days off when he promulgated a policy in which Detectives could not have a regular flex day off other than a Friday. Under the relevant language from the expired 2005-2006 agreement, as historically applied and clarified by bargaining history, if any, the *status quo* on changing a Detective's flex day off within a pay period is that Department supervisors have discretion to approve Detective requests for such a change, but that they do not deny such requests without good cause. Commander Molitor did not have good cause to deny Detective requests to change flex days off within a pay period unless the Detective provided written notice of intent to retire within five years. In 2008, during a contract hiatus period and without the agreement of the Association, Commander Molitor changed the *status quo* when he promulgated a policy in which a Detective could not change his/her flex day off within a pay period, unless the Detective provided the Department with a signed statement of intent to retire within five years.

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

CONCLUSIONS OF LAW

1. Complainant Green Bay Professional Police Association is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and represents certain law enforcement employees of the City of Green Bay Police Department for purposes of collective bargaining.

2. Respondent City of Green Bay is a municipal employer within the meaning of Sec. 111.70(1)(i), Stats. At all times material hereto, former Police Chief Craig Van Schyndle and current Police Chief James Arts have acted on behalf of Respondent City of Green Bay.

3. With respect to Count One of Complainant's complaint, as amended, Examiner Sharon Gallagher dismissed Complainant's allegation that Respondents have violated Sec. 111.70(3)(a)4 and 5, Stats. Complainant's Count One allegation that Respondents have violated Sec. 111.70(3)(a)3, Stats., and, derivatively violated Sec. 111.70(3)(a)1, Stats., is not moot. The clear and satisfactory preponderance of the record evidence establishes that

Commander Brodhagen's decision to not allow Officer Resch to return to his December 25, 2005 Packer game day duty of Club Seats was an adverse action motivated, at least in part, by Commander Brodhagen's hostility toward municipal employee's protected, concerted activity. Therefore, Respondent City, by this conduct of its representative Commander Brodhagen, has violated Sec. 111.70(3)(a)3, Stats., and, derivatively violated Sec. 111.70(3)(a)1, Stats.

4. With respect to Count Two of Complainant's complaint, as amended, Complainant has abandoned its claim that Respondents have violated Sec. 111.70(3)(a)5, Stats. The clear and satisfactory preponderance of the record evidence establishes that Police Chief Van Schyndle's January 2006 decision to require the Association to access daily rosters through the normal open records procedures was an adverse action motivated, at least in part, by Chief Van Schyndle's hostility toward municipal employee's protected, concerted activity. The clear and satisfactory preponderance of the record evidence establishes that, by requiring the Association to access these rosters through the normal open record procedures, Chief Van Schyndle imposed a burden upon the Association that impedes the collective bargaining process. Therefore, Respondent City, by this conduct of its representative Chief Van Schyndle, has violated Sec. 111.70(3)(a) 3 and 4, Stats., and derivatively violated Sec. 111.70(3)(a)1, Stats.

5. With respect to Count Three of Complainant's complaint, as amended, Complainant has abandoned its claims that Respondents have violated Sec. 111.70(3)(a)2, 4 and 5, Stats. The clear and satisfactory preponderance of the record evidence does not establish that, in cancelling the April 20, 2006 posting, Police Chief Van Schyndle interfered with, restrained or coerced a municipal employee in the exercise of the employee's Sec. 111.70(2), Stats., rights. The clear and satisfactory preponderance of the record evidence does not establish that, in cancelling the April 20, 2006 posting, Police Chief Van Schyndle took adverse action against a municipal employee that was motivated, at least in part, by hostility toward the municipal employee's protected, concerted activity. Respondents have not violated Sec. 111.70(3)(a)1 and 3, Stats., as alleged in Count Three of the complaint, as amended.

6. With respect to Count Four of Complainant's complaint, as amended, Examiner Sharon Gallagher dismissed Complainant's allegation that Respondents have violated Sec. 111.70(3)(a)4 and 5, Stats. Complainant has abandoned its allegation that Respondents have violated Sec. 111.70(3)(a)2, Stats., or committed an independent violation of Sec. 111.70(3)(a)1, Stats.

7. With respect to Count Five of Complainant's complaint, as amended, Complainant has abandoned its allegation that Respondents have violated Sec. 111.70(3)(a)5, Stats. Respondents do not have a MERA duty to provide the Association with any notification of Commander Arts' meeting with Officer Danelski or Lt. LePine's meetings with Officer Mulrine. Respondents do not have a MERA duty to provide the Association with an opportunity to be present during Commander Arts meeting with Officer Danelski or Lt. LePine's initial meeting with Officer Mulrine. The clear and satisfactory preponderance of the record evidence does not establish that, during his meeting with Officer Danelski, Commander Arts engaged in individual bargaining. The clear and satisfactory preponderance of the record evidence does not establish

that, during his meetings with Officer Mulrine, Lt. LePine engaged in individual bargaining. The clear and satisfactory preponderance of the record evidence does not establish that Commander Arts' conduct in meeting with Officer Danelski or directing Lt. LePine to question Officer Mulrine has interfered with, restrained or coerced a municipal employee in the exercise of the employee's Sec. 111.70(2), Stats., rights. The clear and satisfactory preponderance of the record evidence does not establish that Lt. LePine's conduct in questioning Officer Mulrine has interfered with, restrained or coerced a municipal employee in the exercise of the employee's Sec. 111.70(2), Stats., rights. Respondents have not violated Sec. 111.70(3)(a)1 and 4, Stats., as alleged in Count Five of the complaint, as amended.

8. With respect to Count Six of Complainant's complaint, as amended, Complainant has abandoned its claim that Respondents have violated Sec. 111.70(3)(a)2 and 5, Stats., or committed an independent violation of Sec. 111.70(3)(a)1, Stats. Respondents do not have a MERA duty to provide the Association with notice of Commander Sterr's discussion with Officer Ramos or to provide Complainant with an opportunity to be present during this discussion. When Officer Ramos contacted Commander Sterr, Respondents did not have a MERA obligation to refer Officer Ramos to Complainant. The record does not establish, by a clear and satisfactory preponderance of the record evidence, that Commander Sterr or Lt. Balza engaged in individual bargaining when they discussed the FTO training opportunity with Officer Ramos and/or Officer Wicklund. Respondents have not violated Sec. 111.70(3)(a) 4, Stats., and derivatively violated Sec. 111.70(3)(a)1, Stats., as alleged in Count Six of the complaint, as amended.

9. With respect to Count Seven of Complainant's complaint, as amended, the record does not establish, by a clear and satisfactory preponderance of the record evidence, that, in giving Officer Thomas permission to flex her workday on July 31, 2006 to assist with the Cops and Kids Camp event, Respondent City's supervisor engaged in individual bargaining. Respondents have not violated Sec. 111.70(3)(a)4, Stats., and derivatively violated Sec. 111.70(3)(a)1, Stats., as alleged in Count Seven of the complaint, as amended.

10. With respect to Count Eight of Complainant's complaint, as amended, Complainant has abandoned its claim that Respondents have violated Sec. 111.70(3)(a)2 and 3, Stats., and committed an independent violation of Sec. 111.70(3)(a)1, Stats. The record does not establish, by a clear and satisfactory preponderance of the record evidence, that, during his conversation with Officer Yantes, Commander Arts engaged in individual bargaining and/or made disparaging remarks that denigrated the Association's status as Officer Yantes' collective bargaining representative. Respondents do not have a MERA duty to provide the Association with prior notice of Commander Arts' discussion with Officer Yantes. MERA does not require that an Association representative be present during Commander Arts' discussion with Officer Yantes. Respondents have not violated Sec. 111.70(3)(a)4, Stats., and derivatively violated Sec. 111.70(3)(a)1, Stats., as alleged in Count Eight of the complaint, as amended.

11. With respect to Count Nine of Complainant's complaint, as amended, Complainant's claim that Respondents have violated Sec. 111.70(3)(a)5, Stats., and derivatively violated Sec. 111.70(3)(a)1, Stats., by failing to implement a grievance arbitration award is not

moot. The clear and satisfactory preponderance of the record evidence establishes that Respondent City failed to accept the terms of the Award issued by Arbitrator Shaw, where previously the parties had agreed to accept the terms of this Award as final and binding upon them. Respondent City does not have a valid defense to its failure to accept the terms of this Award. Therefore, Respondent City has violated Sec. 111.70(3)(a)5, Stats., and derivatively violated Sec. 111.70(3)(a)1, Stats.

12. With respect to Count Ten of Complainant's complaint, as amended, Complainant's claim that Respondents have violated Sec. 111.70(3)(a)5, Stats., and derivatively violated Sec. 111.70(3)(a)1, Stats., by failing to implement a grievance arbitration award is not moot. The clear and satisfactory preponderance of the record evidence establishes that Respondent City failed to accept the terms of the Award issued by Arbitrator Emery, where previously the parties had agreed to accept the terms of this Award as final and binding upon them. Respondent City does not have a valid defense to its failure to accept the terms of this Award. Therefore, Respondent City has violated Sec. 111.70(3)(a)5, Stats., and derivatively violated Sec. 111.70(3)(a)1, Stats.

13. With respect to Count Eleven of Complainant's complaint, as amended, Complainant has abandoned its claims that Respondents have violated Sec. 111.70(3)(a)5, Stats., or committed an independent violation of Sec. 111.70(3)(a)1, Stats. The record establishes, by a clear and satisfactory preponderance of the evidence, that during a contract hiatus period and without a valid defense, Respondent City unilaterally changed the *status quo* on an HRA process that is a mandatory subject of bargaining. Therefore, Respondent City has violated Sec. 111.70(3)(a)4, Stats., and derivatively violated Sec. 111.70(3)(a)1, Stats.

14. With respect to Count Thirteen and Count Fifteen of Complainant's complaint, as amended, the clear and satisfactory preponderance of the record evidence does not establish that Respondents unlawfully coerced Complainant into making contract concessions in violation of Sec. 111.70(3)(a)1, Stats., by threatening to eliminate and then eliminating the two K-9 patrol positions. The clear and satisfactory preponderance of the record evidence does not establish that Chief Arts' conduct in proposing and supporting a 2008 Police Department budget that eliminated the two K-9 patrol positions; Respondent City's budget decision to accept this proposal; or Chief Arts' decision to implement this City budget decision effective January 6, 2008 was motivated, in any part, by hostility toward Officer Resch's protected, concerted activity. The clear and satisfactory preponderance of the record evidence does not establish that Respondents eliminated the two K-9 patrol positions in violation of Sec. 111.70(3)(a) 1, 3 or 4, Stats. The clear and satisfactory preponderance of the record evidence establishes that Respondent City unilaterally changed the *status quo* on a mandatory subject of bargaining during a contract hiatus period without a valid defense when it changed the work schedule and work hours of the K-9 patrol officers on January 6, 2008. Therefore, Respondent City has violated Sec. 111.70(3)(a)4, Stats., and, derivatively violated Sec. 111.70(3)(a)1, Stats.

15. With respect to Count Fourteen of Complainant's complaint, as amended, the clear and satisfactory preponderance of the record evidence establishes that Respondent City,

during a contract hiatus period and without a valid defense, unilaterally changed mandatory subjects of bargaining affecting SROs by implementing a 5/2, 4/3 administrative work schedule during the school year that required SROs to take one flex day off during the pay period; by not permitting SROs to accrue eighteen flex days during the school year for use as paid time off during the following summer; and by failing to credit SROs with nine paper days at the beginning of the school year to be taken as time off during the school year. Therefore, Respondent City has violated Sec. 111.70(3)(a)4, Stats., and derivatively violated Sec. 111.70(3)(a)1, Stats.

16. With respect to Count Fifteen of Complainant's complaint, as amended, Complainant alleges the same Sec. 111.70(3)(a)4, Stats., claim alleged in Count One and dismissed by Examiner Gallagher, *i.e.*, that Respondents violated Sec. 111.70(3)(a)4, Stats., when assigning Officer Resch to Packer game day duties beginning with the 2006 Packer season. Complainant's Count Fifteen allegation that Respondents have violated Sec. 111.70(3)(a)1 and 3, Stats., by not assigning Officer Resch to Club Seats duty at Packer games is not moot. The clear and satisfactory preponderance of the record evidence does not establish that, by not assigning Officer Resch to Club Seats duty during the 2006, 2007 and 2008 Packer seasons, Lt. Bongle, or any other representative of Respondent City, took adverse action against Officer Resch that was motivated, at least in part, by hostility toward a municipal employee's protected, concerted activity or interfered with, restrained or coerced a municipal employee in the exercise of the employee's Sec. 111.70(2), Stats., rights. Respondents have not violated Sec. 111.70(3)(a)3, Stats., and derivatively violated Sec. 111.70(3)(a)1, Stats., or committed an independent violation of Sec. 111.70(3)(a)1, Stats., as alleged in Count Fifteen of the complaint, as amended, by not assigning Officer Resch to Club Seats duty during the 2006, 2007 and 2008 Packer seasons.

17. With respect to Count Sixteen of Complainant's complaint, as amended, the clear and satisfactory preponderance of the record evidence does not establish that Chief Arts' conduct in charging Officer Kingston with misconduct for flexing his schedule to make October 10 and 11, 2007 work days was motivated, in any part, by hostility toward Officer Kingston's, or any other municipal employee's, protected, concerted activity, or interfered with, restrained or coerced a municipal employee in the exercise of the employee's Sec. 111.70(2), Stats., rights. Therefore, Respondents have not violated Sec. 111.70(3)(a)1 and 3, Stats. The clear and satisfactory preponderance of the record evidence does not establish that, in determining that it was inappropriate for Officer Kingston to flex his work schedule to attend a grievance arbitration hearing on work time, Chief Arts unilaterally changed the *status quo* on a mandatory subject of bargaining during a contract hiatus period in violation of Sec. 111.70(3)(a)4, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats. The clear and satisfactory preponderance of the record evidence does not establish that Commander Molitor's decision to deny Detective Scott Peters' request to attend the entire first session of the Association's August 2008 general membership meeting on work time was motivated, in any part, by hostility toward Detective Scott Peters', or any other municipal employee's, protected, concerted activity. Therefore, Respondents have not violated Sec. 111.70(3)(a)3, Stats., and derivatively, violated Sec. 111.70(3)(a)1, Stats. The clear and satisfactory preponderance of the record evidence establishes that, by not granting Association Detective representative Scott Peters permission to use work time to attend the first

session of the August 2008 general membership meeting when it was possible to grant this permission, Commander Molitor, acting on behalf of the City, unilaterally changed the *status quo* on a mandatory subject of bargaining during a contract hiatus period without a valid defense. Therefore, Respondent City has violated Sec. 111.70(3)(a)4, Stats., and, derivatively violated, Sec. 111.70(3)(a)1, Stats.

18. With respect to Count Eighteen of Complainant's complaint, as amended, the clear and satisfactory preponderance of the record evidence does not establish that Commander Molitor, acting on behalf of the City, unilaterally changed the *status quo* on a mandatory subject of bargaining in violation of Sec. 111.70(3)(a)4, Stats., and, derivatively, Sec. 111.70(3)(a)1, Stats., when he promulgated a policy in which Detectives could not have a regular flex day off other than a Friday. The clear and satisfactory preponderance of the record evidence establishes that Commander Molitor, acting on behalf of the City, unilaterally changed the *status quo* on a mandatory subject of bargaining, during a contract hiatus period and without a valid defense, when he promulgated a policy in which a Detective could not change his/her flex day off within a pay period, unless the Detective provided the Department with a signed statement of intent to retire within five years. Therefore, Respondent City has violated Sec. 111.70(3)(a)4, Stats., and derivatively Sec. 111.70(3)(a)1, Stats.

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

ORDER

1. In remedy of the Count One violation of Sec. 111.70(3)(a)1 and 3, Stats., found in Conclusion of Law Three, above, Respondent City is ordered to post the attached Appendix "A".

2. Complainant's allegation in Count Two of the complaint, as amended, that Respondents have violated Sec. 111.70(3)(a)5, Stats., is dismissed on the basis that Complainant has abandoned this claim. In remedy of the Count Two violations of Sec. 111.70(3)(a)1, 3 and 4, Stats., found in Conclusion of Law Four, above, Respondent City is ordered to immediately:

- a) Post the attached Appendix "A;"
- b) Make Complainant whole by reimbursing Complainant for all monies that Complainant paid to the City to obtain daily duty rosters through open records requests as required by former Police Chief Van Schyndle, together with interest at the statutory rate of twelve per cent (12%) per annum.

3. Complainant's allegations in Count Three of the complaint, as amended, that Respondents have violated Sec. 111.70(3)(a)1, 2, 3, 4 and 5, Stats., are dismissed on the basis that these claims have been abandoned by Complainant or are without merit.

4. Complainant's allegations in Count Four of the complaint, as amended, that Respondents have violated Sec. 111.70(3)(a)1, 2, 4 and 5, Stats., have been dismissed by Examiner Gallagher or are dismissed on the basis that these claims have been abandoned by Complainant.

5. Complainant's allegations in Count Five of the complaint, as amended, that Respondents have violated Sec. 111.70(3)(a)1, 4 and 5, Stats., are dismissed on the basis that these claims have been abandoned by Complainant or are without merit.

6. Complainant's allegations in Count Six of the complaint, as amended, that Respondents have violated Sec. 111.70(3)(a)1, 2, 4, and 5, Stats., are dismissed on the basis that they have been abandoned by Complainant or are without merit.

7. Complainant's allegations in Count Seven of the complaint, as amended, that Respondents have violated Sec. 111.70(3)(a)4, Stats., and derivatively violated Sec. 111.70(3)(a)1, Stats., are dismissed on the basis that these claims are without merit.

8. Complainant's allegations in Count Eight of the complaint, as amended, that Respondents have violated Sec. 111.70(3)(a) 1, 2, 3 and 4, Stats., are dismissed on the basis that these claims have been abandoned by Complainant or are without merit.

9. In remedy of the Count Nine violation of Sec. 111.70(3)(a)5, Stats., and, derivative violation of Sec. 111.70(3)(a)1, Stats., found in Conclusion of Law Eleven, above, Respondent City is ordered to immediately post the attached Appendix "A."

10. In remedy of the Count Ten violation of Sec. 111.70(3)(a)5, Stats., and, derivative violation of Sec. 111.70(3)(a)1, Stats., found in Conclusion of Law Twelve, above, Respondent City is ordered to immediately post the attached Appendix "A."

11. Complainant's allegations in Count Eleven of the complaint, as amended, that Respondents have violated Sec. 111.70(3)(a)5, Stats., or committed an independent violation of Sec. 111.70(3)(a)1, Stats., are dismissed on the basis that Complainant has abandoned these claims. In remedy of the Count Eleven violation of Sec. 111.70(3)(a)4, Stats., and derivative violation of Sec. 111.70(3)(a)1, Stats., found in Conclusion of Law Thirteen, above, Respondent City is ordered to immediately:

- a) Post the attached Appendix "A;"
- b) Make whole affected Association bargaining unit employees by reducing the 2008 health insurance premium contribution of each employee who did not receive the 2½% HRA premium reduction in 2008 by 2½% and reimbursing each affected employee in the amount of this premium reduction; together with interest at the statutory rate of twelve per cent (12%) per annum.

12. In remedy of the Count Thirteen violation of Sec. 111.70(3)(a)4, and derivative violation of Sec. 111.70(3)(a)1, Stats., found in Conclusion of Law Fourteen, above, Respondent City is ordered to immediately:

- a) Post the attached Appendix "A:"
- b) Make whole employees affected by Respondent City's unlawful unilateral change in the work hours and work schedules of the K-9 patrol officers by compensating such employees for each hour worked outside of their normal work schedule, as it existed immediately prior to the unlawful unilateral change on January 6, 2008, from the time of the unilateral change on January 6, 2008 until the Association confirmed the K-9 patrol settlement on January 10, 2008, by paying these employees the difference between the wages they received for working those hours and the wages these employees would have received if they had been paid their overtime rate for working those hours, together with interest at the statutory rate of twelve per cent (12%) per annum.

Complainant's Count Thirteen allegations that Respondents have engaged in other conduct that violates Sec. 111.70(3)(a)1, 3 and 4, Stats., are dismissed on the basis that they are without merit.

13. In remedy of the Count Fourteen violation of Sec. 111.70(3)(a)4, Stats., and derivative violation of Sec. 111.70(3)(a)1, Stats., found in Conclusion of Law Fifteen, above, Respondent City is ordered to immediately:

- a) Post the attached Appendix "A:"
- b) Restore the *status quo ante* by crediting SROs with nine paper days on the first day of the school year; permitting SROs to accrue eighteen flex days during the school year for use during the following summer; and scheduling SROs to work the school year schedule in effect immediately prior to Respondent City's unlawful unilateral change to the 5-2,4-3 administrative schedule;
- c) Make whole employees affected by Respondent City's unlawful unilateral change by:
 1. restoring all paper days lost as a result of the unlawful unilateral change consistent with the Examiner's decision; and
 2. restoring any of the eighteen flex days lost because of the unlawful unilateral change consistent with the Examiner's decision.

14. Complainant's allegations in Count Fifteen of the complaint, as amended, that Respondents have violated Sec. 111.70(3)(a)1, 3 and 4, Stats., have been dismissed on the basis that these claims were previously dismissed by Examiner Gallagher or are without merit.

15. Complainant's allegations in Count Sixteen of the complaint, as amended, that Respondents violated Sec. 111.70(3)(a)1, 3 and 4, Stats., when Chief Arts determined that it was inappropriate for Officer Kingston to flex his work schedule to attend the grievance arbitration hearing of October 10 and 11, 2007 on work time and charged Officer Kingston with misconduct for this flexing of his work schedule are dismissed on the basis that these claims are without merit. Complainant's allegations that Respondents have violated Sec. 111.70(3)(a)3, Stats., and derivatively violated Sec. 111.70(3)(a)1, Stats., by Commander Molitor's refusal to permit Officer Scott Peters to attend the first session of the August 2008 general membership meeting on work time are dismissed on the basis that they are without merit. In remedy of the Count Sixteen violation of Sec. 111.70(3)(a)4, Stats., and derivative violation of Sec. 111.70(3)(a)1, Stats., found in Conclusion of Law Seventeen, above, Respondent City is ordered to immediately:

- a) post the attached Appendix "A;"
- b) cease and desist from unlawfully unilaterally changing the *status quo* on a mandatory subject of bargaining during a contract hiatus period by refusing Association representatives, such as Detective Scott Peters, permission to attend sessions of the Association general membership meeting on work time when such sessions are held on the representative's work time and it is possible for the City to grant such permission;
- c) restore the *status quo ante* by granting Association representatives, such as Detective Scott Peters, permission to attend sessions of the Association general membership meeting on work time when such sessions are held on the representative's work time and it is possible for the City to grant such permission;

16. In remedy of the Count Eighteen violation of Sec. 111.70(3)(a)4, Stats., and derivative violation of Sec. 111.70(3)(a)1, Stats., found in Conclusion of Law Eighteen, above, Respondent City is ordered to immediately:

- a) post the attached Appendix "A;"
- b) cease and desist from unlawfully unilaterally changing the *status quo* on a mandatory subject of bargaining during a contract hiatus period by promulgating a policy in which a Detective could not change his/her flex day off within a pay period, unless the Detective provided the Department with a signed statement of intent to retire within five years.

- c) restore the *status quo ante* by not denying Detective requests to change his/her flex day off within a pay period without good cause.
- d) make whole employees affected by this unlawful unilateral change by compensating any Detective who has been denied a request to change his/her flex day off within a pay period under the policy promulgated by Commander Molitor, by paying the Detective the difference between the wages the Detective received for working the requested flex day off and the wages the Detective would have received if the Detective had been paid his/her overtime rate for working that day, together with interest at the statutory rate of twelve per cent (12%) per annum.

Complainant's Count Eighteen allegation that Respondents have engaged in other conduct that violates Sec. 111.70(3)(a)4, Stats., and derivatively violates Sec. 111.70(3)(a)1, Stats., is dismissed on the basis that it is without merit.

17. The notice required to be posted in remedy of the violations of MERA established in Counts One, Two, Nine, Ten, Eleven, Thirteen, Fourteen, Sixteen, and Eighteen of the complaint, as amended, is attached hereto as "Appendix A." This notice shall be signed by Police Chief Arts and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken to ensure that the notice is not altered, defaced or covered by other material.

18. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the date of this Order of the steps taken to comply with this Order.

Dated at Madison, Wisconsin, this 20th day of September, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employees represented by the Green Bay Professional Police Association that:

1. WE WILL NOT violate Sections 111.70(3)(a)3 and 1 of the Municipal Employment Relations Act by taking adverse action against a municipal employee that is motivated, at least in part, by hostility toward a municipal employee's protected, concerted activity.

2. WE WILL NOT violate Sections 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act by unilaterally changing the status quo regarding mandatory subjects of bargaining during the hiatus between collective bargaining agreements or responding to Green Bay Professional Police Association requests for information by imposing burdens upon the Association that impede the collective bargaining process.

3. WE WILL NOT violate Sections 111.70(3)(a)5 and 1 of the Municipal Employment Relations Act by failing to accept the terms of a grievance arbitration award, where previously the City and the Green Bay Professional Police Association had agreed to accept the terms of this Award as final and binding upon them.

4. IN REMEDY OF former Police Chief Van Schyndle's unlawful conduct in responding to Association requests for daily duty rosters by imposing a burden upon the Association that impedes the collective bargaining process and retaliates against municipal employee's protected, concerted activity, we shall make whole the Green Bay Professional Police Association by immediately reimbursing the Association for all monies that the Association paid to the City to obtain daily duty rosters through open records requests as required by former Police Chief Van Schyndle; together with interest at the statutory rate of twelve per cent (12%) per annum.

5. IN REMEDY OF the City's conduct in unlawfully unilaterally changing the *status quo* on the HRA process used to determine 2008 employee health insurance contributions during the hiatus between collective bargaining agreements, we shall make whole affected members of the Green Bay Professional Police Association bargaining unit by reducing the 2008 health insurance contributions of each employee who did not receive the HRA premium reduction in 2008 by the amount of 2½% and immediately reimbursing this amount to the employee; together with interest at the statutory rate of twelve per cent (12%) per annum.

6. IN REMEDY of the City's conduct in unlawfully unilaterally changing the *status quo* on the work hours and work schedules of K-9 patrol officers between January 6, 2008 and January 10, 2008, we shall make whole affected employees by compensating such employees for each hour worked outside of the employee's normal work schedule, as it existed immediately prior to the unlawful unilateral change on January 6, 2008, from the time of the unilateral change on January 6, 2008 until the Association confirmed the K-9 patrol settlement on January 10, 2008, by paying the employees the difference between the wages the employee received for working those hours and the wages that the employee would have received if the employee had been paid his/her overtime rate for working those hours, together with interest at the statutory rate of twelve per cent (12%) per annum.

7. IN REMEDY OF the City's conduct in unlawfully unilaterally changing the *status quo* on hours and conditions of employment of School Resource Officers during the hiatus between collective bargaining agreements, we shall immediately restore the *status quo ante* by:

- a) crediting these employees with nine "paper days" at the start of each school year;
- b) permitting these employees to accrue eighteen flex days during the school year for use as paid time off during the following summer; and
- c) returning to the 5/2 school year work schedule in effect immediately prior to the start of the 2008-2009 school year.

Additionally, we shall immediately make whole affected employees by:

- a) restoring all "paper days" lost as a result of the unlawful unilateral change; and
- b) restoring any of the eighteen flex days lost as a result of the unlawful unilateral change.

8. IN REMEDY OF the City's conduct in unlawfully unilaterally changing the *status quo* during the hiatus between collective bargaining agreements by refusing to grant Association representatives, such as the Detective representative, permission to use work time to attend sessions of the Association's general membership meeting held during the representative's work time when it is possible to grant this permission, we shall immediately:

- a) cease and desist from this unlawful conduct;

- b) restore the status quo ante by granting Association representatives, such as the Detective representative, permission to use work time to attend sessions of the Association's general membership meeting held during the representative's work time when it is possible to grant this permission.

9. IN REMEDY OF the City's conduct in unlawfully unilaterally changing the *status quo* during the hiatus between collective bargaining agreements by promulgating a policy that precludes a Detective on the administrative schedule from changing his/her flex day off within a pay period, unless the Detective provides the Department with a signed statement of intent to retire within five years, we shall immediately:

- a) cease and desist from this unlawful conduct;
- b) restore the *status quo ante* by not denying a Detective request to change his/her flex day off within a pay period without good cause.
- c) make whole employees affected by this unlawful unilateral change by compensating any Detective who has been denied a request to change his/her flex day off within a pay period under the aforementioned policy, by paying the Detective the difference between the wages the Detective received for working the requested flex day off and the wages the Detective would have received if the Detective had been paid his/her overtime rate for working that day, together with interest at the statutory rate of twelve per cent (12%) per annum.

Dated this _____ day of _____, 2010

By: _____
CITY OF GREEN BAY

THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES OF THE GREEN BAY POLICE DEPARTMENT 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.

CITY OF GREEN BAY (Police Department)

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

DISCUSSION

Applicable Legal Standards

Complainant alleges that Respondents have engaged in conduct that violates Sec. 111.70(3)(a)1, 2, 3, 4 and 5, Stats. Sec. 111.70(3)(a), Stats., provides that it is a prohibited practice for a municipal employer individually or in concert with others to:

1. To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2).
2. To initiate, create, dominate, or interfere with the formation or administration of any labor organization or contribute financial support to it, but the municipal employer is not prohibited from reimbursing its employees at their prevailing wage rate for the time spent conferring with the employees, officers or agents.
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.
4. To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employees in an appropriate bargaining unit does in fact have that support, it may file with the commission a petition requesting an election to that claim. An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission. The violation shall include, though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any

collective bargaining agreement covering municipal employees who are not school district employees shall not exceed 3 years, and the term of any collective bargaining agreement covering school district employees shall not exceed 4 years.

...

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

RIGHTS OF MUNICIPAL EMPLOYEES: 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. . .

An employer who violates Sec. 111.70(3)(a)2, 3, 4 or 5, Stats., derivatively violates Sec. 111.70(3)(a)1, Stats. Sec. 111.07(3), Stats., made applicable to these proceedings by Sec. 111.70(4)(a), Stats., provides that “the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence.”

Sec. 111.70(3)(a)1, Stats.

Concluding that it is impossible to define “concerted acts” in the abstract, the Commission has stated that it is necessary to examine the facts of each case to determine whether the employee behavior should be afforded statutory protection and that, at root, this determination demanded an evaluation of whether the behavior manifests and furthers purely individual or collective concerns. CITY OF LA CROSSE, DEC. No.17084-D (WERC, 10/83). As Examiner Marshall Gratz states in SCHOOL DISTRICT OF MARINETTE, DEC. No. 31330-A (12/05); AFF’D BY OPERATION OF LAW, DEC. No. 31330-B (WERC, 1/06):

...

The Commission has recently held that allegations of independent violations of Sec. 111.70(3)(a)1, Stats., are to be analyzed by use of the four-part test outlined below regarding violations of Sec. 111.70(3)(a)3, Stats., "in cases . . . where the essence of the violation lies in the employer's motive for taking adverse action against one or more employees, such as claims of retaliation. In such cases, if lawfully motivated, adverse actions will not be found violative of (3)(a)1 "simply because it could be perceived as retaliatory." CLARK COUNTY, DEC. No. 0361-B (WERC, 11/03) AT 15.

For other claimed violations of Sec. 111.70(3)(a)1, Stats., a prohibited practice occurs when employer conduct has a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Sec. 111.70(2) rights.

WERC v. EVANSVILLE, 69 WIS.2D 140 (1975). If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employee(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights. BEAVER DAM SCHOOLS, DEC NO. 20283-B (WERC, 5/84); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84); JUNEAU COUNTY, DEC NO. 12593-B (WERC, 1/77). However, exceptions to that general rule have been recognized by the Commission in prior cases. For example, in recognition of the employer's free speech rights and of the general benefits of "uninhibited" and "robust" debate in labor disputes, employer remarks which inaccurately or critically portray the employee's labor organization and thus may well have a reasonable tendency to "restrain" employees from exercising the Sec. 111.70(2) right of supporting their labor organization generally are not violative of Sec. 111.70(3)(a)1, Stats., unless the remarks contain implicit or express threats or promises of benefit. ASHWAUBENON SCHOOLS, DEC NO. 14474-A (WERC, 10/77); JANESVILLE SCHOOLS, DEC NO. 8791 (WERC, 3/69). SEE GENERALLY, MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC NO. 27867-B (WERC 5/95) AND CEDAR GROVE-BELGIUM SCHOOLS, DEC. NO. 25849-B (WERC, 5/91).

It is also well established that employer conduct which may well have a reasonable tendency to interfere with employee exercise of Sec. 111.70(2) rights will generally not be found violative of Sec. 111.70(3)(a)1, Stats., if the employer had a valid business reason for its actions. E.G., BROWN COUNTY, DEC NO. 28158-F (WERC, 12/96); CEDAR GROVE-BELGIUM SCHOOLS, DEC. NO. 25849-B (WERC, 5/91); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84); SEE GENERALLY, WAUKESHA COUNTY, DEC. NO. 14662-A (Gratz, 1/78) AT 22-23, AFF'D -B (WERC, 3/78) AND KENOSHA SCHOOLS, DEC. NO. 6986-C (WERC, 2/66) . . .

Sec. 111.70(3)(a)2, Stats.

The Sec. 111.70(3)(a)2 statutory proscription contemplates a municipal employer's active involvement in creating or supporting a labor organization. MENOMONIE JT. SCHOOL DISTRICT NO. 1, DEC. NO. 14811-C (McGilligan, 3/78). Sec. 111.70(3)(a)2 "interference" is of a magnitude which threatens the independence of a labor organization as the representative of employee interests." COLUMBIA COUNTY, DEC. NO. 22683-B (WERC, 1/87) "Domination" involves the actual subjugation of the labor organization to the employer's will. A dominated labor organization is so controlled by the employer that it is presumably incapable of effectively representing employee interests. BARRON COUNTY, DEC. NO. 26706-A (Jones, 8/91); AFF'D BY OPERATION OF LAW, DEC. NO. 26706-B (WERC, 9/91).

In WAUKESHA COUNTY, DEC. NO. 30799-B (2/05), the Commission states:

...

It is well established that the purpose of subsection (3)(a)2 (and its analogs in the private sector) is to curtail employer favoritism toward a particular union or toward a particular leadership cadre within the union, so as to undermine bargaining unit employees' free choice of representatives. Thus, in cases finding "domination," the employer has essentially obliterated a union's ability to act independently of the employer's interests. RACINE UNIFIED S. D., DEC. NO. 15915-B (Hornstra, 11/77). SEE GENERALLY, GORMAN AND FINKIN, BASIC TEXT ON LABOR LAW, 2D ED. (WEST, 2004) at 263-65. In cases of "interference," the employer has not totally subjugated the union to the employer's will, but has "exercised some lesser form of influence in the determination of union policy." ID. at 265. Examples of interference within the proscription of (3)(a)2 would be negotiating with one of the rival unions during the pendency of an election petition, DANE COUNTY, DEC. NO. 5915-B (WERC, 10/73), selecting the individuals to serve on a committee dealing with working conditions, or having a supervisor serve in a significant Union position, PROFESSIONAL POLICEMEN'S PROTECTIVE ASSOCIATION OF MILWAUKEE, DEC. NO. 12448-A (WERC, 10/74).

...

Sec. 111.70(3)(a)3, Stats.

As Examiner Gratz states in MARINETTE, SUPRA:

...

. . . To establish a violation of Sec. 111.70(3)(a)3, Stats., it must be proved by a clear and satisfactory preponderance of the evidence that the municipal employee was engaged in protected, concerted activity; that the municipal employer's agents were aware of that activity; that the municipal employer, or its agents, were hostile towards that activity; and that the municipal employer's actions toward the municipal employee were motivated, at least in part, by its hostility toward the municipal employee's protected, concerted activity. E.G., CLARK COUNTY, SUPRA, AT 12, CITING MUSKEGO-NORWAY SCHOOLS V. WERC, 35 WIS.2D 540 (1967 AND EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122 WIS.2D 132 (1985).

...

As Examiner David Shaw states in MILWAUKEE COUNTY (SHERIFF'S DEPT), DEC. No. 31428-A(7/06); AFF'D DEC. No. 31428-B (WERC, 10/06):

...

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).

...

111.70(3)(a)4, Stats.

Duty to Provide Information

In MADISON METROPOLITAN SCHOOL DISTRICT, DEC. No 28832-B (WERC, 9/98), the Commission states:

...

In MORAINÉ PARK VTAE, DEC. No. 26859-B (WERC, 8/93), the Commission set forth the following general statement of the law applicable to the duty to supply information:

It has long been held that a municipal employer's duty to bargain in good faith pursuant to Sec. 111.70(1)(a), Stats., includes the obligation to furnish, once a good faith demand has been made, information which is relevant and reasonably necessary to the exclusive bargaining representative's negotiations with the employer or the administration of an existing agreement. Whether information is relevant is determined under a "discovery type" standard and not a "trial type standard." The exclusive representative's right to such information is not absolute and must be determined on a case-by-case basis, as is the type of disclosure that will satisfy that right. Where information relates to wages and fringe benefits, it is presumptively relevant and necessary to carrying out the bargaining agent's duties such that no proofs of relevancy or necessity are needed and the burden is on the employer to justify its non-disclosure. In cases involving other types of information, the burden is on the exclusive representative in the first instance, to demonstrate the relevance and necessity of said information to its duty to represent unit employees. The exclusive representative is not entitled to relevant information where the employer can demonstrate reasonable good faith confidentiality concerns and/or privacy interests of employees. The employer is not required to furnish information in the exact form requested by the exclusive representative and it is sufficient if the information is made available in a manner not so burdensome or time consuming as to impede the process of bargaining. (footnotes omitted)

. . .

In MILWAUKEE COUNTY (SHERIFF'S OFFICE), DEC. NO. 32728-B (WERC, 1/10), the Commission reaffirmed the principles enunciated in MORaine PARK VTAE when it recognized that:

. . .

. . . In order to facilitate the Union's ability to represent its bargaining unit members in negotiations and in administering the contract, a municipal employer must provide information upon union request that is "relevant and reasonably necessary" to the Union's carrying out its duties. MORaine PARK VTAE, DEC. NO. 26859-B (WERC, 8/93) (Torosian, Commissioner, concurring and dissenting). Relevance and necessity are determined according to a liberal "discovery-type" standard. ID. The duty to furnish information can be limited where the employer can establish specific confidentiality concerns that outweigh the Union's need for the information. MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 28832-B (WERC, 9/98).

. . .

Unilateral Change in the Status Quo

Under Wisconsin law, mandatory subjects of bargaining are primarily related to wages, hours and conditions of employment and permissive subjects of bargaining are primarily related to the formulation and choice of public policy. CITY OF BROOKFIELD V. WERC, 87 Wis. 2d 819 (1979); UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 Wis. 2d 89 (1977); and BELOIT EDUCATION ASSOCIATION V. WERC, 73 Wis. 2d 43 (1976).

In WASHBURN PUBLIC SCHOOLS, DEC. NO. 28941-B (WERC, 6/98), the Commission states:

...

It is well settled that during a contract hiatus, absent a valid defense, a municipal employer violates Sec. 111.70(3)(a)4, Stats., if it takes unilateral action as to mandatory subjects of bargaining in a manner inconsistent with its rights under the dynamic status quo. ST. CROIX FALLS SCHOOL DIST. V. WERC, 186 Wis.2d 671 (1994) AFFIRMING DEC. NO. 27215-D (WERC, 7/93); RACINE EDUCATION ASSOCIATION V. WERC, 214 Wis.2d 352 (1997); VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96); MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92) AFFIRMED MAYVILLE SCHOOL DISTRICT V. WERC, 192 Wis.2d 379 (1995); JEFFERSON COUNTY V. WERC, 187 Wis.2d 647 (1994) AFFIRMING DEC. NO. 26845-B (WERC, 7/94); CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). The dynamic status quo is defined by relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. CITY OF BROOKFIELD, SUPRA; SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85); VILLAGE OF SAUKVILLE, SUPRA. (At pp. 5-6)

...

In this decision, the Commission further states:

...

[A] status quo analysis is different than a grievance arbitration analysis. The language of the expired agreement, any practice, and any bargaining history are all to be considered when determining the parties' rights under the status quo. SAINT CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-D, SUPRA; CITY OF BROOKFIELD, SUPRA; SCHOOL DISTRICT OF WISCONSIN RAPIDS, SUPRA; VILLAGE OF SAUKVILLE, SUPRA. (At p. 8)

...

In OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04), the Commission states:

. . .

We agree with the Examiner that the Commission issued a blanket holding in GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84): where arbitration is available to resolve a negotiations dispute, the law does not permit unilateral changes in mandatory subjects of bargaining, absent a showing of “necessity,” waiver, or specific unconditional agreement to implement the change. . . .

. . .

Continuation of the *status quo* is a right that exists independently of the right to bargain over substantive issues. Indeed, as the Examiner noted, the Commission has stated that a union need not bargain over discontinuing the *status quo*– i.e., the *status quo* is not subject to waiver and will be deemed relinquished only by express agreement. VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96) at 21. . . . The Commission’s language in SAUK COUNTY speaks directly to the County’s argument in the instant case:

“Even a formal stipulation of agreed items, standing alone, would represent no more than an agreement that the terms it contains shall become a part of the overall agreement consisting of the final offer selected by the arbitrator plus the terms of the stipulation of agreed items. . . . Occasionally, parties agree to an interim implementation of agreed-upon modifications, but a specific agreement to that effect is necessary to deviate from the well-understood norm.” ID. at 16 (emphasis added).

. . .

In CITY OF PRINCETON, DEC. NO. 31041-B (WERC, 6/05), the Commission states:

. . .

As reflected in the Examiner’s recitation of the Commission’s precedent at page 12 of his decision, the Commission has not squarely defined the scope of a “necessity” defense in a unilateral change case. 2/ In the context of this case, we adopt the Examiner’s description of its elements and its limited scope as follows:

“Necessity” by definition is something more than a belief that the contemplated course of action is more economical, more practical, or for whatever reason more desirable than would be

maintenance of the *status quo*. Keeping in mind that “necessity” is offered as an excuse for a *per se* violation of the statutes, and a serious derogation of the exclusive bargaining representative’s role in determining wages, hours and conditions of employment, the situation giving rise to the necessity cannot be one in which the employer simply has a choice to make between the *status quo* and the other course of action. In order to qualify as a “necessity,” the implementation of the change must be occasioned by an unanticipated material change in circumstances imposed upon the employer by outside forces, which renders the *status quo* untenable. ... Moreover, since necessity is a defense to the actual change made, it follows that the deviation from the *status quo* should be limited to that which is required to meet the necessity.

Examiner’s decision at 13.

2/ We note that the National Labor Relations Board articulates the availability of a similar “economic exigency” defense in unilateral change cases. The Board has characterized such an exigency as “‘extraordinary events which are “an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action. ’” RBE ELECTRONICS OF S.D., INC., 320 NLRB 80 (1995), citing BOTTOM LINE ENTERPRISES,” 302 NLRB 373 (1991), ENF’D, 15 F. 3D 1087 (9TH CIR. 1994). See discussion in GORMAN AND FINKIN, BASIC TEXT ON LABOR LAW (2D ED. THOMSON-WEST 2004) at 606-07.

...

In WASHINGTON COUNTY, DEC. NO. 32185-B (WERC, 1/09), the Commission states:

...

To briefly recap the law as it relates to bargaining over subcontracting, the Municipal Employment Relations Act (MERA) requires the County to negotiate with the union over both the decision and the impact of subcontracting bargaining unit work where, as here, the decision primarily affects working conditions because the County is continuing to have the same work performed but by less expensive, non-bargaining unit, employees. UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 WIS.2D 89 (SUP. CT. 1977). An employer may not act unilaterally on such a mandatory subject of bargaining, because to do so undermines the Union’s right to meaningful negotiations and defeats the basic purpose of MERA. SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85) at 14, and cases cited

therein; *NLRB v. KATZ*, 396 U. S. 736 (1962). In general, an employer must notify a union representing its employees that it intends to take action on the particular subject of bargaining and offer the union an opportunity to negotiate beforehand. *Id.*

Here the County did not notify the Union and offer an opportunity to bargain before effectuating a subcontract that resulted in the layoff of 18 employees, and the Union therefore has established a *prima facie* case of unlawful unilateral change. The County, however, offers a well-recognized affirmative defense to such a unilateral change allegation: the County contends that it has already bargained for and acquired the right to subcontract in this manner, pointing to the Management Rights clause and Section 18.04 of the contract.

The affirmative defense on which the County primarily relies in this case is more easily stated than applied. The case law in this area is somewhat opaque. As we pointed out in *STATE OF WISCONSIN, DEC. NO. 31207-C (WERC, 3/06)* at 11, the result often turns upon how precisely the “subject” in question is described. Compare *MAYVILLE SCHOOL DIST. v. WERC*, 192 Wis.2D 379 (1995) (despite comprehensive contract language on health insurance, which did not identify a carrier, the employer had a duty to bargain before changing the carrier), with *CADOTT EDUCATION ASSOCIATION v. WERC*, 197 Wis.2D 46 (Ct. App. 1995) (where the contract provided for holiday pay, but did not specifically address the conditions under which employees are eligible for holiday pay, the contract “covered” the subject and the employer had no duty to bargain before limiting eligibility to those who were in attendance on the days before and after the holiday). In addition, in analyzing such cases, the Commission has not consistently distinguished between the question of whether certain contract language “waives” the right to bargain (thus implicating the “clear and unambiguous” standard) and the question of whether contract language sufficiently “addresses” a subject so as to show that the Union has already exercised its right to bargain on the topic. There is no shortage of decisions in which the two concepts have been used interchangeably, as the Examiner did in the instant case. Under any view of the prior case law, the instant case would present difficulties, because it involves language in a management rights clause that is not illuminated by bargaining history, that is by its terms subject to “applicable law” that arguably includes MERA’s bargaining obligation, and that has not actually been exercised in anyone’s memory. This language (with or without reference to the Layoff clause language) strikes us as a frail basis for concluding that the Union has agreed to allow the County to subcontract the work of 18 bargaining unit members without involving the Union in formulating the decision or the consequences.

A second issue related to the “unilateral change” theory is that pertaining to the County’s obligation to engage in so-called “impact bargaining” even if the contract gave the County authority to subcontract unilaterally. This issue is also fraught with difficulty. Contrary to the Examiner, we think the Union has sufficiently posed the impact bargaining issue. The Union’s May 9, 2006 bargaining demand specifically included the “effect” of any subcontracting decision on the bargaining unit, and the Union’s brief to the Examiner clearly argued the point separately from the “decision bargaining” issue. However, the impact issue is intimately related to the contract waiver issue, since, as the County argues, the contract language could readily be interpreted to waive bargaining over both the decision and its impact. In addition, even if impact bargaining has not been waived, the Commission’s case law is very fact dependent about whether the County would have been required to stay its hand on the subcontracting itself (i.e., maintain the status quo) until impact bargaining was exhausted. See CITY OF MILWAUKEE, DEC. NO. 32115 (WERC, 5/07). Accordingly, despite its pragmatic appeal, a holding that the contract language “addressed” the issue of the subcontracting decision, but not the impact of that decision, is an unsatisfying resolution to this case.

Although the Examiner and the parties view this case primarily through the lens of unilateral change theory, we have concluded that this case is more appropriately resolved by resort to the third issue summarized above, i.e., the County’s duty to disclose that it was seriously considering subcontracting, as a function of its duty to bargain in good faith with the Union. As discussed more fully below, we conclude, in the totality of the specific circumstances present here, that the County violated its duty by failing to share with the Union – contemporaneously in the fall of 2006, while the parties were negotiating for the successor agreement – that the County was seriously considering subcontracting during the term of the successor agreement as a way to reduce operating costs. Had the County done so, the Union’s response (or lack thereof) to the actuality facing its members, and any resulting negotiations or interest arbitration, may have affected either the language in the applicable contract language or its interpretation or both. The County’s failure to provide the Union that opportunity makes it inappropriate to resolve this case by interpreting rights and obligations in a contract that was not negotiated in the requisite good faith. Accordingly, we have set aside the Examiner’s conclusions regarding the waiver and impact bargaining implications of the language in the successor agreement and we do not decide those issues.

Turning to the County’s obligation to inform the Union that it was seriously considering subcontracting, we begin with the language of the statute itself regarding the County’s bargaining obligation:

“Collective bargaining” means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, *in good faith*, with the intention of reaching an agreement, or to resolve questions arising under such an agreement, with respect to wages, hours, and conditions of employment

Sec. 111.70(1)(a), Stats. (emphasis added). This statutory requirement of “good faith” in negotiating a labor contract, which mirrors language in the National Labor Relations Act, 29 U.S.C. Sec. 158(d), is an exception to the general law of contract formation, which requires “good faith” in the performance and enforcement of contracts but (absent duress or fraud) does not regulate the negotiation process. See RESTATEMENT (SECOND) CONTRACTS, SEC. 205, COMMENT “C”; CALAMARI & PERILLO, THE LAW OF CONTRACTS (4TH ED.) (West, 1998), at 458. Thus, for purposes of traditional business contracts, “the bargaining process [has been] treated as if it were a poker game,” CALAMARI & PERILLO at 336, but collective bargaining negotiations are subject to a higher standard of conduct and scrutiny. This important difference – the requirement of good faith in negotiations – underscores other fundamental differences between a typical business contract and the collective bargaining process. Two striking differences are that, in collective bargaining, parties are required by law to negotiate a contract with each other (once a union has been selected by a majority of the bargaining unit) and the contract they are negotiating covers third parties, i.e., the employees in the bargaining unit. Thus the relationship between the union and the employer is an ongoing one, a “‘partnership’ in determining wages and working conditions,” GORMAN & FINKIN, BASIC TEXT ON LABOR LAW (2D ED.) (West, 2004) at 532, that transcends the contents or the duration of any particular contract. The meaning of “good faith” must be viewed in terms of this unique statutorily-imposed relationship and responsibility.

As the Commission has long held, “good faith” in the conduct of negotiations is a “fact-intensive, highly circumstantial” inquiry, in which the Commission examines the “totality of the circumstances” in each case. EDGERTON FIRE PROTECTION DISTRICT, DEC. NO. 30686-B (WERC, 2/05) at 26; CITY OF GREEN BAY, DEC. NO. 18731-B (WERC, 6/83) at 11. Here a number of circumstances converge to compel the conclusion that the County’s conduct regarding its subcontracting plans during the negotiations for the 2007-2008 contract was not consistent with good faith. First, the action the County contemplated, i.e., subcontracting the entire housekeeping and custodial operation, was one that would have a major impact on the bargaining unit. Second, while the County viewed the existing contract language as authorizing or at least permitting this action, the language was not crystal clear, but rather

subject to other plausible (if ultimately unsuccessful) interpretations, as noted by the arbitrator in the companion arbitration award. WASHINGTON COUNTY, MA-13748 (McLaughlin, 3/08). Third, the language on which the County relied had been in the contract for so long that neither party could supply any bargaining history that would shed light on what the parties intended when it was first negotiated. Fourth, not only did the County not in anyone's memory subcontract unit work prior the instant situation,^{7/} but the record contains no evidence that subcontracting was ever discussed over decades of successive contract negotiations. Fifth, the County's sole purpose in subcontracting was to lower its labor costs – a purpose particularly well-suited for exploration and perhaps compromise during the bargaining process. Sixth, while the County had not made a final decision to subcontract, the County had formulated a clear intention of “pursuing” subcontracting by seeking bids and investigating costs; in fact, the County authorized its director to prepare an RFP on the same date that it considered and shortly before it ratified the 2007-08 successor agreement. The subcontracting alternative thus was sufficiently “real” in the fall of 2006, while the County was in active negotiations with the Union, that the County decided to abdicate its earlier efforts to implement more limited layoffs. While the County points out that, in withdrawing its layoff notices, it informed the affected employees (though not the Union) that the County would “be looking at other avenues to achieve operational savings in 2007,” this cryptic reference to its plans only begs the question why the County did not share its intentions both more forthrightly and more directly with the Union itself.

The pivotal implication from the foregoing combination of circumstances is that the Union, while negotiating the successor agreement, neither actually nor with reasonable imputation could have expected the County to implement a subcontracting decision on such a major scale during the term of the successor agreement. Although the County did not actively mislead the Union, the County did intentionally withhold information about an actively formulated plan to investigate subcontracting that clearly would have been of major interest to the Union and the bargaining unit. Collective bargaining, unlike general business transactions, is governed by a “good faith” requirement: it is not a “poker game.” In this situation, the County's “partnership” with the Union, its shared responsibility for the working conditions of the employees, required the County to disclose to the Union that the County was seriously considering subcontracting during the course of the successor agreement then under negotiation. 8/

We emphasize that the holding in this case is intensively fact-based. We are not establishing a per se rule regarding a duty to disclose any and all actions that either party is seriously considering taking during the term of a contract then under negotiation. While we tend to think disclosure generally enhances the collective bargaining process, the extent to which “good faith” will require

such disclosure will be a function of circumstances, such as the significance of the impact on the bargaining unit, how fully formulated the plan is, the clarity vs. ambiguity of any contract language that arguably authorizes the action, and the extent to which the complaining party reasonably should have anticipated the impending action based on bargaining history or past practice. 9/ (footnotes omitted)

...

Individual Bargaining

As Examiner Crowley states in ST. CROIX COUNTY, DEC. NO. 28791-A (5/97):

...

Individual bargaining is defined as negotiations which take place between the employe and the employer. 2/ Under Sec. 111.70(1)(a), Stats., a municipal employer is obligated to bargain with the collective bargaining representative over the wages, hours and conditions of employment for employes in a collective bargaining unit represented by said representative. Under Sec. 111.70(3)(a)4, Stats., a municipal employer commits a prohibited practice where it bypasses the representative and seeks to obtain a contract directly with employes. Thus, when employes selected the Union to represent them, the County was obligated to bargain in good faith only with the Union. However, not all communications by an employer with its employes is a prohibited practice. The employer has certain free speech rights and employer remarks which critically or inaccurately portray the employes' labor organization are not violative of Sec. 111.70, Stats. 3/ Additionally, an employer can directly communicate to its employes truthful comments as to its bargaining proposals that had been submitted to the bargaining representative. An employer cannot threaten or coerce employes or portray the employer as a protector of their rights rather than the bargaining representative and cannot deal with the Union through employes rather than vice versa. 4/ (footnotes omitted)

...

Sec. 111.70(3)(a)5, Stats.

Under Sec. 111.70(3)(a)5, Stats., it is a prohibited practice for a municipal employer individually or in concert with others:

...

5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

...

Count One and Count Fifteen

In the initial complaint filed on October 31, 2006, Complainant claims, in Count One, that Respondents violated Sec. 111.70(3)(a)1, 2, 4 and 5, Stats., by engaging in certain conduct. The "certain conduct" alleged by Complainant is that, in 2005, Commander Brodhagen removed Officer Resch's Club Seats Packer game assignment and, in 2006, then Commander Arts continued not to assign Officer Resch to Club Seats duty.

Examiner Gallagher, who was assigned as Examiner in this case prior to the substitution of Examiner Burns, issued CITY OF GREEN BAY (POLICE), DEC. NO. 32107-A (1/08), which was an Order Granting in Part and Denying in Part Motion to Dismiss Complaint Claims I, IV and XI.

Examiner Gallagher's Order includes the following:

The Motion to Dismiss is granted as to all paragraphs of Claims I and IV which allege violations of Sec. 111.70(3)(a) 4 and 5, Stats., specifically Complaint paragraphs 6-12 and 14 and, in part, 15 are dismissed and Complaint paragraphs 31, in part, and 32-37, and 39-42 are also dismissed.

The Motion to Dismiss is denied as to those portions of Claims I and IV which allege violations of Sec. 111.70(3)(a)1 and 2, Stats., specifically paragraphs 10, and in part 15, and in part 31 and 38.

On September 5, 2008, Complainant filed its Third Amended Complaint. Count Fifteen of the Third Amended Complaint included the allegation that Chief Arts has violated Sec. 111.70(3)(a)1 and 4, Stats., by refusing to assign Officer Resch his preferred Packer game Club Seats assignment during the 2006, 2007 and 2008 seasons. Complainant seeks to raise the same Sec. 111.70(3)(a)4 claim disposed of in Examiner Gallagher's decision. At a pre-hearing conference held on February 3, 2009, Examiner Burns denied Complainant's May 12, 2008 Motion for Reconsideration of Examiner Gallagher's decision to dismiss Complainant's Sec. 111.70(3)(a)4 and 5 allegations. Accordingly, the Examiner has not considered Complainant's claim that Respondents violated Sec. 111.70(3)(a)4 and 5, Stats., in the manner in which Respondents assigned Officer Resch to Packer game day assignments during the 2006, 2007 and 2008 Packer seasons.

At this pre-hearing conference, Examiner Burns responded to Complainant's Motions to Amend Complaint. In this motion, Complainant sought to amend a number of its previously alleged Counts of prohibited practices, including Counts One and Fifteen, by adding the allegation that Respondents had violated Sec. 111.70(3)(a)3, Stats., by retaliating against Officer Resch by not assigning Officer Resch a Club Seats duty at the Packer games. Prior to hearing, the Examiner granted Complainant's motion to amend complaint.

In his Award dated October 29, 2009, Arbitrator John Emery resolved the issue of whether Complainant's bargaining unit members, such as Officer Resch, have a contractual seniority right to work a specific Packer game assignment, such as Club Seats. Arbitrator Emery held that Complainant's bargaining unit members do not have a contractual seniority right to work a specific Packer game assignment, but that they do have a seniority right to hours of work.

The parties agree that this Arbitration Award is final and binding. It is undisputed that Officer Resch received the appropriate hours of work.

With respect to Count One and those portions of Count Fifteen that involve Packer game day assignments, there are two remaining Complainant claims, *i.e.*, that Respondents violated Sec. 111.70(3)(a)3 and 1, Stats., when Commander Brodhagen failed to give Officer Resch his preferred Packer game day assignment of Club Seats in December 2005 and when then Commander Arts failed to give Officer Resch this assignment, beginning with the 2006 Packer season. The City denies that it committed the prohibited practices alleged by Complainant. The City alleges that Complainant's allegations are moot because Officer Resch retired in 2009.

In MILWAUKEE VTAE, DEC. No. 27503-D (WERC, 10/05), the Commission states:

...

The Wisconsin Supreme Court has noted with approval the following definition of a moot case:

... one which seeks to determine an abstract question which does not rest upon existing facts or rights, or which seeks a judgment in a pretended controversy when in reality there is none, or which seeks a decision in advance about a right before it has actually be asserted or contested, or a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy.

WERB v. ALLIS-CHALMERS WORKERS UNION, 252 Wis. 436, 440 (1948). The last prong of this definition has generated most of the litigation in this area and is the concept upon which MATC relies in its motion here. The court has

recently restated this prong as follows: “An issue is moot when a determination is sought that will have no practical effect on an existing legal controversy.” *SEITZINGER V. COMMUNITY HEALTH NETWORK*, 270 WIS. 2D 1, 13 (2004).

Given that the mootness doctrine is a pragmatic tool for judicial efficiency, the court has articulated situations in which it is appropriate to decide a case despite its apparent mootness:

We will decide a case, even though moot, when the issue is of great public importance, when the constitutionality of a statute is at issue, when the situation occurs so frequently that a decision is necessary to guide the circuit courts, when the issue will likely arise again and should be resolved by this court so as to avoid uncertainty, or when the issue will likely be repeated yet evade appellate review because of the length of the appellate review process.

SEITZINGER, 270 WIS. 2D at 13 (citations omitted).

The Commission itself has seldom been hospitable to claims of mootness in the context of prohibited practice proceedings such as the present one. In particular, and consonant with the holding in *ALLIS-CHALMERS, SUPRA*, the Commission does not view the mere cessation of allegedly unlawful behavior as sufficient to dismiss a case for mootness, because to do so would encourage repeated unlawful conduct -- a result that is at odds with the public policy incorporated into the labor relations statutes. *Id.* at 441-42 and cases cited therein. *SEE ALSO CITY OF WEST ALLIS, DEC. NO. 12706 (WERC, 5/74)*, at 5 (even though the parties were submitting their contract to arbitration, the legality of a parity clause was not moot because “the question is of first impression and of such public interest and importance and is asserted under conditions which will immediately recur if a dismissal is granted”). Similarly, an employer’s unlawful unilateral change in health insurance premiums is not moot, even if the contract, once settled, includes that very change, since a dismissal for mootness “could enable parties ... to engage in unlawful conduct with total impunity if they ultimately prevail in the mediation-arbitration process.” *MENOMONEE FALLS SCHOOL DISTRICT, DEC. NO. 20499-A (GRECO, 7/84)*, *AFF’D DEC. NO. 20499-B (WERC, 10/85)* (Examiner’s reasoning expressly adopted by Commission on review). In short, deterrence of future similar unlawful conduct can justify resolving a case even where there is little immediate practical import.

...

Complainant's Sec. 111.70(3)(a)1 and 3, Stats., allegations do not present an abstract question that does not rest upon existing facts or rights. Nor does Complainant seek a judgment in a pretended controversy when in reality there is none; a decision in advance about a right before it has actually been asserted or contested; or a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy. Additionally, deterrence of future similar unlawful conduct would justify resolving this case. Notwithstanding Respondents argument to the contrary, these claims are not moot.

As the City argues, Complainant did not respond to the City's Motion to Make More Definite and Certain by specifically identifying Lt. Bongle as a City representative who retaliated against Officer Resch or stating that Lt. Bongle's prohibited practices complaint was the factual support for its allegations. The allegations in Count Fifteen are sufficiently specific to place the City on notice that Complainant was contesting Officer Resch's Packer game assignments and, by reasonable implication, the motives of those City representatives responsible for making the assignment. The City's representatives would include Lt. Bongle. Neither Complainant's failure to identify Lt. Bongle as a City representative who retaliated against Officer Resch, or Complainant's failure to state that Lt. Bongle's prohibited practices complaint provided factual support for its allegations, provides a reasonable basis to dismiss Complainant's allegations regarding Officer Resch's Packer game assignments in 2006, 2007 and 2008.

In the summer of each year, the Department posts a sign-up sheet for officers who are interested in working Packer games at Lambeau Field. Some officers, such as Officer Resch, state a preference or preferences for specific game duties.

Officer Resch recalls that he was initially assigned the duty of Club Seats in 2001 and, with the exception of the time that Club Seats were undergoing renovation, he worked Club Seats until 2005. Officer Resch further recalls that, when he checked the assignment schedule for the December 25, 2005 game, he noticed that he had not been assigned to Club Seats, but rather, had been assigned to work the field on the ten-yard line. Officer Resch states that, at that time, field duty was generally assigned to senior officers.

Officer Resch recalled that he and Commander Brodhagen exchanged memos on December 19, 2005 regarding his change in assignment. In his memo, Commander Brodhagen explained that the change in his assignment was triggered by Officer Resch's request for an early overtime assignment.

Officer Resch confirms that, at the beginning of the 2005 Packer season, he had signed for early overtime, but that he had never received it prior to December 25, 2005. Officer Resch "guesses" that he received early overtime on December 25th because it was Christmas and many officers did not want the early overtime assignment on that day.

In his memo, Commander Brodhagen offered to return Officer Resch to his Club Seats assignment on December 25, 2005 if Commander Brodhagen could replace Officer Resch with Officer Duebner, but that Commander Brodhagen was concerned that, in doing so, he would violate the contract and trigger a grievance. According to Officer Resch, he told Commander Brodhagen that he could not guarantee that any employee would not file a grievance, but that he was not aware of any basis for a grievance. Officer Resch recalls Commander Brodhagen responded that Officer Resch was not going to get the Club Seats assignment.

According to Officer Resch, he felt wronged because Commander Brodhagen took away the early overtime assignment, which Officer Resch had wanted, but did not give Officer Resch his Club Seats assignment back. Officer Resch's testimony includes the following:

Well, I had initially been assigned an early overtime assignment, not Oneida and Lombardi, which would have been filled by someone else. He had no problem filling and changing – taking somebody out of that position, but somehow he was going to have a problem taking me out of the position of the club seats, which doesn't correlate to either one. I mean, either it was going to be – I couldn't be moved at all because I couldn't be put back in my field—or my traffic assignment. If I couldn't get changed to my club seat assignment, I don't know why he could change me back on one and bump somebody out of that one and not bump me – or change me on the other one.

So because I gave up my right to early overtime, I thought that I would get my assignment back. Had I known I couldn't – I was going to be on the field anyway, the before-game assignment with more overtime was a much better assignment than the traffic corner, I would have stayed on that assignment had I known he couldn't change me back for the whole thing. But he changed me back for only one part, which the least desirable part. And it was his last game, and all he would have had to do was he could have told me that, but he didn't. And, you know, he did that, in my opinion, because, you know, this was his last shot at getting me because I had filed charges against him. (T. Vol. 9 at 1627-8)

Officer Resch recalls a discussion with Commander Brodhagen that was held in the presence of then Captain Arts and in which Commander Brodhagen confirmed that Officer Resch was not going to get the Club Seats assignment on December 25th. Officer Resch recalls that, at that time, he “had a pretty good relationship with Captain Arts. We worked together a lot on the grievances and personnel issues up until that point when he was in internal affairs, and I was kind of led to believe that—you know, that he would be working on assignments for the next game, and the January game I was back in the Club Seats and there wasn't an issue.” (T. Vol. 9 at 1574) Officer Resch states that Commander Brodhagen left the Department at the end of 2005 or the beginning of 2006 and, thereafter, was not involved in Packer game assignments.

According to Officer Resch, at the time of his December 25th change in assignment, Complainant had charges against Commander Brodhagen that were pending with the Police-Fire Commission. Officer Resch recalls that these charges were filed in early 2005 and that, when the Police-Fire Commission would not hear these charges, Complainant went into Circuit Court and obtained a Writ of Mandamus. Officer Resch further recalls that Complainant objected when the Police-Fire Commission was going to promote Brodhagen to Commander and that, at the end of 2005, Complainant filed a grievance, known as the “Packer lights” grievance, alleging that Captain Urban, Captain Arts and Commander Brodhagen were performing non-supervisory duties.

Officer Resch states:

There was a lot of animus between Lieutenant – or Commander Brodhagen and the union, that it even got to the point where, like I said, Commander Arts – or Captain Arts, at the time, was basically taking over all the personnel matters and union matters, that we went to him instead of going to the commander because there was a total breakdown in a relationship there, which was recognized by not only the union but the department and the chief. (T. Vol. 9 at 1578)

2006-2008

Captain Arts assumed Commander Brodhagen’s position at the beginning of 2006. Lieutenant Bongle recalls that, in January 2006, he became the Special Events Coordinator with responsibility to schedule Packer game assignments. As Special Events Coordinator, Lt. Bongle was under the supervision of Commander Arts.

Lieutenant Bongle recalls that, as Special Event Coordinator, he met with representatives of the Packers organization. Lieutenant Bongle further recalls that the Packer organization paid for the services provided by the Department; that these representatives asked that the Department review their assignment procedure because the Packers organization considered the current procedure to produce waste and inefficiencies; and that these representatives established a goal of using 72 officers.

Lieutenant Bongle recalls that, thereafter, he evaluated the existing procedure; determined the number of officers needed to provide necessary services in a safe and efficient manner; and then developed a scheduling matrix that could be run on a computer. According to Lt. Bongle, in the past, the Department had assigned between 90 to 107 officers to a game; he determined that he would need 83 officers to provide the required services; and the Packer organization agreed to this number.

When questioned at hearing, Lt. Bongle responded as follows:

• • •

Q Did you at any time put into your matrix the preference that officers would state when they signed the posting?

A The very first year when I constructed it, I did make a column for that, and then I don't use that anymore.

Q But it was used when you started your new system in 2006?

A I put a column in there for it, yeah.

Q And did you give weight to the preference?

A After I applied the hours factor to get them their time slots and then I looked at to see if the employee was available to work, you know, a lot of games, then the last thing I may consider is if they had a preference to work a specific spot. And that third part was my discretion, and if I could work it without a lot of people moving around, I might try to do it, but I prefer to build the schedule based on the seniority and then the needs of the organization, which is identifying people who can work every game and then put them in the complex positions. So that's the process I use.

Q And we've already established that Officer Resch is one of the more senior officers in the Green Bay Police Department?

A Right. So I made sure he always got the correct number of hours.

Q And Officer Resch also worked all of the games?

A Yes. (T. Vol. 9 at 1535)

...

Lieutenant Bongle recalls that, in 2006, some officers who requested a particular assignment received that assignment and others did not.

Lieutenant Bongle states that seniority determined which block of hours were assigned to an officer and that, from largest to smallest, these block of hours had a start time of six hours before the game; four hours before the game; two hours before the game; and one hour before the game. According to Lieutenant Bongle, Officer Resch's seniority entitled him to be assigned to the largest block of hours.

Lieutenant Bongle states that, prior to and after he changed the Packer game assignment process, the block of hours assigned to Officer Resch, and the other officers, had three duty

assignments, *i.e.*, a pre-game assignment; a game assignment and a post-game assignment. Lieutenant Bongle further states that his matrix had the potential to produce assignments that differed from past assignments because he eliminated assignments that were not necessary; reduced the number of officers assigned to each game; sought to have each officer work under only one supervisor; and sought to have each officer work assignments that were in geographic proximity. Lieutenant Bongle states that the three duty assignments also may have changed because he identified and placed officers who could work every game in the more complex positions.

Lieutenant Bongle describes the 2006 Packer game season as a learning experience and recalls having to adjust initial rosters. Lieutenant Bongle recalls that the initial August 19, 2006 assignment schedule was the first one that he developed; that his initial draft was essentially “a cut and paste” from the previous year and that there were five or six drafts before he finalized the August 19, 2006 roster. Lieutenant Bongle states that, if Officer Resch moved, it was due to Lt. Bongle’s attempts to refine his system.

Lieutenant Bongle states that, under his finalized scheduling process, he takes the sign up list; transfers this list to Excel; assigns each officer a number based on their seniority which stays with the officer throughout the entire season; and then puts this data into his Excel matrix. Lieutenant Bongle recalls that a “lot of people” grumbled that their three-part assignment had changed. Lieutenant Bongle does not recall any specific case of transferring the “grumblers” back.

According to Lieutenant Bongle, once he finalized his matrix, he generally did not remove an officer from an assignment without a good reason. Lieutenant Bongle states that he did not consciously move Officer Resch in any way that was inconsistent with how he dealt with everyone else and that, in 2006, Officer Resch never came to Lt. Bongle to discuss his Packer game day assignment. Lieutenant Bongle states that it is possible that he knew that Officer Resch had worked the Club Seat assignment for a number of years, but he does not believe that he was aware of this fact in 2006.

Chief Arts recalls that he had several officers stop by his office to ask if they could have their old assignments back. Chief Arts explains his interactions with these officers as follows:

• •

. . . I was consistent with all of them. I remember several of them off the top of my head, probably not all of them, but I told them that I would pass the information on to Lieutenant Bongle and we would see what we can do, but I couldn’t promise them anything and that we retained the right to make those assignments.

Q: And in some situations did you - - were you able to make the adjustment?

A: That I'm not sure of. I passed it on and I never checked back. I would assume so but I couldn't be certain. (T. Vol. 12 at 2028-9)

...

Officer Resch recalls that, when he signed up for 2006 Packer season game day overtime, he stated a preference for Club Seats. Officer Resch further recalls that the initial roster for the August 19, 2006 Packer game indicated that he had been assigned to Club Seats. Officer Resch recalls that the 2006 Packer season rosters had numerous revisions.

Officer Resch states that not all officers who indicated a preference when signing for 2006 Packer season game day overtime received their preferred assignment. According to Officer Resch, many of those denied preferences were too junior to have their preference honored.

Officer Resch states that he did not work Club Seats at the initial August 19, 2006 game and did not work Club Seats in the 2007 or 2008 seasons. Officer Resch states that it is possible that he occasionally worked Club Seats during the 2006 season, but he does not recall doing so. According to Officer Resch, four officers worked Club Seats in 2006.

In an email dated August 18, 2006, Attorney Parins advised Attorney Dietrich that the decision to take away Officer Resch's Club Seats assignment was blatant retaliation against union officers. In his responsive email, Attorney Dietrich denied that any change in assignment was based upon union animus. Attorney Dietrich explained that the Packers had asked that the workforce numbers be reduced which resulted in several changes in work assignments.

Officer Resch states that he does not have any evidence that Chief Arts told Lieutenant Bongle to remove Officer Resch from Club Seats. When asked why he thought Lieutenant Bongle would be responding to Officer Resch's union activity, Officer Resch replied that when Lieutenant Bongle was an officer, he was "probably one of the most anti-union members of our union that we had." (T. Vol. 9 at 1583) Officer Resch recalls that, in his thirty years of experience, Officer Bongle was the only member who formally wanted to get out of the union and that Officer Bongle had made no bones about the fact that he did not like the union. According to Officer Resch, Officer Bongle did not like the union's attorney or Officer Resch and did not agree with the union board.

Officer Resch states that, shortly after Officer Resch became Association President, Officer Bongle and another officer named him in a prohibited practices complaint filed by these two officers. Officer Resch recalls that this prohibited practices complaint was filed in 2001 or 2002. Officer Resch further recalls that this complaint had to do with the fact that

Complainant had subpoenaed Officer Bongle to testify in another prohibited practices complaint and that Officer Bongle was so upset about this subpoena that Officer Bongle hired an attorney to represent him.

Officer Resch recalls that, on several occasions, Officer Bongle requested that Complainant provide him with an accounting of legal fees expenditures. Officer Resch further recalls that Officer Bongle had a problem with Complainant's dues being increased and with dues being used to pay the Parins Law firm. Officer Resch states that Officer Bongle attempted to solicit a different representative for the union, but was voted down by the membership. Officer Resch recalls that, in 2002, a dispute involving the termination of Officer H. was resolved and that Officer Bongle had objected to Complainant spending money on defending Officer H. because he believed that the charges against Officer H. had been substantiated.

Officer Resch recalls that, when a prior Chief was taking job actions against Officer Resch and Mulrine, Jim Arts "saw some stuff going on, and he was – as was his nature, was trying to get everybody working together, and we agreed to go meet with the chief." (T. Vol.9 at 1629) Officer Resch confirms that Jim Arts did not have anything to do with these job actions against Officer's Resch and Mulrine.

Officer Resch recalls that, in the late 1990's, Lt. Arts stood behind Officer Resch and joked that Officer Resch had a target on his back. Officer Resch understood Lt. Arts to be implying that Officer Resch's Association activities made him a target.

Officer Resch states that he did not confront Lt. Arts regarding this statement; that Lt. Arts had once been a union representative; that he did not feel intimidated by Lt. Arts' comment; and that he thought Lt. Arts was referring to the fact that Officer Resch had a contentious relationship with Police Chief Lewis. Officer Resch states that, in the late 1990's, he thought he had a good relationship with Arts.

Officer Resch recalls that, between the end of 2005 and August 2006, Complainant had filed a number of grievances and/or prohibited practice complaints against the City. According to Officer Resch, the Association filed approximately eight grievances in 2005 and, by the time that the Packer games started in August of 2006, Complainant had filed approximately thirty grievances. Officer Resch recalls that there were approximately forty grievances filed in 2006 and that Lt. Bongle was involved in a "bunch of special events grievances."

Officer Ben Allen is the current Association President and has been active as an Association representative for approximately five years. Officer Allen recalls that, in 2006, he asked Lieutenant Bongle if he and the Officer that he was field training could go on a walking team during a Packer game because he thought it would be a good way for the new Officer to become acquainted with Lambeau Field and the various game day duties. Officer Allen further recalls that Lieutenant Bongle denied the request on the basis that there were senior officers already assigned to the walking patrol.

Lieutenant Bongle does not recall mentioning seniority to Officer Allen. Lieutenant Bongle states that, if he made the comment attributed by Officer Allen, then the context for this comment would have been that Officer Allen had insufficient seniority for the time block that included the walking team.

Lieutenant Bongle confirms that, in 2006, he was aware that Officer Resch was Association President and that the Association had engaged in grievance activity. Lieutenant Bongle states no one told Lt. Bongle not to put Officer Resch in Club Seats, or to put any other person in a particular position.

Lieutenant Bongle recalls that, in September 2001, he filed a prohibited practices complaint against Officer Resch, as President of the Association. This complaint alleges three counts, *i.e.*, “Coercion and intimidation of union members;” “Failure to present financial reports to members” and “Unauthorized deduction of union dues.” According to Lt. Bongle, this complaint was settled in December of 2001.

Lieutenant Bongle recalls that the interactions with the Association that lead to his complaint occurred at a time when Officer Darm was Association President and that the only reason Officer Resch was named in the complaint was that he was the current Association President. Lieutenant Bongle states that, based on the testimony, he knows that Officer Resch was an Association representative prior to 2001, but that Lieutenant Bongle had not had any contact with Officer Resch in that capacity.

Summary

At all times material hereto, Officer Resch has engaged in protected, concerted activity by filing grievances and otherwise acting as an Association representative for the purposes of collective bargaining and contract administration. At all times material hereto, City Representative’s Commander Brodhagen, Lieutenant Bongle and James Arts, in his position of Chief, Commander and Captain, have known that Officer Resch was Association President and that Officer Resch has engaged in protected, concerted activity.

2005

Officer Resch’s December 25, 2005 Packer game assignment did not include a Club Seats assignment. In discussions recalled by Officer Resch, as well as in the written memo, Commander Brodhagen provided non-retaliatory rationale for his initial decision to change Officer Resch’s assignment on December 25, 2005, *i.e.*, that the change in assignment was triggered by the availability of an early overtime assignment that had been requested by Officer Resch.

When Officer Resch responded that he would waive his right to the early overtime assignment if he could keep his Club Seats assignment, Commander Brodhagen indicated that he could not return Officer Resch to his Club Seats assignment. According to Commander

Brodhagen's memo, he was concerned that, if he displaced Officer Duebner, he would violate the contract by removing a person already given an assignment at the game.

The City argues that Commander Brodhagen was applying Article 6.06. Commander Brodhagen's memo does not identify the contract provision(s) that gave him concern.

City representatives, such as Commander Brodhagen, have a legitimate business purpose in avoiding acts that violate the contract. If Commander Brodhagen had a *bona fide* concern that the contract did not permit him to "remove a person already given an assignment at the game," then the traffic assignment at Lombardi and Oneida should have warranted the same concern. Officer Resch's testimony, however, establishes that when Commander Brodhagen returned Officer Resch to the Oneida/Lombardi traffic assignment, he displaced an Officer already given that assignment.

Officer Resch returned to his Club Seats assignment in early 2006. The record indicates that the January 2006 assignment was under the control of then Commander Arts, rather than Commander Brodhagen.

The nature of the Association's conflict with Commander Brodhagen throughout 2005; Officer Resch's status as Association President; and the inconsistent application of Commander Brodhagen's stated rationale for his refusal to reassign Officer Resch to Club Seats duty on December 25, 2005, logically support the inference that Commander Brodhagen's refusal was motivated, at least in part, by animus toward protected, concerted activity.

The clear and satisfactory preponderance of the evidence establishes that the City, by its representative Commander Brodhagen, retaliated against Officer Resch in violation of Sec. 111.70(3)(a)3, Stats., and, derivatively, Sec. 111.70(3)(a)1, Stats., when Commander Brodhagen refused to reassign Officer Resch to Club Seats duty on December 25, 2005, as alleged in Count One of the complaint. As remedy for this unlawful conduct, the Association requests a cease and desist order and that Respondent be required to post an appropriate notice.

The Examiner agrees with the Association's argument that it is appropriate to order Respondent City to post a notice acknowledging its violation of MERA. However, given the fact that this violation of MERA occurred in 2005 and Commander Brodhagen left City employment in early 2006, the Examiner rejects the Association's argument that a cease and desist order is appropriate.

2006, 2007, 2008

It is evident that James Arts had input into Officer Resch's Club Seat assignment in January of 2006. It is not evident that any City representative other than Lt. Bongle was responsible for assigning Officer Resch to Packer game day duties for the 2006, 2007 and 2008 Packer seasons. Lieutenant Bongle has provided a non-retaliatory explanation for his decision to change the process for assigning Packer game duties in 2006. Lieutenant Bongle has also

provided a non-retaliatory explanation of why this process may have resulted in duty assignments that differed from previous years' duty assignments.

Complainant claims that, with respect to Officer Resch, this non-retaliatory explanation is pretextual. Complainant argues that hostility toward Complainant and Officer Resch's exercise of protected, concerted activity motivated Lt. Bongle's decision not to assign Officer Resch to Officer Resch's preferred Club Seat duty.

It is evident that, prior to 2002, then Officer Bongle was dissatisfied with certain Complainant decisions. It is also evident that this dissatisfaction caused then Officer Bongle to file a complaint of prohibited practices on September 10, 2001 against "William Resch, President Green Bay Police Protective Association." Contrary to the argument of the City, the contents of this complaint and the circumstances surrounding the filing of this complaint, may be considered when determining whether Lt. Bongle is hostile toward the exercise of rights protected under Sec. 111.70(2), Stats.

Officer Resch, who has been active as an Association representative for many years, did not become President until July 2001. The vast majority of allegations in Lt. Bongle's complaint referred to Association conduct that occurred prior to July 2001 and do not reference Officer Resch. The record provides no reasonable basis to discredit Lt. Bongle's testimony that Officer Resch's name was on the complaint because he was President of the Association at the time that the complaint was filed. Nor does the record provide a reasonable basis to discredit Lt. Bongle's testimony that, prior to the time that Officer Resch became Association President, Lt. Bongle had not had contact with Officer Resch in his capacity as Association representative.

The complaint was settled at the end of 2001. Lieutenant Bongle denies that this complaint had any basis in his Packer game assignment decisions. According to Lt. Bongle, he views his complaint "as a disagreement between parties that was settled several years ago, and I consider it history." (T. Vol. 12 at 1968)

In 2006, Complainant filed a number of grievances, including grievances that involved Lt. Bongle's decisions as Special Events Coordinator. The record does not show that Lt. Bongle responded to these grievances by making any statement that expresses, or implies, animus toward Complainant or any Complainant Representative, including Officer Resch, for exercising rights protected by Sec. 111.70(2), Stats.

As Complainant argues, the initial draft of the August 19, 2006 game day roster assigned Officer Resch to Club Seats, but Officer Resch did not work Club Seats on August 19, 2006. Lieutenant Bongle has provided a non-retaliatory explanation for this change in assignment, *i.e.*, that the initial draft was a "cut and paste" of the 2005 schedule and that the final game day roster was the product of multiple drafts in which Lt. Bongle refined his scheduling process. Contrary to the argument of Complainant, Lt. Bongle's testimony does not indicate that Lt. Bongle made a specific decision to remove Officer Resch from a Club Seats assignment on August 19, 2006.

As Complainant argues, Lt. Bongle testified that, after he developed his scheduling procedure, he applied the concept of “scheduling by exception” in which the person did not come out of the schedule until they could not work or opted out of the game. Lieutenant Bongle’s testimony does not reasonably indicate that an Officer who misses a game comes out of the schedule permanently.

Contrary to the argument of Complainant, the evidence that Officer Crabb missed several games in 2006, but continued to be assigned to Club Seats in 2007, is not inconsistent with Lt. Bongle’s testimony regarding his assignment methodology. Nor does Officer Crabb’s assignment reasonably indicate that Lt. Bongle did not want to assign Officer Resch to Club Seats.

Lieutenant Bongle testified that his interest was to have Officers who were available to attend all of the Packer games work the more complex assignments. According to Lt. Bongle, the Club Seat assignment is not a complex assignment, but rather, is a “pretty easy” assignment to which he could assign anybody. Neither the fact that Officer Resch takes issue with Lt. Bongle’s opinion that Club Seats duty is an easy assignment, nor any other record evidence, provides a reasonable basis to conclude that Lt. Bongle’s opinion is not *bona fide*.

Contrary to the argument of the Association, Lt. Bongle did not state on pg. 72 of the transcript of the proceedings before Arbitrator Emery “80 percent of the time officers got the assignment that they preferred.” When describing his use of discretion, Lt. Bongle stated “. . . if I could work it out without a lot of moving people around, I might try to do it . . .” (T. Vol. 9 at 1535)

Officer Resch was not the only officer not given his/her preferred assignment. The record provides no reasonable basis to conclude that these officers could not have received their preferred assignments under the scheduling process described by Lt. Bongle.

Officer Resch was one of the more senior officers. Lieutenant Bongle does not claim, and the record does not establish, that Lt. Bongle considered seniority when he exercised his discretion to give some, but not all, officers their preferred duty assignment. Nor does the parties’ contract provide officers with a seniority right to their preferred duty assignment. The fact that Lt. Bongle did not exercise his discretion to give Officer Resch, as a senior officer, his preferred assignment does not provide a reasonable basis to infer unlawful animus upon the part of Lt. Bongle.

As the City argues, the record does not establish a nexus between then Officer Bongle’s pre-2002 conflict with the Association and its representatives and his exercise of discretion that resulted in Officer Resch not receiving his preferred duty of Club Seats in the 2006, 2007 and 2008 Packer seasons. Lieutenant Bongle has described a process for scheduling Packer game assignments during the 2006, 2007 and 2008 Packer seasons that is reasonable and non-retaliatory. Lieutenant Bongle’s testimony describing this process and his application of this process does not contain the type of inconsistencies that logically support an inference that Lt. Bongle’s explanation is pretextual.

In conclusion, Lieutenant Bongle has provided valid business reasons for his conduct in designing and implementing a Packer game day assignment process and has provided a non-retaliatory explanation of why the implementation of this process did not provide Officer Resch with his preferred assignment of Club Seats. The record does not warrant the conclusion that the provided business reasons and explanation are pretextual. As discussed above, where, as here, an employer has valid business reasons for its actions, such actions will not be found to violate Sec. 111.70(3)(a)1, Stats., "simply because it could be perceived as retaliatory."

The clear and satisfactory preponderance of the record evidence does not establish that Lt. Bongle, or any other City representative, denied Officer Resch a Club Seats assignment during the 2006, 2007 and 2008 Packer seasons in retaliation for Officer Resch's, or any other municipal employee's, exercise of protected, concerted activity. The clear and satisfactory preponderance of the evidence does not establish that, in failing to give Officer Resch his preferred Club Seats assignment during the 2006, 2007 and 2008 Packer seasons, Respondents have engaged in conduct that has a reasonable tendency to interfere, restrain or coerce employees in the exercise of their Sec. 111.70(2), Stats., rights in violation of Sec. 111.70(3)(a)1, Stats.

Complainant's Count Fifteen claims that the City refused, or failed, to assign Officer Resch to Club Seats during the 2006, 2007 and 2008 Packer seasons in violation of Sec. 111.70(3)(a)1 and 3, Stats., are not substantiated by the record evidence. Therefore, the Examiner has dismissed these claims.

Count Two

Count Two, as initially filed, alleges that Respondents violated Sec. 111.70(3)(a)1, 4, and 5, Stats., when former Police Chief Van Schyndle took away Complainant's right to access and copy the daily roster. Subsequently, the Examiner granted Complainant's motion to amend Count Two to include the allegation that this conduct violated Sec. 111.70(3)(a)3, Stats.

As reflected in post-hearing argument, Complainant no longer alleges a violation of Sec. 111.70(3)(a)5, Stats. Thus, the Examiner concludes that Complainant has abandoned this claim.

Complainant continues to allege that Police Chief Van Schyndle engaged in conduct that violates Sec. 111.70(3)(a)4, Stats., and, derivatively Sec. 111.70(3)(a)1, Stats., as well as Sec. 111.70(3)(a)3, Stats. Specifically, Complainant alleges that Police Chief Van Schyndle retaliated against Association bargaining unit representatives for filing grievances and prevented the Association from obtaining information relevant and reasonably necessary to bargain a successor agreement or administer the terms of an existing collective bargaining agreement. Respondents deny committing the prohibited practices alleged by Complainant.

In a letter dated January 19, 2006 and addressed to Attorney Parins, former Police Chief Van Schyndle states:

...

The Green Bay Police Protective Association requested access to the Green Bay Police Department rosters. You, Officers Peters, DuBois and McKeough, made this request stating that the Association would like to have access to the rosters so that when there are scheduling discrepancies, the problems could be ironed out without it going to a grievance.

After I allowed the Association to have access to the rosters in the spirit of cooperation, the Association has filed four grievances that are related to the rosters. Therefore, I have decided to allow the Association to have access to the rosters through the normal open-records procedures. The Association will have to pay the normal processing fee for the records. (Comp. Ex. #29)

...

In this letter, Chief Van Schyndle acknowledges that Complainant had requested access to the Green Bay Police Department rosters and that he had allowed such access. The testimony of former Association President Resch establishes that these duty rosters contained information, such as staffing, which the Association needed to enforce the contract provisions regarding safety staffing, denial and misallocations of overtime, and call-ins.

The letter of January 2006 reflects Chief Van Schyndle's opinion that the Association had requested access to rosters so that scheduling discrepancies could be "ironed out" without resort to the grievance procedures and that Chief Van Schyndle acquiesced to this request. Neither this letter, nor any other record evidence including Chief Arts' testimony regarding conversations that he had with Chief Van Schyndle, establishes that the City and the Association had an agreement in which the right of the Association to access these rosters was conditioned upon the Association "ironing out" scheduling discrepancies without going to the grievance procedure. The record does not support the City's argument that the Association breached an agreement with Chief Van Schyndle that provided the Association with access to the rosters.

At hearing, Officer Brian Stanton described the "access" that had been allowed initially by Chief Van Schyndle, *i.e.*, Association representatives were permitted to copy the duty rosters on City copiers if they did so on their own time and used the Association's paper. Officer Stanton recalls that, on or about mid-January 2006, Chief Van Schyndle approached Officer Stanton as he and another Officer were copying duty rosters. Officer Stanton further recalls that, at that time, Chief Van Schyndle made a statement to the effect that Chief Van Schyndle was not going to permit them to make any more copies of duty rosters.

In summary, the Association requested access to the duty rosters. The duty rosters contained information that is "relevant and reasonably necessary" to carrying out the Association's duties in administering the parties' labor contract. The City does not argue, and

the record does not establish, that information contained in the duty rosters is protected by good faith confidentiality concerns and/or employee privacy interests. Under the principles enunciated in *MORAINÉ PARK*, *supra*, the City's statutory duty to bargain includes the duty to furnish the Association with the information contained on the duty roster.

Chief Van Schyndle did not refuse to provide the information contained on the duty rosters to the Association. Rather, Chief Van Schyndle advised Association representatives that the duty rosters would be provided through the "normal open-records procedures."

It is not evident that Chief Van Schyndle's decision to change the procedure for accessing roster information was related, in any way, to the City's cost in providing this information to the Association. With respect to this dispute, the City's argument that, under the "open records" law or MERA, an employer may charge for the expense of compiling and copying records is irrelevant.

Under *MORAINÉ PARK*, *supra*, the City has a duty to provide the roster information in a manner that is not so burdensome or time consuming as to impede the collective bargaining process. The collective bargaining process, as defined in Sec. 111.70(1)(a), Stats., includes the resolution of grievances arising under the collective bargaining agreement.

The "normal open-records procedure" provides a statutory right to obtain information that is separate and distinct from Complainant's MERA right to be furnished information relevant and reasonably necessary to carry out its duties as exclusive bargaining representative of the police bargaining unit. Additionally, information required to be furnished to Complainant under MERA is not necessarily the same information that is required to be furnished to Complainant under the "normal open-records procedure." By requiring Complainant to request duty roster information through the "normal open-records procedures," Chief Van Schyndle, acting as a representative of the City, imposed a burden upon Complainant that impedes the collective bargaining process in violation of Sec. 111.70(3)(a)4, Stats., and, derivatively, Sec. 111.70(3)(a)1, Stats.

Statements contained in the letter of January 2006 confirm that Chief Van Schyndle knew that the Association representative's request to have access to the duty rosters was for the purpose of contract administration. The statements contained in Chief Van Schyndle's letter further confirm that his decision to require these Association representatives to use "normal open-records procedures" to access the duty roster information was in response to the Association's conduct in filing grievances. In only allowing the Association to have access to the rosters through the normal open-records procedures, Chief Van Schyndle penalized the Association's representatives, who are municipal employees under MERA, for filing grievances.

The clear and satisfactory preponderance of the evidence establishes that the Association's representatives were municipal employees who were engaged in protected, concerted activity; that Chief Van Schyndle, an agent of the City, was aware of that activity;

that Chief Van Schyndle was hostile towards that activity; and that Chief Van Schyndle's decision to only allow the Association to have access to the rosters through the normal open-records procedures was motivated, at least in part, by Chief Van Schyndle's hostility toward municipal employee's protected, concerted activity. By this conduct, Chief Van Schyndle, acting on behalf of the City, violated Sec. 111.70(3)(a)3, Stats., and, derivatively, violated Sec. 111.70(3)(a)1, Stats.

Chief Arts recalls that, when he became the Police Chief, he and the Association were able to work out an agreement regarding Association access to rosters. In a letter to Attorney Parins dated February 12, 2007, Chief Arts states: (Resp. Ex. #8)

The purpose of this letter to advise you and the Green Bay Police Protective Association of the procedure to obtain the daily work rosters. I have spoken with staff and front desk personnel. We will make an extra copy of the daily roster and place it in GBPPA Representative Mike Van Rooy's mailbox. Front Desk personnel have been advised of this new procedure.

If you wish to make copies of 2006 daily rosters, Lt. Bongle will make them available to you for copying. The rosters can be taken to your office for immediate copying but must be returned the same day.

Please contact me if you have any questions.

In remedy of the violations of Sec. 111.70(3)(a)1, 3 and 4, discussed above, it is appropriate to order the City to post an appropriate notice. Inasmuch as Chief Arts' letter of February 12, 2007 effectively rescinded former Chief Van Schyndle's requirement that the Association request duty rosters through the open records procedure, the Examiner denies the Association's request for a cease and desist order.

Contrary to the argument of the Association, it is not an appropriate remedy for the Examiner to issue an affirmative order that the City provide access and the right to copy daily rosters as they are compiled each day. Chief Arts' letter of February 12, 2007 establishes a procedure by which Association representatives may copy daily rosters. The record does not warrant the conclusion that this procedure is so burdensome or time consuming as to impede the process of bargaining.

As Complainant further argues, an appropriate remedy includes an order to make Complainant whole by reimbursing Complainant for all monies paid to the City to obtain daily rosters under the open records law from January 19, 2006 until the time that Chief Arts restored the Association's access to copy daily rosters; together with interest at twelve per cent (12%). This interest rate is the Sec. 814.04(4), Stats, rate applied by the Commission when remedying prohibited practices under MERA.

Count Three

Count Three, as initially filed, alleges a violation of Sec. 111.70(3)(a)1, 2, 4, and 5, Stats. Subsequently, the Examiner granted Complainant's motion to amend Count Three to include an allegation that Respondents had violated Sec. 111.70(3)(a)3, Stats.

As reflected in post-hearing argument, Complainant no longer alleges a violation of Sec. 111.70(3)(a) 2, 4 or 5, Stats. Therefore, the Examiner concludes that Complainant has abandoned these claims.

Complainant continues to allege that the City engaged in conduct that has a reasonable tendency to interfere with the exercise of rights guaranteed under Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats., and that the City has engaged in unlawful retaliation in violation of Sec. 111.70(3)(a)3, Stats. Specifically, Complainant alleges that Respondents cancelled a posted motorcycle certification school in direct retaliation against an Association member who had communicated his belief that he had a contract right to attend the school and his intent to exercise his rights under the labor contract to file a grievance if not permitted to attend. Respondents deny violating Sec. 111.70(3)(a)1 and 3, Stats., as alleged by Complainant.

In April of 2006, the City posted a notice that provided "Afternoon Patrol Officers" with an opportunity to attend "Police Motorcycle Certification School." At the time of this posting, Lieutenant Wesely had been in the training division since approximately January of 2005. Lieutenant Wesely states that he based the 2006 posting upon an April 2003 posting. Lieutenant Wesely recalls sending a letter to then Association President Resch in which he advised Association President Resch that the 2006 posting was the same posting as the 2003 posting and, that, under the 2003 posting, the Department only selected afternoon shift patrol officers.

According to Lt. Wesely, the training division intentionally limited this posting to afternoon patrol officers because the Department did not have enough afternoon patrol officers certified in motorcycle operations. Lieutenant Wesely states that the Department wanted afternoon motorcycle officers to be on active patrol duty, *i.e.*, enforcing traffic and responding to calls for service. Lieutenant Wesely states that Community Patrol Officers (CPOs) may have been assigned to the afternoon shift and that CPOs are certified in motorcycle operations. According to Lt. Wesely, the primary job of an afternoon shift CPO does not involve riding a motorcycle on active patrol.

Lieutenant Wesely recalls that, on or about the day of the posting, he had a conversation with Officer Scott Peters and that, at the time of this conversation, Officer Scott Peters was a union representative. Lieutenant Wesely states that Officer Scott Peters was a day shift officer; that Officer Scott Peters indicated that he wanted to go to this training; and that Lt. Wesely responded that he was not eligible because the posting was for the afternoon shift. According to Lt. Wesely, Officer Scott Peters then said that he was going to talk to Association Board members and that he would probably be filing a grievance.

Lieutenant Wesely recalls that, following his conversation with Officer Scott Peters, he spoke with then Capt. Sterr and Chief Van Schyndle. Lieutenant Wesely recalls that Chief Van Schyndle made the determination to pull the posting. Lieutenant Wesely does not state what he told these supervisors. Nor does he relate any statements of these supervisors.

Lieutenant Wesely states that, to his knowledge, there was not a waiver system in effect at the time of the 2006 posting. According to Lt. Wesely, if the Association had a question about a posting, then the Association would discuss this question with the training division and, at times, the training division would agree with the Association's position.

Officer Danelski, who has conducted motorcycle certification training for the Department since 1997, states that the 2006 posting restricted eligibility to afternoon-shift patrol officers. According to Officer Danelski, the Department had four motorcycles. Officer Danelski recalls that there were seven motorcycle riders on the day shift and one motorcycle rider on the afternoon shift. In Officer Danelski's opinion, the Department did not need more motorcycle riders on the day shift and "no one" wanted to send day shift officers to the posted motorcycle training. Officer Danelski states that he knew that the motorcycle school training had been "called off," but that he does not know why.

Officer Danelski states that he thought that management had asked the Association for a waiver to restrict posting to the afternoon shift. Officer Danelski further states that he does not know if management had previously obtained a waiver on similar postings.

Officer Danelski recalls a conversation with Officer Scott Peters concerning this posting. According to Officer Danelski, Officer Scott Peters, who was on the day shift, was upset that the posting was not open to the whole Department. Officer Danelski recalls that Officer Scott Peters stated that he thought he had a right to go to the school and that Officer Danelski told Officer Scott Peters that junior officers should not be getting a school that Officer Scott Peters should be able to take. Officer Danelski further recalls that Officer Scott Peters stated that he would file a grievance if not permitted to go to the motorcycle certification training. Officer Danelski does not claim to have reported this conversation to a management representative or any other individual.

Officer John Peters recalls that, when he did not hear anything about this posting, he spoke with Officer Danelski and that Officer Danelski said there was some concern that the posting had been offered only to afternoon shift officers. Officer John Peters, who is currently on the Association Board, states that, absent a waiver, schooling has to be posted for the general membership. Officer John Peters states that he does not know if anyone from the Association offered the Department a waiver on the 2006 posting or if anyone from the City asked the Association for a waiver.

Officer Scott Peters states that he signed the 2006 posting; that, at the time he signed this posting, he worked the day shift; and that he was the most senior officer to sign the posting. According to Officer Scott Peters, the motorcycle training school that was the subject

of this posting was required to be offered to the most senior qualified officer unless the Association granted a waiver. Officer Scott Peters states that he was not the only day shift officer to sign this posting.

Officer Scott Peters recalls that the 2006 posting was directed to “Afternoon Patrol Officers,” but states that the “eligibilities” on the posting do not restrict eligibility to afternoon patrol officers. Officer Scott Peters recalls that, at the time of the posting, he looked at the number of officers certified to ride motorcycles and found that there were fewer certified officers on the day shift than on the afternoon shift. Officer Scott Peters confirms that his numbers included CPOs.

Officer Scott Peters does not recall telling anyone that he intended to file a grievance on the posting; but states that he may have done so. Officer Scott Peters further states that he does not know if the City knew that he had a problem with the posting. According to Officer Scott Peters, he heard that the school was not going to be filled because he was the senior person and he would be posting for a detective position in the future. Officer Scott Peters also heard that there was an issue with the posting because officers on shifts other than the afternoon shift had signed the posting.

Summary

As Complainant argues, Chief Van Schyndle pulled this posting several months after he had denied the Association access to the duty rosters. The record, however, provides no reasonable basis to connect the hostility exhibited by the Chief in the duty roster matter to the Chief’s decision to pull the April 2006 posting. The record does not support Complainant’s argument that Chief Van Schyndle’s decision to pull the April 2006 posting was motivated, at least in part, by hostility toward a municipal employee’s protected, concerted activity.

It is not evident that the Association, or any of its members, filed a grievance on the 2006 posting. Nor is it evident that any Association member other than Officer Peters and Officer Danelski had knowledge that Officer Peters contemplated filing a grievance. Neither Officer Peters, nor Officer Danelski, states that he knew, or inferred, that Police Chief Van Schyndle pulled the posting because the Chief had learned that Office Peters was contemplating filing a grievance.

By pulling the posting, the City prevented the breach of contract asserted by Officer Scott Peters because the Department no longer offered motorcycle training school solely to afternoon shift officers. A response to a potential grievance that cures an alleged contract violation is more likely to encourage employees in the exercise of their Sec. 111.70(2), Stats., rights, than to discourage the exercise of such rights.

The record establishes that Chief Van Schyndle made the decision to pull the posting. The record does not establish the reason for Chief Van Schyndle’s decision. After evaluating Chief Van Schyndle’s conduct in pulling the 2006 posting, under all the surrounding

circumstances, the Examiner rejects Complainant claim that this conduct has a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Sec. 111.70(2), Stats., rights.

Complainant has not established, by a clear and satisfactory preponderance of the evidence, that Respondents have violated Sec. 111.70(3)(a)1 and 3, Stats., as alleged in Count Three. Therefore, the Examiner has dismissed these claims.

Count Four

In the initial complaint, Complainant alleges that Respondents violated Sec. 111.70(3)(a)1, 2, 4 and 5, Stats. Examiner Gallagher's Order Granting in Part and Denying in Part Motion to Dismiss Complaint Claim's I, IV and XI includes the following:

The Motion to Dismiss is granted as to all paragraphs of Claims I and IV which allege violations of Sec. 111.70(3)(a) 4 and 5, Stats., specifically Complaint paragraphs 6-12 and 14 and, in part, 15 are dismissed and Complaint paragraphs 31, in part, and 32-37, and 39-42 are also dismissed.

The Motion to Dismiss is denied as to those portions of Claims I and IV which allege violations of Sec. 111.70(3)(a)1 and 2, Stats., specifically paragraphs 10, and in part 15, and in part 31 and 38.

At a pre-hearing conference held on February 3, 2009, Examiner Burns denied Complainant's Motion to Reconsider Examiner Gallagher's Order. At this pre-hearing conference, Examiner Burns responded to Complainant's Motion to Amend the complaint by adding an allegation that Respondents had violated Sec. 111.70(3)(a)3, Stats., to certain Counts of the complaint. Count Four was not included in this Motion to mend.

In post-hearing written argument on Count Four, Complainant does not continue to allege a violation of Sec. 111.70(3)(a)(2), Stats., or an independent violation of Sec. 111.70(3)(a)1, Stats. Rather, Complainant alleges a violation of Sec. 111.70(3)(a)4, Stats., and, derivatively, Sec. 111.70(3)(a)1, Stats.

As discussed above, Examiner Gallagher previously dismissed that portion of Count Four which alleges a violation of Sec. 111.70(3)(a)4 and 5, Stats., and this Examiner denied Complainant's Motion to Reconsider Examiner Gallagher's Order. Inasmuch as all of Complainant's Count Four claims have either been abandoned by Complainant or dismissed by Examiner Gallagher, the Examiner has not addressed any argument with respect to Count Four.

Count Five

In Count Five, as initially filed, Complainant alleges that Respondents violated Sec. 111.70(3)(a)1, 4, and 5, Stats. Complainant filed a motion to amend complaint by adding the allegation that Respondents had retaliated against protected, concerted activity in violation of Sec. 111.70(3)(a)3, Stats. The Examiner denied this motion at the pre-hearing conference held on February 3, 2009. The basis for this denial was that the language in Count Five does not express, or reasonably imply, retaliation in violation of Sec. 111.70(3)(a)3, Stats., and, at the time of the motion to amend, the complained of conduct was not within the Sec. 111.07(14), Stats., one-year filing period.

In post-hearing argument, Complainant does not address the Sec. 111.70(3)(a)5 allegation and, thus, the Examiner considers this claim to have been abandoned by Complainant. Complainant continues to maintain that Respondents have violated Sec. 111.70(3)(a)1 and 4, Stats. Respondents deny committing the prohibited practices alleged by Complainant.

Complainant asserts that these MERA violations occurred when then Commander Arts met with Officer Danelski, without notification to Complainant, and when Commander Arts had a supervisor meet and confer with Officer Mulrine without notification to Complainant. Complainant further asserts that, in both instances, then Commander Arts was attempting to influence and convince these officers that they had to work overtime hours that had been misallocated in an attempt to circumvent, or evade, the duty to bargain over remedy for overtime violations.

Officer Danelski

On January 9, 2006, Officer Danelski filled out an "Officer's Overtime" card in which he requested that he be paid 2.8 hours of overtime for January 9, 2006. According to Officer Danelski, this payment would have been for overtime that Officer Danelski had been contractually entitled to work, but had been misallocated to another Officer. In response to this card, then Commander Arts issued the following memo:

TO: ALL SUPERVISORS
FROM: COMMANDER ARTS
SUBJECT: OFFICER DANELSKI OT ASSIGNMENT
DATE: JANUARY 16, 2006
CC: OFFICER DEAN DANELSKI

Officer Danelski was inadvertently bypassed on an overtime call in. This memo authorizes Officer Danelski to work 2.8 hours of overtime. He must work the 2.8 hours in order to be compensated. Please contact me if there are any questions.

On or about January 16, 2006, Officer Danelski received a copy of his overtime card. This overtime card indicated that Commander Arts had denied his request to be paid 2.8 hours. Attached to this card was a handwritten note from then Commander Arts, which stated, *inter alia*, "I sent you a memo authorizing 2.8 hours." and "If you have any questions, please contact me."

According to Officer Danelski, he had some questions about the denial and contacted Commander Arts. Officer Danelski recalls that he met with Commander Arts and had a conversation on the denial of overtime.

Officer Danelski recalls that, during this conversation, Commander Arts told Officer Danelski that he was denying the payment of the 2.8 hours of overtime because Officer Danelski did not work the overtime, but that Officer Danelski could work hours to make up the overtime. Officer Danelski further recalls that, at the time, he agreed with Commander Arts. According to Officer Danelski, this conversation lasted about one and one-half minutes and Commander Arts was very amicable. Officer Danelski states that, after his conversation with Commander Arts, he happened to meet Association President Resch; that Officer Danelski explained that he had been asked to work the hours; and that Association President Resch told him not to work the hours.

Officer Danelski confirms that, on or about February 3, 2006, the Association filed a grievance requesting that Officer Danelski receive 2.8 hours of overtime for January 9, 2006. The parties agree that the parties settled this grievance in October 2006 and that, under this grievance settlement, Officer Danelski received payment for 2.8 hours of overtime without having to work this overtime.

Summary

Officer Danelski states that he filled out the card requesting payment for 2.8 hours of overtime after being told to do so by an Association representative. Officer Danelski does not claim, and the record does not establish, that, when Officer Danelski submitted this card to management, he told Commander Arts, or any other City representative, that he was submitting this card on the advice of the Association or that the Association was involved in his request for payment of 2.8 hours of overtime. The Association filed its February 3, 2006 grievance after Officer Danelski had his conversation with then Commander Arts.

Contrary to the argument of Complainant, Commander Arts did not advise Officer Danelski to meet with Commander Arts. Rather, Commander Arts offered to meet with Officer Danelski to answer questions on Commander Arts' response to his time card

submission. In response to this offer, Officer Danelski initiated a conversation with Commander Arts because he had questions regarding Commander Arts' denial of his overtime payment request.

In communicating his position on Officer Danelski's request to be paid 2.8 hours of overtime, Commander Arts was not coercing Officer Danelski into working the misallocated overtime or individually bargaining with Officer Danelski. Rather, Commander Arts was informing Officer Danelski of how one party to the contract, *i.e.*, management, was administering the overtime provisions of the contract.

As reflected in the memo of January 16, 2006, Commander Arts did not dispute that Officer Danelski should have been offered the 2.8 hours of overtime on January 9, 2006. According to Chief Arts, at the time of his conversation with Officer Danelski, he was of the opinion that "you have to work the time to get the dime." Contrary to the argument of Complainant, the record provides no reasonable basis to conclude that, in January 2006, Chief Arts did not have a *bona fide* opinion that Officer Danelski must work 2.8 hours in order to receive the overtime pay.

As Complainant recognized when it filed the February 3, 2006 grievance, the parties have bargained contract language that addresses Officer Danelski's overtime rights. The issue of whether or not Officer Danelski was entitled to receive overtime pay without working the overtime was resolved when the parties settled the February 3, 2006 grievance.

In summary, the record provides no reasonable basis to conclude that Commander Arts discussed a pending grievance with Officer Danelski or coerced Officer Danelski into working the misallocated overtime. Respondents did not have a MERA duty to provide Complainant with prior notice of Officer Danelski's meeting with Commander Arts or to provide Complainant with an opportunity to be present at Officer Danelski's meeting with Commander Arts.

In the meeting with Officer Danelski, Commander Arts did not individually bargain with Officer Danelski on the issue of the remedy for misallocation of overtime. Nor did Commander Arts engage in any conduct that reasonably could be construed to have a chilling effect on Officer Danelski's, or any other Green Bay Police Officer's, decision to file a grievance. Complainant has not established, by a clear and satisfactory preponderance of the evidence, that the City, by its representative Commander Arts, has violated Sec. 111.70(3)(a)1 or 4, Stats., as claimed by Complainant. Therefore, these claims have been dismissed.

Officer Mulrine

Officer Resch recalls that, in January 2006, Captain Arts became Commander Arts and assumed the responsibility for Department operations. Officer Resch further recalls that, between January 9, 2006 and February 3, 2006, Association representatives asked to meet with Commander Arts to discuss how to improve the relationship between the Association and the

Department. According to Officer Resch, Commander Arts and the Association's representatives had an informal discussion on a variety of issues, including Officer Danelski's overtime issue.

Officer Resch recalls that Commander Arts indicated that Officer Danelski would have to work the time; that Officer Resch disagreed; and that Officer Resch gave examples of officers who received overtime pay without having to work the overtime hours. According to Officer Resch, one of these examples was Officer Mulrine. Neither Officer Resch's testimony, nor any other record evidence, establishes that this meeting occurred prior to the meeting between Officer Danelski and Commander Arts.

As Commander Arts recalls the conversation, he told the Association's representatives that the Department does not pay overtime when the missed overtime opportunity was unintentional. Commander Arts further recalls that the Association's representatives denied that there was such a distinction and told Commander Arts that, recently, Officer Mulrine had received overtime pay without having to work the overtime hours. Commander Arts recalls that he responded that could not be and that he would check it out.

Police Chief Arts recalls that, following this conversation with the Association's representatives, he told Lt. LePine to ask Officer Mulrine about his overtime situation. Lieutenant Todd LePine recalls that Commander Arts gave him a copy of an "Officer's Overtime" card for Officer Shannon Mulrine and told Lt. LePine to ask specific questions of Officer Mulrine. Police Chief Arts further recalls that he told Lt. LePine that Officer Mulrine was to respond to these questions in detail form. Lieutenant LePine recalls that he was to ask Officer Mulrine if he worked the time; who signed the card; and what the supervisors told Officer Mulrine when they signed the card. Lieutenant LePine states that he wrote these questions on the overtime card.

Lieutenant LePine recalls that, after roll call, he approached Officer Mulrine in the parking lot; gave Officer Mulrine a copy of the overtime card and told Officer Mulrine that Commander Arts requested details on answers to the questions on the card. Lieutenant LePine further recalls that Officer Mulrine responded that he had not worked the time and that he would discuss the request with Officer Resch. According to Lt. LePine, he had asked Commander Arts if his request was an order and Commander Arts responded "Yes." Lieutenant LePine states that he did not want Officer Mulrine to get into trouble so he told Officer Mulrine that the request for details was to be considered an order.

Officer Mulrine recalls that, while he was in a Department parking lot, Lt. LePine gave him a copy of his "Officer's Overtime" card; that this card indicated that Officer Mulrine would be paid 5.3 hours for overtime worked on August 13, 2005; and that this card had been signed by Captain Arts. According to Officer Mulrine, Lt. LePine told him that Commander Arts wanted to know if Officer Mulrine had worked the time; who had signed the card; and which supervisor had given him the card when he signed it. Officer Mulrine recalls that he told Lt. LePine that Jim Arts had signed this card and that Lt. LePine responded that he (Lt.

LePine) had told Capt. Arts that Capt. Arts had signed the card and that Capt. Arts replied that he should just ask Mulrine.

This overtime card indicated that there had been an "Error in Scheduling-Safety Violation" and indicates that then Capt. Arts approved the overtime on August 24, 2005. (Comp. Ex. #55) Officer Mulrine recalls that he had not filed a grievance on this overtime, but prior to receiving this card on September 1, 2005, Association President Resch had told Officer Mulrine to expect the card as part of a grievance settlement. Officer Mulrine states that the card had been filled out at the time it was presented to Officer Mulrine for his signature. Officer Mulrine assumes that he received the overtime payment.

Officer Mulrine states that, a few years prior to his conversation with Lt. LePine, he had been the subject of an internal affairs investigation involving the allegation of a manufactured expense report. Officer Mulrine further states that he never saw this expense report, but understands that Jim Arts had signed his name to this report. Officer Mulrine recalls that this investigation went on for months; that he was suspended for three weeks; and that, in the end, he was not disciplined because he had done nothing wrong.

Officer Mulrine states that Lt. LePine did not make any accusation, but that Lt. LePine's presentation implied that someone other than Jim Arts had signed the overtime card and that Officer Mulrine felt accused of submitting an overtime card that had not been authorized. Officer Mulrine states that the nature of Lt. LePine's questions, as well as his experience with the prior internal affairs investigation, lead him to surmise that he was being accused of taking overtime to which he was not entitled.

Officer Mulrine testified that Lt. LePine's questioning was the kind of procedure used by the Department when investigating misconduct. Concerned that there was an investigation that could lead to discipline, Officer Mulrine contacted an Association representative. According to Lt. LePine, an officer who is the subject of an informal investigation may be asked to write details and, thus, it would be reasonable for Officer Mulrine to assume that he was being investigated.

Officer Mulrine recalls that, within a few minutes of his conversation with Lt. LePine, he had a second conversation with Lt. LePine, in the presence of Association Representative Schmeichel, and that, during this second conversation, Officer Mulrine asked Lt. LePine if he was ordering Officer Mulrine to write details.

Before the end of his shift, Officer Mulrine responded to Lt. LePine's order by drafting details. These details state as follows:

ON 1-25-06 I WAS ORDERED TO WRITE DETAILS BY
LT. LEPINE IN REFERENCE TO SEVERAL QUESTIONS ABOUT AN
OVERTIME CARD.

THE OVER TIME CARD WAS FILLED OUT WITH MY NAME AND A DATE AND TIME AND WHAT APPEARED TO BE COMMANDER ARTS SIGNATURE ON IT. I HAD BEEN TOLD BY A UNION REPRESENTATIVE BEFORE I RECEIVED THE CARD THAT I WAS GOING TO GET IT AS A SETTLEMENT TO GRIEVANCE.

I DON'T RECALL WHO GAVE ME THE CARD BUT I SIGNED IT AND RETURNED IT AND I DIDN'T WORK ANY TIME IN REFERENCE TO THE CARD.

Officer Mulrine states that he also wrote "details" which he submitted to the Association. (Comp. Ex. # 56) In these details, Officer Mulrine claimed that his interaction with Lt. LePine was "clearly an investigation into a grievance and an attempt by members of management to intimidate me or retaliate against me for my involvement in that grievance."

Summary

Presumably, Commander Arts would recognize his own signature. Thus, as Complainant argues, it is odd that Commander Arts would have Lt. LePine ask Officer Mulrine who signed the time card. Given this oddity, as well as Officer Mulrine's prior internal affairs experience, it may have been reasonable for Officer Mulrine to infer that he was the subject of an investigation into whether someone other than Captain Arts had signed the time card. Nonetheless, Commander Arts' purpose in having Lt. LePine question Officer Mulrine was not to investigate Officer Mulrine. Rather, Commander Arts' purpose in having Lt. LePine question Officer Mulrine was to investigate the Association's claim that paying Officer Danelski for time not worked would be consistent with the resolution of Officer Mulrine's prior overtime grievance.

At the time of the conversation between Officer Mulrine and Lt. LePine, there was no pending grievance on Officer Mulrine's time card. Rather, this grievance had been resolved several months earlier by paying Officer Mulrine the requested overtime. Neither Officer Mulrine, nor Lt. LePine, testified that Lt. LePine referenced Officer Mulrine's grievance activity, or any other grievance activity, during their conversation on January 25, 2006.

Lieutenant LePine testified that he did not accuse Officer Mulrine of doing anything improper. Lieutenant LePine's testimony is consistent with Officer Mulrine's account of the conversations.

Lieutenant LePine's conduct did not provide Officer Mulrine with a reasonable basis to infer intimidation or retaliation against Officer Mulrine for his involvement in the grievance related to his overtime card or any other grievance. The fact that Officer Mulrine perceived Lt. LePine's questioning as retaliatory is not sufficient to establish a violation of Sec. 111.70(3)(a)1, Stats., where, as here, Lt. LePine had a legitimate business purpose for questioning Officer Mulrine.

In summary, Lt. LePine's interaction with Officer Mulrine did not involve individual bargaining. MERA does not obligate the City to provide Complainant with prior notice of the meeting initiated by Lt. LePine or to provide Complainant with an opportunity to be present at the meeting initiated by Lt. LePine. The evidence of Commander Arts' and Lt. LePine's conduct in questioning Officer Mulrine about his time card does not warrant the conclusion that Respondents have violated Sec. 111.70(3)(a)1 and 4, Stats., as claimed by Complainant. Therefore, the Examiner has dismissed these claims.

Count Six

In Count Six of the initial complaint, Complainant alleges that Respondents violated Sec. 111.70(3)(a)1, 2, 4 and 5, Stats. In post-hearing written argument, Complainant has limited its argument to the allegation that Respondents violated Sec. 111.70(3)(a)4 and, derivatively, violated Sec. 111.70(3)(a)1, Stats. The Examiner concludes, therefore, that Complainant has abandoned any claim that Respondents committed an independent violation of Sec. 111.70(3)(a)1, Stats., or violated Sec. 111.70(3)(a)2 and 5, Stats.

A review of the complaint, and its subsequent amendments, establishes that the Sec. 111.70(3)(a)4, Stats., claim alleged in the complaint, as amended, is an individual bargaining claim and not a unilateral change claim. Accordingly, the Examiner has not addressed Complainant's claim that Respondents unilaterally changed the *status quo* regarding selection procedures for officers who attend the FTO Training school.

On February 23, 2006, the Training Department posted a training opportunity that includes the following: (Comp. Ex. #32)

...

TO: All Patrol Officers

RE: **Field Training Officer Certification**

Fox Valley Technical College is offering the above training on **May 1-5, 2006, 5:00am-4:30pm**. Upon completion of this course you will assume the position of a Green Bay Police Department Field Training Officer.

Due to the recent changes in the work schedule, we are in need of officers from the afternoon, evening and night shifts.

We anticipate sending as many qualified officers to this training as possible. Please sign the attached sheet if you are interested in attending. This posting shall be in the Shift Commander's office and will remain effective until March 17, 2006. If you would like more information about the FTO program, please contact Lt. Balza or Capt. Sterr.

...

The posting had three columns for signatures, *i.e.*, “Afternoons,” “Evenings,” and “Nights.” Sixteen officers signed this posting.

After the posting came down, the Training Department selected the officers who would receive this training. The Training Department also issued a memo that identified the officers selected for this training, *i.e.*, “Nights”- Craig Carlson, Ben Allen, Patrick Childs, and Jon Nejedlo; “Afternoons” – Cassie Pakkala, Tod Kulow, Derek Wicklund; and “Evenings”-David Steffens and Kevin Warych. This memo was given to certain supervisors and the selected officers.

Officer Ramos signed this posting in the “Afternoons” column. According to Officer Ramos, he heard by word of mouth that he was not going to the FTO training. Officer Ramos states that he thought he had the right to go because he had four consecutive years of law enforcement experience. According to Officer Ramos, he had an approximately one minute conversation with Commander Sterr in which he asked why he could not go. Officer Ramos states that he did not ask for a grievance, but just addressed “it.”

Commander Sterr recalls that, after the memo went out, Officer Ramos approached her outside of the station and asked why he was not going to the school. Commander Sterr further recalls that Officer Ramos stated that he had prior experience with another Department. According to Commander Sterr, she responded something to the effect that you are right; I will check the dates; and if it makes you eligible, then you will go.

Commander Sterr recalls that, after her conversation with Officer Ramos, she looked at his file and determined that he was qualified for the school. Thereafter, Officer Ramos was permitted to attend the FTO training school.

Officer Wicklund signed the FTO posting in the “Afternoons” column. Officer Wicklund received a memo that identified Officer Wicklund as one of the officers selected for the training. Officer Wicklund recalls that he had a conversation with Commander Sterr in which she told him that his selection might have been a mistake and that they were looking into it. Officer Wicklund recalls that Commander Sterr also said that he might not be going to the FTO school because he did not have enough time. Officer Wicklund recalls that he responded that, if did not qualify and did not get it, then he did not get it.

According to Officer Wicklund, at some point he understood that the Association might file a grievance if he, rather than Officer Ramos, went to the FTO training school. Officer Wicklund’s testimony indicated that he then went to Lt. Balza; asked if he was going to the FTO school; Lt. Balza responded that he did not know and that, subsequently, Lt. Balza told him that it was possible that both he and Officer Ramos would go.

Officer Wicklund recalls that, thereafter, he was told that he and Officer Ramos would both go to the FTO training school; that an exception had been made to allow both officers to

go to the training; and that Officer Wicklund would not be allowed to train until his fourth anniversary had passed. Officer Wicklund does not recall if this conversation was with Commander Sterr or Lt. Balza. Commander Sterr does not recall having any conversation with Officer Wicklund on this matter, but agrees that it is possible that she had such a conversation.

According to Commander Sterr, at the time that this posting went up, the Department had determined that it could send up to ten people to the FTO school and that the Department wanted four on afternoons, four on nights, and two on evenings. Commander Sterr recalls that, when the posting came down, there were only eight people who met the qualifications; not including, Officer Ramos. According to Commander Sterr's testimony, these qualifications were "a minimum of four consecutive years of service as a sworn officer with two years minimum as a sworn officer with the Green Bay Police Department."

Commander Sterr recalls that, although Officer Wicklund did not meet these qualifications, he had been selected because he would meet the four-year requirement approximately 60 days after FTO school was scheduled to be completed; the Department thought this would be OK; and the Department wanted to make use of a financial opportunity to send officers to FTO school. Commander Sterr recalls that, prior to the February 23, 2006 posting, there had been sufficient applicants with "a minimum of four consecutive years of service as a sworn officer with two years minimum as a sworn officer with the Green Bay Police Department."

Summary

Contrary to the argument of Complainant, Commander Sterr did not meet individually with Officer Ramos to resolve a grievance. Rather, Officer Ramos approached Commander Sterr to ask her why he had not been selected for the FTO training and, during this conversation, Officer Ramos provided Commander Sterr with information that caused her to conclude that he should have been selected for the FTO training school. This type of information exchange does not constitute individual bargaining within the meaning of MERA.

MERA does not require Respondents to provide Complainant with notice of Commander Sterr's discussion with Officer Ramos or to provide Complainant with an opportunity to be present during this discussion. When Officer Ramos contacted Commander Sterr, Respondents did not have a MERA obligation to refer Officer Ramos to Complainant. Complainant has not established, by a clear and satisfactory preponderance of the evidence, that Commander Sterr or Lt. Balza engaged in individual bargaining in violation of Sec. 111.70(3)(a) 4, Stats., and derivatively Sec. 111.70(3)(a)1, Stats., when they discussed the FTO training opportunity with Officer Ramos and/or Officer Wicklund. Therefore, the Examiner has dismissed these claims.

Count Seven

In Count Seven of the initial complaint, Complainant alleges that, in permitting Officer Stephanie Thomas to flex her work hours to attend a volunteer opportunity on July 31, 2006, the City individually bargained with Officer Thomas in violation of Sec. 111.70(3)(a)4 and, derivatively violated Sec. 111.70(3)(a)1, Stats. Complainant continues to address this allegation in post-hearing written argument. Respondents deny violating Sec. 111.70(3)(a)4 and 1, Stats., as alleged by Complainant.

At hearing, Officer Thomas recalled that she spoke with a shift commander who was a Lieutenant. According to Officer Thomas, she told this shift commander that she wanted to help with the Cops and Kids program; that it was her workday; and that she did not know if it was possible for her to go on her workday or if she would have to take time off. Officer Thomas confirms that this shift commander allowed her to flex her workday to attend this event. Officer Thomas does not claim, and the record does not establish, that individuals other than Officer Thomas and the shift commander were present during this conversation.

Officer Thomas could not recall the name of this shift commander. As the City argues, the record does not establish the identity of the supervisor who agreed to allow Officer Stephanie Thomas to flex her work hours on July 31, 2006.

Officer Thomas does not state that, when seeking time off to attend the Cops and Kids Camp event, she asked the unidentified supervisor for a benefit not provided under the labor contract. Officer Thomas does not state that this unidentified supervisor told Officer Thomas that he was providing Officer Thomas with a benefit not provided by the labor contract. In fact, Officer Thomas does not relate any statements made by the unidentified supervisor.

Lieutenant Wesely's testimony establishes that he had a conversation with Officer Thomas in which Officer Thomas expressed a desire to attend a Cops and Kids event during her regularly scheduled work shift. The record does not establish that the unidentified supervisor had knowledge of Officer Thomas's conversation with Lt. Wesely. Nor does the record establish that the unidentified supervisor had any communication with Lt. Wesely, or other City supervisors and/or managers, regarding an Association bargaining unit member's right to flex their work shift. As the City argues, the record is devoid of evidence regarding the supervisor's motive, or intent, in allowing Officer Thomas to flex her work hours on July 31, 2006.

Complainant's claim that, under Sec. 4.04 of the parties' 2005-2006 collective bargaining agreement, the unidentified supervisor, as a representative of the City, could not allow Officer Thomas to flex her work hours without first obtaining Complainant's agreement is not an individual bargaining claim, but rather, is a grievance claim. The appropriate forum for enforcing Sec. 4.04 of the 2005-2006 labor contract is the parties' contractual grievance procedure.

The Association filed a grievance alleging that Officer Thomas was permitted to flex her work hours in violation of Sec. 4.04 of the labor contract. The parties settled this grievance when they entered into their October 2006 written Memorandum of Agreement. This settlement agreement includes the following:

1. That the City agrees that it failed to comply with the provisions of the Labor Agreement between the parties when it allowed Officer Thomas to change her work hours to attend an event in Milwaukee and have her work hours coincide with attendance at the event based upon the lack of any contract provisions allowing an officer to “flex” their work hours for such purpose.

This settlement agreement also includes the following sentence:

5. The Association reserves the right to use the underlying transaction on which this grievance is based in any prohibited practices complaint it might file with the WERC, accepting that the Association may not allege in any such filing a violation of the Labor Agreement under Wis. Stats. 111.70(3)(a)5, nor may it request any pay or compensation remedy for Officer Thomas.

In summary, the grievance settlement does not waive the Association’s right to raise an individual bargaining claim. Complainant, however, has not established, by a clear and satisfactory preponderance of the record evidence that, in allowing Officer Thomas to flex her work hours, the unidentified supervisor engaged in any conduct that constitutes individual bargaining in violation of Sec. 111.70(3)(a)4, Stats. Inasmuch as there has been no violation of Sec. 111.70(3)(a)4, Stats., as alleged by Complainant, there can be no derivative violation of Sec. 111.70(3)(a)1, Stats.

Count Eight

In Count Eight of the initial complaint, Complainant alleges that Respondents violated Sec. 111.70(3)(a)1, 2 and 4, Stats., by Commander Arts’ conduct in meeting with a grievant, Officer Dan Yantes, on his grievance. At the pre-hearing conference of February 3, 2009, the Examiner granted Complainant’s motion to amend Count Eight to include an allegation that Respondents had violated Sec. 111.70(3)(a)3, Stats.

As reflected in post-hearing argument, Complainant no longer alleges independent violations of Sec. 111.70(3)(a)1, 2 and 3, Stats. Thus, the Examiner concludes that Complainant has abandoned these claims.

Complainant continues to claim that Commander Arts violated Sec. 111.70(3)(a)4, Stats., by meeting directly with a grievant and, further, making disparaging remarks to the grievant as to the manner in which the Association was processing his grievance. Respondents deny violating Sec. 111.70(3)(a)4, Stats., as alleged by Complainant.

Officer Yantes recalls that on October 4, 2006, he was in his squad when he received a communication to see then Commander Arts and, in response to this communication, met with Commander Arts. At hearing, Officer Yantes was questioned as follows:

...

Q: Now, Dan, when you spoke to Commander Arts, what was the conversation?

A: It was basically that he was trying to get the grievances -- some other grievances settled, and then he went and spoke about my grievances specifically.

Q: And what did he say about your grievance?

A: He said the Highway 41 grievance in which I was overlooked on the call-in list, that had been settled and that I would be getting four hours for that, and then he said the other grievance in which I had been left off the call-in list after coming out of the Drug Task Force, that they were looking for -- still looking for what the settlement was going to be on that.

Q: Did the chief indicate whether the city was waiting on something from the union?

A: What I was told was that he wanted to get going on it, that he hadn't heard back from the union yet as to the number of hours, and that he needed me to come up with a number of hours and get that to the union.

Q: Was the message from Officer Arts to the effect that the union was dragging its feet?

A: I don't remember those terms. What he told me was that he wanted to get it done, but he hadn't heard from the union on the number of hours, and he was waiting for that.

Q: That he was waiting for the union - -

A; Correct

Q: -- to get back to him?

A; Yes, and that I needed to get ahold of the union so that we could solve this.

Q: Were you led to believe that the union should have been coming up with the number?

A: I was led to believe that because they hadn't come up with a number, I needed to get things moving, to get that number to them.

...

Q: Officer, did you come up with a number?

A: At that point I did not come up with a number, no.

Q: At any point in this grievance did you come up with a number?

A: We talked it over with the union, and they told me what they were going to try to get.

...

Q: Dan, in terms of the demeanor and tone of the chief during the meeting, did he appear to be frustrated with the failure of the union to come up with the hours?

A: More what I got from it is that for some reason I had to be responsible to go back to my union and tell them to get moving on it. That's what it seemed like to me. It wasn't that he was telling me that they were dragging their feet or that he was frustrated with them, but he was telling me that I had to get onto the union and give them the hours so that they could get that settled. (T., Vol. 4 at 711-16)

Officer Yantes states he eventually received thirteen and a half hours pay in settlement of the grievance; that he did not help the Association arrive at that settlement figure; and he did not know how the Association arrived at this settlement figure. Officer Yantes describes his conversation with Commander Arts as "just talking." Officer Yantes states that there was no hostility; that Commander Arts did not make any promises regarding his grievance; and that Officer Yantes did not feel like Commander Arts was trying to coerce Officer Yantes into taking a number that Officer Yantes did not want to take.

At hearing, Chief Arts reviewed Chief Van Schyndle's letters of August 11 and 17, 2006. Following this review, Chief Arts confirmed that these letters indicated that one of Officer Yantes' grievances had been settled by the payment of four hours of overtime to Officer Yantes; that a second grievance of Officer Yantes had been sustained; and that, with respect to this second grievance, the City intended to research the number of Officer Yantes' lost overtime opportunities. Chief Arts states that Chief Van Schyndle would send copies of

these letters to the Association's representative, but that Chief Van Schyndle would not send copies to then Commander Arts.

Chief Arts recalls that he was present at a grievance meeting with the Association in which a "bunch of grievances" was discussed. Chief Arts further recalls that, at the very tail end of this meeting he made the statement that he "would contact Officer Yantes and ask him what – that he would need to find out what would be a fair settlement and get back to Bill Resch and the rest of the union board, see if we can come up with an agreement because he was overlooked for several overtime opportunities." (T. Vol. 4 at 698-9) Chief Arts' recalls that this statement was made at the very end of the meeting, when everyone was standing and talking.

Complainant disputes that Chief Arts made such a statement. Assuming *arguendo* that Chief Arts' recollection of this meeting and his statement is accurate, the fact that Chief Arts did not hear any objection to his statement would not provide Chief Arts, or this Examiner, with a reasonable basis to conclude that the Association acquiesced to having Chief Arts contact Officer Yantes.

Chief Arts recalls that, in October 2006, he discussed this second grievance with Officer Yantes. According to Chief Arts, this discussion occurred a day or two after the grievance meeting with the Association. As Chief Arts recalls this discussion, he called Officer Yantes into his office and said:

. . .

. . . Dan, we missed you. We owe you money. I don't know if it's four, eight, ten hours. You need to come up with some number that you are comfortable with because I don't know if you would have accepted all of those opportunities or not. Get back to Bill Resch and the rest of the board. Maybe we can come to an agreement. (T. Vol. 4 at 699)

. . .

Chief Arts denies that his meeting with Officer Yantes was to inform him that the union had not provided information to the city for the settlement of his grievance.

Neither Chief Arts, nor Officer Yantes, states that Chief Arts made a proposal to Officer Yates or that Chief Arts asked Officer Yantes to make a proposal, or provide any other information, to Chief Arts or any other City representative. Rather, each agree that Chief Arts asked Officer Yantes to determine the number of hours owed under the grievance and then give this number to the Association so that the grievance could be resolved. By this conduct, Chief Arts acknowledged that the Association, and not Officer Yantes, had the authority to enter into grievance settlements with the City.

In summary, the record does not establish that then Commander Arts negotiated, or attempted to negotiate, with Officer Yantes regarding wages, hours and conditions of employment of any municipal employee represented by the Association. Nor does the record establish that then Commander Arts bypassed, or attempted to bypass, the Association as Officer Yantes collective bargaining representative and obtain any contract directly from Officer Yantes.

Neither the testimony of Chief Arts, nor the testimony of Officer Yantes, establishes that Chief Arts made disparaging remarks about the manner in which the Association was processing the grievance. Assuming *arguendo*, that it would be reasonable to construe Commander Arts' remarks to be critical of the manner in which the Association handled Officer Yantes grievance, such criticism would be protected as employer free speech.

Given the nature of the discussion between Commander Arts and Officer Yantes, MERA does not obligate Respondents to provide the Association with prior notice of this discussion. Nor does MERA require an Association representative to be present during this discussion.

The evidence of the October 2006 meeting between Commander Arts and Officer Yantes does not warrant the conclusion that the City, by its representative Commander Arts, engaged in individual bargaining or denigrated the Association in violation of the City's statutory duty to bargain. The clear and satisfactory preponderance of the record evidence does not establish that the City, by its representative then Commander Arts, has violated Sec. 111.70(3)(a)4, Stats., as alleged by Complainant. Inasmuch as there has been no violation of Sec. 111.70(3)(a)4, Stats., there can be no derivative violation of Sec. 111.70(3)(a)1, Stats. Therefore, the Examiner has dismissed these allegations.

Counts Nine and Ten

In Counts Nine and Ten, as initially filed, Complainant alleges that Respondents violated Sec. 111.70(3)(a)5, Stats., by failing to implement two grievance arbitration awards. As reflected in Complainant's post-hearing argument, Complainant alleges that the failure to implement the two grievance arbitration awards violates Sec. 111.70(3)(a)7, Stats. Respondents deny that they have violated MERA by failing to implement the two grievance arbitration awards as alleged by Complainant.

The City acknowledges that there was a delay in paying the monetary remedies; but asserts that this delay was due to a mistake. The City argues that Complainant has unclean hands because it did not inquire into the delay in a timely manner prior to filing its prohibited practices complaint. The City further argues that the City has rectified the mistake and the matter is moot.

On April 18, 2006, Arbitrator Emery issued an Award that includes the following:

• • •

AWARD

The City did not violate the Collective Bargaining Agreement when it denied Officer Tracy Liska the opportunity to work overtime at the Packers game on September 19, 2004. Nevertheless, it failed to personally notify Officer Liska of the cancellation more than 24 hours prior to the assignment, in contravention of Section 6.03(3) of the contract and Department policy. Therefore, the City shall pay Officer Liska three (3) hours' call-in pay at her then base rate of pay for the late cancellation of the overtime assignment.

...

On July 19, 2006, Arbitrator Shaw issued an Award that includes the following:

...

AWARD

The grievance is sustained and the City of Green Bay is directed to immediately pay Officer Mulrine the overtime pay he would have received under the parties' Agreement for the overtime hours he had been scheduled to work on December 7, December 8 and December 18, 2003, and stand-by pay at the rate provided in Section 6.07 of the parties' agreement for eight (8) hours per day for the following days December 9, December 10, December 11, December 12, December 17, December 18, December 19, and December 20, 2003.

...

At the time of the grievance, Officer Mulrine worked with then Association President Reach as a K-9 patrol officer. Officer Mulrine recalls that, in response to the failure of the City to pay the monetary remedy, Complainant filed this prohibited practices complaint. According to Officer Mulrine, the City was not going to pay him his monetary award until the Association notified the City of its prohibited practices claim.

Officer Mulrine states that his pay stubs show that, on November 30, 2006, he received payment for the overtime hours due under Arbitrator Shaw's Award. Officer Mulrine recalls that this payment included interest, but does not recall the interest percentage.

Association President Resch recalls that either Officer Liska or Officer Mulrine contacted the Association because the officer had not received monies owed under the arbitration award and that, after investigating this issue, the Association became aware that Officer's Liska and Mulrine had not received the monetary remedy owed under their Awards. Association President Resch further recalls that, following this investigation, Complainant filed this prohibited practices complaint.

According to Association President Resch, after filing this prohibited practices complaint, Complainant met with the City and the City agreed to pay the monetary remedy due under each Award, with interest. Association President Resch states that, based on a discussion with Officer Liska, it is his understanding that Officer Liska received this payment; that he is satisfied that the Emery Award has been implemented; and that Officer Liska's payment was probably received in the same period as Officer Mulrine received his payment. Association President Resch recalls that the interest paid was twelve per cent (12%) and that the attorneys representing the Association and the City agreed upon the interest percentage to be paid to Officer's Mulrine and Liska.

As the Wisconsin State Supreme Court recognized in *SAUK COUNTY V. WERC*, 165 Wis. 2d 406 (1991), Sec. 111.70(3)(a)7, Stats., addresses refusals or failures to implement interest arbitration decisions. Neither Arbitrator Shaw, nor Arbitrator Emery, issued an interest arbitration decision.

The decisions of Arbitrators Shaw and Emery are grievance arbitration awards issued pursuant to the provisions of the parties' 2005-2006 agreement. Under these contractual provisions, the Awards of Arbitrator Shaw and Emery are final and binding upon the parties.

The complaint, as amended, clearly alleges a failure to implement a grievance Arbitration Award in violation of Sec. 111.70(3)(a)5, Stats., and this was the claim litigated at hearing. Thus, the Examiner has addressed Complainant's Sec. 111.70(3)(a)5, Stats., allegations, rather than Complainant's Sec. 111.70(3)(a)7, Stats., allegations.

Sec. 111.70(3)(a)5, Stats., imposes upon the City a duty to accept the terms of a grievance arbitration award where, as here, the parties had a previous agreement to accept the award as final and binding upon them. The statute does not impose upon the Association a concurrent duty to monitor the payment of any monetary remedy owed under the award and/or to remind the City that it has not yet paid this monetary remedy.

Complainant could have extended to the City the courtesy of inquiring about the status of the Emery and Shaw Arbitration Award payments prior to filing a prohibited practices complaint. There is no merit, however, to the City's argument that Complainant's claims are barred by the doctrine of "unclean hands."

The Shaw and Emery Arbitration Awards were issued under Chief Van Schyndle's administration. According to Chief Arts, as soon as he became aware that the City had not paid the monies due under these Awards, he met with the City's Attorney and the City agreed that these monies should be paid with interest. At all times material to this complaint, Chief Arts has acted as a representative of the City and not as an individual.

Contrary to the argument of Respondents, it is not evident that the City's delay in paying the monies owed under these Awards was due to a "mistake." Rather, the record provides no rationale for the City's delay in paying the remedies owed under the Awards.

The Shaw Arbitration Award directs the City to “immediately pay” the monetary remedy. The City did not pay the monetary remedy owed under the Shaw Arbitration Award until several months after the date of this Award. The record provides no justification for this delay in payment.

The City did not “immediately pay” the monetary remedy as required by the Shaw Arbitration Award. The record does not establish that the City has a valid defense to its failure to “immediately pay” this monetary remedy. Accordingly, the City failed to accept the terms of the Shaw Arbitration Award. Inasmuch as the parties previously had agreed to accept this award as final and binding upon them, the City has violated Sec. 111.70(3)(a)5, Stats., and, derivatively, violated Sec. 111.70(3)(a)1, Stats.

The Emery Arbitration Award does not direct the City to “immediately pay” the monetary remedy. However, the absence of such a specific direction does not mean that the City has the right to pay these monies whenever the City chooses.

The City did not pay the monetary remedy owed under the Emery Arbitration Award until more than six months after the date of the Emery Arbitration Award. The record provides no justification for this delay in payment.

The City did not pay Officer Liska the monies owed under the terms of the Emery Arbitration Award within a reasonable time after the issuance of this Award. Accordingly, the City failed to accept the terms of the Emery Arbitration Award. Inasmuch as the parties previously had agreed to accept this award as final and binding upon them, the City has violated Sec. 111.70(3)(a)5, Stats., and, derivatively, violated Sec. 111.70(3)(a)1, Stats.

After this prohibited practices complaint was filed, the City paid the monies owed to Officer’s Mulrine and Liska under the Shaw Arbitration Award and the Emery Arbitration Award, respectively, together with interest at twelve per cent (12%). This interest rate is the Sec. 814.04(4), Stats., rate applied by the Commission when remedying prohibited practices under MERA. Thus, the Examiner has not issued a make-whole remedy.

Given this payment, the Examiner rejects the Association’s argument that it is appropriate for the Examiner to issue a cease and desist order. As the Association argues, it is appropriate for the Examiner to order the City to post an appropriate notice.

Consistent with MILWAUKEE VTAE, *supra*, the Examiner is persuaded that deterrence of future similar unlawful conduct justifies resolving this case even though there may be little immediate practical import. Accordingly, the Examiner has rejected the City’s argument that Counts Nine and Ten of the complaint, as amended, are moot.

Count Eleven

In the amended complaint, filed on November 29, 2006, Complainant alleges, as Count Eleven, that Respondents violated Sec. 111.70(3)(a)1, 2, 4 and 5, Stats., related to individual bargaining with Officer Powell. In CITY OF GREEN BAY, DEC. NO. 32107-A (1/08), Examiner Gallagher deferred this Count Eleven claim, to arbitration. At the pre-hearing conference of February 3, 2009, the Examiner granted the Association's request to withdraw the Count Eleven claim involving Officer Powell.

In its third amended complaint, filed on September 5, 2008, Complainant alleges a new Count Eleven involving Health Risk Assessment (HRA). In the HRA Count Eleven, which is the subject of this complaint proceeding, Complainant alleges that Respondents violated Sec. 111.70(3)(a)1, 4 and 5, Stats. In its Motions to Amend Complaint, filed on January 7, 2009, Complainant sought to amend Count Eleven by adding the allegation that Respondents retaliated against concerted, protected activity in violation of Sec. 111.70(3)(a)3, Stats. The Examiner denied this motion at the pre-hearing conference held on February 3, 2009. The basis for this denial was that the language in Count Eleven does not express, or reasonably imply, retaliation in violation of Sec. 111.70(3)(a)3, Stats., and, at the time the motion was filed, the complained of conduct was not within the Sec. 111.07(14), Stats., one-year filing period.

In post-hearing written argument, Complainant addresses only its claim that Respondents have violated Sec. 111.70(3)(a)4, Stats., and, derivatively Sec. 111.70(3)(a)1, Stats., by unilaterally changing, in the fall of 2007 and during a contract hiatus period, the *status quo* on the administration of the HRA under Sec. 17.03 of the labor contract. The Examiner concludes, therefore, that Complainant has abandoned any claim that Respondents have violated Sec. 111.70(3)(a) 5, Stats., or have committed an independent violation of Sec. 111.70(3)(a)1, Stats.

According to Complainant, the unlawful unilateral change in the HRA occurred when the City required a blood draw from the employee's arm, rather than a finger stick, and required employees to meet with the health care provider for a second session of twenty minutes. Respondents deny violating Sec. 111.30(a)4 and 1, Stats., as alleged by Complainant.

Attorney Parins recalls that, when the parties negotiated their 2005-2006 agreement, then Assistant City Attorney Steve Morrison represented the City and that, at times, Human Resources Manager Chad Bastable would provide the Association with information on City proposals and/or positions. In a letter dated October 6, 2005, Attorney Morrison provided Attorney Parins with a status update regarding 2005-2006 contract negotiations with the Association. (Comp. Ex. #79) In this letter, Attorney Morrison identified fourteen items agreed upon by the parties and one item as open for discussion.

A letter dated October 7, 2005, from Attorney Parins to Attorney Morrison includes the following:

...

GBPPA members are being required by supervisors in the police department to participate in a health risk assessment/examination under threats that if they do not comply with this assessment/ examination, they will receive monetary penalties in the form of a 2.5% increase in their individual contributions towards health insurance premiums.

The assessment/examination procedure apparently is part of health insurance packages that were bargained into the labor contracts with other unions in the City.

No such health package has been agreed to with the GBPPA. The City does have a proposal for such a health package, but such continues in the negotiating stage. Members of the GBPPA continue to be covered with the health plan as set forth in the 2002-2004 contract. There exists no monetary penalty in that health insurance package.

The City should not be making threats or even discussing matters that are currently in collective bargaining with individual members of the GBPPA. The GBPPA demands that the City immediately cease and desist from discussing with members of the GBPPA any aspects of the proposed health plan that is currently on the bargaining table between the GBPPA and the City. Discussions concerning that item should be reserved only to the bargaining table.

The GBPPA also demands that the City immediately communicate to members of the GBPPA that they have no obligation or requirement to participate in the assessment/examination being conducted by Prevea Clinic and that no members of the GBPPA will be adversely affected by not participating. (Comp. Ex. #80)

...

Attorney Parins responded to Attorney Morrison's letter of October 6, 2005 with a letter dated October 10, 2005. This letter includes the following:

...

Comment should be made regarding the insurance package. Under separate cover we have written to you regarding qualification for the 2.5% premium reduction. The GBPPA would expect that there be agreement that all GBPPA

members be given full opportunity after ratification of the contract to qualify for the premium reduction.

Also in regards to qualification for premium reduction the GBPPA assumes that the City will agree to defining the standard for determining qualification for the premium reduction and agree that this standard may not change without collective bargaining. (Comp. Ex. #81)

...

Attorney Parins recalls that, between October 6 and October 13, 2005, he had conversations with Attorney Morrison and HR Manager Bastable in which he advised them that his client was insisting that it receive the details of the HRA plan and that the City agree not to make any changes to this plan without collective bargaining. Attorney Parins further recalls that, when Attorney Morrison and HR Manager Bastable assured him that neither would be a problem, Attorney Parins requested that they meet with his client and that such a meeting was held on October 13, 2005.

Attorney Parins recalls that, at the meeting of October 13, 2005 and because of client concerns that the City would add requirements to the HRA plan, he asked if the City would agree that there would be no changes without collective bargaining and that Attorney Morrison responded that changes would not be made without collective bargaining. Attorney Parins further recalls that the following document, provided by the City's HR Department, was discussed at the meeting of October 13, 2005: (Comp. Ex. #82)

Health Risk Assessment (HRA)

Questions and Answers

1. What a Health Risk Assessment (HRA)?

An HRA is an education awareness tool that measures a person's health risks. The assessment consists of completing a questionnaire and a biometric screening (cholesterol, glucose, blood-pressure, body fat percent, body mass index, height, and weight).

2. What do I have to do before my HRA appointment?

A couple weeks before your HRA, Prevea will send you a Health Monitor questionnaire. You must complete it and bring it to your appointment. When answering the questionnaire, be honest and fill in the circles correctly. You will need to fast 12 hours prior to your appointment time (no food or drink — water is acceptable). Take your medication as prescribed. If you take medication(s) and are concerned about fasting, consult your physician.

3. What happens at the appointment?

You'll meet one-on-one with a Prevea Health Care Professional. There will be a finger stick for the cholesterol panel and glucose. Your blood pressure will be taken and your weight, body fat, and body mass index will be measured. The Health Care Professional will discuss your results with you.

4. When do I receive my results?

You will receive your biometric results at the time of your appointment (blood results, blood pressure, body fat percent and body mass index). Your personal report will be processed by the Summex Corporation and sent directly to your home within 2-3 weeks. Your personal report is a "tell it like it is" summary of your health status based on your HRA results.

5. Where does the HRA take place?

HRA appointments will be on-site at various City of Green Bay locations from June through November. Prevea Health Care Professionals will do HRAs at the Park Shop, DPW East, DPW West, Water Utility, City Hall, Transit, Police, and Fire.

6. Why should I participate?

The screening takes place at work, on work time. It only takes 20 minutes; your blood results are processed in 5 minutes and discussed with you. It is completely confidential. There is no cost to you to do the screening. The HRA is one of the requirements for the Wellness Incentive Program. If an employee completes all necessary components of the Wellness Incentive Program by November 15, 2005, then he/she receives the financial incentive for the employee share of the health insurance premium in 2006. Also, the HRA is a good self-awareness tool for you to monitor your health.

7. What if my union or association hasn't settled its labor contract yet?

That doesn't matter. Even if your union or association has not formally agreed to the Wellness Incentive Program, you may still do the HRA. Due to the limited dates that Prevea has available for the City's HRAs, be proactive and get this requirement done in the event that your union or association later settles their contract. HRA appointment times are being made available for your departments over the next several months. Take advantage of them so that you don't run out of time to get the program requirements done, such as if your contract settles near the end of the year.

8. Who receives a copy of my results?

You are the only one to receive your individual results. You will receive a copy of your blood work (when you leave the screening). Your personal report is processed and sent directly to your home. The City does not receive a copy of your personal results or report. After all employees complete their HRAs, the City receives an aggregate report showing the overall results for the City's entire employee population. No individually identifiable information is on the aggregate report.

...

The Association taped the meeting of October 13, 2005. Human Resources Manager Chad Bastable and Attorney Steve Morrison attended the meeting of October 13, 2005. These individuals are no longer employees of the City and did not testify at hearing.

In this tape recording, Attorney Parins raises the issue of the 2.5 percent insurance premium reduction and indicates that he is not aware of the program specifics. Attorney Parins then indicates that, whatever the program is, the Association would like the standards for qualifying for the 2.5% referred to or incorporated. Attorney Morrison responds by stating "It will be incorporated in the contract." Attorney Parins then makes a statement that the standards will not be changed without collectively bargaining. Attorney Morrison responds "No" and that, like all the other contracts that have been settled, the standards will be attached to the Association's contract.

In subsequent discussions of the HRA, Attorney Parins states that he trusts that the parties can agree that the qualification standards would not change during the contract and Attorney Morrison responds "Absolutely." Attorney Morrison then states that the City agrees that they won't be changed and that this agreement will be evidenced by Attorney Morrison's signature on the contract, if the parties ever reach the point of signing a contract.

Attorney Parins recalls that, after this meeting, his client was satisfied and participated in the HRA for the 2006 insurance premium reduction even though the parties had not finalized their contract. According to Attorney Parins, the parties had no other bargaining table discussions on the HRA during the negotiation of the 2005-2006 agreement. According to Attorney Parins, the HRA administered for the 2006 and 2007 insurance premium reduction was as described to the Association on October 13, 2005.

The parties signed the 2005-2006 labor agreement on October 10, 2006. One of the signatories for the City is Human Resources Manager Bastable.

Sec. 17.03 of the 2005-2006 contract states:

Employees shall be entitled to reduce their health insurance premium contribution in the year 2006 and thereafter by two and one-half percent (2 ½%)

per year by successfully completing the “Wellness Incentive Requirements for Physical Exam” as set forth on the “MD Alert & Sign-off Form” (Attachment A), and by successfully completing the “Wellness Incentive Requirements for PCP, ERA, and Physical/Health Activity” as set forth on the “Employee Sign-off Form” (Attachment B). All wellness incentives must be completed in the year prior to receive the two and one-half percent (2 ½%) reduction to the health insurance premium. This agreement incorporates the “MD Alert & Sign-Off Form” (Attachment A) and the “Employee Sign-off Form” (Attachment B) referenced herein.

...

Documents attached to the 2005-2006 collective bargaining agreement include the following:

**Wellness Incentive Qualifiers
City of Green Bay
Labor Management Committee
November 12th, 2004, 8 00 AM, City Hall Room 604**

This exhibit is meant to be a basis for an incentive for participating in activities that will enhance individual employee wellness and reduce claims expenses. Enhanced employee wellness and reduced medical claims expense will have a positive effect on everyone at the City.

Screening & Physician Qualifiers:

- Register as a patient with a Primary Care Physician (PCP)
- Participation in the confidential, on-site health screening (Health Risk Assessment HRA)
- Completion of a routine physical exam as provided for by established age and sex appropriate guidelines (See current guidelines listed below)
- **Females**
 - Females between the ages of 40-49 need to have an annual pelvic/pap smear and a mammogram every other year.
 - Females age 50 and older need to have an annual physical exam including height/weight, blood pressure, complete skin exam, complete oral cavity exam, palpitation for thyroid nodules, auscultation for carotid bruits, total cholesterol, pelvic/pap smear and mammogram.

- All pregnant employees are required to be under the care of a physician, and attend a prenatal class or view a series of prenatal videos.

- **Males**

- Males age 50 and older need to have an annual physical exam including height/weight, blood pressure, complete skin exam, complete oral cavity exam, palpitation for thyroid nodules, auscultation for carotid bruits, total cholesterol, and rectal exam.

Note: You must also complete the Physical or Other Health Related Activity requirement.

Physical or Other Health Related Activity Qualifier:

Complete any **one** of the following Physical or Other Health Related Activities, or any other similar activity as deemed appropriate by the employee, to meet this requirement.

The items listed below are examples only.

Examples of Physical or Other Health Related Activity Qualifiers (you need only one):

- Participation in any “Fun Run/ Walk” activity
- Participation in a “Learning Session” such as City sponsored “Lunch and Learn” sessions or the Wausau Benefits Disease Management Nurse Coordinators
- Activity time at a local Fitness Club or YMCA
- Individual physical activity time, such as a walking program, softball league participation, etc.
- Participation in a Smoking Cessation Program; Weight Management classes or groups; Stress Management classes; etc.
- Job oriented targeted training
- Any other Physical or Other Health Related Activity as deemed appropriate by the employee and reported to Human Resources

Note: You must also complete the Primary Care Physician (PCP); Health Risk Assessment (HRA), and Physical Exam Requirements.

Employees must completed Wellness Incentive requirements and then submit signed “MD Alert & Sign-Off Form” and “Employee Sign-Off Form” to Human Resources.

...

MD ALERT & SIGN-OFF FORM
City of Green Bay
Wellness Incentive Requirements for Physical Exam

The requirements listed below are the basis for a significant financial incentive for City of Green Bay Employees.

Attention Physician: Completing this form will help you avoid follow up phone calls or requests for additional services relative to these requirements

Attention Employee: Complete the requirements below and obtain Physician's signature and return this signed form, along with the Employee Sign -Off Form, to Human Resources Dept., attention Laurie Maroszek by November 15th.

Requirements:

- Be registered as a patient with a Primary Care Physician (PCP) (i.e. Obstetrician/Gynecologist, Internist, Family Practice, General Practice, etc) and
- Completion of a routine physical exam as provided for by established age and sex appropriate guidelines (See current guidelines listed below). Note: The employee must have attained the ages below by January 1 of the current year. Employees under these ages don't need to do physical exam requirement.

Females

- Females between the ages of 40-49 need to have an annual pelvic/pap smear and mammogram every other year.
- Females age 50 and, older need to have an annual physical including: height/weight, blood pressure, complete skin exam complete oral cavity exam, palpitation for thyroid nodules, auscultation for carotid bruits, total cholesterol, pelvic/pap smear, and mammogram.
- All pregnant employees are required to be under the care of a physician, and attend a prenatal class or view a series of prenatal videos.

Males

- **Males age 50 and older** need to have an annual physical including: height/weight, blood pressure, complete skin exam, complete oral cavity exam, palpitation for thyroid nodules, auscultation for carotid bruit, total cholesterol, and rectal exam.

Employee Name (Print): _____

PCP Name: _____ Date of Physical Exam: _____

I certify that the above individual has completed these requirements in ____ (fill in current year)

Physician or MD office administrative staff name (Print): _____

Signed: _____ (MD or other MD office administrative Staff)

Date signed: _____ MD phone number: _____

Please return signed form when requirements are completed, but no later than November 15th to:

**City of Green Bay, Human Resources Dept, Attn: Laurie Maroszek,
100 North Jefferson Street — Room 500, Green Bay, WI 54301**

O31805 MD Alert Sign Off Form

...

Attorney Parins states that the language of Sec. 17.03 did not exist when Association members participated in the HRA for the 2006 premium reduction. According to Attorney Parins, the City provided the forms attached to the collective bargaining agreement to the Association on October 13, 2005. Attorney Parins states that these forms are incorporated by reference into Sec. 17.03.

Attorney Parins recalls that the Association's President received a packet of materials from the City's HR Department dated May 3, 2007. Information contained in this packet included the following: (Comp. Ex #83)

...

HEALTH RISK ASSESSMENTS (HRA)

The HRA is a 2-step process in 2007. It's a confidential on-site screening. There is no cost to employees. The 2nd appointment is approximately 3-4 weeks after the 1st appointment.

- 1st appt – HRA Screening (10 minutes): A more extensive profile will be done, so the blood draw is taken from your arm (not a finger poke). Employees must fast 8-12 hours before the 1st appt. Measurements are taken (height, weight, waist, hip, wrist). Blood pressure is taken. Completed questionnaire is turned in to Prevea rep.
- 2nd session – HRA Review (20 minutes): Confidential one-on-one meeting with a Prevea health care professional to review your personal HRA summary report and set goals. This is when you'll get your paper HRA report and instructions on how to access your Personal Health Desktop online via eCare Solutions web tool.

Employees must do both HRA sessions in 2007 to get the financial incentive in 2008.

...

Attorney Parins recalls that, when he learned that there were going to be changes in the HRA, he contacted HR Manager Chad Bastable. Attorney Parins further recalls that the City's position was that it had the management prerogative to make the HRA changes. Attorney Parins states that he objected to this City position.

Attorney Parins sent an email dated August 28, 2007 to Attorney Dietrich that includes the following: (Comp. Ex. #85)

...

This is to give you a heads up on what is happening regarding the health assessment. The city has changed the procedures and requirements for the assessment. This was done without bargaining. When the Assessment was being first put into the contract the GBPPA met with Chad and Attorney Morrison and they both gave assurances that there would be no change in this without first collectively bargaining the change. The GBPPA is refusing to go through with any 2007 assessment that is not the same as the one it agreed to and incorporated into the contract. Apparently the city refuses to administer the assessments the same as last year.

...

Attorney Parins states that a blood draw is a more invasive procedure than a pinprick and permits a whole panel of tests that provides medical information not available from a pinprick. Attorney Parins states that his clients were concerned about the confidentiality of medical information and that a second meeting would create transportation and child care issues.

Attorney Parins recalls that, prior to August 2007, the HRA was not part of the negotiations for the successor agreement. Attorney Parins further recalls that, after August 2007, he and Attorney Dietrich exchanged correspondence addressing the Association's objection to the HRA changes. One such exchange began with an email from Attorney Dietrich dated September 24, 2007 that includes the following: (Comp. Ex. #86)

...

Tom:

It is my understanding that the Green Bay Professional Police Association is objecting to the process being used by the City of Green Bay for the Wellness Preventive Program and the health risk assessment for 2008. I also understand that the matter of dispute involves an alleged change in circumstances where the blood draw which is done as part of the health risk assessment is now accomplished by the blood draw taking place on one occasion and then the employee meeting with a nurse from the health care provider at a later date to go over the results. It is also my understanding that both of these activities occur during work time so there is no financial loss or impact to members of the Association.

I am wondering if there is a way we can resolve this matter amicably between the parties. The City of Green Bay is desirous of having all of its employees participating in the health risk assessment since it is for the best that the employee know and work toward improving his/her health. This is also very important for police officers who are involved in physical activities while performing their duties.

I am wondering if we could discuss this matter further and see if there is a chance that this issue could be resolved amicably so that members of the Association participate in the health risk assessment. Please let me know if you want to schedule a meeting to discuss this or if we can have a conversation over the telephone (or perhaps a telephone call with Chad Bastable) to discuss this.

...

Attorney Parins responded with the following: (Comp. Ex. #86)

...

Date: 9/25/2007 4:07 PM

Subject: Re: HRA Issues Involving Protective Police Association

Dean,

I am resending this email after talking to my client. The GBPPA is most willing to accommodate the City with a negotiating session where this issue can be discussed.

You should be aware of, and be prepared to address, protections that the GBPPA will be insisting on, particularly with the more invasive procedures. We will be asking that the confidentiality be one of doctor/patient between our members and the clinic conducting the HRAs, with the City being specifically excluded as a party entitled to be privy to any information absent a specific written authorization by the GBPPA member.

We would expect this to be a provision that has some teeth regarding liability of the medical provider if a breach occurs.

Tom

Dean,

Your description of the situation and the position of the GBPPA is not entirely correct.

Your client, the City of Green Bay, and our client, the GBPPA, have a contract which sets forth an annual Health Risk Assessment procedure (HRA). It was specifically agreed to by your client and my client that there would be absolutely no change in any aspect of the HRA procedure without collective bargaining between the parties.

Your client refuses to conduct the HRA for this year in the manner provided for in the collective bargaining agreement. GBPPA members are absolutely ready willing and able to participate in the HRA procedure as set forth in the labor contract.

Rather, your client has unilaterally made changes in the procedure.

The GBPPA takes the position that the City must bargain these changes before implementation. It should be noted that the changes do deal with items that qualify GBPPA members for compensation.

We are in the hiatus period of the contract. The GBPPA will sit down with the City to discuss this item. Please provide us with the changes proposed by the City.

...

Attorney Parins recalls that, in October 2007, following this email exchange, the City made an offer that would have resolved the HRA issue, but that, when Attorney Dietrich subsequently advised Attorney Parins that there had been a miscommunication, the parties continued to exchange correspondence addressing the HRA issue. Attorney Parins recollection is consistent with the evidence of October 2007 correspondence exchanged between the parties. (Comp. Ex. 87, 88 and 91)

On or about November 8, 2007, the City's HR Manager sent a notice to City employees, including members of the Association's bargaining unit, that the "Wellness Incentive Program" deadline was November 15, 2007. Attorney Parins recalls that, in December of 2007, the Association "caved" by agreeing to accept changes to the HRA, including a blood draw rather than a pinprick and a second visit, if the City would agree that there would be no further changes without collective bargaining. According to Attorney Parins, he understood that the City would not agree.

Attorney Parins sent Attorney Dietrich a letter dated December 7, 2007 that includes the following:

...

Reference is made to the current and on-going disagreement and dispute as to whether the City of Green Bay has the management right and prerogative to make unilateral changes in the manner that Health Risk Assessments are to be conducted under the contract provisions of the wellness incentive program provided for in Section 17.03 of the Collective Bargaining Agreement.

The Green Bay Professional Police Association ("GBPPA") has demanded that changes in the manner subsection 17.03 is administered must be collectively bargained.

While this dispute continues the City has refused to schedule and conduct Health Risk Assessments to be administered in the same way they were administered in the year 2006. This is despite the fact that the City agreed in writing by way of an email from yourself to the GBPPA send (sic) October 1, 2006 that it would

provide for HRA's to be administered in the same way they had been in the year 2006.

Section 17.03 provides that the HRA's must be completed in the year prior to receive the 2 1/2% reduction to the health insurance premium. The year 2007 is rapidly coming to close without the City giving any opportunity to GBPPA members to participate in HRAs in the manner administered in the Year 2006.

The GBPPA does hereby request and demand that the City forthwith schedule and offer to GBPPA members the opportunity to participate in Health Risk Assessments administered in the same fashion as they were in the year 2006. Subsection 17.03 makes clear that GBPPA members are "entitled" to reduce their health insurance premiums by participating. The City has a corresponding duty to make the HRA's available for participation.

The GBPPA also suggests that the underlying disagreement and dispute be submitted for a declaratory ruling by the WERC. Of course, such cannot be either submitted to or decided by the WERC in the year 2007. (Comp. Ex. #100)

...

Attorney Parins recalls that, in December 2007, the City offered an HRA to members of the Association's bargaining unit. According to Attorney Parins, the offered HRA was not the HRA procedure that had been used to determine 2006 and 2007 employee health insurance premium reductions, but rather, was a new procedure that included a blood draw and a second appointment. This recollection is consistent with HR Manager Bastable's notice of December 13, 2007 (Comp. Ex. #102), as well as with Attorney Dietrich's email of December 13, 2007, which includes:

...

Mr Parins the HRAs will be conducted with a two step process—a blood draw will be taken at the first meeting and then a second meeting will be scheduled in Jan with the employee to go over the results of the blood test The forms contained in the Labor Agreement are the forms that must be completed by the employee and will be used by the medical personnel The information given to the City will be handled the same way as occurred in 2006 and the City will use the aggregate information in the same manner as used in 2006 Please call with questions Dean D (Comp. Ex. 103)

...

Attorney Dietrich and Attorney Parins continued to exchange correspondence regarding HRA; with the City suggesting that members of the Association participate in the HRA process and, if the Association believes there has been a violation of the labor contract, then the Association could exercise its rights to file a grievance. (Comp. Ex. 104, 105, and 106) A letter from Attorney Parins to Attorney Dietrich, dated December 17, 2007, includes the following: (Comp. Ex. #107)

...

The GBPPA would like to make clear and restate that it believes that the manner in which CBA Section 17.03 is administered is part and parcel of that contract section itself. This administration was collectively bargained in the first instance, and it cannot be unilaterally changed by the City without collective bargaining.

...

At some point prior to the end of 2007, the Association Board issued a document to GBPPA membership in which the Board stated its position on the HRA process that the City intended to use to determine 2008 employee health insurance premium contributions. This document includes the following statement: "The Union Board is asking the membership to stand together and not take the HRA until the City agrees to bargain the changes."

Conclusion

The HRA procedure is used to determine employee health insurance contributions and, thus, is primarily related to wages, hours and conditions of employment of the Association's bargaining unit members. The HRA procedure is a mandatory subject of bargaining.

Respondent City violates its statutory duty to bargain if, during a contract hiatus period and without a valid defense, it unilaterally changes the *status quo* on a mandatory subject of bargaining. As discussed above, this *status quo* is a dynamic *status quo* and is defined by relevant language from the expired contract as historically applied and clarified by bargaining history, if any.

Sec. 17.03 of the expired 2005-2006 agreement states:

Employees shall be entitled to reduce their health insurance premium contribution in the year 2006 and thereafter by two and one-half percent (2 ½ %) per year by successfully completing the "Wellness Incentive Requirements for Physical Exam" as set forth on the "MD Alert & Sign-off Form" (Attachment A), and by successfully completing the "Wellness Incentive Requirements for PCP, ERA, and Physical/Health Activity" as set forth on the "Employee Sign-off Form" (Attachment B). All wellness incentives must be completed in the

year prior to receive the two and one-half percent (2 ½%) reduction to the health insurance premium. This agreement incorporates the “MD Alert & Sign-Off Form” (Attachment A) and the “Employee Sign-off Form” (Attachment B) referenced herein.

Sec. 17.03 does not contain an express reference to HRA.

There are two attachments to the 2005-2006 contract. One attachment is entitled “MD Alert & Sign-off Form.” This form is incorporated into the contract as “Attachment A.” This form, which does not reference HRAs, is for physicians to certify that the employee has completed the “Wellness Incentive Requirements for Physical Exam” that are listed on the form.

The second attachment to the 2005-2006 contract is a document entitled “Wellness Incentive Qualifiers City of Green Bay Labor Management Committee November 12th, 2004, 8:00 AM, City Hall Room 604.” This document is not the “Employee Sign-off Form” that is identified as “Attachment B.” Nonetheless, this document is incorporated into the contract by virtue of its attachment to the contract. This second attachment lists, as one of the “Screening & Physician Qualifiers,” “Participation in the confidential, on-site health screening (Health Risk Assessment HRA).”

This second attachment does not identify the components of the referenced HRA. However, the evidence of bargaining history establishes that, at the negotiation session of October 13, 2005, the parties agreed to incorporate into the contract the HRA procedure proposed by the City at the time of the October 13, 2005 meeting and not to change this HRA procedure without collectively bargaining. This proposed HRA procedure included a “finger stick for the cholesterol panel and glucose,” as well as one appointment. The HRA procedure used to determine the Association’s bargaining unit employees’ health insurance premiums for the 2006 and 2007 calendar years included a “finger stick for the cholesterol panel and glucose,” as well as one appointment.

In summary, under the relevant language from the expired contract as historically applied and clarified by bargaining history, the *status quo* on mandatory subjects of bargaining required to be maintained during the contract hiatus period includes the HRA process used by the City to determine 2006 and 2007 employee health insurance premium contributions. This HRA process uses a “finger stick,” rather than a blood draw from the arm, and has one appointment, rather than a “2-step process of one HRA screening appointment and a second appointment for a “HRA Review.”

There is no requirement that the Association bargain with the City to maintain the *status quo* on mandatory subjects of bargaining during a contract hiatus period. Nonetheless, after the Association received notice of the City’s intent to use a different HRA procedure to determine 2008 employee health insurance premiums, the parties met and exchanged proposals on HRA issues.

The parties' negotiation did not produce an agreement to change the HRA procedure until late spring of 2008. The agreed upon change to the HRA procedure applied to 2009 employee health insurance premium contributions, but did not apply to 2008 employee health insurance premium contributions.

During a contract hiatus period and without the agreement of the Association, the City implemented an HRA procedure for determining 2008 employee health insurance contributions that used a blood draw from the arm and a "2-Step process" of one HRA screening appointment and a second appointment for a "HRA Review." By this conduct, the City unilaterally changed the *status quo* on a mandatory subject of bargaining, without a valid defense, in violation of Sec. 111.70(3)(a)4, Stats., and, derivatively, Sec. 111.70(3)(a)1, Stats.

The appropriate remedy for the City's violation of MERA includes an order requiring the City to post the appropriate notice. However, after the unlawful unilateral change, the parties bargained a change in the HRA procedure. Therefore, the Examiner has not issued an order to cease and desist or to return to the *status quo* that existed prior to the City's unlawful unilateral change.

In RACINE COUNTY, DEC. NO. 31377-C, 31378-C, (WERC, 6/06), the Commission states:

...

As the Association points out, the Commission "has a great deal of latitude in devising its remedies and may tailor them to the facts of a specific case." OZAUKEE COUNTY, DEC. NO. 30551-B (WERC, 2/04), citing EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985). The Association also correctly notes that the Commission has long adhered to the following articulation of its remedial goals in cases where a public employer has unilaterally changed wages, hours, or working conditions rather than negotiating such changes with the union:

The conventional remedy for a unilateral change refusal to bargain includes an order to reinstate the status quo existing prior to the change and to make whole affected employees for losses they experienced by reason of the unlawful conduct. The purposes of reinstatement of the status quo ante is to restore parties to the extent possible to the pre-change conditions in order that they may proceed free of the influences of the unlawful change. In our view the purposes of make whole relief include preventing the party that committed the unlawful change from benefiting from that wrongful conduct, compensating those affected adversely by the change, and preventing or discouraging such violations.

GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84).

In GREEN COUNTY and a companion case, CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84), the Commission recognized that there are some unilateral change situations where conferring make-whole relief may provide employees a benefit to which they would not have been entitled if the employer had never violated the law. In each of those cases, the employer had implemented a change while the parties were awaiting an interest arbitration award that would set the hours and working conditions retroactively, covering the time during which the employer had implemented its changes. In BROOKFIELD, the arbitrator ultimately established a retroactive contract with the very same schedule of hours that the employer had unilaterally implemented. Nonetheless, the Commission remedied the unilateral change in BROOKFIELD by giving the employees additional pay for the hours they worked beyond the previous work schedule, noting that such somewhat anomalous relief was necessary in order to deter similar unlawful conduct in the future.

Thus, as a general matter, it has long been clear that, where appropriate, the Commission's remedies may place employees in a better position than they would have been if the employer had not violated the law.

...

The City's unlawful unilateral change prevented Association bargaining unit employees from participating in the HRA procedure that had been bargained by the parties. Therefore, the appropriate make-whole remedy is to reimburse all Association bargaining unit employees who did not receive the 2½% premium reduction in 2008 by paying these employees the amount of this 2½% premium reduction, together with interest at the statutory rate of twelve percent (12%).

The Examiner realizes that this make-whole remedy may provide a premium reduction to employees who would not have participated in the HRA process even if the City had not unilaterally implemented a change in this process. The Examiner, however, is not aware of any reliable method of determining which bargaining unit employees, if any, would fall within this category. Therefore, the Examiner concludes that her make-whole remedy is appropriate to prevent the party that committed the unlawful change from benefiting from that wrongful conduct, to compensate those affected adversely by the change and to prevent or discourage such violations. The fact that the Association advised its membership not to participate in the unlawful unilaterally implemented HRA process does not provide a reasonable basis to conclude that the Association, or employee's who did not participate in this process, have waived or forfeited their right to this make-whole remedy.

Count Twelve

In its Third Amended Complaint, Complainant alleges, as Count Twelve, that Respondents violated Sec. 111.70(3)(a)1 and 4, Stats., by evaporating and effectively removing the promotional procedures of the labor contract. At the start of hearing on May 11, 2009 and in response to Complainant's request, the Examiner dismissed this claim.

Counts Thirteen and Fifteen

Count Thirteen

In its Third Amended Complaint, Complainant alleges, as Count Thirteen, that Respondents violated Sec. 111.70(3)(a)1 and 4, Stats., by unlawfully coercing contract concessions and unilaterally changing the *status quo* on a mandatory subject of bargaining during a contract hiatus period. In its Motions to Amend Complaint, Complainant moved to amend Count Thirteen by adding the allegation that Respondents had retaliated against concerted, protected activity in violation of Sec. 111.70(3)(a)3, Stats.

At the pre-hearing conference held on February 3, 2009, the Examiner granted this motion to amend. In post-hearing argument, Complainant continues to allege that Respondents have violated Sec. 111.70(3)(a)1, 3 and 4, Stats., by threatening to eliminate and then eliminating two K-9 unit positions held by Officers Resch and Mulrine unless the Association would agree to revisions of Section 7 of the contract that were acceptable to Respondents.

Complainant reasons that, under the terms of Sec. 111.70(2), Stats., the Association has the right to bargain collectively, with a corollary right under Sec. 111.70(1)(a), Stats., not to agree to any proposal and not to make any concession. Complainant further reasons that, inasmuch as the Association is a unit comprised of law enforcement personnel, its collective bargaining rights are augmented as set forth in Sec. 111.77, Stats. Complainant maintains that these provisions of MERA include the right to have the City's K-9 proposal determined under the procedures of Sec. 111.77, Stats. Complainant argues that, by requiring the Association to accept and concede to the City's proposals for modifying Article Seven of the labor contract outside of the Sec. 111.77, Stats., mediation/arbitration process, Respondents engaged in conduct that has a reasonable tendency to interfere with, restrain or coerce the Association and its members from exercising their rights under Sec. 111.70(2), Stats. Respondents deny that they have violated MERA as alleged in Count Thirteen of the complaint, as amended.

Count Fifteen

In Count Fifteen of its Third Amended Complaint, Complainant alleges that Respondents violated Sec. 111.70(3)(a)1 and 4, Stats., when Respondents retaliated against Officer Resch's exercise of protected, concerted activity by eliminating the K-9 unit positions held by Officers Resch and Mulrine and depriving Officer Resch of his chosen Packer game day overtime assignment. In its Motions to Amend Complaint, Complainant moved to amend

Count Fifteen by adding the allegation that Respondents had retaliated against Officer Resch in violation of Sec. 111.70(3)(a)3, Stats. The Examiner granted this motion at the pre-hearing conference held on February 3, 2009.

The Count Fifteen allegations involving Packer game day assignments have been addressed above. Respondents deny violating MERA as alleged in Count Fifteen of the complaint, as amended.

Discussion

The parties' expired 2005-2006 collective bargaining agreement includes the following language:

. . .

7.03 APPOINTMENTS TO K-9 UNIT. Appointees to the K.-9 Unit shall be subject to the following selection procedure:

(1) Positions in the K-9 Unit will be filled through the normal posting process. The desirable qualification of this position is a commitment by the officer to remain in the program for five years, but that this qualification is met by the employee spending three years in the program. Any officer who enters the program and becomes eligible for promotion during the three years of the program must waive his/her opportunity for any promotion until the full three-year commitment to the program is completed unless the parties mutually agree otherwise.

(2) The K-9 Unit will work four days on, followed by four days off, on a rotating schedule. They will work ten hours a day, including 30 minutes per day for grooming, kennel care, usual and customary veterinary time and vehicle upkeep.

(3) The-K-9 Unit will be responsible for 24 hours of maintenance training per month on a yearly average. A K-9 handler will adjust his/her workday for training purposes.

(a) The training will be broken down as follows:

1. Eight hours per month on a scheduled workday.
2. Eight hours per month on a scheduled day off.
3. Eight hours per month on down or slow periods on their normal work shift.

(4) The K-9 Unit will submit to recertification training as scheduled by the Department. A K-9 handler will adjust his/her workday for training purposes.

(5) Compensation for training on a K-9 handlers day off will be paid a time and one-half.

(6) K-9 demonstrations will be authorized by the Operations Commander and will be compensated by compensatory time at straight time on an hour-for-hour basis. K-9 demonstrations will be mutually agreed upon by both the K-9 handler and the Operations Commander. Mandatory demonstrations will be paid at time and one-half.

(7) Vacations days and personal days will be administered on a day-for-day basis. Off-time coming will be administered on an hour-for hour basis.

(8) Handlers will be paid for the same number of hours for holidays as if they were a regular shift employee.

(9) The K-9 handler will be allowed to use the K-9 vehicle for personal use within the city limits if the K-9 partner is along in the car with the officer.

(10) For purposes of call-in, the officer's workday shall end at noon on the last day of his work cycle. Their workday will then start at noon on the first scheduled day back to work

(11) When there is not a Green Bay Police Department K-9 working in accordance Article 7, Section 7.03 (10), a Green Bay Police Department K-9 shall be called in by seniority, except that an on-duty K-9 Unit from another police agency shall be called in if it is available for immediate response and the time of response is in good faith considered to be as fast as that of an off-duty Green Bay Police Department K-9 Unit.

(12) A retired K-9 may be used in exceptional circumstances with the mutual agreement of the City of Green Bay and the Green Bay Police Bargaining Unit

(13) As long as the option outlined in Number (12) exists, the City will be responsible for routine medical costs, but not treatment for illness or injury (except on-duty injuries).

(14) The K-9 Officer will be subject to the residency requirements as outlined in Article 36, Residency, of the labor agreement.

...

Attorney Dietrich's testimony indicates that the parties began the exchange of proposals on the successor agreement in January of 2007. Chief Arts recalls that the City's initial proposals contained proposals related to K-9 Officers. According to Chief Arts, the City had been trying to negotiate changes to the K-9 program since 2000 and, in early 2007, the City had proposals on the table that dealt with the schedule, compensation, vacation selection, taking time off, and maintenance.

In a letter dated May 10, 2007 and addressed to Attorney Dietrich, Attorney Parins encloses "the counter proposal of the GBPPA to the City's proposal regarding a change in Sec. 7.03 of the labor contract dealing with the K9 unit." (Comp. Ex. #2) The enclosed counter proposal (with modifications to the existing contract language identified by italics and underlining) states:

GBPPA K-9 Proposal Drafted 5/10/07

7.03 APPOINTMENTS TO K-9 UNIT. *The K-9 Unit consists of all K-9 handlers and partners employed by the City of Green B.* Appointees to the K-9 Unit shall be subject to the following selection procedure:

(1) Positions in the K-9 Unit will be filled through the normal posting process. The desirable qualification of this position is a commitment by the officer to remain in the program for five years, but this qualification is met by the employee spending three years in the program. Any officer who enters the program and becomes eligible for promotion during the first three years of the program must waive his/her opportunity for any promotion until the full three-year commitment to the program is completed unless the parties mutually agree otherwise.

(2) *Members of the K-9 Unit will work three days on followed by three days off on a rotating schedule with the same 8 1/2 hour work day as shift officers, excepting only that the work day shall include one hour for K-9 partner and vehicle maintenance described in subparagraph (7) below.*

(3) *Members of the K-9 Unit will be responsible for 24 hours of maintenance training per month on a yearly average. A K-9 handler will adjust his/her workday for training purposes.*

(a) The training will be broken down as follows:

1. Eight hours per month on a scheduled workday.
2. Eight hours per month on a scheduled day off.

3. Eight hours per month on down or slow periods on their normal work shift.

(4) Members of the K-9 Unit will submit to recertification training as scheduled by the Department. A K-9 handler will adjust his/her workday for training purposes.

(5) Compensation for training, K-9 partner and vehicle maintenance, including necessary and proper veterinarian care and treatment, on a K-9 handlers' day off will be paid a time and one-half.

(6) K-9 demonstrations will be authorized by the Operations Commander and will be compensated by compensatory time at straight time on an hour-for-hour basis. K-9 demonstrations will be mutually agreed upon by both the K-9 handler and the Operations Commander. Mandatory demonstrations will be paid at time and one-half.

(7) K-9 handlers will be responsible for the feeding, kennel care, rooming exercise, and veterinarian care of the K-9 partner, and will attend to vehicle upkeep. It is conclusively stipulated that these duties, except veterinarian care, will take one hour per day. The time necessary for seeing to veterinarian care will be determined by the time actually spent

(8) The duties of K-9 teams are specialized and city wide in nature so that K-9 teams will not be assigned particular zones or areas to patrol but will nonetheless count toward minimum safety staffing for purposes of Section 5.07.

(9) The K-9 handler will be allowed to use the K-9 vehicle for personal use within the city limits if the K-9 partner is along in the ear with the officer.

(10) For purposes of call-in, the K-9 officer's workday shall end at noon on the last day of his work cycle. Their workday will then start at noon on the first scheduled day back to work.

(11) When there is not a Green Bay Police Department K-9 team working, a Green Bay Police Department K-9 team shall be called in by seniority; except that an on-duty K-9 team from another police agency may be called in if there is no Green Bay Police Department K-9 team available for call in and there is an emergent need for immediate deployment of a K-9 team, all in the same manner that police officers from another agency may be called in to the City of Green Bay to provide general police services under a mutual assistance concept.

(12) *K-9 teams will be assigned the same hours as the “evening” shift but will not be part of the shift for purposes of duty assignments, vacation selection or off time requests.*

(13) The K-9 Officer will be subject to the residency requirements as outlined in Article 36, Residency, of the labor agreement.

Officer Resch states that the May 10, 2007 proposal includes the K-9 position held by Officer Swanson because the City wanted to make changes to the K-9 unit. Officer Swanson, unlike Officers Resch and Mulrine, held a passive K-9 position.

Attorney Dietrich recalls that, after the City received Attorney Parins letter of May 10, 2007, there were several outstanding issues, including payments for dog training and maintenance. Attorney Dietrich further recalls that, in June of 2007, the City filed a petition for interest arbitration pursuant to Sec. 111.77, Stats. According to Chief Arts, the Association’s proposal on the K-9 positions was a total package proposal and, therefore, the Association’s proposal of May 10, 2007 does not indicate that the parties had reached an agreement that the two K-9 positions would be changed to a 5/3 work schedule.

Chief Arts recalls that, shortly before the August 2007 mediation session, he made the decision to eliminate the two K-9 patrol positions if the parties were unable to agree upon changes to this program. Based upon his discussions with the mediator, Attorney Dietrich concluded that the Association had dropped all demands except a wage proposal and that the Association had no interest in discussing the work hours of the K-9 Officers. Attorney Dietrich does not state that he met with any Association representative to confirm his understandings. Chief Arts states that he also concluded that the Association had withdrawn all proposals except for wages.

An email dated October 22, 2007, from Chief Arts to Brown County Sheriff Kocken, states: (Comp. Ex. #5)

In the event that the Green Bay Police Department is unable to support a K9 program, would the Brown County Sheriff’s Department be able to assist our department with the use of your K-9’s? If so, please indicate any costs that may be associated with the service. I also understand that there may be times that K9 service is not available. Thank you.

Sheriff Kocken responded with an email dated October 23, 2007 that states:

The Brown County Sheriff’s department will gladly assist your department with K-9 calls for service when a K-9 officer is on duty or available to be called for duty. There will be no charge to the City of Green Bay for this service.

Our officers now occasionally respond in the city for K-9 calls. Officers advised me that this is working well and do not foresee any problems.

Please feel free to contact me if you have any problems.

Chief Arts recalls that, since he began his employment with the City in 1986, Brown County has performed K-9 services for the City if the City's K-9 unit was not available and, at times, when it was available.

Chief Arts recalls that, shortly before the Joint Finance/Personnel Meeting of Thursday, November 8, 2007 he decided to add the elimination of the K-9 patrol positions to his 2008 Department budget proposal. According to Chief Arts, he continued to hope for an agreement, but was of the opinion that the parties' positions were far apart. Chief Arts states that this meeting gave the Department and Association membership their first notice that the K-9 patrol program could be cut. The minutes of this meeting include the following: (Comp. Ex. #4)

...

Chief Arts said the other major change is elimination of the K-9 program. This move would put more officers on the road to answer calls for service and fill 150 patrol shifts with more than 1200 patrol hours. The result would be overtime savings of more than \$50,000. The Sheriff's Department has agreed to cover the City's K-9 calls at no additional cost.

Chief Arts said this is not a popular decision. He appreciates the fact that the officers care so much for the program, but said that difficult budget decisions had to be made, and negotiations with the union to reach a more affordable canine program have been unsuccessful to date. The increase in overtime from \$745,920 to \$915,990 is based on actual real-time figures and current spending in the 2007 budget and is not inflated. 128 days per year are currently not covered by the K-9 unit. One of the two officers worked 117 days, while the other worked 119 days. \$2,500 has been left in the budget for a passive K-9 narcotic handler who does not operate under the same schedule.

Ald. DeWane stated that the K-9 Unit is one of the department's most important assets, and that a life could be on the line while waiting for a dog to arrive from somewhere in the County. He asked if there was anyone already on staff who could take the Assistant Chief job. Chief Arts replied that, in addition to handling grievances, this person would also be responsible for implementing technology projects such as GERP, process improvements, and accountability from the top down. Operations Commanders and Detective Commanders already have their plates full. He hasn't started an evaluation yet, but the cost would be \$87,000 for Step 4 or \$82,000 for Step 3. K-9 officers are paid per

hour, but work a 4 — 4 schedule; this was negotiated several years ago. The department must still come up with another \$100,000 for the budget, and this is the one area that would make the most impact on the budget while impacting the fewest people. Chief Arts had put in for five additional officers, but they were cut. The department needs more officers on the road to keep the response time down, and this move would put two additional officers in those zones. The rank, salary, and overtime rates of the current K-9 officers would remain the same.

Ms. Foeller said the base salary for these positions is about \$65,000, or \$86,717 with fringes, including health & dental. Overtime for one of the positions was at \$43,000, and adding fringes brought the total to about \$115,000. Overtime was much lower for the second officer.

Chief Arts said keeping the K-9 Unit and putting two officers on the road would cost \$140,000 more in the budget.

...

These minutes indicate that, following this discussion, interested parties were permitted to speak and that these interested parties included Michael VanRooy, Vice-President of the Association, and Officer Shannon Mulrine. At this meeting, the Joint Finance/Personnel committee voted to approve the Chief's budget proposal that eliminated the two patrol officer K-9 positions held by Officers Mulrine and Resch.

According to Chief Arts, the passive K-9 handler position occupied by Officer Swanson is a position that is distinct from that occupied by Officers Resch and Mulrine in that Officer Swanson works a 5/2, 4/3 administrative schedule and is part of the Detective Division under SRO. Chief Arts states that Officer Swanson works closely with the Green Bay School District and the Drug Task Force.

Lieutenant Laux, who has supervised the K-9 program since late 2006 or early 2007, states that Officer Swanson, unlike Officers Mulrine and Resch, worked days as school liaison. According to Lieutenant Laux, Officer Swanson's canine was a drug dog and did not do the type of police work performed by Officer Resch and Mulrine's canines; such as track and bite work. Lieutenant Laux states that Officers Resch and Mulrine were assigned to patrol cars and could perform all patrol work, but primarily responded to K-9 calls. Lieutenant Laux states that Officers Resch and Mulrine worked from 7 p.m. to 5 a.m. and that call volume is low between 3:30 a.m. and 5 a.m.

Lieutenant Laux recalls that, in October or November, Chief Arts gave him a "heads up" that there was a possibility that the K-9 program was being eliminated. According to Lieutenant Laux, the Chief gave several reasons for this elimination, *i.e.*, the need to effectively manage the department, financial reasons and a desire to unify all patrol shifts on the 5/3 schedule. According to Lieutenant Laux, no one ever told him that the positions were being eliminated because of the individuals who occupied the positions.

Lieutenant Laux states that he met with the governing board of the Association to learn what the Association was looking for so that he could make a proposal to Chief Arts that would avoid the elimination of the K-9 patrol program. Although Lieutenant could not recall the specific date of this meeting, Officer Resch's testimony establishes that this meeting occurred on November 13, 2007.

According to Association President Resch, Lieutenant Laux showed up at the meeting of the governing body without any prior notice to Officer Resch. Officer Resch does not recall that the Association altered its position on November 13, 2007. Officer Resch further recalls that Lt. Laux made it clear that the Association was going to have to negotiate to save the program.

Lieutenant Laux recalls that, during the period the K-9 agreement was negotiated, there was a lot of comment about Officer Resch's overtime. Lieutenant Laux does not identify the source of these comments. Lieutenant Laux states that Officer Resch took a ton of overtime, as was his right as a senior officer.

Chief Arts recalls that, prior to the Council Meeting of November 15, 2007, Alderpersons requested additional information with respect to his budget proposal on the K-9 program. Chief Arts further recalls that he responded to this request by providing a packet of information that includes a cover memo dated November 14, 2007. (Comp. Ex. #5) This memo includes the following paragraph:

...

The information is broken into sections. I hope it will be helpful in understanding this issue. Please understand we have tried numerous times to negotiate a more service oriented and cost efficient Canine contract. We have tried up to this morning to reach an agreement with the Union.

...

Attached to this cover memo is a document that states:

SHIFT IMPACT

ADDS 150 SHIFTS TO DEPARTMENT ANNUALLY

ADDS 1200 MAN HOURS OF PATROL ANNUALLY

THE ADDITIONAL SHIFTS WILL SAVE AN ESTIMATED \$65,000 IN OT COSTS

**BROWN COUNTY SHERIFF HAS AGREED TO COVER K9 CALLS
AT NO ADDITIONAL COST**

At hearing, Chief Arts testified that his proposal to eliminate the K-9 program would save \$9,000 to \$10,000 due to the elimination of overtime compensation for mandatory dog training and that he had projected a savings of more than \$50,000 in overtime resulting from the change in work schedule and hours. Chief Arts states that the K-9 conflict never had anything to do with individuals and everything to do with the work schedule.

According to Chief Arts, he was trying to change certain conditions in the contract that affected his Department's budget. Chief Arts states that the reassignment of the two K-9 officers as regular patrol officers working regular patrol officer hours would improve the Department's level of service and allow the Chief to manage more effectively and efficiently. According to Chief Arts, this would occur because the K-9 officers would work more shifts under the 5/3 schedule; the officers' increased availability should have the effect of reducing overtime due to safety staffing requirements; and these officers would be working more hours during times when there were calls for service.

In Officer Resch's opinion, the numbers that Chief Arts provided to the City Council to justify his budget proposal were not realistic. Officer Resch recalls that he addressed his concerns regarding Chief Arts' numbers when he met with Commanders Molitor and Sterr on December 6, 2007 and that Commander Molitor indicated that he did not have sufficient information to respond to Officer Resch's concerns.

Officer Resch is aware that the Department has cut back on positions or not filled positions because of budgetary constraints. Officer Resch confirms that overtime for safety staffing is one of the biggest parts of the Police Department's budget. Officer Resch states that, in 2004, the 4/4 schedule was in effect and safety staffing overtime was approximately \$50,000. Officer Resch doubts that the 4/4 schedule caused overtime to increase to \$195,000 in three years.

In a letter dated November 14, 2007 and addressed to Attorney Dietrich, Attorney Parins states: (Comp. Ex. #6)

...

Being faxed/mailed with this letter is a proposed Side Letter of Agreement for K-9 Officers. We are informed that Chief Arts delivered this to individual members of the GBPPA governing board yesterday.

We are further informed that the Chief made this proposal as a "take it or leave it" proposal which must be responded to before the common council meeting scheduled for tomorrow.

At the outset, the GBPPA needs to inform you that the union representatives cannot enter into an agreement changing contract language. This requires action of the membership. There is no way that a membership meeting could, in any event, be held before tomorrow.

Additionally, the union representatives on the governing board have determined that they could not recommend the proposal in its present form. At the same time, the proposal is along the lines of the proposal made by the GBPPA at the bargaining table. The GBPPA proposal would adopt the 5-3 work schedule and contain many of the other provisions as Chief Arts proposal. Reasonable mind should be able to work out differences at the bargaining table.

...

Attached to this letter is a three-page document entitled "Proposed Side Letter of Agreement for K-9 Officers." The bottom of this document had blank signature lines for the Chief of Police, the City of Green Bay and the Green Bay Police Association.

According to Chief Arts, the "Proposed Side Letter of Agreement for K-9 Officers," which was typed in his office, was to be given to Attorney Parins, as the exclusive bargaining agent, to see if the parties could reach an agreement. Chief Arts recalls that he continued to propose a budget that included the elimination of the K-9 program and continued to attempt to work out an agreement on the K-9 program.

At hearing, Chief Arts testified as follows:

...

. . . I remember this now because in your second paragraph where you state, "We are further informed the Chief made this proposal as a 'take it or leave it' proposal," that was never – and I repeat never—the words out of my mouth. " (T. Vol. 1 at 116)

...

Subsequently Chief Arts was questioned and responded as follows:

...

Q: Now, Chief, in your testimony now, when you're stating that there would be an elimination of the program unless an agreement could be reached, isn't that a take it or leave it?

A: I never said that though. I'm telling you that now on the record, but I never said to any of your members, to you or to anyone else, Take this proposal or I eliminate it. It never happened. (T. Vol. 1 at 121)

...

Chief Arts recalls that, after he had reviewed every point with the two Association board members, he stated "This is the end point; this is not a start of a new beginning and now we see where we end up." (T. Vol. 2 at 268)

On November 15, 2007, the City's Common Council held a public hearing on the proposed 2008 budget. Among the topics discussed at this public hearing was the Chief's budget proposal to eliminate a portion of the K-9 program. When Chief Arts was asked to address his proposal to reallocate resources from K-9 to patrol, Chief Arts stated, *inter alia*: (Comp. Ex. #10)

...

This is not about anything other than the contract. It's not \$56,780 to add into the budget to keep the K9. What this is about is managing our resources so that we can staff the shifts at the appropriate times and places to maximize our biggest benefit. By doing that we will save in the budget the 56, approximately \$56,780. It's not a cost item that you add back into it. Now what the proposal is for the elimination of K9 budget, it will put more officers on the road simply because we will be able to manage the shifts better. We will be able to manage when they take off. Currently we have no control over that program. We cannot tell them they can, we cannot stop them from taking off of work, we can't stop them from taking vacation, even when there's everyone else is taking their vacation picks, it's an independent picking program. So by eliminating the K9 program what you would do is you would add 150 shifts of patrol, over 1200 man hours and you'd have--that's where the savings would be coming in. That would, the savings would be coming in from the fact that you no longer have to post for overtime because that particular group picks independently. It's nothing about the person, it's nothing about the K-9 handler or the K-9 dogs, it's about the contract, it's about managements ability to manage those resources. And part of the reason why this an attractive appeal? is because the Sheriff's Department, which is also funded by City tax dollars has agreed to pick up those additional costs. . . . I understand that this is a very, very difficult decision and I, again, and I'll say this again and I appreciate the fact that the officers are here, they're so passionate about the program, but sometimes difficult decisions have to be made at budget time and this is something that we simply can't afford anymore under the current conditions of the contract. I also want you to know that we have tried numerous times to negotiate a better program so we could have more service, more coverage, and I think at the last joint finance, a couple

of you have asked me for some information on that, and I included that and it's in a packet for you. The bottom line is this. We've been trying since January to come up with a new K9 contract that wouldn't take any money away from the officers, they would be paid the same, they would be operating under the same conditions and terms of every other patrol officer on the department, on the 5/3 schedule. In addition, we would have paid them \$4,000, \$4,100 for care and maintenance of the animal, and we even made an agreement to add an additional K9, or we attempted to make an agreement, to add an additional K9 late in 2008 with no taxpayer dollars. That was the last agreement that we just tried and that just fell through the wind this morning, or yesterday morning. In fact, I should refer to what Officer Van Roy stated, there is two board members here right not that can testify that the words take it or leave it never came up. That was not the case. We've been trying to do this for a long time. As a matter of fact I think back in 2001 or 2002 when we were trying to negotiate a more management friendly contract we offered five additional K9 dogs as long as we could go to the 5/3 like everybody else. Again this is not about the person or the dog, it's about our ability to manage our resources and the fact of the matter is when I need K9 the most June, July, August and September there are days when they work five or six days because I can't stop them from taking off. Management has asked, you have asked us to try to do a better job of reigning in our resources. And that's what this proposals about. It's not about the person, it's not about the dog, it's about our ability to put the service where we need it at the times we need it most. There are a couple of other things I want to clarify. K9 does not . . . The K9 doesn't cause the OT. They don't cause the OT. It is the contract that cases the overtime. . . We all like K9. Everyone on this council likes K9. But the fact of the matter is the cost has outweighed the benefit and when we have the opportunity to have our calls covered by someone else that's where the savings is gonna come in. I think Tony kind of said it before, you have good people in a bad system, and that's what we're trying to work through. We nearly made the agreement but we were, we were not successful.

. . .

Officer Resch states that he was at the Council meeting in November 2007. Officer Resch's testimony indicates that he understood that the Council had voted in favor of Chief Arts' budget proposal on the elimination of the K-9 patrol program. Resch further states the, prior to this council meeting, the Association had not agreed to drop any of the proposals contained in its offer of May 10, 2007.

Chief Arts recalls that Attorney Parins contacted the Chief regarding meeting without the parties' Attorneys and, as a result, certain members of the Association's governing board met with Commanders Molitor and Sterr to discuss the K-9 issue. Chief Arts understood that information from this meeting would be brought back to the Association's committee for

decision. According to Chief Arts' email of December 5, 2007, this meeting was held on December 6, 2007. (Resp. Ex. #4)

In this email to Commanders Molitor and Sterr, Chief Arts states a position on the sections of Sec. 7.03. These positions include the following:

. . . The K-9 **must** be on the same schedule as all other patrol officers, 5/3 5/3, in the same manner as shift personnel;" "Vacation and other time off will be administered on a hour for hour basis in the same manner as shift personnel. This is a must;" (re: 7.03(9) –No change in this provision. This must stay the same as well. The Association does not want to use the County K-9;" (re: 7.03(13) – This is the care and maintenance provision. The last offer was 30 minutes straight time per day at base APO rate. This amounts to \$5,040.65, salary, plus \$1273.77, for a total of \$6314.42(2007 rates). We went higher in an attempt to get an agreement. The proposal stated that the future K-9 care and maintenance would be \$4000 plus \$10,010.80, fringe for a total of \$5010.80 (2007 rates) Based on our overall package, \$4,000 per year to the handler, is where I would like to be. This is important because I am open to adding an additional K-9 in 2008 and 2009. One dog was offered in 2008 (without tax payer expense).

Officer Resch recalls that Commanders Sterr and Molitor met with the Association on December 6, 2007 to discuss the K9 patrol program. At hearing, Officer Resch testified as follows:

. . .

Q: Now, my question was, did either Commander Sterr or Lieutenant – or Commander Molitor or Lieutenant Laux use the fact that the program was eliminated as a bargaining tool against the union at the meeting?

A: Well, not directly, but that it was eliminated and we – we were discussing it, but it was not about saving it, it was about – it was gone. There was –There is no program anymore. As we sat there, the program was done, that we would have to give into concessions to save it. (T. Vol. 3 at 405)

Q: So it's your testimony that at that meeting – Strike that. Your testimony was that you were told that the positions were gone and you would have to give in to the – or concede in order to get it back. Who told you that at this meeting?

A: Commander Molitor

Q; And did you have any response to that?

A: I just thought that there—they're things that we could work through. I did say that I think there had been problems in the past that, you know, there's been retaliation from other chiefs. He stated that he was trying to put, you know, whatever had happened in the past kind of behind us to move forward. I told him I felt it was kind of the same thing that happened in the past, we felt the same way, that this was against us and me and Officer Mulrine and myself because of the history here. (T. Vol. 3 at 405-06)

...

Officer Resch recalls that, in the meeting of December 6, 2007, the parties reviewed the contract line by line and discussed how it would be handled under the 5/3 schedule. Officer Resch further recalls that this meeting did not produce an agreement and that outstanding issues were vacation selection and compensation for canine maintenance. According to Officer Resch, these two items had been an obstacle all along. According to Officer Resch, the 5/3 schedule was not an issue at the December 6, 2007 meeting because, since May 10, 2007, the Association had not requested that the 4/4 schedule be maintained.

According to Officer Resch, the K-9 Officers on the 4/4 schedule were able to take their vacations without picking against any other officer and this allowed them to take their vacations whenever they wanted. Officer Resch states that placing Officers Resch and Officer Mulrine into the power shift greatly affected the power shift because Officers Resch and Mulrine were senior officers and, thus, entitled to the maximum number of vacation days. Officer Resch recalls that the Association was concerned about limiting the ability of the officers on the power shift to take vacation.

In a letter dated December 7, 2007 and addressed to Attorney Dietrich, Attorney Parins states: (Comp. Ex. #7)

...

The Green Bay Professional Police Association ("GBPPA") has been informed by reliable sources that the City of Green Bay has contracted out K-9 Officer/Partner duties customarily and usually performed by GBPPA members pursuant to the terms and conditions of the Collective Bargaining Agreement.

The GBPPA has received no notification of this contracting out by the City of Green Bay.

If in fact the City of Green Bay has, or intends to, contract with Brown County or any other person or entity to provide K-9 Officer/Partner services customarily and usually performed by GBPPA members the GBPPA does hereby request and demand that such not be implemented prior to collective bargaining with the GBPPA.

We would appreciate your thoughts regarding K-9 duties forum for collective bargaining. The GBPPA and the City are in the hiatus period and additionally are in the initial stages of interest arbitration.

...

In a memo dated December 10, 2007 and addressed to "All Supervisors," Commander Sterr states: (Comp. Ex. #8)

...

RE: K9 Transition

Effective January 6, 2008, the Green Bay Police Department K9 program will be eliminated. Officer Resch and Officer Mulrine will be assigned to the patrol division on a 5/3 schedule.

They will be assigned as follows:

Officer Resch will be assigned to evening shift group 4 on a 5/3 schedule
Officer Mulrine will be assigned to evening shift group 8 on a 5/3 schedule

Either officer may post to any future opening that occurs. Vacation selection will be in accordance with the established procedure for that division.

If you have any questions, please contact either Chief Arts or myself.

...

The list of cc's included Attorney Parins.

In a memo dated December 10, 2007 and addressed to "Officers Resch and Mulrine," Commander Sterr states: (Comp. Ex. #8)

...

RE: K9 Transition

Effective January 6, 2008, the Green Bay Police Department K9 program will be eliminated.

You will be assigned as follows:

Officer Resch evening shift group 4 on a 5/3 schedule
Officer Mulrine evening shift group 8 on a 5/3 schedule

You may post to any future opening that occurs. Vacation selection will be in accordance with the established procedure for that division.

Please contact Lt. Laux to make arrangements to turn in the K9 squad and any other city owned K9 equipment. You will be given the opportunity to keep your K9 as long as you agree to be responsible for all financial costs associated with the care and maintenance of the animal.

If you have any questions, please contact either Chief Arts or myself.

...

The list of cc's included Attorney Parins.

In a memo dated December 11, 2007 and addressed to Attorney Parins, Attorney Dietrich states: (Comp. Ex. #9)

...

Re: - Green Bay Professional Police Association Elimination of Canine Officer Position

Dear Mr. Parins:

This letter is to advise you, on behalf of the City of Green Bay, that action has been taken by the Common Council of the City to discontinue the Canine Officer position in the Green Bay Police Department.

As a result of this action, the employees currently serving as Canine Officers will be assigned to regular patrol shifts as a member of the Police Department. Each officer will be advised of their assignment by the Police Chief.

Since each of these officers will be assigned a patrol shift and will be provided the opportunity to select vacation pursuant to their seniority, we are not aware of any other issues that need to be discussed between the City and the Police Association. If you have any questions or wish to discuss this further, please feel free to contact me directly on behalf of the City of Green Bay.

...

Chief Arts confirms that, during the budget process, the City voted to eliminate the two K-9 patrol positions. Chief Arts states that, once the budget was passed, he could not just wait and hope that something happened in bargaining because he did not have a K-9 patrol program as of January 1st. According to Chief Arts, he chose a January 6, 2008 implementation date because it was normal operating procedure to implement changes at the beginning of a pay period.

Officer Resch recalls that, prior to Commander Sterr's memo of December 10, 2007, the parties had scheduled a second meeting, with their attorney, to discuss the K-9 patrol program. Officer Resch further recalls that, after receiving the memo of December 10th, the governing board decided to cancel this meeting and request a meeting that would include Attorney Parins. Officer Resch further recalls that this request resulted in a meeting on December 26, 2007.

In a letter dated December 12, 2007 and addressed to Attorney Dietrich, Attorney Parins states: (Comp. Ex. #13)

...

This is in reference and response to your letter of December 11, 2007.

First of all thank you for giving the GBPPA actual notice that the City is eliminating the K9 position held by the Association President, Officer Resch, and a longtime union activist, Officer Mulrine. Your letter is in error, however, in stating that the City took action to discontinue the K9 officer position in the Green Bay Police Department. The City has not eliminated the K9 position held by Officer Swanson.

By this letter the GBPPA hereby restates its demand that the City collectively bargain the decision to eliminate the job positions of Officers Resch and Mulrine. This decision is definitely a mandatory subject of bargaining. Although the City is attempting to quote this as a "level of service" decision, the facts are otherwise.

As you know, from the onset of negotiations between the City and the GBPPA we have expressed concerns that proposals the City brought to the bargaining

table regarding the K9 positions were proposals made in bad faith and specifically in retaliation against the union president. There has been a definite history of such retaliation, including City action involving the K9 position throughout a good portion of Officer Resch's term as president.

Public statements by both the Chief of Police and other City of Green Bay officials have made it clear that this is not a "level of service" decision. Rather, it is quite clear from these statements that the elimination of the position had to do with the labor contract between the GBPPA and the City, and the control of the Chief of Police over the GBPPA.

The GBPPA also, hereby restates its demand that the impact of this decision be bargained before its implementation. There is a definite bargaining history between the GBPPA and the City regarding reassignment of officers when a job position is eliminated. Additionally, K9 coverage has a great deal to do with officer safety. The GBPPA would demand to bargain all aspects of the impact of removing the K9-position.

The courtesy of a reply is requested.

...

In a letter dated December 12, 2007 and addressed to Attorney Dietrich, Attorney Parins states: (Comp. Ex. #14)

...

Reference is made to my letter of December 7, 2007.

In that letter I had stated that the City had given no notification to the GBPPA regarding the termination of its K9 unit. This has now changed. Chief Arts spoke to the undersigned by telephone on December 10, 2007, and advised that he was sending to me by way of attachments to e-mails written notification regarding the termination of the K-9 unit. Chief Arts in fact did send me those written notifications which were authored by his designee Commander Sterr. According to these documents the Green Bay Police Department K9 unit will be eliminated effective January 6, 2008. Actually that is a misstatement. The documents refer only to Officers Resch and Mulrine.

The documents also propose that Officer Resch be assigned to the evening shift group 4 on a 5/3 schedule and that Officer Mulrine be assigned to evening shift group 8 on a 5/3 schedule.

The question as to the job assignments to which Officer Resch and Mulrine would be reassigned to and the wages, hours and conditions of employment go to the impact of the City's decision to eliminate the K9 program. The GBPPA suggests that there are other subjects upon which the elimination of the K9 program will impact on the wages, hours and conditions of employment of the members of the GBPPA generally.

In addition to its demand to bargain the decision to eliminate the K9 program in the Green Bay Police Department and rely upon the Brown County Sheriff's Department, the GBPPA does hereby request and demand to bargain the impact of that decision on members for the GBPPA, including but not limited to Officer Resch and Officer Mulrine.

The GBPPA demands to bargain this impact before the elimination of the K9 program is effectuated and certainly before there had been any change whatsoever in the wages, hours or conditions of employment of either Officer Resch or Officer Mulrine.

The courtesy of a response to this demand is expected.

...

Attorney Dietrich states that he did not, and does not, construe the above letter (Comp. Ex. #13) as demanding that the K-9 negotiations be part of the interest arbitration proceedings. Attorney Dietrich states that he understood the Association to have made a demand to bargain the decision to eliminate the K-9 positions and a demand to bargain the impact of this decision.

In a letter dated December 13, 2007 and addressed to Attorney Parins, Attorney Dietrich states: (Resp. Ex. #6)

...

Re: Elimination of Canine Patrol Officer Position

This letter is a follow up to your correspondence of December 12, 2007, regarding the elimination of the Canine Patrol Officer position. Please be advised that the correspondence was not received by our office until Friday, December 14. It was not sent by email to our office as indicated in the correspondence.

The Common Council has eliminated the Canine Patrol Officer position. The Association has been advised that this position is eliminated from the table of organization of the Green Bay Police Department as of January 6, 2008. The officers assigned to the Canine Patrol Officer position will be assigned to

regular patrol duties as of January 6, 2008. If there are questions regarding the work schedule or work duties assigned to these employees, please contact me immediately with any questions you may have.

You have indicated in previous correspondence that the Police Association desires to negotiate over the impact of the elimination of this position from the table of organization of the Police Department. Please advise what other issues the Association believes are subject to impact bargaining since the two employees in this position will be treated the same as all other patrol officers in the Police Department. These employees will continue to maintain their seniority and exercise their seniority rights under the Labor Agreement as they have been exercised in the past.

We are not aware of any other issues that would require further negotiations between the City and the Police Association. If you have particular issues or a proposal that you wish the City to consider, please forward that to me as soon as possible. We can then discuss the necessity of a meeting between the City and the Association.

If you have any questions, please let me know.

...

In a memo dated December 18, 2007 and addressed to the City Council, Chief Arts states: (Comp. Ex. #22)

...

On December 6, 2007 representatives from police management met with union officials in a final effort to discuss the proposed elimination of the Green Bay Police Department's Patrol Canine program. While concessions were made on both sides, the issue came down to the care and maintenance of the canines. The City offered to pay each canine officer over \$5000 for care and maintenance. The Union demanded almost double that amount. We were not able to come to an agreement.

The City is under extreme financial pressure to meet its obligations. However, the presence and documents of the officers at various city council meetings sent home the message how important the canine program is, and we tried, one last time to negotiate a solution to the problem that would ensure the continuance of the program while maintaining fiscal responsibility at the same time. There have been several attempts to resolve this dispute starting last January.

Sometime after this meeting, some department members participated in a petition on the Internet alleging that the city plans to euthanize Pocket and Lobo, the two canines that have been loyal to the City and its officers. Nothing could be further from the truth. Putting the canines down was NEVER an option. In the past, dogs that retired have remained with their handlers. The current canines were offered to their handlers. They have not accepted them yet but we assume they will and if they don't we will donate them to another police department. Because of this baseless allegation, the police administration and the city have come under attack by those who have been woefully misled to believe we would try to destroy these beautiful animals who are part of our police department.

It is our most sincere desire to maintain the canine program. The status quo could not continue and we made a very fair offer to the Union. The union's exclusive bargaining agent Tom Parins and the union rejected every offer we have put forward. Had the Union agreed to the terms we struggled to offer, the program would continue. However, because of the cost of service and the limited availability of the canines on the current rotation, the city was left no choice but to discontinue the program effective January 6, 2008.

...

In an email dated December 19, 2007 and addressed to various Association Representatives including Officer Resch and Attorney Parins, Chief Arts states: (Comp. Ex. #12)

...

Subject: K9

As you are aware the City Council referred back to the Green Bay Police Department the K9 negotiation issue. Their mandate was to continue negotiations in an effort to reach an agreement prior to January 6, 2008. There are currently postings up within the department for a variety of shifts. If either of the K9 officers that may be affected by the elimination of the patrol K9 unit wish to sign any of those postings we would encourage them to do so with the understanding that they are not abandoning their position within the K9 unit should an agreement be reached.

We look forward to hearing from you so we can work on getting this issue resolved. Please contact Commander Sterr, Commander Molitor or myself to arrange a meeting.

...

Attorney Dietrich states that, although he was not present at the City Council meetings, he understood that the City Council had taken action to eliminate the K-9 positions as of January 1, 2008. On January 4, 2008, Attorney Parins and Attorney Dietrich had the following email exchange: (Comp. Ex. #16)

...

Dean:

My client advises that it was not agreed during the Moliter/Sterr discussions that future officers be paid straight time for re-certification and instructs that the city's proposal to pay straight time be rejected. Your language should be changed accordingly.

...

Tom:

This email will confirm our telephone conversation at noon today. The issue of future Canine Patrol Officers being compensated at the straight time rate for recertification training is an important component of any agreement between the City and the Association. If we are unable to resolve this issue along the lines suggested by the City, we will not have an agreement between the parties.

Please be advised that the City intends to proceed with the elimination of the Canine Patrol Officer program as of January 6 absent a tentative agreement between the City and the Association. It will be necessary to schedule another meeting to discuss the impact of the elimination of this program. Please advise of dates you have available for such a meeting.

...

Attorney Dietrich recalls that the parties met on December 26, 2006. Officer Resch recalls that, on December 26th, the disputed issues were vacation selection and payment for canine maintenance. Officer Resch further recalls that, at some point, the Association had an issue with the City using the County to perform bargaining unit work, but that he does not know if this issue was on the table on December 26.

Officer Resch recalls that the Association's board met on Friday, January 4, 2008 and rejected the latest proposal of the City. Officer Resch further recalls that, at that time, the City had made a concession to grandfather vacation picks and had offered a maintenance payment of ½ hour per day. According to Officer Resch, the Association's board was concerned about the fact that new handlers would have a different maintenance/training payment than the current handlers.

Officer Resch recalls that, because of the elimination of his K-9 position, he had posted into the Drug Task Force. Officer Resch further recalls that he worked his January 4, 2008 K-9 shift and then cleaned out his car because he thought his K-9 position had been eliminated. Officer Resch states that he was not scheduled to work on January 5.

According to Officer Resch, Chief Arts and the City's Attorney met on January 5; submitted a proposal to the Association on January 5; and that, on January 5, the Association voted on this proposal. Officer Resch recalls that the Association instructed Attorney Parins to contact the City and advise the City that the Association would accept the City's proposal under protest. Officer Resch recalls that Officer Mulrine was told that he had to report with his canine on Sunday, January 6; that he would be working 7 to 3:30 and that his hours had been changed to the 5/3 schedule.

Between January 5 and January 10, 2008, the representatives of the parties exchanged letters, emails and phone calls as they attempted to finalize a settlement on their K-9 patrol officer dispute. (Resp. Ex. #28, 29, 30 and Comp. Ex. #15 and 17) Chief Arts confirms that, on January 10, 2008, the parties signed a written agreement on the K-9 patrol program.

According to Chief Arts, when he discussed this agreement at a City Council meeting, he was asked how the program would be funded and he replied that he would cover the costs by not filling positions. Officer Resch states that, under the January 2008 agreement, Officers Resch and Mulrine had the right to pick vacation under the old system and that future K-9 Officers would pick their vacation in competition with the other officers in their patrol group.

Officer Resch states that the City was not trying to reach an agreement between November 2007 and January 2008 because the City had stated that, unless you agree to this, the K-9 patrol program was done. Officer Resch further states that the City Council was willing to put money back into the budget; but that the Chief argued against this. According to Officer Resch, if the Chief had really wanted the program, then he would have accepted the money from the Council and continued to negotiate. Officer Resch states that the Chief did not have any interest in having Officer Resch or Officer Mulrine continue in the K-9 patrol program.

Officer Resch states that he received pressure from the media; who portrayed him as selfish, greedy and an abuser of vacation selection. Officer Resch states that the media also ran negative stories about how much money he was making. Officer Resch states that he and the Association received pressure from other officers who wanted the Association Board to settle so that the Department would not lose their canines. According to Officer Resch, the negotiation of the K-9 patrol settlement did not involve the normal collective bargaining process. Officer Resch states he would not have agreed to some of the items in this settlement, but for the pressure and tactics used by the City, and that the Association would have gone to arbitration.

Attorney Dietrich recalls that the parties discontinued contract negotiations after the mediation in August 2007 because a declaratory ruling (DR) had been filed with the WERC. Attorney Dietrich recalls that these negotiations resumed in March 2008 when the parties met with the mediator. Attorney Dietrich recalls that, at the March 2008 mediation session, the Association provided the City with a contract settlement offer. (Comp. Ex. #127) This settlement offer, in relevant part, states:

...

**SETTLEMENT OFFER
GREEN BAY PROFESSIONAL POLICE ASSOCIATION
TO
CITY OF GREEN BAY**

Continue all terms of the 2004-2006 Labor Agreement unless modified by the provisions of this Settlement Offer and Supplemental Agreements. In regards to reference to "Supplemental Agreements" the GBPPA has, and continues to, object to the agreement regarding changes to the K9 program provisions of Article 7 and changes in the HRA's conducted under Article 17, and reserves the right to file for and prosecute appropriate proceedings before the courts or WERC and agreements on these subject mailers are agreed to only with those objections and reservation of rights.

...

Attorney Dietrich recalls that, following this mediation session, the parties discussed procedures for the exchange of final offers.

The City submitted its final offer to the mediator in a letter dated September 16, 2008. (Comp. Ex. #3) According to Chief Arts, this final offer did not include any proposal on the K-9 positions because the parties had reached an agreement on the K-9 positions in January 2008. The parties settled their contract in April of 2009; just prior to the scheduled arbitration hearing.

Attorney Dietrich states his understanding that "Supplemental Agreements," as that term is used in the Association's settlement offer, *supra*, refers to K-9 patrol program agreements reached by the parties in December 2007 and finalized in January 2008. Attorney Dietrich recalls that he was not directly involved in K-9 issues from the August 2007 mediation session until December of 2007; at which point he communicated with City officials and the Association to reach an agreement on Sec. 7.03.

Summary

Count Thirteen and Count Fifteen Sec. 111.70(3)(a)1 and 4 claims

The parties exchanged proposals on their successor 2007-2008 contract in early 2007. The City proposed changes to the contract that, in the view of the Police Chief, would permit the City to operate the K-9 patrol program in a more efficient manner.

In May 2007, the Association made a proposal to the City in which the Association accepted some, but not all, of the City's proposals on the K-9 patrol officer positions. The Association's counter proposal was a total package offer. The City did not accept this counter proposal.

In August 2007, the parties met with a mediator in an attempt to resolve their 2007-2008 contract dispute. The parties did not have any face-to-face discussions. Chief Arts states that he understood that the Association withdrew all of its proposals except for wages. The record provides no reasonable basis to conclude that this understanding was not *bona fide*. At some point after this mediation session, the parties' 2007-2008 contract negotiations were held in abeyance pending resolution of one, or more, declaratory ruling petitions.

In late October or early November 2007, the Police Chief decided that his 2008 Department budget would include a proposal to eliminate the K-9 patrol program. The Police Chief introduced this budget proposal at the November 8, 2007 Finance/Personnel meeting.

As the Association argues, the Police Chief sought to eliminate the K-9 patrol program, in part, because the Association had not made contract concessions on the K-9 patrol program that were sought by the City. Contrary to the argument of the Association, such conduct is not evidence of bad faith bargaining, *per se*. For example, a municipal employer with a dynamic *status quo* right to eliminate a program does not bargain in bad faith when it chooses to exercise this right because it has not obtained desired contract concessions.

On November 13, 2007, Lt. Laux met with Association representatives to facilitate an agreement between the Association and the City with respect to the K-9 patrol program. From comments made by Lt. Laux, Association President Resch concluded that the Association would have to negotiate to save the K-9 patrol program.

It may be that, because of the Chief's budget proposal to eliminate the K-9 patrol program, the Association was not in the catbird seat with respect to negotiating a settlement on the K-9 patrol program. MERA, however, does not mandate that both parties bargain from the same position of strength.

In a letter dated November 14, 2007, Attorney Parins responded to a written proposal from Chief Arts. Attorney Parins' response indicates that the Association's governing board could not recommend the proposal in its present form, but that reasonable minds should be able to work out differences at the bargaining table.

The City Council approved the Police Chief's budget proposal to eliminate the two K-9 patrol positions on November 15, 2007. Thereafter, and in response to a suggestion from Attorney Parins, representatives of the parties met on December 6, 2007 to discuss the K-9 patrol program.

Neither Lt. Laux's meeting with the Association representatives on November 13, nor Commander Molitor's meeting with Association representatives on December 6, 2007, resulted in a settlement of the parties' K-9 dispute. Each meeting, however, indicates a continued willingness on the part of both parties to negotiate a settlement of their K-9 dispute.

In a letter dated December 7, 2007, Attorney Parins states that he had heard that the City intended to contract out K-9 duties and made a request to bargain with the City prior to the implementation of such contracting out. On or about December 10, 2007, Commander Sterr provided Attorney Parins with a copy of a memo that stated that the K-9 patrol program would be eliminated effective January 6, 2008.

In a letter dated December 11, 2007, Attorney Parins demanded that the City collectively bargain the decision to eliminate the two K-9 patrol positions and to bargain the impact of this decision before implementation of this decision. Attorney Parins followed up with a letter dated December 12, 2007, in which Attorney Parins states that, in addition to its demand to bargain the decision to eliminate the K-9 patrol program and rely upon Brown County, the Association demanded to bargain the impact of this decision before the elimination of the K-9 patrol program was effectuated.

Attorney Dietrich responded in a letter dated December 13, 2007. In this letter, Attorney Dietrich requests that, if the Association has any particular issues or proposals, that the Association forward these issues as soon as possible.

In an email dated December 19, 2007, Chief Arts notified the Association that the City Council had given the Department a mandate to continue negotiations with the Association in an effort to reach an agreement prior to January 6, 2008. In this email, Chief Arts indicated that he looked forward to hearing from the Association so that the parties could work toward resolving the K-9 dispute.

On December 26, 2007, the parties met to negotiate K-9 issues. On January 4, 2008, the Association's Board rejected the City's most recent proposal on the K-9 dispute. On January 5, 2008, the City made another proposal on the K-9 dispute and, on that date, the Association Board voted on the proposal and instructed Attorney Parins to contact the City and advise the City that it would accept this proposal under protest. It is not evident that, on January 5, 2008, Attorney Parins contacted the City or otherwise informed the City that the Association had accepted its proposal under protest.

On January 6, 2008, the City did not eliminate the K-9 patrol program as announced in Commander Sterr's memo of December 10, 2007. On January 6, 2008, the City changed the

K-9 patrol officers' work schedules and work hours when it placed these officers on the work schedule and work hours of regular patrol officers.

Complainant argues that one of the rights protected by Sec. 111.70(2), Stats., includes the right of the Association to have the dispute regarding the City's K-9 proposal determined under the procedures of Sec. 111.77, Stats. Complainant further argues that the City's threat to eliminate the two K-9 patrol positions unless the Association conceded to the City's proposals, and then actually eliminating the K-9 patrol positions but advising the Association that the position would be restored if the Association made the concessions, violates these MERA rights.

Sec. 111.77, Stats., provides an interest arbitration procedure that may be used by the City, as the employer of municipal law enforcement employees, and the Association, as the collective bargaining representative of such employees, to resolve disputes over provisions to be included in successor collective bargaining agreements. As the Association argues, Sec. 111.77, Stats., does not require either party to make bargaining concessions. Nor does it prohibit either party from seeking bargaining concessions.

At the time of the January 2008 settlement, a Sec. 111.77, Stats., interest arbitration petition was pending. Inasmuch as the parties did not finalize the offers to be submitted to the interest arbitrator until after the mediation session of March 2008, the Association had an opportunity to respond to the City's budget decision to eliminate the K-9 patrol by submitting proposals on the K-9 dispute to the interest arbitrator.

It may be that the Association could not stop, or reverse, the City's budget decision through the exercise of its Sec. 111.77, Stats., rights. This record, however, provides no reasonable basis to conclude that the City engaged in any conduct that precluded the Association from exercising its Sec. 111.77, Stats., rights.

Contrary to the argument of the Association, this record does not establish that the Association was unlawfully coerced into making bargaining concessions. Rather, the record establishes that, when confronted with the budgetary decision to eliminate the K-9 unit, the Association chose to negotiate an agreement with the City that preserved the K-9 unit.

As discussed above, the City did not eliminate the K-9 patrol program on January 6, 2008. Rather, on January 6, 2008 the City continued the K-9 patrol program, albeit with changed work hours and work schedules. Inasmuch as the City did not eliminate the K-9 patrol program during a contract hiatus period as alleged by Complainant, the undersigned has not addressed the parties' arguments on the issue of whether Respondent had the *status quo* right to eliminate the K-9 patrol program.

Contrary to the argument of Complainant, the record does not warrant the conclusion that the January 10, 2008 settlement agreement is not a valid settlement agreement. The Association argues that it had not agreed that the City could implement the changes in the K-9

patrol unit's work hours and work schedules on January 6, 2008 or at any time prior to January 10, 2008. The record does not establish otherwise. In changing the work hours and work schedules of K-9 patrol officers on January 6, 2008, the City unilaterally changed the *status quo* on mandatory subjects of bargaining during a contract hiatus period without a valid defense.

Conclusion

Complainant has not established, by a clear and satisfactory preponderance of the evidence, that Respondents unlawfully coerced the Association into making contract concessions in violation of Sec. 111.70(3)(a)1, Stats., by threatening to eliminate and then eliminating the two K-9 positions held by Officers Resch and Mulrine. Complainant has not established, by a clear and satisfactory preponderance of the evidence, that Respondents unilaterally eliminated the two K-9 positions held by Officers Resch and Mulrine in violation of Sec. 111.70(3)(a)4, Stats. Accordingly, these Count Thirteen and Fifteen allegations have been dismissed.

Complainant has established, by a clear and satisfactory preponderance of the evidence, that Respondent City unilaterally changed the *status quo* on a mandatory subject of bargaining during a contract hiatus period, without a valid defense, when it implemented changes to the K-9 patrol officer's work schedules and work hours on January 6, 2008. By this conduct, Respondent City has violated Sec. 111.70(3)(a)4, Stats., and derivatively violated Sec. 111.70(3)(a)1, Stats.

The appropriate make-whole remedy for the City's violation of its statutory duty to bargain is to order the City to immediately compensate affected employees for each hour worked outside of their normal work schedule, as it existed immediately prior to the unlawful unilateral change on January 6, 2008, from the time of the unilateral change on January 6, 2008 until the Association confirmed the K-9 patrol settlement on January 10, 2008, by paying these employees the difference between the wages they received for working those hours and the wages these employees would have received if they had been paid their overtime rate for working these hours, together with interest at the statutory rate of twelve per cent (12%) per annum. The appropriate remedy includes an order to post a notice. Given the settlement agreement of January 10, 2008, it is not appropriate to order the City to cease and desist or to restore the *status quo ante*.

Count Fifteen

The portion of Count Fifteen related to Packer game assignments, as well as the allegations that Respondents have violated Sec. 111.70(3)(a)1 and 4, Stats, have been discussed above. This discussion addresses the Count Fifteen allegation that Respondents violated Sec. 111.70(3)(a)1 and 3, Stats., by proposing to eliminate and then eliminating the two K-9 patrol positions in retaliation for Officer Resch's protected, concerted activity.

The complaint, as filed and amended, alleges that Respondents have unlawfully retaliated against Officer Resch. Accordingly, the Examiner has not addressed Complainant's allegation that Respondents have unlawfully retaliated against Officer Mulrine.

As discussed above, to establish a violation of Sec. 111.70(3)(a)3, Stats., Complainant must prove, by a clear and satisfactory preponderance of the evidence that:

1. that Officer Resch was engaged in protected, concerted activity;
2. that the municipal employer's agents were aware of that activity;
3. that the municipal employer, or its agents, were hostile towards that activity; and
4. that the municipal employer's actions toward the municipal employee were motivated, at least in part, by its hostility toward the municipal employee's protected, concerted activity.

Complainant has established, by a clear and satisfactory preponderance of the evidence, that Officer Resch has engaged in protected, concerted activity and that, prior to Chief Arts' decision to propose the elimination of the two K-9 patrol positions, agents of the municipal employer, including Police Chief Arts, were aware of that activity.

During the 2008 budget process, the City Council voted to eliminate the two K-9 patrol positions from the Department's 2008 budget. It is evident that, but for Chief Arts' budget recommendation to eliminate these two positions, the City Council would not have voted to eliminate the two K-9 patrol positions. Chief Arts determined that this elimination would be effective on January 6, 2008. Thus, Chief Arts is the City representative who is responsible for the City's decision to eliminate the K-9 patrol program effective January 6, 2008.

In support of its claim that the municipal employer, or its agent, was hostile towards Officer Resch because of his exercise of protected, concerted activity, Complainant relies upon a portion of Attorney Dietrich's testimony. (T. Vol. 10 at 1694-6). In this testimony, Attorney Dietrich recalls that the focus of his discussions with the Association with respect to the K-9 Officer was "the change in the contract language needed to have the K-9 Officer position functioning as a part of the regular schedule and the regular team of officers." Attorney Dietrich further recalls that he remembers this because

. . . anytime I made a statement about the hours of work for the K-9 position or why there were changes being proposed by the city, I would receive a very aggressive response from one of the members of the bargaining team for the association. Happens to be the person who was a K-9 officer. Quite often the responses were with a raised voice, and on at least one occasion, if not more, he would tell me that I didn't know what I was talking about and that

what I was saying wasn't accurate and that what I – what was being proposed would not improve service.

So I know we talked about service because I got it thrown back in my face on a number of occasions during the collective bargaining process. And I tried to articulate what I was trying to present and what I understood in regards to the operations of the K-9 unit. And apparently I wasn't very successful in doing that.

Subsequently, Attorney Dietrich confirmed that he was talking about Officer Resch.

Notwithstanding Complainant's arguments to the contrary, the content, tone and tenor of this testimony do not provide a reasonable basis to conclude that Attorney Dietrich exhibits an aggravation from which one may reasonably infer that Attorney Dietrich is hostile toward Officer Resch's exercise of protected, concerted activity. Assuming *arguendo*, that such an inference were reasonable, the record provides no reasonable basis to impute such hostility to Chief Arts.

As the Association recognizes, this record contains no direct statements by Chief Arts of unlawful hostility. As the Association argues and the Examiner's discussion *supra* recognizes, prior to the time that Chief Arts proposed the elimination of the two K-9 patrol positions, Department management had made decisions that had an adverse impact upon Officer Resch's conditions of employment. Contrary to the argument of the Association, the evidence of these adverse actions does not provide a reasonable basis to infer that Chief Arts is hostile to Officer Resch's exercise of protected, concerted activity.

The changes sought by the City had a significant adverse impact upon Officer Resch's hours, wages and working conditions. As the Association argues, Officer Resch testified that he felt that adverse actions were taken against him based upon his position as Association President. Officer Resch's opinion that Respondents had taken adverse action against him because of his position as Association President is not proof that such adverse action has occurred.

The Association argues that the record contains substantial testimony by Officer Resch, as well as exhibits, that show that Chief Arts made statements that were critical and derogatory of Officer Resch and the Association throughout the K-9 dispute. The Association does not identify this testimony of Officer Resch. The Association identifies three Exhibits, *i.e.*, Complainant Exhibits #22, 26, and 27.

Complainant Exhibit #22 is a memo from Chief Arts to the City Council. Complainant Exhibit #26 is a newspaper article entitled "Police dig in for dogfight over city's K-9 program." Complainant Exhibit #27 is a newspaper article entitled "Green Bay police officers' request comes at K-9 program's tail end." As the Examiner stated at hearing, statements attributed to Chief Arts in newspaper articles are unreliable hearsay and, as such,

will not be credited unless corroborated by reliable evidence. Contrary to the argument of the Association, neither Chief Arts' statements in Complainant Exhibit #22, nor the corroborated statements attributed to Chief Arts in Complainant Exhibits #26 and 27, express or reasonably imply that Chief Arts is hostile to Officer Resch's exercise of protected, concerted activity.

It is evident that, in response to media requests and at City council meetings, Chief Arts provided information related to the K-9 dispute. It is also evident that there were media reports that quoted Chief Arts and/or purported to relay information provided by Chief Arts. The record provides no reasonable basis to discredit Chief Arts' claims that he was not responsible for how the media reported on the K-9 dispute. Nor does this record provide a reasonable basis to conclude that Police Chief Arts released any information for the purpose of harassing or engendering public criticism of Officer Resch.

It is evident that Officer Resch was a very devoted and well-respected K-9 patrol officer. As Officer Resch testified at hearing, he received public criticism for obtaining benefits for which he was entitled to receive under the collective bargaining agreement.

According to Officer Resch, at times, this public criticism was based upon incomplete and/or inaccurate information. The record does not reasonably indicate that Police Chief Arts, or any other City representative, knowingly provided incomplete and/or inaccurate information to the public.

Officer Resch and the Association dispute the reliability of information that Chief Arts provided to the City Council in support his budget proposal. This record, however, does not establish that information provided by Chief Arts is so unreliable, or the conclusions that Chief Arts drew from this information are so unreasonable, as to warrant an inference of pretext and improper motive.

At the public hearing of November 15, 2007, Chief Arts stated that his budget proposal to eliminate the two K-9 patrol positions was "nothing about the person, its nothing about the K-9 handler or the dogs, it's about the contract, it's about management's ability to manage those resources." Chief Arts' testimony indicates that it was "about the contract" because the contract provisions required the City to schedule the K-9 Officers on a 4/4 schedule with ten hour days. According to Chief Arts, this contract requirement did not allow the most efficient use of Department resources because the ten-hour days included periods of low call volume. Lieutenant Laux confirmed that the K-9 Officer's hours of 3:30 a.m. to 5 a.m. tend to be at the lower end of the call volume.

According to Chief Arts, "it's about managements ability to manage those resources" because movement from a 4/4 schedule of ten hour days to a 5/3 schedule of eight and one-half hours creates more work shifts per K-9 patrol officer. Chief Arts states that resulting increases in patrol hours would not only reduce response time, but also, would reduce safety staffing overtime because it would increase manpower on some shifts.

As Respondent argues, Chief Arts also considered it fair that the K-9 patrol officers have the same work schedule and training/vacation benefits as the regular patrol officers. As Chief Arts testimony indicates, he anticipated that the change in vacation selection procedure would reduce safety staffing overtime because the Department would have more control over when the two K-9 patrol officers would take vacation and the Department would save money by conducting training at straight pay, rather than at overtime rates.

The Association and the City disagree as to whether the elimination of the K-9 patrol program would produce all of the efficiencies projected by Chief Arts. The record, however, provides no reasonable basis to conclude that the Police Chief did not have a good faith belief that it was an inefficient use of Department resources to continue to operate the K-9 patrol program under existing contractual requirements. Nor does the record provide a reasonable basis to conclude that the Police Chief did not have a good faith belief that, by eliminating the K-9 patrol program, the Department could use resources currently allocated to the K-9 patrol program in a more efficient manner.

As Officer Resch testified at hearing, as early as May 2007, the Association's bargaining proposals had included a proposal to move K-9 patrol officers from a 4/4 schedule to a 5/3 schedule. As the record establishes, this proposal was part of a total package offer. Officer Resch confirms that, at the time that Chief Arts submitted his proposal to eliminate the two K-9 patrol positions, the Association had not agreed to allow Chief Arts to implement the 5/3 schedule or to make any of the changes to the K-9 patrol program that, in Chief Arts view, were necessary to efficiently manage the Department's resources.

As the Association argues, Chief Arts sought to eliminate the K-9 patrol program through the budget process, in part, because the Association had not made contract concessions. Such conduct, however, is not evidence of unlawful animus, *per se*. For example, if the City has the dynamic *status quo* right to eliminate the K-9 patrol program, then the City would have the MERA right to decide to eliminate the K-9 patrol program, rather than to continue to pursue contract concessions at the bargaining table.

Chief Arts is the City representative responsible for the City's 2008 budget decision to eliminate the two K-9 patrol positions effective January 6, 2008. Chief Arts has offered non-retaliatory business reasons as rationale for his decision. The record provides no reasonable basis to conclude that this non-retaliatory rationale is pretextual.

In summary, the clear and satisfactory preponderance of the evidence does not establish that Chief Arts' conduct in making a 2008 budget proposal to eliminate the K-9 patrol program and supporting this budget proposal was motivated, in part, by hostility toward Officer Resch's protected, concerted activities. The clear and satisfactory preponderance of the evidence does not establish that the City's conduct in accepting this budget proposal and Chief Arts' conduct in deciding to implement this budget proposal on January 6, 2008 was motivated, in part, by hostility toward Officer Resch's protected, concerted activities.

The most reasonable conclusion to be drawn from the record evidence is that this conduct of the City and Chief Arts was motivated solely by legitimate business reasons. To be sure, Officer Resch perceived Chief Arts' and the City's conduct to be retaliatory. However, where as here, Respondents' conduct was lawfully motivated, adverse actions do not violate Sec. 111.70(3)(a)1, Stats., "simply because it could be perceived as retaliatory."

In December of 2007, Chief Arts decided that he would implement the 2008 budget decision to eliminate the K-9 patrol program on January 6, 2008. Contrary to the argument of Complainant, the K-9 patrol program was not eliminated on January 6, 2008. Rather, the parties negotiated a settlement that saved the K-9 patrol program.

The record does not establish, by a clear and satisfactory preponderance of the evidence, that Respondents proposed to eliminate and then eliminated the K-9 patrol program in retaliation for Officer Resch's protected, concerted activity. The portion of Count Fifteen that alleges that Respondents have violated Sec. 111.70(3)(a)1 and 3, Stats., by proposing to eliminate and then eliminating the patrol program have been dismissed.

Count Fourteen

In its Third Amended Complaint, Complainant alleges, in Count Fourteen, that Respondents violated Sec. 111.70(3)(a)1 and 4, Stats., by unilaterally changing the *status quo* regarding the work schedule and hours of its School Resource Officers, a/k/a SRO, during the contract hiatus period, as set forth in August 2008 memos from Attorney Dietrich. In its Motions to Amend Complaint, Complainant moved to amend Count Fourteen by adding the allegation that Respondents retaliated against concerted, protected activity in violation of Sec. 111.70(3)(a)3, Stats. In an email dated February 5, 2009, Complainant's Attorney advised the Examiner that Complainant was withdrawing this motion.

In post-hearing argument, Complainant alleges that Respondents have violated Sec. 111.70(3)(a)4, Stats., and, derivatively violated, Sec. 111.70(3)(a)1, Stats., by unilaterally changing the *status quo* on the work schedule and hours of SROs during a contract hiatus period. Respondents deny violating Sec. 111.70(3)(a)1 and 4, Stats., as alleged by Complainant.

The City contracts with the Green Bay School District to provide police services to the District under the SRO program. Under this contract, the District pays for the salaries of all SROs.

In a posting dated November 29, 2007, the Department recruited Officers for SRO positions. Lieutenant Jody Buth, a supervisor of SROs since August 2007, gave a power point presentation to Officers selected for these positions. This presentation included the following information: (Comp. Ex. #61)

...

SRO Schedule

Roll Call is Mandatory No exceptions

- 7:00 A.M. in the classroom

Monday through Friday

- 7:00 A.M. to 3:30 P.M.
- If you chose to work on “off” school days, you will be assigned to the detective division and work cases primarily from Human Services (child abuse and child sexual assault cases.)

SRO Vacation & Off Days

- School District expectations:
 - SROs are expected to work on all scheduled school days.
 - SRO’s are expected to use vacation days during the summer and during scheduled vacations throughout the school year.
 - Keep in mind the district funds your positions. Don’t abuse their system they watch this very closely.

...

Off Time Accruals

SRO 68 Hours

- This is the maximum number of comp hours you can accumulate for working school events such as sporting events and dances, 68 hours is max for any particular the school year.
- It is calculated at 45 hours x 1.5. Telestaff does the calculation automatically. Once you hit the maximum 68 hours, Telestaff will not allow you to enter any more.

- On average most SRO's actually work around 75-120 hours per year.
- The SRO-68 is a separate account from the city's 100 hour comp time maximum.
- Most SRO's use the SRO-68, in conjunction with their yearly vacation and city comp time to cover their off time during the summer months.

9 Paper Days

- SRO's receive nine off days on the first day of the school year to help cover school vacations and randomly scheduled off days.
- SRO's paper days MUST be used these during the school year.
- On the last scheduled day of the school year any days not used you lose.

...

According to Lt. Buth, the SRO schedule identified in his Power Point presentation worked like the administrative schedule of 5/2, 4/3 because the SROs received an eight-hour flex day for one of the Fridays in this work cycle. Lieutenant Buth acknowledges, however, that, if the SROs received all the flex days created by a 5/2, 4/3 schedule, then the SROs would receive twenty, rather than eighteen, flex days for use during the summer.

Lieutenant Buth states that, while the SROs were expected to use all their vacation days when school is not in session, he could not prevent SROs from taking time off during the school year because they were entitled to their contractual benefits. According to Lieutenant Buth, School District representatives were concerned that, during the 2007-2008 school year, SROs were taking too much time off during the school year and Lt. Buth advised SROs that taking excessive amounts of time off during the school year would be cause for removal from the program.

Lieutenant Buth recalls that his predecessor, Lt. Belongia, told Lt. Buth that, on the first day of the school year, the SRO Lieutenant needed to go into TeleStaff and build the nine paper days into the schedule of SROs. Lieutenant Buth further recalls that he asked Lt. Belongia what paper days were and she responded that these days were to help cover vacations and randomly selected off days during the school year, such as teacher in-service days.

Lieutenant Buth states that he did not have an understanding that paper days were to compensate SROs because they were working more days within their pay period. Lieutenant Buth further states that paper days had to be taken on days when school was not in session.

According to Lt. Buth, when a member of the City's Human Resources Department told Lt. Buth to make sure that SRO-68, which provided SROs with up to eight days of comp time for use in the summer, did not incur FLSA liability, he decided to investigate SRO scheduling practices, including the nine paper days.

Assistant Chief Molitor recalls that, after Lt. Buth raised questions about paper days, he investigated their origins. Assistant Chief Molitor further recalls that he had discussions with current and retired members of the Department regarding the origin of paper days.

According to Assistant Chief Molitor, Bob Boncher, one of the original four SROs, started in 1977 and quit the program prior to the 1978-79 school term. Assistant Chief Molitor recalls that Officer Boncher stated that he did not receive any paper days, but that David Byrnes, who became a SRO prior to the 1979-80 school year, stated that he had received the nine paper days. Assistant Chief Molitor further recalls that Officer Byrnes and several other individuals told Assistant Chief Molitor that the nine paper days were "an equalization" between the two schedules and that others told him that these days were for curriculum development. Assistant Chief Molitor states that some former SROs stated that they did extra work for paper days and others stated that they did not do any extra work.

According to Assistant Chief Molitor, he understood that this "equalization" was not an "equalization" of work hours, but rather, was an "equalization" of total compensation. For example, he recalls that former Officer DePrey was the Association President between 1977 and 1979 and that Officer DePrey told him that he thought the nine paper days were to "equalize" the fact that SROs were not receiving time and one-half for work such as attending PTA meetings. Assistant Chief Molitor further recalls that Officer DePrey stated that the nine paper days were the product of an agreement between the union and management.

Assistant Chief Molitor recalls that, in 1986, the Department was reorganized and shift employees moved from a 5/2, 5/3 schedule to a straight 5/3 schedule. Assistant Chief Molitor has the understanding that, when the 1986 contract was negotiated, SROs received nine paper days and that, after 1986, SROs were not required to perform any work to receive the nine paper days. Assistant Chief Molitor further understands that there was a period of time in 1986 in which SROs worked the 5/2, 4/3 administrative schedule during the school year, but that the School District balked at the lack of coverage. According to Assistant Chief Molitor, the SROs then reverted to the Monday through Friday schedule; received eighteen flex days to be banked for use in the summer; and earned a flex day off every other week in the summer.

Chief Arts states that he was a supervisor of SROs for at least one school year in 2001. Chief Arts recalls that, at that time, SROs received nine paper days that were full days off with pay and that SROs would notify a supervisor when they were taking days off as "paper days." Chief Arts further recalls that the "word around" the Department was that the nine paper days were for curriculum development, but that he was not aware of any supervisor who ever required the SROs to perform work in order to receive pay for the nine paper days.

Chief Arts states that, during the school year, the SROs were expected to work Monday through Friday and that the SROs earned eighteen flex days, which were banked for use in the summer. Chief Arts recalls that, using a 5/2, 4/3 schedule, he would build a summer schedule for each SRO by giving each SRO every other Friday off and then fill in the schedule by using their accumulated eighteen flex days; eight comp days; and any available vacation and personal days. Chief Arts further recalls that, under this scheduling system, most SROs were off the entire summer.

Assistant Chief Molitor recalls that, at the time the parties signed their 2005-2006 collective bargaining agreement, SROs worked Monday through Friday during the school year; received nine paper days and accrued eighteen flex days to be used during the summer. Assistant Chief Molitor further recalls that, at that time, the SROs earned additional flex days during the summer. According to Assistant Chief Molitor, in 2008, he concluded that the nine paper days were a relic of the past and that the existing SRO work schedule had to be changed because it violated the equalization requirements of Sec. 4.01 and 4.02.

Association Secretary Rodney Dubois has been a SRO since January of 2003. Officer Dubois recalls that, from the time that he came into the SRO program until September of 2008, he worked Monday through Friday during the school year. Officer Dubois further recalls that he received nine "paper days" off with pay for use during the school year; he received eighteen (18) flex days for use during the summer; and he accrued eight days of comp time under SRO 68 for use during the summer. Officer Dubois states that, when he entered the SRO program, then Lt. Arts told Officer Dubois that Lt. Arts did not know why SROs received paper days, but that SROs received nine paper days that only could be used during the school year.

Attorney Parins states that he has represented the Association in negotiations since 1973. Attorney Parins further states that he was President of the City's personnel committee from 1968 through 1972.

Attorney Parins recalls that the SROs were first created in the late 1970's and funded under a governmental grant program. According to Attorney Parins, the grant entity established wages, hours and working conditions and that, if the Association had not accepted these wages, hours and working conditions, then the City would not have been able to hire additional officers to implement the SRO program. Attorney Parins recalls that the nine paper days were a curriculum prep day established by the terms of the grant.

Attorney Parins recalls that, in 1986, shift employees moved from a 5/2, 5/3 schedule to the straight 5/3 schedule and the parties met to discuss how this change would affect the SRO program. Attorney Parins further recalls that the City proposed, as a fair equalization, that the non-shift SROs receive the nine paper days and an additional eighteen flex days. Attorney Parins states that the SROs considered this proposal fair and that the SROs continued to receive the nine paper days and eighteen flex days until the fall of 2008.

In a letter dated July 3, 2008 and addressed to Attorney Parins, Chief Arts states: (Jt. Ex. #16):

...

The Department recently began researching the origin of the nine paper days used by School Resource Officers. It's my understanding that the paper days were used for performing school related work. According to at least one of the original Liaison Officers, paper days were designed to compensate for time that was spent for the development of curriculum that the Liaison Officer had to prepare that was usually in addition to their 8-hour shift. Over the course of years, the need for each Liaison Officer to develop their own curriculum ended, however, the compensation did not evaporate accordingly. Today, these paper days represent "free" compensation for no work. Since this work is no longer performed, I am looking to stop the compensation and eliminate the paper days

Before a final decision is made I am looking for any information you may have regarding the use of "paper days."

In addition, initially the four Liaison Officers (now called SRO's) were not permitted to take vacation or other leave during the school year and, therefore, they were permitted to accrue their flex days for use during the summer months. There are now ten SRO' s. We have been permitting them to take vacation and other leave during the school year. We are contemplating having the SRO's resume a normal Administrative schedule, 5/2-4/3, and use their flex days as they occur during this upcoming school year. However, before we do so, we would like to have your input on this and bargain over any impact this may have.

...

In a letter dated July 10, 2008, Attorney Dietrich notified Attorney Parins that the City was considering eliminating the SROs' paper days and explained the City's rationale for that elimination. Attorney Dietrich requested that the Association provide any background or additional documentation regarding the assignment of additional work to the SROs and requested a meeting to discuss the elimination of these paper days. (Jt. Ex. #6)

Attorney Parins responded in a letter dated July 14, 2008 and suggested that the paper days issue be discussed at the negotiating session scheduled for July 28, 2008. (Jt. Ex. #7) Attorney Parins' letter included the following:

...

As to the "paper days" the GBPPA suggests that this is a compensation item for School Resource Officers. We do not believe that there has been any significant

changes in the duties of SRO's since the compensation for that position was established in the 2005-06 Labor Agreement.

...

The parties did not meet on July 28, 2008.

Attorney Dietrich sent Attorney Parins a letter dated August 11, 2008 that includes the following: (Jt. Ex. #8)

...

Re: Termination of Past Practice Regarding Work Days for School Resource Officer in Green Bay Police Department

Dear Mr. Parins:

As you know, the current Labor Agreement between the City of Green Bay and the Green Bay Professional Police Association expired as of December 31, 2006. The City has identified a past practice involving the work days for the position of School Resource Officer. The employees in the position of School Resource Officer have been taking nine days per school year as time off with pay and not reporting for work at the Police Department or reporting in for work. Employees have simply taken the nine days as a day off with pay and not performed any work related to their duties as School Resource Officer.

Effective August 28, 2008, the City is discontinuing any past practice that allows employees in the position of School Resource Officer to take nine days off during the school year with pay and not perform work or report to work. The taking of these days off without pay was previously related to the School Resource Officer performing paperwork and curriculum development work for the duties of the position when working in the school setting. The employees currently in these positions are not performing any paperwork or work related to the development of curriculum or school work assignments. These employees are therefore expected to report to work pursuant to normal procedures.

Please be advised that there is no language in the expired Labor Agreement that provides for these nine days being taken off with pay. As a result, the burden rests with the Police Association to pursue new contract language that would address these workdays for employees in the position of School Resource Officer. Also please be advised that if the employees in the position of School Resource Officer do not report to work as normally required for the position, they will be subject to appropriate disciplinary action for failure

to properly perform their duties as a School Resource Officer and a member of the Green Bay Police Department.

If you wish to discuss this matter further, please feel free to contact me directly.

...

Attorney Parins responded with a letter dated August 12, 2008. This letter, which was addressed to Attorney Dietrich, includes the following; (Jt. Ex. #9)

...

We are in receipt of your letter of August 11, 2008, which purports to be a termination of past practice, but is in reality a unilateral change in the work hours of School Resource Officers. This change is being made during the hiatus period between contracts.

The GBPPA strongly objects to any change in the hours or work schedules of its member SRO's and demands to bargain any changes or modifications.

Your reference to "performing paperwork and curriculum development" as the genesis for the establishment of the work schedule is inopposite. We are informed that any such work has long gone by the board, and a number of Labor Agreements have been entered into in the interim. The fact of the matter is the Labor Agreements contemplated the established continuation of the work schedules of SRO's, and the work schedules of all other officers, for that matter.

Even if we assume for purposes of argument that the work schedule is based upon past practice, such clearly constitutes a mutually accepted past practice which is contractually based. These cannot be unilaterally repudiated.

The GBPPA further objects to implementation of any change in the SRO work schedule without prior collective bargaining regarding the change.

This office is the collective bargaining representative of members of the GBPPA. This function does not include supervision and direction of the work force. Communication to this office regarding instructions or orders for employees as to when and where to report to work is inappropriate. If the City wants to order SRO's to report to work it should follow the chain of command in place for such purposes.

Finally, if the City orders SRO's to report to work and perform policing duties outside of the regularly scheduled work day for SRO's, all such hours will be compensable at the overtime rate pursuant to Section 6.01 of the Labor Agreement. Additionally, if the duties being assigned to the SRO's are duties customarily performed by other job classifications, the allocation of these job assignments to SRO's without posting would constitute a violation of Section 6.03 of the Labor Agreement and a possible wrongful denial of overtime opportunities to other more senior officers.

...

Attorney Dietrich sent Attorney Parins a letter dated August 15, 2008 that includes the following: (Jt. Ex. #10)

...

Re: Green Bay Police Department — Hours of Work for School Resource Officer

Dear Mr. Parins:

We are writing in response to your August 12 correspondence regarding the hours of work of the School Resource Officer. We do not believe that this is a unilateral change in the work hours for this position. The work hours for this position are described, albeit very generally, in the Labor Agreement between the City and the Police Association. There is no reference to having nine days off and not being required to perform the duties of the School Resource Officer position. Thus, the City has the right to terminate any alleged practice upon expiration of the Labor Agreement between the City and the Police Association.

The City will proceed as it deems necessary in requiring work to be performed by the School Resource Officers. We also believe that we have negotiated with the Green Bay Professional Police Association to the extent necessary at our last meeting between the City and the Police Association. If the Association has a different proposal it wishes to make regarding the work hours for the School Resource Officer position, please communicate that offer to me as soon as possible.

If you have questions, please feel free to contact me directly.

...

On August 27, 2008, Attorney Dietrich emailed a copy of a letter to Attorney Parins. This letter, which is also dated August 27, 2008, includes the following: (Jt. Ex. #11)

...

RE: Discontinuance of Practice Regarding Work Schedule for Addition of School Resource Officer in Green Bay Police Department

Dear Mr. Parins:

This memorandum is to notify you that the City of Green Bay and the Green Bay Police Department is intending to discontinue certain past practices involving the work schedule for the position of School Resource Officer in the Green Bay Police Department.

As you know, the hours of work for the position of School Resource Officer are not specifically identified in the Labor Agreement between the City and the Police Association. Certain practices regarding the hours of work of the School Resource Officer position have existed within the Department but are no longer necessary or appropriate for the work and level of services provided by the School Resource Officer to the students of the Green Bay School District. As a result, the City is intending to discontinue the following practices related to the work schedule of the School Resource Officer:

- School Resource Officers are given nine (9) days off with pay apparently for extra curriculum work and paperwork performed by the School Resource Officer as part of the teaching duties of this position. The City is now aware that there is no curriculum work that must be performed by School Resource Officers nor is there paperwork to be performed by the officers that cannot be performed as part of their regular assignment in the school setting. As a result, the City is discontinuing the granting of nine (9) additional days off with pay that are used by School Resource Officers outside the normal school year; and
- School Resource Officers are expected to work a regular administrative schedule of five (5) on, two (2) off, four (4) on, three (3) off. School Resource Officers have been allowed to work the fifth day in the second week of this cycle and then take another day off in its place. This has resulted in instances where School Resource Officers are not available for performing duties in the school setting which is the primary role and function of the School Resource Officer position. The City is therefore discontinuing this practice of allowing School Resource Officers to work the fifth day in the second week of the work rotation and take a different day off except in those

instances during the last five (5) years of an employee's work prior to retirement when the employee is allowed to work the fifth day and bank additional time for use at retirement.

The City is willing to negotiate with the Association regarding the impact of this change in practice. Since the Labor Agreement is silent on these matters, the City will proceed with the discontinuance of these past practices and negotiate over any impact of the elimination of these practices. We look forward to the Police Association identifying any potential bargaining impact for discussion purposes.

We can discuss this at the meeting scheduled for Thursday, August 28.

...

The parties met on August 28, 2008. During this meeting, the parties exchanged proposals on paper days, but the exchange of these proposals did not produce any agreement.

Attorney Dietrich sent Attorney Parins a letter dated August 29, 2008 that includes the following: (Jt. Ex. #13)

...

RE: Discontinuance of Past Practice Regarding Hours of Work of School Resource Officer in Green Bay Police Department

Mr. Parins:

This Memorandum is to advise you that the City is discontinuing past practices involving the hours of work for the School Resource Officer position in the Green Bay Police Department. There is no contract language in the Labor Agreement that specifically addresses the hours of work for this position. The City is therefore proceeding with elimination of certain practices regarding the hours of work for this position. Specifically, the City is notifying the Police Association of the following action:

- School Resource Officers will be expected to work a 5-2, 4-3 administrative schedule. Employees will be allowed to take vacation time off in accordance with the provisions of the Labor Agreement. Employees will not be allowed to accumulate time off for working the fifth day in the 4-3 work week and will expect officers to take off all three days of that 4-3 work week. Employees will continue to earn compensatory time for overtime

hours worked in accordance with reasonable expectations of the Green Bay School District and the Department.

- Employees have previously been allowed to take nine work days off with pay and not report to work based, upon curriculum development work and school paper work that was to be performed by these officers. Since these officers are no longer required to do curriculum development work or school paper work, this additional time off is no longer necessary or appropriate and is being discontinued. School Resource Officers will be expected to perform work as appropriate instead of taking time off without loss of pay.

The City and the Association have met to bargain over the impact of the discontinuance of these practices. The parties have been unable to resolve differences regarding any potential impact on the elimination of these days off with pay. Each School Resource Officer will be advised of expectations regarding their work hours by the Police Department Administration.

If you have questions or wish to discuss this further, please feel free to contact me directly.

...

The City implemented the changes referenced in Attorney Dietrich's letter of August 29, 2008 at the beginning of the school year. These changes were implemented during a hiatus period between collective bargaining agreements. As a result of these changes, SROs did not have a Monday through Friday workweek; did not accumulate eighteen flex days during the school year for use in the summer; and were not credited with nine paper days to be used during the school year. These changes continued in effect until the parties implemented the following:

MEMORANDUM OF AGREEMENT

IT IS HEREBY AGREED by and between the City of Green Bay ("City"), and the Green Bay Professional Police Association ("Association") that the following shall constitute the agreement between the parties regarding the work schedule of the School Resource Officers in the Green Bay Police Department:

1. The School Resource Officers will work a 5/2 work schedule during the time school is in session. The hours of work of this position will be 7:00 a.m. to 3:30 p.m.

2. Each School Resource Officer will accumulate one (1) work day every other week while school is in session and “bank” that day for off time during the summer months. Accumulated “banked” days cannot be carried over to the next school year.**
3. By agreeing to the above, neither the City or the Association compromise their respective position regarding the School Resource Officer’s wages and work schedule in relation to the collective bargaining agreement and the current litigation (Change in SRO Hours Prohibited Practice filed September 5, 2008).

Dated this day of __ October, 2008.

...

**The position of the GBPPA is that there is no every other Friday to “bank” because SROs never had off every other Friday, and that the work year should be rather equalized under Sections 4.01 and 4.02 as it has been up until the 2009-09 school year. As set forth in the attached letter dated October 9, 2008.

At the bottom of this memorandum, Chief Arts wrote “Changed by Union 10/28/08.” The parties signed this memorandum on October 28, 2008. Attached to this memorandum was a copy of a letter dated October 9, 2008 that, in relevant part, states:

...

Police Chief James A. Arts
Green Bay Police Department
307 South Adams Street
Green Bay, WI 54301

RE: GBPPA - SRO Work Schedule

Dear Chief Arts:

This is in reference to the discussions and communications we have had regarding the school year work week of the SROs.

The department has ordered SROs to take off every other Friday during the school year as if they were working a 5/3-4/3 work week. The department has also instructed SROs that they will not be given the historical 9 off-days during the school year when students are not in session. The GBPPA has filed prohibited practice charges over both of these changes with the WERC, and has also demanded that the department pay overtime to SROs for all hours worked in excess of the historical work schedule of SROs.

The SROs feel that they should be working these Friday off-days during the school year, and apparently the Green Bay Area School District feels the same way. You indicated that the department also would like the SROs to work these days. You suggested that the City and the GBPPA enter into an agreement to allow the SROs to work these Fridays and take compensatory time during the school summer vacation, and that this agreement not affect or compromise the legal or bargaining position of either the City or the GBPPA in the collective bargaining process or the complaint proceedings before the WERC.

You specifically suggested that we agree that SROs work a 5/2 Monday through Friday work week during the school year. The GBPPA will agree with this.

You specifically suggested that SROs would accumulate one (1) work days every other week during the school year and take these as off-days during the summer school vacation period. The GBPPA will conditionally agree to this, with the condition being that the GBPPA is not agreeing that these off-days adequately compensates SROs for working the 5/2 Monday through Friday work schedule, but is only agreeing that these compensatory off days will go toward compensating the SROs for working the Monday through Friday work schedule.

Please accept this letter as the proposal of the GBPPA for the agreements set forth above, including the proviso that nothing in these agreements will affect or compromise the bargaining or legal positions of either the City or the GBPPA in the collective bargaining process or the complaint proceedings before the WERC. If this proposal is acceptable please advise in writing.

You had also suggested that the Green Bay Area School District be a party to this agreement. The GBPPA does not believe that to be appropriate given that it is not the municipal employer of the SROs.

Thank you for your consideration of this proposal.

...

Conclusion

The nine paper days and eighteen flex days are paid time off. Paid time off, as well as the SROs' work schedule, primarily relate to wages, hour and conditions of employment and, therefore, are mandatory subjects of bargaining. Respondent City violates its statutory duty to maintain the *status quo* during a contract hiatus period when it unilaterally changes the *status quo* on a mandatory subject of bargaining without a valid defense. As discussed above, this *status quo* is a dynamic *status quo* and is defined by relevant language from the expired contract as historically applied and as clarified by bargaining history, if any.

As each party recognizes, Sec. 4.01 and 4.02 of the expired 2005-2006 contract address work schedules. This language states:

4.01 NON-SHIFT EMPLOYEES. The work schedule for non-shift employees shall be equalized with that of the shift employees subject to approval of the supervisor. Approval shall not be unreasonably withheld. The workday for non-shift employees shall be a maximum of eight and one-half hours.

4.02 SHIFT EMPLOYEES:

(1) The work week for shift employees shall consist of five (5) duty days with three (3) days off in a repeating cycle. The work week for non-shift employees shall be five (5) duty days during the normal work week with weekends off, as modified by the schedule set forth in the departmental reorganization of October, 1986 and shall be administered as to each employee as it now is.

...

The language of Sec. 4.01 and 4.02(1) does not expressly define the work schedule for non-shift employees, such as the SROs. For example, it does not define what is meant by “equalized;” does not identify the modifications in “the schedule sent forth in the departmental reorganization of October, 1986;” and does not identify the administration of the work schedule “as it now is.” Accordingly, it is appropriate to consider other evidence, including the historical application of this language and bargaining history, when determining the meaning of this contract language.

The City argues that it properly repudiated the practice of providing nine “paper days” in an effort to equalize the schedule between the SROs and all other Officers, as required by Article 4.01 of the parties’ collective bargaining agreement. Standing alone, the language of Sec. 4.01, which subjects the work schedules of non-shift employees “to approval of the supervisor”, may provide the City with certain rights to disapprove existing work schedules of non-shift employees. Sec. 4.01, however, does not stand-alone. Rather, it must be construed in a manner that is consistent with other contract language.

Sec. 4.02(1) requires the City to administer the SRO “work week” as it existed at the time that parties entered into their 2005-2006 collective bargaining agreement. At the time that the parties entered into their 2005-2006 collective bargaining agreement, the City administered the SRO “work week” by scheduling SROs to work Monday through Friday during the school year; allowing SROs to accrue eighteen flex days during the school year for use during the following summer; and, at the start of the school year, crediting SROs with the nine paper days.

Sec. 4.02(1) also recognizes that the “work week” of non-shift employees, such as the SROs, was modified by the departmental reorganization of October 1986. The bargaining history testimony of Attorney Parins provides a reasonable basis to conclude that “The work week for non-shift employees” “as modified by the schedule set forth in the departmental reorganization of October, 1986” includes SROs’ working Monday through Friday during the school year, receiving nine paper days and eighteen flex days. This bargaining history also warrants the conclusion that the “equalization” referenced in Sec. 4.01 occurred when the SRO work schedules were modified by the departmental reorganization of October 1986.

The “practices” of administering the SRO work schedules that existed when the parties entered into their 2005-2006 agreement are “practices” which give meaning to ambiguous contract language. The City does not have the right to unilaterally repudiate such practices during the contract hiatus period.

The City argues that it interprets Sec. 4.04 as precluding SROs from working a flex day. Sec. 4.04 flex day restrictions, which are discussed more fully below in Count Eighteen, do not preclude the City from continuing to administer the SRO “work week” by allowing SROs to work Monday through Friday during the school year.

In summary, under the language of Sec. 4.02 of the parties’ expired 2005-2006 collective bargaining agreement, as historically applied and clarified by bargaining history, the *status quo* on mandatory subjects of bargaining required to be maintained during the contract hiatus include:

- 1) a SRO school year work schedule of Monday through Friday;
- 2) the accrual of eighteen flex days during the school year for use during the summer; and
- 3) nine paid paper days to be taken off during the school year; subject to the proviso that these days not be taken while school is in session

There is no requirement that the Association bargain with the City to maintain the *status quo* on mandatory subjects of bargaining during a contract hiatus period. Nonetheless, after the Association received notice of the City’s intent to change SRO work schedules, and prior to the time that the City changed the SRO work schedules, the parties met and exchanged proposals on SRO issues. Inasmuch as this negotiation did not produce an agreement, this negotiation did not alter the *status quo* described above.

During a contract hiatus period and without a valid defense, the City unilaterally changed the *status quo* on mandatory subjects of bargaining by eliminating the nine paper days; by not permitting the SROs to accrue eighteen flex days during the school year for use in the summer; and by implementing the 5/2, 4/3 administrative work schedule during the school year. Therefore, the City has violated Sec. 111.70(3)(a)4, Stats., and, derivatively, violated Sec. 111.70(3)(a)1, Stats.

Following the City's unlawful unilateral change, the City and the Association negotiated the MOU of October 28, 2008. Paragraph Three of this MOU states as follows:

3. By agreeing to the above, neither the City or the Association compromise their respective position regarding the School Resource Officer's wages and work schedule in relation to the collective bargaining agreement and the current litigation (Change in SRO Hours Prohibited Practice filed September 5, 2008).

Given the above paragraph, the undersigned concludes that the MOU of October 28, 2008 is an interim agreement that is in effect until either this prohibited practices claim has been litigated or the parties bargain another agreement affecting their SRO dispute. It is not evident that the parties have bargained another agreement affecting this controversy.

Given this interim agreement, it would not be an appropriate remedy to order Respondent City to cease and desist from its unlawful unilateral change. The appropriate remedy for Respondent City's unlawful unilateral change is to order the City to post the appropriate notice; to return to the *status quo* that existed prior to the City's unlawful unilateral change and to make-whole affected employees for losses resulting from the City's unlawful unilateral change.

Apparently, when the City implemented the MOU of October 28, 2008 and reverted to the SRO school year schedule of Monday through Friday, SROs accrued flex days for use in the summer. The Examiner is unable to determine whether this accrual provided the SROs with the eighteen flex days required to be maintained as part of the *status quo*.

If the City's unlawful unilateral change resulted in any SRO accruing less than eighteen flex days for use in the summer, then the City owes the affected SRO the difference between the flex days that were accrued and the eighteen flex days that would have accrued but for the unlawful unilateral change. The SROs' *status quo* right is to accrue eighteen flex days for use in the summer. Accordingly, the City may not offset any of the eighteen flex days owed the SRO by crediting the SRO with any flex day required to be taken off during the school year as a result of the unlawful unilateral implementation of the 5-2, 4-3 administrative schedule.

Any employee owed flex days under this make-whole remedy shall have the right to use these flex days during the summers of 2011 and/or 2012. Each flex day so used will be paid at the employee's wage rate in effect at the time that the flex day is used. The Examiner has allowed affected employees to carry over flex days from one summer to the next to ensure that affected employees will have the opportunity to use all owed flex days during the summer months. As an alternative remedy, an employee owed flex days under this make-whole remedy may notify the City, within thirty days of the date of this decision, that the employee elects to be paid for any, or all, owed flex days at the employee's wage rate in effect on the date of this decision; together with interest at the statutory rate of 12%.

The MOU of October 28, 2008 did not restore any of the nine paper days. Thus, the appropriate make-whole remedy includes the restoration of all paper days that should have been credited to the SROs at the beginning of the school year for use during that school year, but were not credited due to the City's unlawful unilateral change.

Given the restriction that paper days are not to be used on days that school is in session and the need for SROs to be at work while school is in session, it may be impossible for SROs to take paper days owed to the employee under the make-whole remedy as time off during the school year. Accordingly, the employee may use paper days owed under the make-whole remedy during the 2010-2011 school year, subject to the restriction that paper days may not be used on days that school is in session, and during the summers of 2011 and 2012. As an alternative remedy, an employee owed paper days under this make-whole remedy may notify the City, within thirty days of the date of this decision, that the employee elects to be paid for any, or all, owed paper days at the employee's wage rate in effect on the date of this decision; together with interest at the statutory rate of 12%.

Count Sixteen

In Count Sixteen of the Third Amended Complaint, Complainant alleges that Respondents have violated Sec. 111.70(3)(a)1 and 4, Stats. In its Motions to Amend Complaint, Complainant moved to amend Count Sixteen by adding the allegation that Respondents had retaliated against Detective Scott Peters and Officer Kingston in violation of Sec. 111.70(3)(a)3, Stats. The Examiner granted this motion at the pre-hearing conference of February 3, 2009.

In post-hearing argument, Complainant claims that, during the contract hiatus period in 2008, the City unilaterally changed the *status quo* related to union activity by Association officers and took adverse action against Detective Scott Peters and Officer Kingston for their exercise of protected, concerted activity. Complainant argues that this conduct violates Sec. 111.70(3)(a)1, 3, and 4, Stats. Respondents deny committing the prohibited practices alleged by Complainant.

Officer Kingston

It is undisputed that October 10 and 11, 2007 were Officer Kingston's regularly scheduled off days and that Officer Kingston flexed his work schedule so that October 10 and 11, 2007 would become workdays. Officer Kingston testified that, although he performed some duties of his Community Police Officer position, his primary activity on both days was attending a grievance arbitration hearing in his capacity as an Association representative. Officer Kingston confirms that his reason for flexing his work schedule was not to conduct Department business, but rather, to attend the arbitration hearing on work time. Officer Kingston states that, at the time, it was his understanding that his attendance at the hearing was consistent with what had occurred in the past.

There was an internal investigation of Officer Kingston's conduct in claiming pay for October 10 and 11, as well as other conduct. Officer Kingston's conduct in claiming pay for October 10 and 11, as well as other conduct of Officer Kingston, was the subject of misconduct charges filed by Chief Arts. Officer Kingston and the Association contested these charges. The parties subsequently entered into a settlement of these charges.

At hearing, Complainant's representative stated that Complainant was not seeking to relitigate the disciplinary issues that were the subject of this settlement. Complainant argues that Chief Arts sought to discipline Officer Kingston for attending the grievance arbitration on October 10 and 11, 2007 and, thus, retaliated against Officer Kingston in violation of Sec. 111.70(3)(a)3, Stats.

The record before the Examiner provides no reasonable basis to conclude that Chief Arts sought to discipline Officer Kingston for attending the grievance arbitration hearing. Rather, the most reasonable conclusion to be drawn from the record evidence is that Chief Arts sought to discipline Officer Kingston for improperly claiming pay for attending the grievance arbitration on October 10 and 11, 2007. The issue of whether or not Chief Arts was correct in determining that Officer Kingston improperly claimed pay was resolved with the settlement of the charges.

The record does not establish that Chief Arts' decision to charge Officer Kingston for misconduct was based, in any part, on animus toward Officer Kingston, or any other municipal employee, for engaging in protected, concerted activity. Contrary to the argument of Complainant, the record does not establish, by a clear and satisfactory preponderance of the evidence, that Respondents took adverse action against Officer Kingston in violation of Sec. 111.70(3)(a)3, Stats., and, derivatively, Sec. 111.70(3)(a)1, Stats.

Complainant claims that the City's response to Officer Kingston was a unilateral change in the *status quo* relating to union activity as established by Article 31 of the parties' collective bargaining agreement and existing practices of administering Article 31. Article 31 provides Association representatives, such as Officer Kingston, with certain rights to attend to union business "during the course of the working day for a reasonable time, provided that permission is first obtained from the commanding officer, or superior officer of that Bargaining Unit." Article 31 also states "The Bargaining Unit agrees to conduct its business off the job as much as possible." An Association representative's right to conduct Association business on work time is primarily related to wages, hours and conditions of employment and, thus, is a mandatory subject of bargaining.

Respondent City violates its statutory duty to bargain when, during a contract hiatus period, it unilaterally changes the *status quo* on a mandatory subject of bargaining without a valid defense. As discussed above, this *status quo* is a dynamic *status quo* and is defined by relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. The record does not contain any evidence of bargaining history that is relevant to this issue.

As a Community Police Officer (CP), Officer Kingston had the right to flex his work schedule under Article 7.06(3). This provision permits Officer Kingston to flex his work hours “to accommodate the neighborhood/community needs.”

Officer Kingston’s conduct in flexing his off days to attend a grievance arbitration hearing on work time is inconsistent with the union’s contractual agreement to conduct its business off the job as much as possible. Inasmuch as Officer Kingston did not flex his work hours “to accommodate the neighborhood/community needs,” his conduct is inconsistent with the plain language of Article 7.06(3).

The language of the expired collective bargaining agreement, on its face, does not provide Officer Kingston with a right to flex his off day to a workday in order to conduct Association business on work time. Rather, the most reasonable construction of the language of the expired collective bargaining agreement is that Officer Kingston may not flex his off day to a workday in order to conduct Association business on work time.

Officer Kingston states that he did not think that his attendance at the hearing was outside of what was permitted. Officer Kingston does not state that, prior to October 10 and 11, 2007, any supervisor told him that he could flex an off day to a workday so that he could conduct Association business on work time. Rather, he states that he had the understanding that other CP Association representatives had adjusted their schedule to attend hearings and meetings. Officer Kingston did not identify these other CP Association representatives.

At one time, Officer Scott Stimpson was a CP Association representative. Officer Stimpson states that, as a CP Association representative, he adjusted his schedule to attend hearings and meetings during the workday and that he is aware that other Association representatives were allowed to do this. Officer Stimpson does not identify these other Association representatives.

Officer Stimpson believes that he always called the station to specify that he was at a meeting. Officer Stimpson recalls that he was a CP Association representative from the spring of 2006 to the summer of 2006. During that period, Officer Stimpson recalls that he attended one arbitration hearing.

Officer Dave Schmitz has been employed as a CP Officer for the past thirteen years. Officer Schmitz recalls that approximately five or six years ago, he was a CP Association representative for approximately one year. According to Officer Schmitz, he typically attended Association meetings on his day off. Officer Schmitz recalls that, if he had an Association meeting during his workday, then he would leave work to attend the Association meeting. Officer Schmitz’s testimony indicates that he flexed his work schedule to perform his Department duties, but that he did not flex his work schedule to attend a union meeting on work time.

At hearing, the parties stipulated “that the findings or the report of the investigation of the human resources department of the City of Green Bay contained in Complainant Number 45 was true and accurate, that we can dispose of having those people as witnesses . . .” (T. Vol. 5 at 813) This report, from the City’s Human Resources Department and dated May 8, 2008, includes the following: “At least three other CP union reps stated that they have adjusted their schedules in the past and attended hearings and meetings, claiming to just make it their workday.” (Comp. Ex. #45) This report does not identify these other “CP union reps.” This report does not state that the “adjustments” stated by “at least three other CP union reps” had been known or accepted by City representatives.

Lieutenant James Runge was a supervisor in the CP unit from 2006 until 2009. According to Lt. Runge, Officer Kingston never told Lt. Runge that he was flexing his work schedule to attend union meetings, hearings or contract negotiations and that he first learned of this conduct when the Department began the investigation that lead to charges against Officer Kingston. Lieutenant Runge states that he does not know if any other CP Association representative flexed their workday to attend union functions or union duties, but had heard that they did. Lieutenant Runge did not identify the source of this information.

Captain William Galvin has been a CP supervisor since 2007. Capt. Galvin states that he is not aware that, in the past, CP Officers flexed their workday to attend to union business.

In summary, the record establishes that, prior to October 2007, there were CP Association representatives who flexed their work schedules in order to attend to Association business on work time. The record, however, does not establish the level of supervisor awareness of this conduct.

The evidence of past application of the relevant contract provisions does not warrant the conclusion that Respondents, or their representatives, mutually agreed to or accepted that CP Association representatives have the right to flex off days to work days in order to attend to Association business on work time. Accordingly, the Examiner rejects the Association’s argument that the City administered Article 31 by permitting CP Association representatives to flex off days to work days so that these Officers could attend grievance arbitration hearings or conduct other Association business on work time.

The record does not contain any evidence of bargaining history that is relevant to this issue. The relevant language from the expired contract as historically applied does not establish that Association representatives such as Officer Kingston have a *status quo* right to flex off days to work days for the purpose of attending to Association business on work time. In determining that it was inappropriate for Officer Kingston to flex his off days to work days to attend the grievance arbitration hearings in October 2007, Respondents did not unilaterally change the *status quo* on a mandatory subject of bargaining in violation of Sec. 111.70(3)(a)4, Stats., and, derivatively, Sec. 111.70(3)(a)1, Stats.

Complainant argues that Chief Arts conduct in charging Officer Kingston with misconduct is unlawful interference in violation of Sec. 111.70(3)(a)1, Stats., because it had a “chilling effect” upon Officer Kingston’s exercise of his Sec. 111.70(2), Stats., rights. At hearing, Officer Kingston testified that, after he was disciplined for attending the arbitration hearings, he did not know what was allowed, or not allowed, as far as union activity while working so he did not do any union activity. Where, as here, the “chilling effect” upon the exercise of Sec. 111.70(2), Stats., rights is due to a misperception that an employee has been disciplined for engaging in protected, concerted activity, when, in fact, the employer has a legitimate business purpose for its disciplinary decision, there is no violation of Sec. 111.70(3)(a)1, Stats.

Detective Scott Peters

In August of 2008, the Association held two sessions of its general membership meeting. One of these sessions occurred during Detective Peters regular work shift. At this time, Officer Peters was the sole Association representative for Detectives and represented approximately twenty Detectives.

Officer Scott Peters recalls that he told his supervisor, Commander Molitor, that he was going to attend the first session of the general membership meeting and that Commander Molitor responded that he could not attend the first meeting and that he got this from “upstairs.” Officer Peters considered “upstairs” to refer to Chief Arts. Officer Peters then asked if he could use his lunch hour to attend this session and Commander Molitor agreed. Officer Peters recalls that, when Commander Molitor told him not to attend the first session, that Commander Molitor meant what he said and that there would be no debate. Officer Peters used his one-half hour lunch period to attend the first session, but this lunch period did not provide him with sufficient time to attend the whole session.

Commander Molitor states that Officers Peters’ workload was the reason he denied Officer Peters’ request. According to Commander Molitor, Officer Peters was not working on anything that required him to “drop everything,” but that, in order to make progress on his cases, Officer Peters needed to attend to his workload. Commander Molitor states that it was his opinion that Officer Peters could effectively communicate at the second session and that, if Officer Peters desired to go to the first session, he could effectively communicate during his lunch period. Commander Molitor recalls that, after he denied Officer Peters permission to attend the first session, Officer Peters responded that Commander Molitor was going to regret it.

Commander Molitor recalls that, in the summer of 2008, he had attended “a lot of” meetings with the Association that were also attended by Officer Peters. According to Commander Molitor, the business at these meetings had to be attended to, but the meetings did not appear to be fruitful. Commander Molitor states that the progress of cases had been hampered by the fact that he and Officer Peters were out of the office at these meeting. Commander Molitor recalls that Officer Peters complained to Commander Molitor that these meetings were a hindrance.

Commander Molitor recalls that, in the three years that he had been responsible for the Detective division, he had not stopped any Detective representative from attending a general membership meeting other than Officer Peters in August of 2008. Commander Molitor states that he does not know what happened before he was there, but thinks that, over the years, Detective representatives probably were permitted to attend general membership meetings. Commander Molitor states that he knows that other Detective representatives have not gone to certain Association meetings due to work, but does not know if these were general membership meetings.

Officer Scott Peters states that Commander Molitor did not indicate that he was denying Officer Scott Peters' request to attend the first session because of his workload. Officer Scott Peters recalls Commander Molitor saying that Officer Scott Peters did not need to attend both sessions. According to Officer Scott Peters, he was not doing anything that day that required him to stay at work.

Officer Scott Peters recalls that, at the time of the August 2008 general membership meeting, there had been union meetings on work time. Officer Scott Peters further recalls that he and Commander Molitor discussed these meetings and that these discussions were that they were spending a lot of time in mediation when nothing was being accomplished. Officer Scott Peters could not recall any complaints that he was not getting his work done.

Officer Scott Peters states that, as the Association representative for Detectives, he needed to be present at both sessions of the general membership meeting in order to represent his Detectives. Officer Scott Peters further states that he represents both Day and Afternoon shift Detectives; that there were many agenda items to be discussed at the two sessions; and that he was concerned that, if he did not attend both sessions, Detectives might not have a voice in decisions.

Officer Scott Peters states that he was a union representative on the day shift in Patrol and that, in 2008, he became a Detective representative. According to Officer Scott Peters, as a union representative, he had always been able to attend general membership meetings during work time. Officer Scott Peters states that the City can grant or deny permission to conduct union business on work time, but, with respect to general membership meetings, he was under the impression that Association representatives were permitted to go to general membership meetings during work hours if they informed their supervisor that they were going.

Officer Scott Peters states that he has known Commander Molitor for a long time and that he has a good rapport with him. Commander Molitor states that, generally speaking, he and Officer Scott Peters have a good relationship.

Retired Detective Michael McKeough worked for the City as a Detective from 1982 to January 2, 2006 and was the Association Detective representative for about two and 1/2 years before he retired. Retired Detective McKeough recalls that he was always permitted to attend general membership meetings, governing board meetings and grievance arbitration meetings on

work time. According to retired Detective McKeough, he would let his Lieutenant know that he was attending and the Lieutenant would respond “OK thanks for letting me know.” (T. Vol. 4 at 790)

Detective Steve Darm was President of the Association from 1997 to 2001. Article 31 provides the Association President with rights to conduct Association business on work time that are not provided to other Association representatives. Detective Darm’s testimony reasonably indicates that, when he was an Association representative other than President, he attended Association meetings during his workday. Detective Darm does not recall any Association representative being denied the right to attend a general membership meeting.

Association President Resch recalls that, when he was on the Association’s governing board, as President or a shift representative, management allowed the shift representatives to attend general membership meetings on work time if possible. Association President Resch recalls that, at times, there were problems with call volume and staffing that prevented Road Deputies from attending and that the parties had discussions at the bargaining table and agreed that uniformed Patrol would respond to situations that developed out on the streets. Association President Resch states that, if an on-duty officer is needed for an emergency or something out of the ordinary, then union activity is put aside.

Association President Resch states that each of the August 2008 general membership meeting sessions would have the same agenda, but that motions and votes can happen at anytime. According to Association President Resch, such meetings generally last about two hours and that it is important that the sole Detective representative be present at each session in order to answer questions on Detective issues. Association President Resch recalls that the August 2008 general membership meeting included a discussion on how Detectives take their flex days.

Summary

It is evident that, at the time that Commander Molitor denied Officer Scott Peters permission to attend the first session of the August 2008 general membership meeting on work time, Commander Molitor held the opinion that the two of them had attended meetings between Respondent and Complainant that were a waste of their time. Neither Commander Molitor’s testimony, nor any other record evidence, establishes that Commander Molitor considered these meetings to be time wasted because they involved the exercise of protected, concerted activity. Rather, the most reasonable conclusion to be drawn from the record evidence is that Commander Molitor considered these meetings to be wasted time because they were not fruitful.

The record does not warrant the conclusion that Commander Molitor’s decision to deny Officer Scott Peters permission to attend the first session of the August 2008 general membership meeting on work time was motivated, in any part, by hostility toward Officer Scott Peters, or any other municipal employees, exercise of protected, concerted activity.

Complainant's claim that, in denying Officer Scott Peters permission to attend the first session of the August 2008 general membership meeting, Respondents took adverse action against Officer Scott Peters in violation of Sec. 111.70(3)(a)1 and 3, Stats., is not substantiated by the record evidence.

Contrary to the argument of the City, the record does not establish that the Association could have dealt with all Detective issues during the time that Officer Scott Peters attended the first and second sessions of the August 2008 general membership meeting. Rather, the record establishes that, in order to represent the Detectives properly, Officer Scott Peters needed to be present during the entire first session of the general membership meeting. Such attendance was necessary because Officer Scott Peters had to be available to answer questions from the membership regarding Detective issues and to speak on behalf of the Detectives as issues were discussed by the general membership.

As the City argues, Article 31 states "The Bargaining Unit agrees to conduct its business off the job as much as possible." Given the need for Officer Scott Peters to be present during the entire first session of the August 2008 general membership meeting, it was not possible for him to conduct his business as the Association's Detective representative entirely "off the job."

In conclusion, the dynamic *status quo* is defined by relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. The language of Article 31, as historically applied and clarified by its bargaining history, establishes that the City has granted governing board members, such as the Detective representative, permission to use work time to attend general membership meetings held during the representative's work time when it is possible to grant this permission.

It is evident that there was a need for Officer Scott Peters to make progress on his caseload. It is not evident that Officer Scott Peters' attendance at the entire first session of general membership would have delayed such progress to any significant degree. Commander Molitor did not grant Association Detective representative Officer Scott Peters permission to use work time to attend the first session of the August 2008 general membership meeting when it was possible to grant this permission. By this conduct of its representative Commander Molitor, the City has unilaterally changed the *status quo* on a mandatory subject of bargaining during a contract hiatus period without a valid defense. Therefore, Respondent City has violated Sec. 111.70(3)(a)4, Stats., and, derivatively violated, Sec. 111.70(3)(a)1, Stats.

In remedy of these MERA violations, the City is ordered to post a notice. Additionally, the City is ordered to cease and desist from unlawfully changing the *status quo* on a mandatory subject of bargaining, during a contract hiatus period, by refusing Association representatives, such as Detective Representative Scott Peters, permission to attend the Association general membership meeting on work time when it is possible to give such permission and to restore the *status quo ante*. As acknowledged by Complainant, it is not appropriate to issue a make-whole order.

Count Seventeen

In its Third Amended Complaint, Complainant alleges that Respondents violated Sec. 111.70(3)(a)1 and 4, Stats., by unilaterally implementing a CPU reorganization. At the pre-hearing conference of February 3, 2009, the Examiner granted the Association's motion to withdraw Count Seventeen.

Count Eighteen

In the Third Amended Complaint, Complainant alleges that Respondents violated Sec. 111.70(3)(a)4 and 1, Stats. In post-hearing argument, Complainant asserts that the City made a unilateral change in the Detective work schedule, during the contract hiatus period, with respect to how Detectives are allowed to take their bi-weekly flex day. Complainant further asserts that, by this conduct, the City violated Sec. 111.70(3)(a)4, Stats., and, derivatively violated Sec. 111.70(3)(a)1, Stats. Respondents deny violating Sec. 111.70(3)(a)4 and 1, Stats., as alleged by Complainant.

It is undisputed that the Detectives at issue work a 5/2, 4/3 administrative schedule. Under this schedule, the Detectives' normal bi-weekly work schedule is Monday through Friday. During this bi-weekly work schedule, the Detectives receive one flex day off.

Commander Molitor, as supervisor of Detectives, promulgated a policy in which Detectives were not permitted to select, as a regular flex day off, any day other than a Friday. Additionally, Detectives were not permitted to work their "regular" flex day off and then use another day within the bi-weekly payroll period as their flex day off, unless the Detective provided written notice of intent to retire within five years. Complainant, contrary to Respondents, argues that, by this conduct, Commander Molitor unlawfully unilaterally changed the *status quo* on a mandatory subject of bargaining.

The language of the parties' expired 2005-2006 agreement includes the following:

4.01 NON-SHIFT EMPLOYEES. The work schedule for non-shift employees shall be equalized with that of the shift employees subject to approval of the supervisor. Approval shall not be unreasonably withheld. The workday for non-shift employees shall be a maximum of eight and one-half hours.

4.02 SHIFT EMPLOYEES: The work week for shift employees shall consist of five (5) duty days with three (3) days off in a repeating cycle. The work week for non-shift employees shall be five (5) duty days during the normal work week with weekends off, as modified by the schedule set forth in the departmental reorganization of October, 1986 and shall be administered as to each employee as it now is.

4.04 FLEX TIME. Officers will not be allowed to flex their hours in a workday except as explicitly provided for in the labor contract or specifically agreed to in writing between the City and the Association from time to time.

The Narcotic Canine Handler may flex his/her work hours on their workday with supervisory approval.

The Training Division supervisory staff may assign the Rangemaster to other shifts or work hours on their normal workday for training purposes.

Officers who work an administrative scheduled (5-2,4-3) may work on their flex day with supervisory approval during their last five years of work before their declared retirement date.

...

Assistant Chief Molitor recalls that, while he was researching another issue, he reviewed the contract language of the expired agreement, as well as other agreements. According to Assistant Chief Molitor, this research caused him to conclude that the fourth paragraph of Sec. 4.04 applied to Detectives who changed flex days off within a pay period. Assistant Chief Molitor states that, by withholding permission to change flex days within a pay period unless the Detective signed an agreement to retire within five years, the City was abiding by the fourth paragraph of Sec. 4.04 of the labor agreement. Chief Arts states that the Department had to stop allowing Detectives to change their flex day because Sec. 4.04 of the contract states that this cannot happen.

As the Association argues, the language of Sec. 4.04, on its face, does not prohibit employees from changing one flex day off for another flex day off. Rather, this language addresses an employee's right to work on their flex day.

Association President Resch states that he was the Association President when the fourth paragraph of Sec. 4.04 was bargained into the 2005-2006 agreement. According to Association President Resch, this paragraph was in response to the Association's request to obtain an existing supervisory employee benefit, *i.e.*, the right to work on the flex day generated by the administrative schedule so that the flex day could be banked for use on an undetermined future date. Association President Resch states that the parties did not discuss that this language would limit any existing right to schedule or change an employee's flex day.

Association Secretary Rod Dubois recalls that he was present during the negotiation of the fourth paragraph of Sec. 4.04. Officer Dubois states that, when the parties negotiated the fourth paragraph of Sec. 4.04, there were no discussions that this language would apply to officers who wished to change a flex day within a pay period.

Officer Dubois recalls that, during the negotiation of the fourth paragraph of Sec. 4.04, the discussions were that Officers would not have to take their flex day off during the pay period, but rather, could work their flex day and use that flex day as time off after the end of the payroll period. According to Officer Dubois, the Association was seeking the ability to “bank” flex days because supervisory employees had this benefit.

Officer Dubois’ testimony indicates that this “banking” benefit not only allowed supervisors to string flex days together to have a week off; but also, allowed supervisors to use banked flex days in lieu of vacation during the period in which the unused vacation could be placed into escrow for paying retiree health insurance. According to Officer Dubois, the City suggested the “five year” limitation to coincide with the period in which employees could escrow unused vacation. Other record evidence does not contradict Association President Resch and Secretary Rod Dubois’ testimony regarding the negotiation of the fourth paragraph of Sec. 4.04.

In summary, the language of paragraph four of Sec. 4.04 was initially negotiated into the expired 2005-2006 collective bargaining agreement. This language, on its face, does not address Detective rights to change flex days off within a payroll period. The evidence of the historical application of this language establishes that, during the term of the expired agreement, Detectives were not required to provide notice of intent to retire within five years in order to change flex days off within a pay period.

The language of the fourth paragraph of Sec. 4.04, as historically applied and clarified by bargaining history, does not support Assistant Chief Molitor’s interpretation of Sec. 4.04. Contrary to the argument of the City, the fourth paragraph of Sec. 4.04 does not prohibit the City from granting Detective requests to change flex days off within a pay period unless the Detective provides notice of intent to retire within five years.

Under Sec. 4.02, “The work week for non-shift employees shall be five (5) duty days during the normal work week with weekends off, as modified by the schedule set forth in the departmental reorganization of October, 1986 and shall be administered as to each employee as it now is.” The testimony establishes that the “departmental reorganization of October, 1986” is the reorganization referenced in the “Memorandum of Understanding” attached to the parties’ 1986 collective bargaining agreement.

This MOU states as follows:

MEMORANDUM OF AGREEMENT

The Chief has determined that in order to make the best and most efficient use of present manpower in the Department, a change must be made in present work schedule and shift assignments. The change basically would be to establish for line personnel in the Detective and Patrol Divisions, a continuous five day on — three day off work week consisting of 8 3/4 hour workdays using

eight groups for personnel rotation. The change would not decrease the number of hours worked by any officer. In order to effectuate this change, there also will have to be a reduction in vacation selection time for uniform officers, and officers will be required to attend in—service training on their days off, which also will increase the availability of manpower for work assignments.

The Bargaining Unit agrees in concept with the proposed changes, and to facilitate the change, enters into this Agreement with the City which outlines the changes to be implemented. The Bargaining Unit agrees also that it will not seek increased salary, benefits or other conditions for the changes aside from the terms of the Agreement.

This Agreement is as follows:

1. The present work schedule will be changed to a continuous five day on — three day off work week consisting of 8 3/4 hours per day, with shifts rotating on the basis of eight groups, and shifts scheduled within the hours, all as more particularly described in the attached schedules.

2. The change will be effectuated as soon after October 1, 1986 as is practical.

3. Present rules and procedure for shift and work assignments selection will continue.

4. The number of patrolmen in the patrol division to be allowed off on vacation at one time shall be reduced by one man per shift, but in all other respects, vacation selection shall remain as it presently is.

5. Officers will be required to attend mandatory in—service schooling on their off days, not to exceed four days per year.

6. Civilian Reorganization — The cadet program will be abolished and be replaced by Community Service Officers. Four (4) Community Service Officers will be assigned to the communications center, allowing four (4) police officers to be assigned street duty.

7. For the 5-2 people, a program similar to the “Manitowoc Plan” will be instituted. That plan provides a system where the 5-2 people will receive approximately the same number of days off per year as the shift employees. This is accomplished by allowing these people to select their days off on a monthly basis. They are first expected to take Saturdays and Sundays for their off days. They would select any additional day they are entitled to based on manpower needs of the division they work in. This insures an adequate work

force at all times. These days would be known as flex days and would only be allowed if the division's workload allows. This will replace the need for the 3 additional personal days and they will be forfeited.

8. Three (3) lieutenants will be added to the Patrol Division and one (1) detective will be added to the Detective Division.

9. Five (5) detective lieutenants shall be eliminated. A new position of Staff Sergeant shall be created. This position shall be paid at \$2,565.00 per month. These positions shall be non-supervisory and incorporated into the Union. The present lieutenants shall fill these positions and maintain their pay parity with Patrol Lieutenants for as long as they are in the position.

10. Leadman pay provision lines 133 through 141 of the contract shall be forfeited.

As in time as to all new work schedules, it is contemplated that problems will be encountered when the changes are implemented, requiring adjustments in the schedule. In order to work out any such problems, the changes agreed to above, shall be implemented on a trial basis for the period of one year, and Department management and Bargaining Unit representatives shall meet on a regular and periodic basis during the year, at least monthly, to review the working of the new schedule and to negotiate and work out changes necessary to overcome any problems that may arise. Although the new schedule will be on a trial basis for one year, both the Bargaining Unit and the City agree that the basic concept of the schedule is very workable, and both agree to, in good faith, use their best efforts to work out any problems encountered so as to change the basic concept as little as possible during the trial year and only as the actual needs of the Department dictate.

These changes will be abandoned only if there is no feasible way to make it work, given departmental needs. If these changes must be abandoned, the work schedule shall be returned in all respects to the work schedule in effect as of the signing of this Agreement, and all officers promoted or demoted as the result of this Agreement shall return to former rank as if this Agreement and the scheduling changes set forth herein had never been made, with the exception of the civilian reorganization and assignments.

Dated this 10th day of September, 1986

Paragraph 7 of the above MOU references flex days and indicates that the employee would select his/her flex day subject to manpower needs of the division.

Attorney Parins has been representing Complainant since 1973. Attorney Parins recalls that, as a result of the 1986 reorganization, there were discussions between Complainant and Respondent representatives regarding equalizing non-shift employees on a 5/2 schedule with shift employees. Attorney Parins recalls that these discussions included having these employees take every other Friday off like the Captains and Deputy Chiefs were doing.

Assistant Chief Molitor recalls that he became a Detective in the mid-nineties; promoted to Lieutenant of Detectives in 1997; left the Detective division in 1998; and returned as supervisor of the Detective division in January of 2006. Assistant Chief Molitor, who did not work the administrative schedule while he was a Detective, admits that he has little, if any, direct knowledge of how the Detective division administered the administrative schedule prior to January of 2006.

Based upon his conversations with the prior Commander of the Detective Division, Assistant Chief Molitor understands that Detectives had changed their flex day with the permission of a supervisor. Assistant Chief Molitor states that he does not know if permission had ever been withheld. Assistant Chief Molitor further states that he had been told by retired Captain Van Haute that, when people came into the Detective division, they were assigned one of the Fridays as their off day so that there was manpower on each day and that Capt. Van Haute never had a problem with Detectives' changing their flex day.

According to Assistant Chief Molitor, as of 2006, Detectives were assigned a Friday flex day; with the goal of having one-half of the Detectives off on each Friday of the pay period. Assistant Chief Molitor recalls that, from January of 2006 until he promulgated his policy in 2008, Detectives changed their flex day with the permission of a supervisor.

Chief Arts recalls that he became an afternoon Detective supervisor in 2000 and, a year later, became a day shift Detective supervisor. According to Chief Arts, he was a Detective supervisor for approximately three years. Chief Arts recalls that, at that time, the Department scheduled Detectives to have a Friday flex day off; with the goal of having one-half of the Detectives off on each Friday. Chief Arts does not recall that any Detective had a regular flex day off other than Friday or that any Detective requested a regular flex day off other than a Friday. Chief Arts states that he never received a request to change a flex day to another day in the week, but that he understands that other supervisors permitted Detectives to change their flex day within a pay period.

Retired Detective Michael VanRoy states that he was hired into the Department in 1979; became a Detective in 1991; and remained a Detective until he retired approximately fourteen years later. According to Detective VanRoy, he became a Detective when Commander Brodhagen was in charge of Detectives; that, at that time, Detectives had a designated flex day; that Detective VanRoy's designated flex day was Friday; and that Commander Brodhagen told Detective VanRoy that his flex day could be used anytime during the pay period. Retired Detective VanRoy recalls that, prior to 2005-06, it was not possible for Detectives to "bank" their flex days; but rather, Detectives had to use their flex day in a

pay period. Retired Detective VanRoy recalls that, when he changed his flex day, he always told his supervisor and his supervisor never denied the change in flex day.

Detective Haglund became an employee of the Department in 1980 and a Detective in the early 90's. Detective Haglund recalls that, when he went to days and on the administrative schedule, Jerry Williams was the Commander of Detectives. Detective Haglund recalls that, at that time, he was told that he could pick a flex day. According to Detective Haglund, Detectives generally picked a Friday or a Monday so that they could have a three-day weekend, but that Detectives could change their flex day by telling their supervisor that they were moving their flex day to another day. Detective Haglund states that he frequently changed his flex day to accommodate his Army reserve schedule.

While Detective Haglund does not recall any particular discussion on this point, he doubts that the Department would allow all Detectives to flex on the same day. Detective Haglund recalls that he could not intentionally change his flex day to generate overtime; but that if he had moved his flex day and then became aware of the fact that he had to be in court on that day, he was not required to change back to his original flex day.

Detective Haglund does not recall any instance of a supervisor denying a request to change his flex day until the fall of 2008, when he was told that he would not be permitted to change his flex day unless he provided a letter stating that he intended to retire within five years. Detective Haglund states that, after he provided the Department with such a letter, he was permitted to move his flex day. At hearing, the parties stipulated that the testimony of a number of other subpoenaed Detectives would provide substantially the same testimony as Detective Haglund and retired Detective VanRoy. (T. Vol. 4 at 668)

Summary

In summary, Detectives on the administrative schedule are "non-shift" employees within the meaning of Sec. 4.01 and 4.02. Under Sec. 4.02, the work week for non-shift employees is not only modified by the schedule set forth in the departmental reorganization of October, 1986, but also, "shall be administered as to each employee as it now is."

The evidence of the modification by the schedule set forth in the departmental reorganization of October 1986 indicates that employees had a right to select the flex day off, subject to manpower needs, but that there was an expectation that the officers' regular flex day off would be on a Friday. The evidence of past practice indicates that, at times, Department supervisors allowed Detectives to select their regular flex day off and, at other times, Department supervisors assigned the Detective's regular flex day off. This evidence also indicates that officers generally, but not always, had a Friday as their regular flex day off. Neither the modification by the schedule set forth in the departmental reorganization of 1986, nor the evidence of the administration practices in effect at the time that the parties entered into their 2005-2006 collective bargaining agreement, establish that Detectives have an unfettered right to choose which day of the week will be their regular flex day off.

The evidence of the modification by the schedule set forth in the 1986 departmental reorganization indicates that officers would select their regular flex day off and that the Department would allow this selection if manpower needs permitted. However, the evidence of the subsequent administration of Detective flex days off provides a reasonable basis to conclude that the parties have mutually accepted a practice in which Department supervisors assign a regular flex day off based upon the manpower needs of the Department. Such evidence also reflects a mutual understanding that manpower needs permit Department supervisors to assign one of the Fridays in the payroll period as the Detective's regular flex day off.

The evidence of the modification by the schedule set forth in the departmental reorganization of October 1986 does not address an employee's right to change a flex day off within a payroll period. The evidence of the past administration of Detective flex days off indicates that Department supervisors have discretion to approve Detective requests to change a flex day off within a pay period, but that Department supervisors did not deny such requests without good cause.

As discussed above, Commander Molitor's decision to deny Detective requests to change flex days off within a pay period unless the Detective provides written notice of intent to retire within five years is based upon an erroneous interpretation of Sec. 4.04 of the parties' collective bargaining agreement. Respondents have not established good cause to deny Detective requests to change flex days off within a pay period unless the Detective provides written notice of intent to retire within five years.

The practices of "scheduling" and "changing" flex days that existed when the parties entered into their 2005-2006 agreement are practices that gives meaning to Sec. 4.01 and 4.02 of the parties' 2005-2006 collective bargaining agreement. Contrary to the argument of the City, it does not have the right to unilaterally repudiate such practices.

Conclusion

The Detective's work schedules, including selecting and changing flex days off, are mandatory subjects of bargaining. Respondent City violates its statutory duty to bargain when, during a contract hiatus period, it unilaterally changes the *status quo* on a mandatory subject of bargaining without a valid defense. As discussed above, the dynamic *status quo* is defined by relevant language from the expired contract as historically applied and as clarified by bargaining history, if any.

Contrary to the argument of the Association, then Commander Molitor did not unilaterally change the *status quo* on a mandatory subject of bargaining during a contract hiatus period when he promulgated a policy that required Detectives to have a Friday as the Detective's regular flex day off. Therefore, by this conduct of its representative Commander Molitor, the City has not violated Sec. 111.70(3)(a)4, Stats., and, derivatively violated Sec. 111.70(3)(a)1, Stats.

As discussed above, Commander Molitor did not have good cause to deny Detective requests to change flex days off within a pay period unless the Detective provides written notice of intent to retire within five years. Accordingly, Commander Molitor unilaterally changed the *status quo* on a mandatory subject of bargaining, during a contract hiatus period and without a valid defense, when he promulgated a policy that did not permit Detectives to change a flex day off within a pay period unless the Detective provided written notice of intent to retire within five years. Therefore, by this conduct of its representative Commander Molitor, the City has violated Sec. 111.70(3)(a)4, Stats., and, derivatively violated Sec. 111.70(3)(a)1, Stats. As remedy for its violation of MERA, the Examiner has ordered the City to cease and desist from its unlawful unilateral change; restore the *status quo ante*; post an appropriate notice and make-whole affected employees.

A Detective denied a request to change his/her flex day off because of the City's unlawful unilateral change worked a day that should not have been the Detective's regular workday. Thus, the appropriate make-whole remedy is to order the City to compensate any Detective who was denied such a request by paying the Detective the difference between the wages the Detective received for working the requested flex day off and the wages the Detective would have received if the Detective had been paid his/her overtime rate for working that day, together with interest at the statutory rate of twelve per cent (12%) per annum. This make-whole remedy is necessary to prevent the party that committed the unlawful change from benefiting from that wrongful conduct, to compensate those affected adversely by the change and to prevent or discourage such violations.

In its Third Amended Complaint, Complainant asks for costs, disbursements and actual attorneys fees. In MILWAUKEE COUNTY, DEC. NO. 28063-E (WERC, 2005), the Commission states:

. . . Attorney fees in complaint proceedings are awarded: (1) where an extraordinary remedy is deemed appropriate -- DER(UW HOSPITAL), DEC. NO. 29093-B (WERC, 11/98); (2) as part of a make whole remedy where a breach of the duty of fair representation is found (and then only for the portion of the proceeding in which a violation of contract claim is tried against the employer) -- UNIVERSITY OF WISCONSIN-MILWAUKEE (GUTHRIE), DEC. NO. 11457-H (WERC, 5/84); and (3) where the party found to have illegally failed to implement a Sec. 111.70(4)(cm), Stats., interest arbitration award did not have good cause for its conduct. ERC 33.20(2).

The facts of this case do not warrant the conclusion that it would be appropriate to order any extraordinary remedy, such as costs, disbursements and attorney's fees. Accordingly, Complainant's request for costs, disbursements and attorney's fees is denied.

Dated at Madison, Wisconsin, this 20th day of September, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner