STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 216-A, AFSCME, AFL-CIO, ASHLAND CITY EMPLOYEES-PUBLIC WORKS, Complainant,

vs.

CITY OF ASHLAND, Respondent.

Case 86
No. 68428
MP-4464

Decision No. 32697-A

Appearances:

Attorney Laurence Rodenstein, Wisconsin Council 40 - AFSCME, Suite B, 8033 Excelsior Drive, Madison, Wisconsin 53717, appearing on behalf of AFSCME Local 216-A, Complainant.

Attorney Scott W. Clark, Clark & Clark, 214 West Main Street, Ashland, Wisconsin 54806, appearing on behalf of the City of Ashland, Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On November 25, 2008 AFSCME Local 216-A (Union) filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Ashland (City) had committed prohibited practices within the meaning of Secs.111.70(3)(a)1, 111.70(3)(a)3, 111.70(3)(a)5, and 111.70(3)(c), Stats. as regards its treatment of members of the Union's bargaining unit, Keith Igo (Igo), Brien Ledin (Ledin) and Todd Deeth (Deeth). Informal attempts to resolve the matter failed and on March 26, 2009, the Commission appointed a member of its staff, Steve Morrison, to act as the Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats.

Respondent's answer and affirmative defenses were filed on December 15, 2008. On March 30, 2009 the Respondent filed a "motion to dismiss and motion for costs upon frivolous claim," which motions were held in abeyance pending an evidentiary hearing on the matter.

Pursuant to notice, the Examiner conducted a hearing on the matter at City Hall in Ashland, Wisconsin, on May 13, 2009. At the hearing the Examiner accepted the withdrawal of the Complainant's Sec. 111.70(3)(a)5 claim and the Examiner denied the motion to dismiss and for costs relating to the Secs. 111.70(3)(a)1 and 3 claims and the 111.70(3)(c) claim. A transcript of that hearing was provided to the Commission on June 9, 2009. Briefing was initially completed on July 15 at which time the Examiner closed the record. The Examiner re-opened the record on July 26, 2009 for the limited purpose of receiving the collective bargaining agreement material to this matter into evidence. That agreement was received as Joint Exhibit K on August 3, 2009, at which time the record was closed.

FINDINGS OF FACT

1. The Complainant Union (Union) is a labor organization with offices at 8480 East Bayfield Road, Poplar, Wisconsin. At all material times John Radloff (Radloff) was the President of the Union and James Mattson (Mattson) was its Business Agent.

2. The Respondent City is a municipal employer with offices at 601 West Main Street, Ashland, Wisconsin. At all material times, Attorney Scott W. Clark was the City Attorney for the City. At all times material Brian Knapp (Knapp) was employed by the City as the City Administrator.

3. The Union and the City have been, at all times material herein, parties to a collective bargaining agreement covering the City's Public Works employees. At all material times the Union has been the exclusive bargaining representative of the bargaining unit of City Public Works employees. Deeth, Igo and Ledin were, at all material times, employees of the City. Igo and Ledin worked in the Public Works Department and was a member of the DPW bargaining unit. The record is unclear as to which Department Deeth was assigned but at all material times all three men were members of the Union.

4. In or about May of 2008, the City posted the position of Utility Operator II. This position's description had recently been revised to add the requirement of Grade 1 and Grade 2 certification. The revised description read, in pertinent part:

Title of Position:	Utility Operator I I
Immediate Supervisor:	Water & Wastewater Utility Superintendent
Effective Date:	January, 2004 Revised May, 2008

> This is a skilled position involving the safe and efficient use of a variety of equipment used in the operation, maintenance and repair of drinking water treatment facilities, drinking water distribution and wastewater collection infrastructure and wastewater treatment facilities. The position also requires

heavy physical labor associated with maintenance of treatment equipment and conveyance materials.

This is a union position. Normal working hours are 7:00 a.m. to 3:30 p.m. with lunch break from 12:00 p.m. to 12:30 p.m. Schedule will vary to cover shifts Monday through Sunday. Rotating weekend work is required. Potential over-time is based on seniority.

SECTION B

ESSENTIAL KNOWLEDGE, SKILLS AND JOB-RELATED EXPERIENCE REQUIRED

- Knowledge and experience in various water and wastewater treatment methods and techniques.
- Knowledge and experience with computers and computer programs including Microsoft Office.
- Experience in operating and maintaining various heavy and light construction equipment.
- Ability to perform heavy physical tasks under varying working conditions.
- Knowledge and experience in general mechanics and construction.
- Basic knowledge of gas and diesel engine maintenance and operation.
- Ability to follow oral and written instructions, and participate as a team member in the operation.
- Troubleshooting skills: Able to quickly look over a situation and offer ideas to resolve problems.
- General electrical knowledge.
- Knowledge and experience in operations, maintenance and repair of electric motors, motor controllers, switching gear, VFD Drives and valves normally found in water and wastewater operations.
- Knowledge and understanding of SCADA system operations, maintenance, troubleshooting and repair.

SECTION C

SPECIAL QUALIFICATIONS REQUIRED OR DESIRED

- High school graduation or equivalent is required.

- Post high school education in related field is highly desired.

- Possession of valid Wisconsin Driver's License.

- Possession of Commercial Driver's License or ability to obtain within six months.

- Possession of Wisconsin Grade 1 Surface Water Treatment and Distribution Operator Certificates, and possession of Wisconsin Grade 2 Wastewater Operator Certification in subclassses Activated Sludge, Disinfection, Laboratory, Primary Settling, Mechanical Sludge Handling, and Phosphorus Removal.

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5. Prior to the May, 2008 revision to the Utility Operator I I job description (finding 4), the City's description for the same position was, for all practical purposes, identical to the revised description, with one notable exception: the revised job description added the reference to the Grade 1 and Grade 2 licenses under the section entitled "Special Qualifications Required or Desired." This reference in the revised job description did not specify whether the licenses were "Required" or "Desired" or whether they were subject to the "ability to obtain" (within a specific period of time) provision.

6. Four individuals from outside the employee ranks of the City applied for the Utility Operator I I position. Employees Igo, Ledin and Deeth all signed the Utility Operator I I posting. None of the four outside individuals were found to be qualified for the position and all four were rejected by the City.

7. At all times material Ray Hyde (Hyde) was employed by the City as the Public Works Director and was the direct supervisor of the Utility Operator I I position. Prior to signing the posting for the Utility Operator II position Igo and Ledin both spoke to Hyde and expressed their interest in signing the posting for the Utility Operator I I position even though they may not have been technically qualified by reason of not having the Grade 1 and Grade 2 certificates set forth in Findings 4 and 5. Hyde encouraged both men to sign the posting. Igo had discussed the possibility of moving to the position of Utility Operator I I with Hyde prior to the posting. When the posting came up Igo again spoke to Hyde who said, according to Igo, and the record does not dispute the statement, "Well, go ahead and sign it. Doesn't necessarily mean you'll get it." In the case of Ledin the record shows that he talked to Hyde about signing the posting and that Hyde was encouraging and told Ledin that he (Hyde) would help him with any training necessary. Hyde also told Ledin that if they could not find qualified people he (Hyde) would "look back" to the union. Igo also talked with City Administrator Knapp about signing the posting and, while he did not remember specifically what Knapp's response was, the record suggests that he was not in any way discouraged by Knapp from signing the posting.

8. Following signing the posting for the Utility Operator I I position, Igo, Ledin and Deeth were all informed by the City that their applications had been denied. The record does not specify how they were notified but the Examiner infers it was by letter from Hyde. The Union then filed a timely grievance on behalf of Igo and Ledin alleging violations of various contractual provisions as follows:

> **14.03**
>
> In the event a vacancy occurs in one of the Utility Divisions, the most senior qualified employee in that Division shall be considered for a promotion in that Division first. If no one is qualified or if no one from that Division signs for the position, then the most qualified senior employee in the other Utility Divisions would be given first consideration for the position. If no one is qualified or if no one in a Utility Division signs for the position, then the most qualified senior employee in the Streets & Parks Division would be given first consideration for the position. If no one in the Streets and Parks Division has signed for the position, then the most qualified senior employee in the Engineering Division would be given first consideration. In the event an employee from another Utility Division fills the vacancy, his/her name will be placed at the bottom of the seniority list for the Division to which he/she has transferred, but shall keep his/her original seniority date for purposes of overall seniority within the combined Utility Divisions. In the event an employee from the Streets or Parks Divisions or Engineering Division fills the vacancy, his/her name will be placed at the bottom of the Division seniority list and at the bottom of the combined Utility Divisions (sic) seniority list. The employee shall keep original starting date of employment for the purposes of benefit calculation.
>
> **15.01** In order to promote better and more efficient service for the City of Ashland, a training program is hereby established under the supervision of the Director of Public Works, whereby employee efficiency will be increased and all employees eventually will become trained in the operation of all equipment used by the City of Ashland. The City agrees to provide the opportunity for supervised training on equipment necessary to do an assigned job.
>
> **15.03** Certification of the employee's qualifications to operate the equipment shall be a letter from the supervisor in charge of training stating his/her availability to perform work for the City with that particular piece of equipment. Said letter shall also state the number of hours of training the employee has had and certain limitations, if any.
>
> **17.01** Employees will not be allowed to "bump" from one Division to another. New positions or permanent vacancies defined as not being caused by vacation, illness, leave or similar reasons shall be posted on the unit bulletin board for a period of five (5) working days. Said notice shall contain the prerequisites for

the position which shall be consistent with the job classifications and requirements. Each employee desiring to fill the vacancy shall sign his/her name and date of seniority under the position to be filled. Vacancies shall be filled by seniority as described in Article 14.

17.02 Trial Period An employee upon being promoted to a higher paying position shall serve a trial period of forty-five (45) days. Should the employee not qualify or should the employee so desire, within the forty-five (45) day period, he/she shall be reassigned to his/her former position without loss of seniority. During the first fourteen (14) days, the employee shall receive his/her old classification rate plus one-half (½) the difference between his/her old classification rate and the new classification rate, if not previously trained. Thereafter, the employee shall receive the full amount of the new classification rate. Employees who have had prior training shall receive the new rate upon award of the position.

9. Under Article 26 - Grievance Procedure, the parties' collective bargaining agreement provides, in pertinent part:

. . .

26.02 . . .

Step I: The aggrieved employee and the Union Grievance Committee shall set forth the grievance in writing to the superintendent or department head within ten (10) working days of the cause of the grievance or when the employee should have reasonably known of such cause. The superintendent or department head shall respond in writing to the Union and the grievance within three (3) working days.

. . .

Step IV: Arbitration

. . .

1. General. If the grievance is not settled at the third step, the Union may proceed to arbitration by informing the Committee in writing within fourteen (14) calendar days following the written response of the Committee of the Whole that they intend to do so.

. . .

4. It is agreed that if any time limit set forth herein is not complied with, the grievance shall be deemed decided against the party who failed to comply with the time limit. The parties may, however, mutually agree in writing to extend the time limits in any step of the grievance procedure.

10. The Union set forth the date of the alleged infraction as May 16, 2008 and filed the grievance on May 23, 2008, within the contractual time limit as set forth in Finding of Fact 9. Although the parties' contract required the City to reply to Union grievances within three working days, in the past the Union had agreed in writing to grant extra time to reply to grievances upon the request of the City, and the City had done the same for the Union. Had the City requested extra time to answer this grievance, Radloff testified that he ". . .wouldn't have felt that it would have been a problem had they come forward and asked for more time." The City failed to respond to the Union's grievance within the three day deadline and it failed to ask for more time. By June 2, 2008, the Union's Grievance Committee had not heard from the City regarding this grievance. Consequently, on June 2, 2008, Radloff sent the following e-mail to Hyde:

> Ray;
>
> I came to my attention Friday that the Grievance Committee never received an answer to the grievance filed with you on 5/23/08. I asked if there was any communication from you asking for more time (Article 26, step IV sec. 4) and the reply that there was no communication. So in accordance with the same article 26 step IV sec. 4 the grievance has been decided against the party who failed to comply with the time limit.
>
> Please refer to the Request for Settlement in the aforementioned grievance for the proper action from your office for the final determination of this grievance.
>
> Lets put this grievance to bed and move on.
>
> John Radloff
> President 216A
>
> cc: Buckwheat, Rae; Knapp, Brian; Mattson, Jim; Monroe, Ed; Wosepka, David

In response to Radloff's e-mail to Hyde, Hyde sent the following letter on June 2, 2008:

. . .

> Dear Mr. Radloff,
>
> I apologize for the tardiness of this response; however, I must deny your grievance based on the fact that even if a trial period was offered, none of the employees posted for this position would be able to acquire the necessary qualifications.

Sincerely,

Raymond Hyde
Public Works Director
City of Ashland

Among others, Hyde copied Clark.

11. At some time prior to June 2, 2008 and June 10, 2008, the record is unclear of the exact date but suggests that it was on June 5, Radloff attended a meeting to discuss this grievance. Present at that meeting, in addition to Radloff, were Mattson, Knapp, and Clark. Radloff testified that at this meeting the Union was informed that the reason the three men were turned down was because of their lack of certifications. Radloff further testified that Clark brought up the possibility that a fraud had taken place. This was the first time the issue of fraud had been mentioned. Radloff's testimony is credible and the record does not refute that testimony.

12. On June 10, 2008 Radloff received the following letter from Clark:

June 10, 2008

Mr. John Radloff
President, AFSCME Local 216-A
C/O Department of Public Works

Re: Complaint and Grievance No. 2008/1-5/20/08

Dear Mr. Radloff:

This letter is being written in response to the above-referenced grievance.

I understand that the grievance was delivered to Mr. Hyde, Public Works Director, on May 23, 2008 and that due to the rigorous schedule of activities in which the DPW is engaged Mr. Hyde did not respond to the grievance within the three days prescribed by the contract. We acknowledge the contract language regarding the impact of failing to timely respond to a grievance, however, in this particular instance failure to respond is inconsequential.

The purported grievance arises out of a posted Position Announcement for Utility Operator I I Position. I attach copies of the relevant postings.

Please note the language in the last paragraph of the postings: "Employees interested in applying for the job **and who meet the minimum requirements"** shall endorse his/her name on this notice…" (Emphasis added.)

The qualifications include certification requirements for wastewater treatment and water distribution.

None of the three individuals who signed the postings and who are the grievants possessed the certification requirements for the position of Utility Operator I I.

By signing the posting, each of the individuals made a false representation that each met the minimum requirements set forth in the posting.

A party is not entitled to be placed in a better position because of misrepresentation than he would have been had there been no misrepresentation. (Chitwood v. A.O. Smith Harvestore Products, Inc., 170 Wis. 2d 622, 489 N.W.2d 697 [Wis. App.1992].

Torts such as fraud and deceit rest on the notion that a party should not be able to create an informational advantage through deception. Stated otherwise, one guilty of fraud cannot be allowed, by operation of law, to profit by that fraud. Public policy requires that perpetrators of fraud, like willful slayers, be deprived of the fruits of their wrongdoing. (Am. Jur.2d, Fraud, Section 13.)

The false entries in the postings by the three individuals may constitute a violation of Wisconsin Statute 943.39.

The three grievants are not permitted by the law to base any subsequent actions, including grievances, on the false representations they made by signing the postings. The attempt by the grievants and Local 216-A to compel the City to place any of the unqualified individuals in a trial period for Utility Operator I I is an effort to reap profit or advantage from the prior misrepresentation. Such an attempt to gain advantage from misrepresentation is contrary to law and equity.

Based upon the foregoing the grievances are denied and will not be recognized as valid.

If you have any questions please direct them to my office.

Very truly yours,

Scott W. Clark
City Attorney

SWC:mha
Enclosures
cc: James Mattson, Staff Representative, Wisconsin Council 40
cc: Brian Knapp, City Administrator
cc: Ray Hyde, Public Works Director
cc: Edward Monroe, Mayor

Copies of the two postings (Igo signed one copy, Ledin and Deeth signed another) were attached to Clark's letter.

13. In response to the above letter from Clark, Mattson, on June 12, 2008, sent the following letter:

Mr. Scott Clark
Ashland City Attorney
214 West Main Street
Ashland, WI 54806

RE: Grievance No. 2008-1 (Dated May 20, 2008)

Mr. Clark:

I am in receipt of your letter dated June 10, 2008 giving the City's belated response to above (sic) noted grievance. As you admit in your letter the City did not respond to this grievance in a timely manner (three days) as required by **Article 26:02 (4).** The language in this section clearly states the following:

> 4. It is agreed that **if any limit set forth is not complied with, the grievance shall be deemed decided against the party who failed to comply with the time limit.** The parties may, however, mutually agree in writing to extend the time limits in any step of the grievance procedure. (Emphasis added).

There was not an extension of time limits (sic) granted or requested in processing (sic) of this grievance. Without question the Local has won this grievance. The remedy the grievance seeks is clear. The most senior employee signing the job posting shall be granted the position.

If you disagree with this remedy the parties should proceed to arbitration.

I must also take strong exception to your allegations of fraud being committed by the interested employees who signed these job postings. In the event unqualified employees sign job postings they are simply not granted the position. There is certainly no fraud being committed by anyone. The common practice is that interested employees are **encouraged** to sign job postings.

I await your response at your earliest convenience.

If you have any questions concerning this matter please feel free to contact me.

Sincerely,

James E. Mattson
Staff Representative
Wisconsin Council 40
Local 216-A, AFSCME, AFL-CIO

C: Rae Buckwheat, Ashland City Clerk
John Radloff, President Local 216-A

14. In response to the above letter, Clark sent the following:

June 17, 2008

Mr. James Mattson
AFSCME
8480 E. Bayfield Road
Poplar, WI 54864

Re: Complaint and Grievance No. 2008/1-5/20/08

Dear Mr. Mattson:

Thank you for your letter of June 12, 2008.

Your letter is patently inconsistent. In the fourth paragraph of your letter you admit that: "In the event unqualified employees sign job postings they are simply not granted the position." Yet you argue that "the most senior employee signing the job posting shall be granted the position."

It is the above inconsistency and your argument that an unqualified individual must be given a specific position which compels the City to point out the faulty basis of the union argument in its relying on misrepresentation in the signing of the postings.

It is apparent that you do not understand the proposition that a matter which is based on fraud or misrepresentation is *void ab initio*. That is to say, I t is a nullity in the first instance.

It is regrettable that the City is forced to point out the dishonesty of the individuals signing the posting, however, you make that necessary by taking the "gotcha" position in reliance on Article 26:02(4).

In addition to the application of the concept of *void ab initio* there is also the argument that the union position leads to absurd results. Your argument which attempts to compel the City of Ashland to give an unqualified individual a job that he cannot perform and for which he cannot be qualified in the forty-five day trial period makes no sense at all.

If AFSCME desires to proceed to arbitration, go ahead. Until that time the City of Ashland does not recognize the validity of the grievance based on misrepresentation or fraud in the first instance.

Very truly yours,

Scott W. Clark
City Attorney

SWC/mha
cc: John Radloff, President, AFSCME Local 216-A, c/o Department of Public Works
cc: Brian Knapp, City Administrator
cc: Rae Buckwheat, City Clerk
cc: Ray Hyde, Public Works Director

15. In response to Clark's letter of June 17, 2008 above, Mattson sent the following:

June 23, 2008

Mr. Scott Clark
Ashland City Attorney
214 West Main Street
Ashland, WI 54806

RE: Grievance No. 2008-1 (Dated May 20, 2008)

Mr. Clark:

In response to your letter dated June 17, 2008, this letter is to notify you Local 216-A, AFSCME, AFL-CIO, is advancing the above noted grievance to

arbitration. As per the terms of Article 26-step IV, the parties are to attempt to select an agreeable arbitrator to hear this grievance. At your earliest convenience contract (sic) me so we may proceed with the selection of an arbitrator.

If you have any questions concerning this matter please feel free to contact me.

Sincerely,

James E. Mattson
Staff Representative
Wisconsin Council 40
Local 216-A, AFSCME, AFL-CIO

C: Rae Buckwheat, Ashland City Clerk
John Radloff, President Local 216-A

16. Clark's letter of June 10, 2008, Finding of Fact 12 above, was posted (the record is not clear who posted the letter nor the specific date it was posted) on the employees' lunchroom bulletin board shortly after June 10, 2008. Several employees saw the letter before Igo did and as a result were "gassing us that we were felons." Initially Igo took their "gassing" as a joke but as the contents of Clark's letter "started sinking in" he began to get sick. In his words "I mean, I couldn't believe I was going to lose my job for a felony for a job that I was basically encouraged to sign." He almost went home that day because he was so upset and had trouble focusing on things. "I remember I backed into a telephone pole. I was hauling gravel that day. I was just so worked up, I just couldn't focus on nothing. I thought I'm going to lose my job over this crap and I just - - and I thought I was pretty forward, you know, talking with administration, and I felt like I was trapped into this and now they're going to fire me for signing this job posting." According to his testimony Igo ". . .lived in fear for quite a while about it. I didn't know." He also suffered from chest pains and was informed by his doctor that they were stress related. Ledin also saw Clark's letter posted on the bulletin board and was initially angry and felt that this was ludicrous. ". . .you know, how could they accuse me of being fraudulent just for signing a posting. Then I was a little worried that, you know, could they actually accuse me of being fraudulent?" Ledin called his dad, a 30-year union member, to ask if he had "ever heard of such a thing. He had never, and I started to really be concerned that – how could I be accused of being fraudulent. It just didn't seem right."

17. Between the end of June and the end of October, 2008, the parties entered into discussions concerning the grievance. Those discussions resulted in an agreement which was memorialized in a side letter as follows:

SIDE LETTER OF AGREEMENT

This Agreement is made by and between the City of Ashland (hereinafter "City") and the Department of Public Works; Utility, Streets and Parks Divisions Local 216-A AFSCME, AFL-CIO, (hereinafter "Local 216-A.)

1. The City, after interviewing applicants for the Utility Operator I I position will offer the Utility Operator I I positions to new Utility Operators under the following conditions:

   A. The following certifications must be obtained by the bargaining unit employees within one (1) year and /or two (2) test periods from the time of transfer to the utility division:

      1. Water: Surface Water Grade 1T
      2. Wastewater: General Grade T (Introductory)

   B. Top priority is the need for certification in the Water Utility. New Utility Operators are encouraged to get the surface water certification during the first available testing period and shall be required to obtain further certifications beyond the one (1) year as required by the Wisconsin DNR to operate the water and/or wastewater treatment facilities. These include:

      - Water Distribution Grade I

      - Wastewater Sub-classification: Activated Sludge, Disinfection, Mechanical Sludge Dewatering, Phosphorus Removal, Laboratory, Preliminary and Primary treatment.

2. Local 216-A shall withdraw the grievance it filed with the City dated May 20, 2008 regarding the posting disputes for the Utility Operator I I positions.

3. The City is entitled to set qualifications for new positions. Individuals that sign for but do not meet the qualifications of a posting, will not be entitled to the position, but may be considered for the position at the discretion of the City.

4. Local 216-A is interested in pursuing discussions with the City to discuss the future succession planning.

5. Local 216-A requests a response to this Side Letter Agreement within three (3) working days.

The above document is dated October 10, 2008 and is signed by President Radloff, Vice President Greg Ledin, Secretary Local 216 Alyssa Core, Mattson, Knapp and Rae Buckwheat, City Clerk.

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

CONCLUSIONS OF LAW

1. The Respondent City is a "municipal employer" within the meaning of Section 111.70(1)(j), Stats.

2. Scott Clark was at all times an agent of the Respondent City and acted within the scope of his authority as an agent of the Respondent City.

3. Keith Igo and Brian Ledin were engaged in lawful, concerted activity for the purpose of collective bargaining or other mutual aid or protection, within the meaning of Sec. 111.70(2), Stats. when they signed the posting for the Utility Operator I I position.

4. Keith Igo, Brien Ledin and the Union were engaged in lawful, concerted activity for the purpose of collective bargaining or other mutual aid or protection, within the meaning of Sec. 111.70(2), Stats. when they filed the grievance herein.

5. Clark, as the agent of the City, was aware of Igo's and Ledin's exercise of lawful, concerted activity as set forth in Conclusion of Law 3 above.

6. Clark, as the agent of the City, was not hostile toward Igo's, Ledin's or the Union's exercise of lawful, concerted activity as set forth in Conclusion of Law 3 and 4 above.

7. The statements contained in the letters of June 10 and June 17, 2008 constituted a threat of reprisal which would tend to interfere with, restrain, or coerce Keith Igo and Brien Ledin and members of AFSCME Local 216-A in the exercise of rights guaranteed by Sec. 111.70(2) in violation of Sec. 111.70(3)(a)1, Stats.

8. Because Clark's letters of June 10, 2008 and June 17, 2008, on behalf of the City, were not motivated by hostility toward Keith Igo and Brien Ledin and members of AFSCME Local 216-A for their lawful, concerted activity, the City, through its agent Clark, did not discriminate against Igo and Ledin and members of AFSCME Local 216-A in violation of Sec. 111.70(3)(a)3, Stats.

9. The agreement noted in Finding 17 did not waive the Union's right to pursue the instant complaint.

10. In writing the June 10 and June 17, 2008 letters, Clark was acting within the scope of his authority as an agent of the City. Accordingly, Clark's conduct did not violate Sec. 111.70(3)(c), Stats.

11. The allegations contained in the Complaint are not frivolous.

ORDER

1. To remedy its violation of Sec. 111.70(3)(a)1, Stats., the Respondent City of Ashland shall immediately:

    a. Cease and desist from making threats of reprisal which would tend to interfere with, restrain, or coerce Keith Igo or Brien Ledin or any of its employees represented by AFSCME Local 216-A in the exercise of rights guaranteed by Sec. 111.70(2), Stats.

    b. Immediately take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

        (1) Notify all of its employees represented by AFSCME Local 216-A, by posting in conspicuous places in the City facilities where such employees generally congregate, copies of the Notice attached hereto and marked "Appendix A." The Notice shall be signed by the City Administrator and shall be posted immediately upon receipt of this Order and remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the City to ensure that said notices are not altered, defaced, or covered by other material.

        (2) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply with it.

Dated at Wausau, Wisconsin this 21st day of August, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steve Morrison /s/
Steve Morrison, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES OF THE CITY OF ASHLAND REPRESENTED BY AFSCME, LOCAL 216-A

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 AFSCME, Local 216-A that:

> WE WILL NOT make threats of reprisal which would tend to interfere with, restrain, or coerce Keith Igo or Brien Ledin or any of our employees represented by AFSCME Local 216-A in the exercise of rights guaranteed by Sec. 111.70(2), Stats.

Dated this _____ day of _____, 2009

CITY OF ASHLAND, WISCONSIN

_____
City Administrator

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED OR COVERED BY ANY OTHER MATERIAL.

CITY OF ASHLAND

MEMORANDUM ACCOMPANYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint initiating these proceedings, limited by it's withdrawal of its allegations of a violation of Sec. 111.70(3)(a)5, AFSCME, Local 216-A alleged that the City of Ashland violated Secs.111.70(3)(a)1 and 3 by accusing Keith Igo, Brian Ledin and Todd Deeth of fraud and misrepresentation based upon their signing a posting for the position of Utility Operator I I in or about May, 2008. The City denied that it committed any prohibited practice and sought dismissal of the complaint. The Complainant also alleges an independent violation of Sec. 111.70(3)(c) against City Attorney Clark although it does not name him individually as a party.

Complainant's Position

Clark's statements had a reasonable tendency to interfere with employee protected activity. His comments were intemperate and menacing. An employee's right to sign a posting has always been unassailable, a fundamental right afforded represented employees. It is the primary contractual tool for employee advancement. The act of signing a posting is an unencumbered right embedded in the Agreement.

The threatening nature of Clark's remarks in his June 10, 2008 are self-evident. He initially referred to the employee's actions as "false representations" and escalated that charge by citing an appeals court case (CHITWOOD V. A.O. SMITH HARVESTORE PRODUCTS, INC.) apparently because he felt that that case, although not applicable, created a legalistic milieu supporting an allegation of fraud.

Igo and Ledin were traumatized by Clark's commentary. Igo testified that he was in disbelief, felt sick and unable to focus, that he backed into a telephone pole because he could not focus and thought he would lose his job. He also suffered chest pains which were later diagnosed to be stress related. Ledin worried that the City might act on its claim that his signing of the posting was an actionable case of fraud. Tod Deeth did not testify.

The Commission has held that a finding of anti-union animus is not necessary to establish a violation of Sec. 111.70(3)(a)1, Stats. (Citations omitted.) Interference may be proved by showing the Respondent's conduct had a reasonable tendency to interfere with the employee's right to exercise MERA's rights. Citing BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84).

The City's anger was kindled by the legitimate decision to enforce the terms of the Agreement providing for disposition of late responses by the City in the grievance process. This resulted in an undesirable outcome for the City awarding the position to an "unqualified" candidate. The incendiary nature of the Respondent's comments had the effect of coercing and intimidating both applicants from exercising their protected activity in the future (and, possibly other bargaining units of the City of Ashland). Even if the underlying basis for the Respondent's actions was not union animus, the threatening content was sufficient to show interference.

Clark's actions interfered with two fundamental rights under the contract - the right to grieve violations of the Agreement and the right to sign a job posting without interference or coercion, (Citing VILLAGE OF WEST MILWAUKEE, DEC. NO. 9845-B, (WERC, 10/71)). The City Attorney exacerbated the force of his conduct by failing to apologize to the applicants, or to retract any of the deleterious content in the June 10, 2008 letter. Clark not only charged the employees with fraud (alluding to the fraud statute) suggesting that it could amount to a Class H felony, he cited an inapposite case (CHITWOOD) and an American Jurisprudence article on fraudulent conduct suggesting that the act of signing the job posting could be considered a Class H felony. These threats were sufficiently powerful to chill the entire bargaining unit with respect to its decision to sign for a job posting and to interfere with the Union's right to enforce the terms of Article 26 of the Agreement.

Respondent's conduct also violates a Sec. 111.70(3)(a)3, Stats. Citing MUSKEGO-NORWAY SCHOOL DISTRICT V. WERB, 35 Wis. 2D 540 (1967) to sustain a retaliation/discrimination charge, the Union must establish by a clear and satisfactory preponderance of the evidence, each of four elements: 1. That the employee has engaged in lawful concerted activity (or was believe to have so engaged); 2. That the employer was aware of (or believed it was aware of) such activity at the time of the adverse action; 3. That the employer bore animus toward the activity; 4. That the employer's adverse action against the employee was motivated at least in part by that animus, even if other factors contributed to the employer's adverse action. The evidence shows that Local 216-A has sustained all of the four elements to prevail on a fnding that Respondent has violated Section 111.70(3)(a)3 of MERA.

Clark violated Section 111.70(3)c. Instead of embarking on a more conventional option in the face of the anomalous outcome of the grievance, Clark elected to ratchet a mundane question involving the application for a water utility position into inferential threats of felony charges. The Commission cannot consider this absurd and injurious conduct to be within the acceptable scope of his authority. His threats did cause considerable emotional distress against a municipal employee engaged in protected activity. Clark had to know that the previous job description did not contain the licensing requirement and the new one revised in 2008 did and Clark had to have known that the act of signing for a job vacancy had nothing to do with felonious conduct, so the only purpose for the extremist content of his charges was to frighten

the applicants and, derivatively, the members of the Union. Also, Clark knew or should have known of the conversations of Hyde and Knapp with Igo and Ledin regarding their intention to sign for the posting and of their (Knapp and Hyde) failure to discourage the employees to do so. Issuing Clark's "legal screed" constitutes conduct outside the scope of his authority and shows that he was acting in an individual capacity and should be held individually liable for the impropriety of his conduct.

The settlement of this grievance does not bar the Union from pursuing it's statutory claims under MERA. The doctrine of *expressio unis est exclusio alterius* is applicable. Because the settlement does not include any reference to potential prohibited practice claims the Union is free to pursue them.

City's Position

The City has the burden of proof on its prohibited practice complaint to establish a violation by the clear and satisfactory preponderance of evidence.

The legal arguments by the City attorney in the context of grievance litigation are "absolutely privileged" and cannot be the basis for a prohibited practice complaint. Citing SNOW V. KOEPPL, 159 Wis. 2D 77, 464 N.W. 2d 215:

> "Statements made in the course of judicial proceedings are absolutely privileged and insulate the speaker from liability so long as the statements 'bear a proper relationship to the issues.' BERGMAN v. HUPY, 64 Wis. 2d 747, 750, 221 N.W. 2d 898,900 91974). The rule is traceable to earliest Wisconsin case law. JENNINGS v. PAINE, 4 Wis. 472 (1885). The rule extends to attorneys, witnesses and physicians appointed to examine a person in connection with judicial proceedings. See BROMUND v. HOLT, 21 Wis. 2d 336, 129 N.W. 2d 149 (1964). The Wisconsin rule is in harmony with the general rule throughout this country. BUSSEWITZ v. WISCONSIN TEACHER'S ASS'N, 188 Wis. 121, 124-25, 205 N.W. 808, 810 (1925) The determination whether the statements are pertinent and relevant to the issues is a question of law for the court and not a fact issue for the jury. *Id.* at 124, 205 N.W. at 810. When making this inquiry, all doubts should be resolved in favor of relevancy. *Id.* There is good reason for the rule:
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> If parties are shadowed by the fear that by some mistake as to facts or some excess of zeal, or by some error…they may be subjected to harassing litigation…they may well feel that justice is too dearly bought and that it is safest to abandon its pursuit…[F]eelings are often wounded and reputations are sometimes soiled. This is, of course to be regretted, but… '[T]he paramount

public interest here intervenes and overrides considerations of mere private right as between the parties.' (Citations omitted.)

The complaint is barred by the doctrine of accord and satisfaction because the side letter provides that the Union shall withdraw the grievance relative to the Utility Operator I I position. Thus, the side letter resolves all matters arising from the grievance.

The complaint is barred by the doctrines of estoppel and/or waiver. The Union representatives admitted that nothing was said about a prohibited practice prior to the parties reaching the Side Letter Agreement. The Union's attempt to ambush the City with a prohibited practice complaint after receiving the benefits of the Side Letter Agreement is inequitable and is barred by the Equitable Doctrines of Waiver and/or Estoppel.

"The doctrine of estoppel, also called equitable estoppel, focuses on the conduct of the parties. MILAS v. LABOR ASS'N OF WISCONSIN, 214 Wis. 2d at 11, 571 N.W. 2d. 656. The elements of equitable estoppel are: (1) action or nonaction (sic), (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or nonaction (sic), and (4) which is to his or her detriment. *Id.* at 11-12, 571 N.W. 2d. 656. The party asserting estoppel must prove the elements by clear, satisfactory and convincing evidence. *Id.* at 12n. 14, 571 N.W.2d 656."

All of the elements of estoppel are present in this case. All indications from AFSCME in reaching the Side Letter Agreement were that the settlement was a full and final settlement of all disputes arising from the grievance. Equity bars the complaint herein.

The City of Ashland is entitled to costs against the Complainant and/or its attorney on the basis of the Complaint and subsequent proceedings being frivolous pursuant to Wisconsin Statute 227.483. The City has consistently maintained that the complaint was frivolous within the meaning of Statute 227.483 because the only basis for the claim rests on the City Attorney's letters of June 10 & 17, 2008, and these letters were written in defense of the City's position in grievance litigation. Because the grievance sought to compel the City to hire unqualified individuals it was preposterous.

Management has the contractual right to establish minimum job requirements and the Union has not established any contractual language to the contrary. The WERC has repeatedly held that an individual has no right to a job for which he/she is not qualified. (Citations omitted.)

The fact that the Union and its attorney pursued a prohibited practice complaint after taking advantage of the Side Letter Agreement shows that the purpose of doing so was for harassment or for maliciously injuring the City or the City Attorney.

Because of the foregoing reasons the City is entitled to costs and expenses in the amount of $4,250.00 against AFSCME and its legal counsel. The complaint should be dismissed.

DISCUSSION

The issues in this case present the following three questions: whether the statements made by Clark in his capacity as City Attorney in letters dated June 10, 2008 and June 17, 2008 directly interfered with the employees' exercise of rights protected by MERA; whether those same letters discriminated against the employees' exercise of those rights; and whether the actions of Clark exceeded his authority as the City Attorney and thus support an independent claim against him under Sec. 111.70(3)(c). (The Examiner notes that the Complaint does not name Clark individually, however the Complainant does allege a violation of Sec. 111.70(3)(c)Stats. Both parties argued and briefed the issue, consequently the Examiner will address the allegation.)

1. Alleged independent interference violation of Section 111.70(3)(a)1, Stats. (Interference)

Section 111.70(3)(a)1 Stats. makes it a prohibited practice for a municipal employer "[t]o interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. 2." The rights identified in Sec. 111.70(2) are those which are "lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection**. . .**" (see CITY OF LACROSSE, DEC. NO. 17084-D (WERC, 1983). 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 were not in fact deterred from exercising Sec. 111.70(2) rights. JEFFERSON COUNTY, DEC. NO. 26845-B (WERC, 7/92), *aff'd* 187 Wis. 2D 647 (Ct. App. 1994), citing WERC V. EVANSVILLE, 69 Wis. 2D 140 (1975) and BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84).

Employer conduct which may well have a reasonable tendency to interfere with the employee's exercise of Sec. 111.70(2) rights will generally not be found to violate Sec. 111.70(3)(a)1, Stats. if the employer had a valid business reason for its actions. E.g. RACINE UNIFIED SCHOOL BOARD, DEC. NO. 29074-B (Gratz, 4/98); BROWN COUNTY, DEC. NO. 28158-F (WERC, 12/96); CITY OF OCONTO, DEC. NO. 28650-A (Crowley, 10/96), *aff'd by operation of law*, -B (11/96); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 27867-A (Burns, 7/93); *aff'd by operation of law* -B (WERC, 7/93); CITY OF MILWAUKEE, DEC. NO. 26728-A (Levitan, 11/91), *aff'd on rehearing*, - D (WERC, 9/22); CEDAR GROVE-BELGIUM SCHOOL DISTRICT, DEC. NO. 28549-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). In determining whether the employer had a valid business reason for its actions the Commission has historically employed a balancing test

weighing the rights of the employees and their representatives against the obligations and duties of the municipal employer. KENOSHA BOARD OF EDUCATION, DEC. NO. 6986-C (WERC, 2/66). The Commission has characterized this balancing test as "permitting an employer to 'interfere with its employee's lawful concerted activity to the extent justified by the [employer's] operational needs.'" STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, DEC. NO. 30340-B (WERC, 7/04), at 13. The balancing analysis must be applied on a case-by-case and issue-by-issue basis to determine whether, under any given set of circumstances, the municipal employer conduct involved interferes with or restrains employees in the exercise of their MERA rights.

Neither side argues or suggests that the act of signing a posting is not a lawful, concerted activity for the purpose of collective bargaining or other mutual aid or protection. Clark's statements were clearly such as would chill a reasonable person's future exercise of their rights in signing a posting or processing a grievance. The Respondent *seems* to argue that its right to vigorously defend against a grievance it believed to be without merit outweighs the employees' right to be afforded the protections of MERA and their right to engage in the lawful, concerted activity of signing postings and filing grievances. In other words, Respondent *seems* to argue that its letters of June 10 and June 17, 2008 constitute an 'operational need' sufficient to allow it to interfere with its employees' lawful concerted activity. The Examiner is not persuaded by this argument. The threats implicit in the June 10 and June 17 letters do not constitute an 'operational need' sufficient to allow it to interfere with its employees' lawful concerted activity. They only constitute intimidating threats of serious adverse employment or legal consequences as a result of having engaged in the lawful concerted activity of signing a posting and filing a grievance.

The Complainant has the burden of proving by a clear and satisfactory preponderance of the evidence that the statements made by the City's agents contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain, or coerce employees or that there was actual interference. BROWN COUNTY, DEC. NO. 17258-A (WERC, 8/80). It is not necessary to prove that Respondents intended to interfere with or coerce employees or that there was actual interference. CITY OF WAUKESHA, DEC. NO. 11486, (WERC, 12/26/72). Interference may be proved by a showing that the Respondent's conduct had a reasonable tendency to interfere with the employee's right to exercise MERA rights. CITY OF BROOKFIELD, *Id.* In each instance, the remarks as well as the circumstances under which they were made must be considered in order to determine the meaning which an employee would reasonably place on the statement. CITY OF LACROSSE, DEC. NO. 17084-C (WERC, 4/82). The same statement made in two different circumstances might be coercive in one and not the other. The statement must relate to the exercise of some MERA ritght otherwise it does not violate the provisions of MERA. CITY OF LACROSSE, DEC. NO. 17084-D (10/83). While a vigorous defense to grievances is not inherently illegal, the set of circumstances in this case makes it clear to the Examiner that those two letters, coming from a person in a position of legal authority, constituted an implicit threat of adverse action in the form of potential criminal prosecution and/or termination of employment and that the employees could reasonably have placed that meaning on them. There can also be no doubt

that these letters caused a chilling effect on other Union members who may have been considering signing a posting in the future. Having considered the remarks as well as the circumstances under which they were made the Examiner is convinced that Respondent's conduct had a reasonable tendency to interfere with the employees' exercise of MERA rights. Thus, the Complainant has proven by a clear and satisfactory preponderance of the evidence that the conduct of the employer in this instance, under these facts, when balanced against the rights of the employees to engage in lawful, concerted activity, had a reasonable tendency to interfere with the employees in the exercise of their MERA rights in violation of Sec. 111.70(3)(a)1, Stats.

The Respondent further argues that the letters of June 10, 2008 and June 17, 2008 represent nothing more than the zealous representation and defense against what were perceived by the City to be frivolous claims and that his written opinions as expressed in those letters, *having been made during the course of grievance litigation*, are "absolutely privileged." In support of this position Respondent cites the Wisconsin Supreme Court in SNOW V. KOEPPL, 159 Wis 2D 77, 464 N. W. 2d 215 (1990) as follows:

> "Statements made in the course of judicial proceedings are absolutely privileged and insulate the speaker from liability so long as the statements 'bear a proper relationship to the issues.'BERGMAN v. HUPY, 64 Wis. 2d 747, 750, 221 N.W. 2d 898, 900 (1974). The rule is traceable to earliest Wisconsin case law. JENNINGS v. PAINE, 4 Wis. 472 (1855). The rule extends to attorneys, witnesses and physicians appointed to examine a person in connection with judicial proceedings. See BROMUND v. HOLT, 24 Wis. 2d 336, 129 N.W. 2d 149 (1964). The Wisconsin rule is in harmony with the general rule throughout this country. BUSSEWITZ v. WISCONSIN TEACHERS' ASS'N, 188 Wis. 121, 124-25, 205 N.W. 808, 810 (1925). The determination whether the statements are pertinent and relevant to the issues is a question of law for the court and not a fact issue for the jury. *Id.* at 124, 205 N.W. at 810. When making this inquiry, all doubts should be resolved in favor of relevancy. *Id.* There is good reason for the rule:
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> If parties are shadowed by the fear that by some mistake as to facts or some excess of zeal, or by some error. . .they may be subjected to harassing litigation. . .they may well feel that justice is too dearly bought and that it is safest to abandon its pursuit. . .[F]eelings are often wounded and reputations are sometimes soiled. This is, of course to be regretted, but. . . '[The paramount public interest here intervenes and overrides considerations of mere private right as between the parties.' Citations omitted.

Respondent relies on SNOW V. KOEPPL, *Id.*, in support of its argument that its City Attorney's written opinions as expressed in the letters of June 10 and June 17, 2008 are "absolutely privileged" thus insulating the City and the City Attorney from liability thereby barring the complaint herein. Respondent's reliance on SNOW V. KOEPPL, *Id.* is misplaced. The

actions of the Respondent violated Sec. 111.70(3)(a)1, Stats. and, thus, are illegal. This Examiner is not aware of any legal authority, nor has the respondent provided any, which would insulate illegal acts from liability because of a 'privilege.'

Respondent next argues that the complaint is barred by the doctrine of accord and satisfaction because

> "The withdrawal of the grievance evidences an intent to treat the grievance as never having occurred. Logically, the City's response in the grievance litigation process is resolved as well." (See Respondent's Brief, p.3)

The City reasons that because the Side Letter Agreement in settlement of the grievance resolved all matters arising from the grievance, then it resolved the issues relating to any violations of Sec. 111.70, Stats. too. This is not true. The settlement agreement resolved only the issues relating to the grievance (i.e., the identity of the person/s to be selected for the Utility Operator I I position and under what circumstances he/she/they would be selected), not the issues flowing from the City's conduct relating to Clark's June 10 and June 17, 2008 letters. In essence, the Respondent argues that the Union has *waived* its right to rely on the protections afforded by Sec. 111.70, Stats. because of the execution of the grievance settlement set forth in Finding of Fact 17. The Commission has consistently stated that a waiver of a statutory right…must be established by "clear and unmistakable" contract language or bargaining history. CITY OF WAUWATOSA, DEC. NO. 19310-C, 19311-C, 19312-C, (WERC, 4/84). The grievance settlement fails to provide *any* reference to any statutory claim, let alone a "clear and unmistakable" waiver of any statutory right. The Examiner notes that the parties could have provided for such a waiver, but did not. The grievance is a contractual issue whereas the rights provided by MERA are statutory. The settlement or withdrawal of a grievance does not extinguish rights guaranteed under MERA absent a "clear and unmistakable" intent to do so.

2. Alleged violation of Sec. 111.70(3)(a)3 (Discrimination)

Section 111.70(3)(a)3, Stats., provides that it is a prohibited practice for a municipal employer to encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment. In order to prevail on this count, a complainant must prove that:

1. The employee was engaged in lawful and concerted activities protected by MERA; and

2 The employer had knowledge of those activities; and

3. The employer was hostile towards those activities; and

4. The employer's action was based, at least in part, on hostility towards those activities. MUSKEGO-NORWAY C.S.J.S.D., NO. 9 V. WERB, 35 Wis.2D 540, 562 (1967)

The third and fourth elements above, hostility and illegal motive, may be direct (overt statements of hostility) or, as is more often the case, inferred from the facts and circumstances of the case. TOWN OF MERCER, DEC. NO. 14783-A (Greco, 3/77). In the absence of direct evidence of hostility or illegal motive, the Examiner must consider the total circumstances surrounding the case. In order to support an allegation of a violation, these circumstances must be sufficient to give rise to an inference of pretext which is reasonably based upon established facts that can logically support such an inference. COOPERATIVE EDUCATION SERVICE AGENCY #4, ET AL., DEC. NO. 13100-E (Yaffe, 12/77), *aff'd,* DEC. NO. 13100-G (WERC, 5/79).

As to the fourth element, it is irrelevant that an employer has legitimate grounds for its actions if one of the motivating factors was hostility toward the employee's protected concerted activity. LACROSSE 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 action. MUSKEGO-NORWAY C.S.J.S.D., NO. 9 V. WERB, *Id.* While an employer's legitimate actions may properly be considered in fashioning a remedy, discrimination against an employee due to concerted activity will not be encouraged or tolerated. EMPLOYMENT RELATIONS DEPT. V. WERC, 122 Wis.2D 132, 141 (1985).

On the issue of concerted and protected activity, the Commission has explained:

> The MERA does not refer to "protected" activities. Sec. 111.70(2) of the MERA identifies certain rights of municipal employes (sic) which, broadly stated, are "to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection..." The rights thus identified are enforced by Secs. 111.70(3) and 111.70(4) of MERA. Protected activity is, then, a shorthand reference to those lawful and concerted acts identified and enforced by MERA. Thus, acts which are not lawful or not concerted within the meaning of Sec. 111.70(2) of MERA are not protected.
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> . . .
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> It is impossible to define "concerted" acts in the abstract. Analysis of what a concerted act is demands an examination of the facts of each case to determine whether employe (sic) behavior involved should be afforded the protection of Sec. 111.70(2) of MERA. At root, this determination demands an evaluation of whether the behavior involved manifests and furthers individual or collective concerns. CITY OF LACROSSE, *Id.*

Applying the above analysis to the total circumstances surrounding this case it is clear that the activities of Igo, Ledin and Deeth were collective and not just individual. They signed a posting in their attempt to further and improve their positions as employees of the City, activity which benefits all employees and falls squarely within the collective bargaining agreement. When their posting was rejected, the Union filed a grievance pursuant to the grievance procedure set forth in the collective bargaining agreement. When a grievance procedure is established by contract (as was the one in this case) the right to process grievances without coercion or interference along the way from an employer is a fundamental right included within the employees' right to representation. Threats made by the City Attorney on behalf of the City in the letters of June 10 and June17, 2008 make it clear that the City Attorney was motivated by the employees' attempts to enforce their contractual rights. In the event the City were allowed to continue on this course of conduct it certainly would discourage protected concerted activity. What is not clear on this record is that in making these threats the City Attorney, on behalf of the City, was motivated, in whole or in part, by his desire to retaliate against the employees for their legitimate concerted activity in posting for open positions or in processing grievances. In other words, it is not clear that Clark was motivated by hostility *toward the concerted activity*. The Examiner is convinced that Clark was angered, not by the fact that postings were signed or that grievances were pursued (the lawful concerted activities), but rather by the Union's suggestion that the City should hire unqualified applicants to the position of Utility Operator I I on the basis that a contractual time limit had been missed. The Examiner believes that Clark saw this grievance as an attempt to take advantage of a technical contractual violation which would result, absent a zealous defense of his client, in what he described as an "absurd result." His letters of June 10 and June 17, 2008 were certainly unconventional and overstated the motives of the employees involved. There were other more conventional (and legal) ways to deal with the problem. He could have gone to arbitration, for instance. Instead he fired back with both barrels and, in so doing, crossed the line between a zealous defense and a violation of law. Although Clark's assertions set forth in his June 10 and June 17, 2008 letters were uncalled for, the record as a whole convinces the Examiner that Clark's actions were not based, in whole or in part, on hostility toward the lawful concerted activities of Igo, Ledin and the Union. They do, however, bolster the finding of the Sec. 111.70(3)(a)1, Stats. violation.

Based upon the above analysis it is clear that the four elements of proof required to prevail on the allegation of a Sec. 111.70(3)(a)3, Stats. violation have not been shown. The Complainant has failed to prove the third element, that the employer was hostile towards the lawful concerted activities of Igo, Ledin and the Union, and the fourth element, that the employer's actions were based, at least in part, on hostility towards those activities by a clear and satisfactory preponderance of the evidence. It has thus failed to prove a violation of Sec. 111.70(3)(a)3, Stats. The Examiner questions whether Clark's letters constitute "action" as required by element four. Had the City formally charged Igo and Ledin with some sort of criminal violation relating to fraud or misrepresentation, or had it disciplined them for it, the Examiner believes this would have constituted "action" as envisioned by element four. The Examiner believes that the letters constitute the *threat* of action, not the action itself. In light of the above, however, I need not decide this issue.

3. Alleged violation of Sec. 111.70(3)(c)

In addition to the Sec. 111.70(3)(a)1 and 3 allegations, the Union has alleged that Clark should be held individually responsible under Sec. 111.70(3)(c) for his actions in writing the June 10 and June 17, 2008 letters. Sec. (3)(c) provides as follows:

> It is a prohibited practice for any person to do or cause to be done on behalf of or in the interest of municipal employers or municipal employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by para. (a) or (b).

The Commission has recently interpreted the analogous provision in the State Employment Relations Act (SELRA), Sec. 111.84(3), Stats., as "intended to reach individuals or entities who cause unfair labor practices but who are not within the reach of either subsection (1) as an employer or subsection (2) as an employee or a union." COUNCIL 24 AND STATE OF WISCONSIN, DEC. NO. 31397-C (WERC, 6/07), at 18. Subsections (1) and (2) of SELRA are analogous to Sections (3)(a) and (b) of MERA. The Examiner sees no reason to reach a different interpretation of MERA than the Commission has provided for SELRA's analogous language. Since Clark was acting within the scope of his authority as an agent of the City in taking the actions at issue here, and since the City is within the reach of Section (3)(a) of MERA, Clark is not subject to individual responsibility under Section (3)(c).

4. Respondent's petition for fees and costs

The Examiner has denied the Respondent's request for an order granting reasonable attorneys' fees and costs. Even if the Examiner had found that the allegations in the Complaint were frivolous, which he did not, the Commission as held repeatedly in recent years that it is without statutory authority to grant the relief the Respondents request in this case. E.g., MILWAUKEE AREA TECHNICAL COLLEGE, DEC. NO. 30254 (WERC, 1/4/02) at 4. ("We deny the Respondents' request for costs and attorneys' fees because we do not have the statutory authority to grant same in complaint proceedings to responding parties. STATE OF WISCONSIN, DEC. NO. 29177-C (WERC 5/99.")

Dated at Wausau, Wisconsin this 21st day of August, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steve Morrison /s/
Steve Morrison, Examiner

SM/gjc
32697-A