STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES AFSCME DISTRICT COUNCIL 40 AFSCME LOCAL 3024, Complainants,

v.

VILLAGE OF GERMANTOWN, Respondent.

Case 77
No. 69769
MP-4584

Decision No. 33034-A

Appearances:

Bruce Ehlke, 6502 Grand Teton Plaza, Suite 202, Madison, Wisconsin 53719, for the labor organization.

Kyle J. Gulya, Attorney at Law, Three South Pinckney Street, Suite 1000, Madison, Wisconsin 53703-4200, for the municipal employer.

ORDER GRANTING MOTION TO DISMISS IN PART AND DENYING MOTION TO DISMISS IN PART

On April 8, 2010, Wisconsin Council of County and Municipal Employees, AFSCME District Council 40 and AFSCME Local 3024 filed a Complaint with the Wisconsin Employment Relations Commission alleging that the Village of Germantown had committed prohibited practices within the meaning of Secs. 111.70 (3)(a) 1, 4 and 5, Wis. Stats., to wit: that the imposition of certain layoffs breached the collectively bargained agreement, in violation of Sec. 111.70(3)(a)5.; that the layoffs were imposed to retaliate against the union after it refused to reopen the collective bargaining agreement and agree to wage concessions, in violation of Sec. 111.70(3)(a)1; and that the employer refused to provide information necessary for the union to process a grievance and prepare for arbitration, in violation of Sec. 111.70(3)(a)4.

On May 12, 2010, Stuart D. Levitan, an Examiner on the Commission's staff authorized to make and issue Findings of Fact, Conclusions of Law and Order in the matter, issued a Notice of Hearing for June 15, 2010. On June 11, 2011, the parties agreed to defer the matter to grievance arbitration.

A grievance arbitration hearing before Atty. John R. Emery, a member of the commission's staff, was held on August 12, 2010. The parties submitted written arguments, the last of which was received on January 5, 2011. On April 5, Arbitrator Emery issued an Award in which he held that "the Village of Germantown did not violate the collective bargaining agreement by implementing layoffs for twelve days in 2010 for all bargaining unit personnel in the DPW Union and Technical/Clerical Union," and denied the grievance.

On August 25, the Village filed a Motion to Dismiss the prohibited practice complaint in its entirety for the reasons of issue preclusion (collateral estoppel) and claim preclusion (*res judicata)*. On September 12, the Union filed a written response, it which it agreed that the charge alleging a violation of Sec. 111.70(3)(a)5 should be dismissed, but held to the charges alleging a violation of Secs. 111.70(3)(a) 1 and 4. On September 26, the Union agreed to amend its complaint to eliminate the charge alleging a violation of Sec. 111.70(3)(a)4.

On the basis of the Complaint, the Emery Award, and the arguments of the parties, it is hereby

ORDERED

That the Motion to Dismiss the elements of the complaint alleging a violation of Secs. 111.70(3)(a)4 and 5, Wis. Stats., is GRANTED.

That the Motion to Dismiss the element of the complaint alleging a violation of Sec. 111.70(3)(a)1, Wis. Stats., is DENIED.

Dated at Madison, Wisconsin, this 28th day of September, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/
Stuart D. Levitan, Examiner

VILLAGE OF GERMANTOWN

**MEMORANDUM ACCOMPANYING ORDER
GRANTING MOTION TO DISMISS IN PART
AND DENYING MOTION TO DISMISS IN PART**

The union alleged that the employer committed several violations of MERA, to wit: that the imposition of certain layoffs breached the collectively bargained agreement, in violation of Sec. 111.70(3)(a) 5, Wis. Stats.; that the layoffs were imposed to retaliate against the union after it refused to reopen the collective bargaining agreement and agree to wage concessions, in violation of Sec. 111.70(3)(a)1; and that the employer refused to provide information necessary for the union to process a grievance and prepare for arbitration, in violation of Sec. 111.70(3)(a)4.

Pursuant to established practice, the complaint was deferred to grievance arbitration. Having prevailed in arbitration, the employer now seeks to have the complaint be dismissed in its entirety.

The union acknowledges that two elements to the complaint – charges that the employer violated the collective bargaining agreement (in violation of Sec. 111.70(3)(a)5.) and effectively engaged in a refusal to bargain by withholding necessary information (in violation of Sec. 111.70(3)(a)4.) – should be dismissed. Accordingly, I have granted the employer's motion to do so.

The employer contends the remaining charge, that it violated Sec. 111.70(3)(a)1 by retaliating against the members of the union for their refusal to reopen the collective bargaining agreement, should also be dismissed on the grounds of claims preclusion and issue preclusion. The union contends the arbitration award did not fully and completely address all the legal issues surrounding its complaint.

I agree with the union.

The Commission has held that, even when a complaint is filed under Sec. (3)(a)1, "the appropriate paradigm for cases involving retaliatory or discriminatory adverse action lies in the four-element framework of Section (3)(a)3." CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/2003). Under that well-established framework, a municipal employer violates Sec. 111.70(3)(a)3, Stats., where the complaining party establishes the following four elements: (1) that a municipal employee engaged in lawful concerted activity; (2) that the municipal employer, by its officers or agents, was aware of said activity; (3) that the municipal employer was hostile to the lawful concerted activity; and (4) that the municipal employer took

action against the municipal employee based at least in part upon such hostility. MUSKEGO-NORWAY C.S.J.S.D. NO. NO V. WERB, 35 Wis.2D 540 (1967); Employment Relations Dept. v. WERC, 122 WIS.2D 132 (Sup. Ct. 1985).

The employer is correct that the issue of animus was raised at arbitration, and that Arbitrator Emery did address it as follows:

> ...I do not find that the Village's action in this case was used for the purpose of undermining the Union or discriminating against its members, *as that language is used here*. To be sure, the members of these bargaining units were treated differently than the members of the other bargaining units, who were not laid off, but I do not find, based on this record, that the purpose of the layoffs was either to undermine the Union or discriminate against its members. (*emphasis* added; emphasis in original).

The phrase "as that language is used here" reminds us that the arbitrator was explicitly interpreting and applying language from the collective bargaining agreement, which is different from analyzing facts pursuant to Commission case law. Moreover, the conclusion that "the purpose" was not to undermine the Union or discriminate against its members does not necessarily preclude a determination that the employer based its action "at least in part" upon hostility to the unit members engaging in lawful concerted activity. Regarding the fourth element cited above, it is irrelevant that an employer has legitimate grounds for its action if one of the motivating factors was hostility toward the employee's protected concerted activity. LA CROSSE COUNTY (HILLVIEW NURSING HOME), DEC. NO. 14704-B (WERC, 7/78).

Accordingly, I have denied the employer's motion to dismiss the element to the complaint alleging a violation of Sec. 111.70(3)(a)1.

Dated at Madison, Wisconsin, this 28th day of September, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/
Stuart D. Levitan, Examiner

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