

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS, LOCAL 415 (WESTON), Complainant,**

vs.

VILLAGE OF WESTON, Respondent.

Case 31
No. 69462
MP-4562

Decision No. 33167-A

Appearances:

Law Office of John B. Kiel, LLC, by **Attorney John B. Kiel**, 3300 252nd Avenue, Salem, Wisconsin 53168, appearing on behalf of the Complainant.

Melli Law, S.C., by **Attorney Douglas E. Witte**, Ten East Doty Street, Suite 900, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the Respondent.

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

On January 8, 2010, International Association of Firefighters Local 415 (Weston), hereinafter the Complainant, filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against the Village of Weston (hereinafter the Respondent), alleging that the Respondent had committed violations of Sec. 111.70(3)(a)1, 3 and 4, Stats. arising out of an alleged unilateral decision by the Village Administrator to award paid time off to certain employees in recognition of their voluntary contributions to the annual Weston Fest festival in July 2009. On June 11, 2010, the Complainant filed an Amended Complaint, alleging, in addition to the aforementioned acts, that the Village engaged in retaliatory conduct against Union Officer Jason Russ, who had participated in filing the original complaint herein, by wrongfully disciplining him. On November 9, 2010, the Commission appointed John Emery, a member of its staff, as Examiner to issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07 and 111.70(4)(a), Stats. On November 19, 2010, the Village filed an Answer and Affirmative Defenses. Thereafter, a hearing was conducted in Weston, Wisconsin on November 29, 2010. The proceedings were

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transcribed and the transcript was filed on January 2, 2011. The parties filed initial briefs by February 15, 2011 and reply briefs by March 11, 2011, whereupon the record was closed.

The Examiner, having considered the evidence, the applicable law and the arguments of the parties and being advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. International Association of Firefighters, Local 415 (Weston), the Complainant herein, is a labor organization maintaining its principal place of business at 3300 252nd Avenue, Salem, Wisconsin

2. The Village of Weston, the Respondent herein, is a municipal employer maintaining its principal place of business at 5500 Schofield Avenue, Weston, Wisconsin.

3. The Complainant and Respondent are in a collective bargaining relationship and at the time of the events referenced herein were parties to their first collective bargaining agreement covering the period from December 16, 2008 through December 31, 2010.

4. The bargaining unit represented by Local 415 includes all regular full-time and all regular part-time Firefighters/EMTs employed by the Village, excluding confidential, supervisory, managerial and executive employees. There are two supervisory/managerial employees, eight bargaining unit employees, including two fair share employees of the Village Fire Department. Those two do not belong to the Union, but fair share costs are deducted from their wages. The Village also employs a number of paid-on-call Firefighters who are not members of the bargaining unit.

5. For the past several years, the Village has hosted a community event over a weekend during the summer known as Weston Fest, which involves a number of different activities. During the summer of 2009 Weston Fest occurred over the weekend of July 24-26. In past years, the event was sponsored by a local merchant, but in 2009 the Village was solely responsible for organizing and staffing the event.

6. Prior to the 2009 Weston Fest, Village Administrator Dean Zuleger sent out a request to all Village employees asking for volunteers to work at various of the Weston Fest events. Many employees responded to the request, including several Local 415 members and the fair share employees. The Firefighter personnel worked at the Weston Fest Pancake Breakfast, which took place on Saturday, July 25. Those employees participating were Kris Grod, Jason Russ, David Hunsicker, Rose Procknow, Denise Behm, Marty Christiansen and Evan McBain. Grod is a supervisory employee. Hunsicker and Christiansen are fair share employees. The others are members of Local 415.

7. On Monday, July 27, Zuleger sent an e-mail to several Village employees, as follows:

Dear Staff (or as I called you this weekend The Orange Army):

Words cannot express my love and appreciation for each of you – (and the others that do not have e-mails who will get letters this week), **for the time and effort you gave back to the community this past weekend. WESTONFEST is officially a hit because of you!**

We had several people tell us (who have festival experience) that this was one of the best run events that they have ever been involved with and that you could not tell it was our first time – **THE CREDIT GOES TO ALL OF YOU** – who took time from your family to serve other families in the community.

And while all of you provided significant help, I would like to give a personal thanks to **Scott Tatro** who really spent his whole weekend as our technical guru. Without him the vent [sic] would have had no power – you were invaluable. To **Valerie Parker/Rhonda & Marty Christiansen** who literally had to be told to go home – and who has [sic] line staff did a masterful job with their two events. To **Shawn and the Park Staff**, whose pride and enthusiasm for this type of programming really showed this weekend. To the **Street/Utility Crew** who took down and put up stages, fences, etc. with the utmost efficiency.

To **Missy and Hope**, who did everything they needed to do – and showed us how to have fun doing it. All of the posters worked and Missy, the Health Tent was a big hit!

So, in my appreciation, **I NEED ALL OF YOU WHO WORKED AT WESTONFEST** to find some time before now and the beginning of school year **to take a day on me** and spend some time with your family.

Once again, thanks for all that you did at WESTONFEST and more importantly all that you do for the Village each day. **YOU MAKE THIS A SPECIAL PLACE TO WORK AND LIVE.**

Dean A. Zuleger
Chief Operating Officer/Administrator
Village of Weston
715-241-2600 (direct)

“May it be said when the sun sets on your life, you made a difference”

Grod, Hunsicker, Christiansen and Behm were among the recipients of the e-mail. Russ, Procknow and McBain were not.

8. On or about September 10, 2009, Behm forwarded a copy of the e-mail to Russ, who was also a Union Steward and Executive Board member, to inquire as to how much time off she would receive.

9. On September 11, Russ sent an e-mail to Zuleger inquiring about the complimentary days off, as follows:

Administrator Zuleger,

It was brought to my attention that a few of our members have received a [sic] extra day off for working at Weston Fest. If you could please explain the criteria for receiving that extra day off. There were a few people that worked it and did not receive your e-mail noting this. Thanks for your time in this matter.

Thanks,

Jason Russ
Village of Weston
Firefighter/EMT
Union Steward Local 415

Zuleger responded, as follows:

Anyone that volunteered six hours or more of time in a [sic] honest effort. It was at my discretion.

Russ responded, as follows:

Is this to be paid out as 24 hour?

Zuleger responded again, as follows:

In Marty C's case it will be a 24 hour day as he easily put that much time in. Now go back to work.

Russ then forwarded the e-mail exchange to Local 415 President Ted Tautges.

10. On December 4, 2009, Tautges sent an e-mail to Zuleger, as follows:

Dean,

It has come to my attention that some Village employees may have been awarded time off for volunteering at Westontfest, including members of the Fire Department who work under the collective bargaining agreement. It is unclear,

however, if all of the employees who volunteered received time off and how much time each employee received if they received any time at all.

In an effort to clarify any misunderstanding, I am requesting that you provide the names of any Fire Department personnel that received compensatory time, the number of hours they volunteered, and the number of compensatory hours that were given to each employee. Please also include the same information if there are other instances where time off was awarded for volunteering at any similar events. This request only applies to those working under the collective bargaining agreement, whether or not they have joined the IAFF L-415. Any other information that you feel may be helpful would also be appreciated.

Thank you for your time and assistance in this matter.

Ted Tautges
President IAFF L-415

Zuleger responded to this request later on December 4, as follows:

NO

11. On December 5, 2009, Zuleger sent another e-mail to Tautges and Russ, as follows:

Ted & Jason:

I have reviewed your request with our labor attorney and staff attorney of the WERC on two fronts. First, was our granting of time off for those who volunteered to serve their community during Weston Fest a violation of the CBA with any of our unions. The answer is no – it is within our management rights to control such matters. Second, based on our records, it appears that we granted to at least three FTE fire department employees one day off for their unselfish effort to help during Weston Fest – Captain Kris Grod, Marty Christiansen and Dave Hunsicker – but the Village Clerk is still reviewing time sheets. We will try to have an accurate report by the December 14, 2009 [sic].

But it must be noted that ALL VILLAGE EMPLOYEES that unselfishly served the community were afforded an additional day off in our appreciation of their dedication to the community. It is the opinion of legal counsel that since this appreciation was extended to all those who helped (including represented, non-represented, and fair share members) that we acted fairly and without prejudice. More importantly all consulted, thought our reward in this matter was not only a good example of employee relations, but also...NICE!

I do want to thank you for bringing this matter to my attention, though, as I was able to ascertain that this issue has been one of contention within the firehouse and may have resulted in a violation of Article 14 of the CBA. I have asked Chief Meilahn to look [sic] into the matter and will act accordingly based on his finding.

I must end by saying that while I am disappointed that we are even addressing an effort that was meant to be a nicety, but not surprised. Maybe if some of your disgruntled members would have served during Weston Fest rather than grumbling and complaining they could have received the complimentary day off.

12. According to Village records, Marty Christiansen took his complimentary day off on December 21, 2009. It is unknown whether Grod or Hunsicker took a complimentary day off. Behm apparently did not take a day off. Zuleger retroactively approved Christiansen's day off without consulting the Union.

13. On January 8, 2010, the Union filed its initial complaint in this matter.

14. On April 7, 2010, Fire Chief Steve Meilahn received a phone call from Don Kimlicka, the Emergency Medical Services (EMS) Coordinator at St. Clare's Hospital in Weston complaining that on April 7, 2010 Jason Russ and On Call Firefighter/EMT Mike O'Rourke had been engaging in inappropriate behavior in the EMS report room at St. Clare's Hospital. He stated that Russ and O'Rourke had told him they had moved furniture and items around in the room and held a sign up to the surveillance camera saying "Where's Don?" According to Kimlicka, he had reported the matter to Dr. Steve Muhle, the EMS Medical Director, and both of them felt the behavior was unprofessional. Meilahn asked Kimlicka to put his complaint in writing and he would investigate further.

15. Subsequently, Kimlicka sent Meilahn a letter regarding the incident, as follows:

Re: Jason Russ/Mike O'Rourke
Camera incident

Date: April 7, 2010

Steve,

Per our conversation this letter is a follow-up regarding an incident on the above date. On April 7th around 1500 Jason and Mike came into my office stating "have you looked at the camera yet?" For reference SCH placed a camera in the EMS room to capture possible employee behavior that violates [sic] SCH policies and not for EMS services. Apparently some were aware of the camera including Jason and Mike.

I asked them what they did. They explained we held up a sign that apparently said “where’s Don” and moved items to be off camera. I notified them that I did not place the camera and I did not view it. I also mentioned that the individuals who are in control of the camera do not have a sense of humor regarding what they catch on it. At that point they both looked extremely surprised.

I then contacted Tim Grice, our Facilities Director whom [sic] would be viewing this. He mentioned he did see something but since it was an isolated incident he ignored it and unfortunately already erased the video. He did mention that we should follow-up with those individuals and the Weston Fire Department regarding unprofessional behavior.

Dr. Steve Muhle and I discussed this and although it does appear to be an isolated incident we would like to be certain it does not happen again. The individuals in question represent Weston Fire Department as professionals and thus behaviors should follow that level. We do not feel a reprimand is necessary, but the individuals should be advised that this behavior must not continue. Having fun from time to time is okay, but individuals must think of the consequences before embarking on it.

The interaction between SCH and Weston Fire Department has been fantastic and very professional; we do not feel that this incident has jeopardized this in any way.

If you have any further questions regarding this incident, please feel free to contact me.

16. Subsequent to receiving Kimlicka’s letter, Meilahn reviewed Russ’s personnel file and made attempts to speak with Dr. Muhle and Tom Grice, which were unsuccessful. He also received a communication from another Firefighter/EMT reporting that Russ had been bragging about the camera incident. Meilahn then made a tentative decision to issue a counseling letter to O’Rourke, which does not constitute discipline under the Village policies, and to issue a written reprimand to Russ. A written reprimand is the second step in the Village’s progressive discipline policy. He then met with Zuleger to discuss the incident and his proposed actions, with which Zuleger concurred. Meilahn then drafted a counseling letter for O’Rourke and a written reprimand for Russ.

17. On April 30 Meilahn and Captain Kris Grod met with Russ to discuss the camera incident and to issue his discipline. At that point, Russ asked for Union representation and the meeting ended.

18. Later on April 30, Meilahn and Grod met with O’Rourke to discuss the incident. O’Rourke admitted that the events had occurred and described it as something that he

and Russ had engaged in together. Meilahn then presented O'Rourke with the counseling letter and the meeting ended.

19. Sometime in early May, Meilahn and Grod again met with Russ and Union President Ted Tautges. At that time, Russ was again asked about the incident. Russ stated that he was not working on April 7 and it was then determined that the events had actually occurred on April 6. Russ denied any knowledge of the sign incident or of moving any furniture or other items, but stated he had held up a finger while on camera to indicate to O'Rourke that he would like a soda. Russ admitted that he and O'Rourke had met with Kimlicka on April 6, but that O'Rourke had brought up the camera incident and claimed to have engaged in the behavior in question. Meilahn told Russ he was uncertain how to address the issue, but that Zuleger had recommended a written reprimand because this was Russ' second offense. Thereupon, Meilahn presented Russ with the written reprimand, as follows:

April 30, 2010

To: Jason Russ, Firefighter/EMT
Weston Fire Department

From: Chief Steve Meilahn
Weston Fire Department

Re: Written Reprimand for Conduct at St. Clare's Hospital on April 7th, 2010. Article 14 – Employee Conduct; Boisterous or Disruptive Activity in the Workplace, Unprofessional Conduct at Outside Events Where the Employee is representing the Village of Weston.

Background

On April 7th 2010 at or about 3:00 p.m. while at St. Clare's Hospital in the Village of Weston and while representing the Village of Weston Fire Department you and EMT Mike O'Rourke engaged in activity described by St. Clare's administrative staff as unprofessional. This activity took place in the EMS report room at St. Clare's. The activity was described as holding up a sign that apparently said "where's Don" it also involved moving items around to be off camera. This activity was seen by Tim Grice, Facilities Director for St. Clare's, while he was viewing the video feed from a camera located in the EMS report room. Mr. Grice asked that the Weston Fire Department be made aware of this incident of unprofessional behavior.

As you are aware Don Kimlicka is familiar with this incident as is the Weston Fire Department's Medical Director, Dr. Muhle. All parties at St. Clare's are disappointed with the unprofessional behavior exhibited by you and EMT O'Rourke. Mr. Kimlicka has provided me with documentation concerning this incident.

Subsequent to the April 7th, 2010 incident I received an e-mail from Mr. Kimlicka dated April 19th, 2010. In this e-mail he describes behavior seen by St. Clare's Paramedic Tim Halverson in which you were carrying on about the camera issue the week previous to the April 19th e-mail. At that time, Mr. Halverson asked you "who told you to misbehave in front of the camera"? Again, this is behavior that does not paint our agency in a professional manner.

This is the second incident involving you and St. Clare's and other members of the Weston Fire Department in which you displayed unprofessional conduct. I refer you to the e-mail incident which took place on or about October 21, 2007.

Management Decision

Based on the information provided to me by Mr. Kimlicka I find that you are in violation of the Agreement Between Village of Weston And IAFF Local 415, specifically Article 14- Employee Conduct; Boisterous or Disruptive Activity in the Workplace, Unprofessional Conduct at Outside Events Where the Employee is representing the Village of Weston.

If like behavior is exhibited by you at any time within the next six (6) months it may result in up to 10 days off and/or termination.

20. In October 2007 Russ was involved in an incident wherein someone gained access to Russ's e-mail account and sent an obscene e-mail to Deb Martin, an EMT supervisor at St. Clare's Hospital in response to an e-mail she had sent to Russ. It was initially thought the perpetrator might be another member of the Weston Fire Department, but it was ultimately determined that the sender was Russ's 11 year old step-daughter. Russ was not disciplined for the incident, but was required by Zuleger to write letters of apology to Martin and the other members of the Fire Department under threat of possible discipline. Russ did write the letters as directed by Zuleger and Zuleger then indicated that the matter was closed.

21. The decision by the Village Administrator on July 27, 2009 to unilaterally grant some, but not all, bargaining unit employees a complimentary day off for volunteering to work at Weston Fest was not based upon hostility toward the Union, but did interfere with the employees' rights to bargain through representatives of their own choosing.

22. The decision by the Village Administrator on July 27, 2009 to unilaterally grant some, but not all, bargaining unit employees a complimentary day off for volunteering to work at Weston Fest also represented a unilateral change with regard to a mandatory subject of bargaining.

23. The Village Administrator's initial refusal to comply with Union President Ted Tautges' request for information about the granting of the complimentary time off on December 4, 2009, and his subsequent response on December 5, 2009, were based, in part, on hostility toward the Union.

24. The decision by the Village Administrator in December 2009 to unilaterally approve Marty Christiansen's use of a Weston Fest comp day interfered with the employees' rights to bargain through representatives of their own choosing.

25. The decision by the Village Administrator on July 27, 2009 to unilaterally approve Marty Christiansen's use of a Weston Fest comp day also represented a unilateral change with regard to a mandatory subject of bargaining.

26. The evidence is insufficient to establish that the issuance of the written reprimand to Russ on April 30, 2010 was based, in part, on hostility toward Russ' engagement in protected concerted activity.

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

CONCLUSIONS OF LAW

1. The Complainant, IAFF Local 415, is a labor organization within the meaning of Section 111.70(1)(h), MERA.

2. The Respondent, Village of Weston, is a municipal employer within the meaning of Section 111.70(1)(j), MERA.

3. The decision by the Village Administrator on July 27, 2009 to unilaterally grant some, but not all, bargaining unit employees a complimentary day off for volunteering to work at Weston Fest constituted a refusal to bargain with the Union over wages, hours and other conditions of employment, contrary to Sec. 111.70(3)(a)4, Stats.

4. The decision by the Village Administrator on July 27, 2009 to unilaterally grant some, but not all, bargaining unit employees a complimentary day off for volunteering to work at Weston Fest, which was forwarded to some, but not all, of the bargaining unit employees who worked at Weston Fest, was not based upon hostility toward the Union, or the employees' exercise of protected rights and did not violate Sec. 111.70(3)(a)3, Stats.

5. The decision by the Village Administrator on July 27, 2009 to unilaterally grant some, but not all, bargaining unit employees a complimentary day off for volunteering to work at Weston Fest, which was forwarded to some, but not all, of the bargaining unit employees who worked at Weston Fest, interfered with, restrained, or coerced the employees in the exercise of rights guaranteed in Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

6. The Village Administrator's initial refusal to comply with Union President Ted Tautges' request for information about the granting of the complimentary time off on December 4, 2009, and his subsequent response on December 5, 2009, constituted refusals to

bargain with the Union over wages, hours and conditions of employment contrary to Sec. 111.70(3)(a)4, Stats. and further interfered with, restrained, or coerced the members in the exercise of rights guaranteed in Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

7 The Village Administrator's subsequent response to Tautges and Jason Russ on December 5, 2009, wherein he indicated he had directed to Fire Chief to investigate bargaining unit members for violations of the contract for purposes of potential discipline, had a reasonable tendency to interfere with, coerce or restrain Tautges, Russ and the other Union members in the exercise of their protected rights, contrary to Sec. 111.70(3)(a)1, Stats. and further interfered with, restrained, or coerced the members in the exercise of rights guaranteed in Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

8. The Village Administrator's subsequent response to Tautges and Jason Russ on December 5, 2009, wherein he indicated he had directed to Fire Chief to investigate bargaining unit members for violations of the contract for purposes of potential discipline was based, in part, on hostility toward Union members' protected concerted activity, contrary to Sec. 111.70(3)(a)3, Stats.

9. The Village Administrator's decision to retroactively approve Christiansen's use of a Weston Fest day on December 21, 2009 constituted a refusal to bargain with the Union over wages, hours and other conditions of employment, contrary to Sec. 111.70(3)(a)4, Stats.

10. The discipline issued to Jason Russ on April 30, 2010 was not based on hostility toward Russ's protected concerted activity and did not violate Sec. 111.70(3)(a)3, Stats.

Based upon the foregoing Findings of Fact and Conclusion of Law, the Examiner herewith makes and issues the following

ORDER

As and for a remedy for the violations of statute noted in Conclusions of Law 3, 5, 6, 7, 8 and 9 above, the Village of Weston, its officers and agents, shall immediately take the following actions:

- 1) Cease and desist from refusing to negotiate with Local 415 over wages, hours and other conditions of employment and from individually bargaining with Local 415 members.
- 2) Post the notice attached hereto as "Appendix A" in conspicuous places in the Village's buildings where notices of Local 415 are posted. The Notice shall be signed by a representative of the Village 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.

- 3) Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

Dated at Fond du Lac, Wisconsin, this 19th day of May, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner

APPENDIX "A"

**NOTICE TO EMPLOYEES REPRESENTED BY INTERNATIONAL ASSOCIATION
OF FIRE FIGHTERS, LOCAL 415**

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 you that:

WE WILL NOT violate Section 111.70(3)(a)4 of the Municipal Employment Relations Act by refusing to bargain with Local 415 over wages, hours and other conditions of employment, or by individually bargaining with employees represented by Local 415.

WE WILL NOT violate Section 111.70(3)(a)4 of the Municipal Employment Relations Act by refusing to provide information requested by Local 415 that is relevant to its role as the exclusive collective bargaining representative.

WE WILL NOT violate Section 111.70(3)(a)3 of the Municipal Employment Relations Act by discriminating against Local 415 or its members in regard to hiring, tenure, or other terms or conditions of employment..." for engaging in protected concerted activity.

WE WILL NOT violate Section 111.70(3)(a)1 of the Municipal Employment Relations Act by interfering with the right of employees represented by Local 415 to bargain through representatives of their choosing by bargaining individually with unit employees or by treating fair share members more favorably than Local 415 members.

Dated this ____ day of _____, 2011

VILLAGE OF WESTON

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

BACKGROUND

IAFF Local 415 is a labor organization representing several Firefighter bargaining units in municipalities in north central Wisconsin. In 2008, the employees of the Village of Weston Fire Department organized for purposes of collective bargaining over wages, hours and conditions of employment and Local 415 was recognized as the exclusive representative of the bargaining unit, exclusive of managerial, supervisory, confidential and executive employees. The Department has ten employees, two who are supervisory employees and eight who are bargaining unit members. Two of the bargaining unit members are fair share members, who do not have voting rights in the unit, but who pay fair share contributions to support the Union's bargaining activities on their behalf. The Department also employs a number of paid-on-call Firefighters who are not members of the bargaining unit. Firefighter Ted Tautges serves as the President of the bargaining unit and Firefighter Jason Russ is a Union Steward and member of the Executive Committee.

For a number of years, the Village has held an annual community event over a weekend in the summer known as Weston Fest, which features a number of different activities for community members to participate in. Prior to 2009, the primary sponsor of the event was a local business, but in 2009 the business owner announced he could not sponsor the event any longer, at which point the Village took over primary sponsorship. In 2009, Weston Fest was held over the weekend of July 24-26. In order to adequately staff the various events, Village Administrator Dean Zuleger asked Village employees to volunteer to serve in various capacities. The employees of the Fire Department were primarily responsible for staffing a Weston Fest Pancake Breakfast on Saturday, July 25. Department members who volunteered to work at the breakfast included Kris Grod, Marty Christiansen, Dave Hunsicker, Denise Behm, Rose Procknow and Evan McBain. Russ was also at the Pancake Breakfast, but was on duty at the time. Grod is a supervisory employee and Christiansen and Hunsicker are fair share members of the bargaining unit. Behm, Procknow and McBain are regular members of the bargaining unit.

Subsequent to Weston Fest, Zuleger decided to reward Village employees who had volunteered time at Weston Fest with a complimentary paid day off. Accordingly, he sent an e-mail out on July 27 to select employees informing them that they were eligible for a paid day off, to be used before the beginning of the 2009-10 school year. Zuleger did not bargain with Local 415 over the proposed day off, or otherwise inform the Local leadership of his decision beforehand. Grod, Christiansen, Hunsicker and Behm received the e-mail; Procknow, McBain and Russ did not.

In early September 2009, Behm contacted Russ to inquire as to how many hours of leave she would receive for her participation at Weston Fest. This was the first Russ had heard of Zuleger's offer. Russ e-mailed Zuleger on September 11, 2009 to inquire as to the criteria for awarding the time off. Zuleger replied that, in his discretion, any employee who volunteered six hours received the day off, and that, in Christiansen's case, it would be a twenty-four hour day due to the amount of time he put in. He then instructed Russ to, in effect, stop making inquiries and go back to work. Russ reported the exchange to Ted Tautges, who determined to investigate further. On December 4, 2009, Tautges e-mailed Zuleger to request specific information about the identities of employees receiving time off, the numbers of hours they worked and the amount of paid time off they received. He also asked for information about any past instances where time off was awarded under similar circumstances. Later that day, Zuleger replied, refusing to provide the information. The next day, after consulting with counsel and a WERC staff member, Zuleger e-mailed Tautges and Russ with some of the information, but took umbrage at the Union's concerns over the matter. In his e-mail, he made critical remarks about Union members who complained about not receiving the time off and indicated that he was directing the Fire Chief to conduct an investigation into to whether their actions constituted violations of the labor agreement for which they might be disciplined.

On December 21, 2009, Marty Christiansen took a paid day off designated as a "Weston Fest" day. Subsequently, when Zuleger learned of it he met with Christiansen and his wife to ask why he took the day so late when Zuleger's directive on July 27 had indicated that the day was to have been taken before the beginning of the school year. Christiansen stated he had not been able to take the day earlier and Zuleger agreed to grant the day off. Zuleger did not negotiate with the Union or otherwise inform its leadership about Christiansen's day off. On January 8, 2010, the Union filed its initial complaint, alleging that Zuleger had committed prohibited labor practices by unilaterally awarding the Weston Fest days off to selected employees without negotiating with the Union, by refusing to provide information about the matter to Tautges when initially requested and by making threatening and disparaging remarks about bargaining unit members who had complained about his actions.

On April 7, 2010, Fire Chief Steve Meilahn was contacted by Don Kimlicka, Director of Emergency Medical Services (EMS) at St. Clare's Hospital in Weston, with a complaint about Russ and paid-on-call Firefighter Mike O'Rourke. According to Kimlicka, Russ and O'Rourke had come to his office and asked him if he had seen a sign they held up to the surveillance camera in the EMS Report room at St. Clare's saying "where's Don?" He claimed they also had moved items and furniture in the room around so they would not appear on the camera. Kimlicka told them he had not seen the surveillance tape, but told Russ and O'Rourke that the security personnel at St. Clare's would not be amused and that they should not do such things in the future. Kimlicka stated that he had spoken with Facilities Director Tom Grice, who stated he had seen something on the tape, but that it had been erased. Kimlicka stated that he and the EMS Medical Director, Dr. Steve Muhle, did not feel discipline was necessary, but did want to make sure the incident would not be repeated. Meilahn did not speak directly with Grice or Muhle about the incident, nor did he personally view the video tape.

Subsequent to receiving Kimlicka's complaint, Meilahn met with Zuleger to discuss how to handle the situation. They agreed that O'Rourke should receive counseling, which is a non-disciplinary action, but that Russ should receive a written reprimand, which is the second step in the Village's disciplinary progression after an oral reprimand. The rationale for issuing discipline to Russ, but not O'Rourke, was that Russ had been involved in an incident in 2007 wherein Russ' 11 year old step-daughter had gained access to his e-mail account and sent an obscene email to an employee at St. Clare's Hospital. This incident occurred before the bargaining unit was created, so Russ was a non-represented employee at the time. Further, Russ was not formally disciplined, but was required by Zuleger to write letters of apology to all concerned. Nevertheless, Zuleger and Meilahn felt the prior incident raised Russ' misconduct to a higher level, justifying discipline. Thereafter, Meilahn prepared a counseling letter for O'Rourke and a written reprimand for Russ.

On April 30, 2010, Meilahn arranged to meet with Russ and O'Rourke separately to deliver the letters. He met with Russ first and when Russ understood that the purpose of the meeting was disciplinary he asked for Union representation, whereupon the meeting ended. Meilahn then met with O'Rourke and gave him the counseling letter. During the meeting, O'Rourke discussed the incident in terms that led Meilahn to believe that Russ and O'Rourke had acted together. Meilahn met again with Russ, along with Ted Tautges, in early May, at which time he discussed the incident with Russ and Tautges. There was initial confusion because Russ had not been working on the day Kimlicka had indicated the incident occurred. It was then determined that the day in question was not April 7, but April 6, when Russ had been working. Russ, however, denied having any hand in the actions in the EMS Report Room that day. Nevertheless, Meilahn issued the written reprimand to him at the end of the meeting.

PARTIES' POSITIONS

Complainant

The Union asserts that the Village engaged in individual bargaining with Fire Department employees when Zuleger offered employees the complimentary day off in recognition of their voluntary service at Weston Fest without negotiating the issue with Local 415, in violation of Secs. 111.70(3)(a)4 and 1, Stats. The Village committed another violation when it retroactively approved a Weston Fest day for fair share member Marty Christiansen in December 2009. The Union further asserts that the approval of the paid leave day for Christiansen constituted preferential treatment for fair share members over against regular members of the bargaining unit. These acts interfered with members' rights "to bargain collectively through representatives of their own choosing..." contrary to Sec. 111.70(2), Stats. and thus violated Secs. 111.70(3)(a)4 and 1.

The Union also asserts that the Village unlawfully interfered with the protected concerted activities of Local 415, in violation of Sec. 111.70(3)(a)4 when Zuleger, on December 4, 2009, initially refused to comply with Tautges' request for information about the granting of time off for Weston Fest. The Union notes that this refusal lasted only for a day,

but maintains that this action interfered with the Local's entitlement to the information and, thus violated Secs. 111.70(3)(a)4 and, derivatively, Secs. 111.70(3)(a)1.

The Union further argues that the Village violated Secs. 111.70(3)(a)3, Stats. by acting to "discourage membership in a labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment." In this regard, the Union points out that numerous WERC decisions hold that a finding of hostility and improper motive may be based either on direct evidence or inferred from the surrounding circumstances.

The Union notes that the investigation by Local 415, and Jason Russ, of the Weston Fest incident were a proper exercise of protected concerted activity. The e-mails between Zuleger and the Local 415 leadership establish the Village's knowledge of his activity. The Village was also aware that Local 415 had filed its initial complaint in January 2010. The evidence shows that the Village was hostile to this activity. In his response to Russ' initial inquiry on September 11, 2009, Zuleger closed by saying, "Now get back to work." On December 4, 2009, Zuleger responded to Tautges' e-mail inquiry with an abrupt, "NO." On December 5, Zuleger responded again by threatening Local 415 members with an investigation and possible discipline and closed by saying, "I must end by saying that while I am disappointed that we are even addressing an effort that was meant to be a nicety, but not surprised. Maybe if some of your disgruntled members would have served during Weston Fest rather than grumbling and complaining they could have received the complimentary day off."

The Union asserts that the written reprimand issued to Russ on April 30, 2010 was based on its hostility toward, and in retaliation for, his protected concerted activity in pursuing the Weston Fest issue. First, unlike past instances of discipline raised by the Village, no investigatory interview was conducted with Russ prior to issuing the discipline. In fact, Chief Meilahn and Zuleger predetermined to discipline Russ based solely on the complaint from Don Kimlicka without giving Russ an opportunity to review and respond to the charges and Meilahn had drafted the letter of discipline before he ever met with Russ. The meeting was, therefore, pretextual, and was only intended to give Russ the discipline, not to determine his version of the facts. Had he done so, Meilahn would have learned that Russ was not involved in the incident at the hospital and never admitted involvement in such to Kimlicka. The Village, through Chief Meilahn, also attempted to claim that the EMS Medical Director, Dr. Muhle, was angry about the incident, but there is no evidence that Dr. Muhle saw the video tape of the incident, nor did Meilahn ever speak directly to him about it. The Village claims that the more severe action taken against Russ was based on previous discipline in October 2007, but the record reveals that Russ was not disciplined at that time. Thus, O'Rourke, who admitted being involved in the video tape incident, received a counseling letter, whereas Russ, who denied being involved, got a written reprimand. The only possible conclusion is that Russ was treated differently than O'Rourke due to his protected concerted activity.

The Union maintains that the Village also violated Secs. 111.70(3)(a)3 and 1 when it engaged in disparate treatment between fair share members and regular members. When Zuleger decided to award time off for volunteering at Weston Fest he selectively offered the

time off to fair share members and the award of time off was limited to fair share members. When Zuleger sent out his July 27 e-mail offering the complimentary days off, the e-mails went to supervisor Kris Grod, fair share members Marty Christiansen and Dave Hunsicker and regular member Denise Behm. Regular members Rose Procknow, Evan McBain and Jason Russ did not receive the e-mail, although they volunteered at Weston Fest, nor did Chief Meilahn, who was aware of the offer, inform them of it. Christiansen used the day off, but it is unclear whether Grod or Hunsicker did so; Behm did not. This disparate treatment not only discriminated against regular members due to the Village's hostility toward their protected concerted activity, but interfered with them in the exercise of their protected rights.

Respondent

The Village concedes that it inadvertently failed to bargain with Local 415 before offering the complimentary Weston Fest days. It was a spontaneous gesture by Dean Zuleger and the Village President to show appreciation to employees who had worked to make Weston Fest a success. Zuleger offered the paid leave to all employees who worked, regardless of affiliation, and did not bargain with any of the Unions representing Village employees. There was no evil intent and the Village will post a notice admitting a violation of the duty to bargain.

There was no discrimination in the way the Village offered the complimentary days off. Zuleger's offer applied to all employees who worked at Weston Fest. His e-mail was sent to numerous employees who Zuleger saw working and all Department heads, so that all eligible employees would be notified. Half the members of the Fire Department were notified directly. The other half likely learned of the offer through the grapevine. Even if all employees did not learn of it, however, that does not equate to discrimination. The only evidence of an employee not being aware was the testimony of Jason Russ, who learned of it from Denise Behm in early September. Zuleger was never asked by an employee for a day off and never denied a day off. The only person who apparently took a day off was Marty Christiansen. It is unknown why other employees did not take the complimentary day off.

The Village contends that it did not refuse or fail to provide requested information about Weston Fest. The only request made was by Tautges on December 4. Zuleger initially responded "no" because he was out of the office. The next day he provided the requested information, which he supplemented later in a conversation with Tautges. A response to a request for information within a day of the request does not constitute a wrongful failure to provide information.

The Village also disputes that the discipline of Jason Russ was in retaliation for his engaging in protected concerted activity. Russ and Mike O'Rourke were disciplined based on information the Village received about their horseplay at St. Clare's Hospital. The decision had nothing to do with Russ' position as a Union Steward. The Village has disciplined employees, before and after Weston Fest, for a variety of reasons, and has disciplined fair share member Dave Hunsicker twice, which undercuts the argument of anti-union bias. The Village believed

Russ had committed the misconduct based on credible evidence offered by a disinterested party, Don Kimlicka. Further, Russ bragged about his actions to another person, who reported it. Russ' denials that he was involved were not credible. He did not refute the information in the discipline letter in his second meeting with Chief Meilahn and did not grieve the discipline, so it appears he had no valid defense to the charge.

The Union may argue that Zuleger was motivated by a retaliatory motive in disciplining Russ, but the discipline decision was ultimately left up to the Chief. There is no allegation that the Chief operated out of an improper motive. Moreover, the Village had no knowledge that Russ was involved in filing the complaint. The Union may also argue that the discipline was too severe, because O'Rourke was only counseled, but Russ received a written reprimand. The difference, however, is that Russ had received prior discipline in 2007, at a time before the collective bargaining agreement was in place. The Union may also contend that the investigation was inadequate. The record shows, however, that the Chief spoke with Kimlicka, read his report and attempted to view the videotape and speak with the Facilities Director who did view the tape. He had no reason to doubt the truth of the allegations. It was not unusual for the Chief to write up discipline notices before meeting with the employees and he testified that, had the meetings revealed information that changed his mind, he would have altered the discipline. He was properly disciplined for misconduct and his status as a Union Steward was irrelevant.

Complainant Reply

The Union asserts that the Village's justification for disciplining Russ does not stand up to scrutiny. It took Kimlicka's word that Russ had engaged in horseplay without conducting any more objective inquiry. It states that the discipline was justified, not by the fact that Russ had engaged in improper behavior, but on its belief that he had, based solely on Kimlicka's report. It did not, however, take Kimlicka's recommendation that no discipline was necessary. The reason is because the Village had predetermined to discipline Russ based on its hostility toward his protected concerted activity. Further, since Kimlicka's report was based on multiple levels of hearsay, it is clear the Village did not conduct an objective, non-discriminatory investigation. Russ' version of events, that he was not present at the time the horseplay occurred, is more credible, which the Village would have discovered had it conducted a thorough investigation. The Village did not conduct such an investigation because it had predetermined to discipline Russ based on its hostility to his protected concerted activity. Further, the Village's claim that it did not know Russ was involved in the filing of the complaint has no merit. Russ was involved in the investigation of the Weston Fest event and exchanged e-mails with Zuleger about it. He is also identified in the complaint itself as a member of the bargaining unit and was known to be a member of its executive board.

The Union further asserts that the Village's claim that its failure to bargain was inadvertent is disingenuous. The Village was aware of its duty to bargain with Local 415. This is set forth in the recognition clause of the contract. Zuleger told Russ that the complimentary days off were offered in his discretion, that he did not need to bargain with the Union. When

Tautges requested information about the matter from Zuleger, Zuleger peremptorily responded, "NO." The following day, Zuleger responded further to Tautges and stated that the granting of the time off was a matter of management rights. The Village's action was not inadvertent, but was intentional and persistent

The Village also treated non-bargaining unit members more favorably than bargaining unit members. Zuleger's July 27 e-mail was sent to five of the ten bargaining unit members. Two of the five were the Chief and Captain Kris Grod, supervisory employees. Two were fair share members. Only one was a regular bargaining unit member. Local 415 leadership was not informed, nor were bargaining unit members Rose Procknow and Evan McBain, who volunteered at Weston Fest. Moreover, it appears from the Village records that the only employees who actually received time off were Captain Grod and the two fair share employees. It should also be noted that Zuleger specified that the time off should be used before the school year began, but that he nevertheless approved a day off for fair share employee Marty Christiansen in late December, a further example of discrimination in favor of the fair share employees. Finally, the Village's hostility toward regular members is shown by Zuleger's negative references to bargaining unit employees in his December 5 e-mail to Tautges and Russ.

Respondent Reply

The Village contends that it only engaged in one instance of failure to bargain, when Zuleger initially offered the complimentary day off. The Union attempts to claim there was individual bargaining with Marty Christiansen by approving his taking a Weston Fest day in December, but that ignores the record. The Village was unaware that Christiansen had taken the day off until after the fact. The day was approved after the fact because the Village did not think it was proper to revoke the offer. This does not create a separate, distinct violation.

The Village reasserts that it did not selectively offer Weston Fest days only to fair share members. Zuleger's e-mail was sent to dozens of employees, including all Department heads. The only Fire Department employee who is known to have volunteered for Weston Fest who did not receive the e-mail was Rose Procknow. Further, it is likely that the other employees all found out about the offer through the grapevine. There is also no evidence that the Village limited the taking of the days off or ever denied a request to do so. The record is clear that Marty Christiansen is the only Fire Department employee who actually took a day off. There was no effort to exclude anyone, but the offer was only intended for those employees who had volunteered as a way of showing appreciation.

The Village also reasserts that it did not refuse to provide requested information. The Village provided the information within a day of Tautges's request, after Zuleger initially said no. The Village is unaware of any case wherein a twenty-four hour turnaround of a request for information was required. There was no urgency to the request, yet Zuleger responded within twenty-four hours and supplemented the request with further information within two weeks.

Finally, the Village properly disciplined Jason Russ and was not retaliating for his union activities. The Village was unaware that Russ was involved in filing the complaint and Zuleger had been involved with Tautges in responding to the request for information. Further, the Village did not rush to judgment, but waited for over three weeks after the horseplay incident to discipline Russ, which would be unexpected if disciplining him was the goal. The Village had credible evidence from Kimlicka about the incident and it was backed up by the report from Ted Halverson that Russ had been bragging about the incident. There had been numerous incidents between the hospital and Village employees and the Village was trying to maintain a positive relationship, so it felt discipline of the employees involved was necessary. Russ, as the regular Firefighter, was deemed to deserve greater discipline than the paid on call Firefighter. The Union attempts to raise a number of points that it claims show anti-union animus, but these are red herrings. There was no anti-union animus. Zuleger offered the day off as an attempt to be nice. He initially said no to Tautges' request for information because he was away from his office. He probably told Russ to "go back to work" because Russ had gone outside the chain of command in making his request, which should have gone to Grod. Zuleger's comment about disgruntled employees was an honest observation and his comment that the Chief would be investigating potential conduct code violations was appropriate to raise with the Union leadership, and Russ in particular, to remind Russ that there is a Code of Conduct, in light of Russ' own incident in 2007 wherein he wrongly accused fellow firefighters of hacking into his e-mail account without conducting a proper investigation. Finally, the Village was trying to maintain a positive business relationship with the hospital. Russ was disciplined because his misbehavior jeopardized that relationship, not because of his protected concerted activity.

DISCUSSION

Legal Framework

The Union has alleged that the Village has committed prohibited practices in violation of Secs. 111.70(3)1, 3 and 4, Wis. Stats. With respect to establishing such claims, the Wisconsin Supreme Court has held that it is the Complainant's burden to establish the elements of its claims by a clear and satisfactory preponderance of the evidence. *LAYTON SCHOOL OF ART AND DESIGN V. WERC*, 82 WIS. 2D 324 (1978).

Sec. 111.70(3)(a)1 makes it a prohibited practice for a municipal employer "to interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2)." The rights guaranteed under sub. (2) include: "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..." It has been held that "(i)n order to prevail upon the allegation that an employer has violated Sec. 111.70(3)(a)1, Stats., the complaining party must demonstrate, by a clear and satisfactory preponderance of the evidence, that an employer has engaged in conduct which has a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Sec. 111.70(2) rights. A

violation may be found where the employer did not intend to interfere and an employee did not feel coerced or was not, in fact, deterred from exercising Sec. 111.70(2) rights. A finding of anti-union animus or motivation is not necessary to establish a violation of Sec. 111.70(3)(a)1. ”ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-B (Burns, 1/93), citing CITY OF EVANSVILLE, DEC. NO. 9440-C (WERC, 3/71); BEAVER DAM UNIFIED SCHOOL DISTRICT, 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

Sec. 111.70(3)(a)3 makes it a prohibited practice “to encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment...” With respect to establishing a claim under Sec. 111.70(3)(a)3, Examiner Marshall Gratz stated in SCHOOL DISTRICT OF MARINETTE, DEC. NO. 31330-A (12/05); AFF'D BY OPERATION OF LAW, DEC. NO. 31330-B (WERC, 1/06): Sec. 111.70(3)(b)3, as follows:

. . . 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. WERB, 35 Wis.2d 540 (1967 and Employment Relations Department v. WERC, 122 Wis.2d 132 (1985).

Sec. 111.70(3)(a)4 makes it a prohibited practice for an employer to, among other things, “refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit.” Among other things, refusal to bargain has been held to include individual bargaining with employees, instead of the exclusive representative, over wages, hours and other conditions of employment. It has also been held to include refusal to provide the exclusive representative with information which is relevant and reasonably necessary to administering the terms of a collective bargaining agreement. GREENFIELD SCHOOLS, DEC. NO. 14026-B (WERC, 11/77); MILWAUKEE COUNTY, DEC. NO. 33001-C (Houlihan, 2/10)

The Merits

The amended complaint alleges that the Village violated Sec. 111.70(3)(a)4, Stats. when, on July 27, 2009, Village Administrator Dean Zuleger initially notified bargaining unit members, without first consulting the Union, that he was awarding them a complimentary day off for their voluntary participation in Weston Fest. Additionally, the Union contends that the Village committed further violations when Zuleger initially denied Union President Ted Tautges' request for information about the Weston Fest days on December 4, 2009, and when

Zuleger, again without consulting the Union, retroactively approved the use of a Weston Fest day by fair share member Marty Christiansen on December 19, 2009. The Union asserts that these acts also constituted a derivative violation of Sec. 111.70(3)(a)1, Stats., in that it interfered with bargaining unit members' right to bargain through representatives of their own choosing.

The Union also alleges that the Village violated Sec. 111.70(3)(a)3, and derivatively Sec. 111.70(3)(a)1, Stats. by retaliatory conduct for members' exercise of protected rights, based on hostility toward that activity and anti-union animus, evidenced by Zuleger's disparaging comments and threat of potential discipline contained in his December 5, 2009 e-mail to Tautges and Jason Russ. It further asserts that the discipline issued to Russ on April 30, 2010 was also based on hostility toward Russ' protected concerted activity, contrary to Sec. 111.70(3)(a)1 and 3, Stats. The allegations will be dealt with herein in turn.

Sec. 111.70(3)(a)4 allegations

It is undisputed that Zuleger's decision to offer the complimentary Weston Fest days was unilateral and that he did not consult or otherwise negotiate the matter with the Union beforehand. There is also no question that the offer of a complimentary day off is a subject involving wages, hours and conditions of employment. Zuleger initially insisted in his initial e-mail to Russ in September 2009 that the decision was made within his discretion as Village Administrator. In his December 5 e-mail to Tautges and Russ, he continued to assert that the decision was permissible within the Village's management rights and even asserted that his opinion was based upon the advice of counsel and a staff member of the WERC. In the Village's brief, however, it concedes that Zuleger's actions were technically violative of Sec. 111.70(3)(a)4, albeit innocently done. Hostility, or anti-union animus is not a necessary element to finding a violation of Sec. 111.70(3)(a)4, however, and I find that Zuleger's unilateral action did violate the Statute. Likewise, Zuleger's decision to retroactively approve Christiansen's Weston Fest day was made without first negotiating with the Union. This action constituted a form of individual bargaining with a bargaining unit member over an issue relating to wages, hours and other conditions of employment, which is also a violation of Sec. 111.70(3)(a)4. The Village explains that it does not consider the action to be a violation because it was retroactive and because it felt it was improper to withdraw the day off after it had been offered. In any event, this was a proper subject of negotiation over a mandatory subject of bargaining and, by dealing directly with Christiansen rather than the Union, the Village did violate the Statute.

The Union also alleges that Zuleger's initial e-mail to Tautges on December 4, 2009, wherein he refused Tautges' request for information about the Weston Fest days constituted a refusal to bargain. Zuleger testified that Tautges' e-mail was received, and his reply was sent, while he was at a meeting away from his office. His response thus may have reflected the fact that he was 1) otherwise engaged at the moment and 2) away from his office and not able to access the information requested. His initial response, however, was a terse "no," without further explanation, leaving his intended meaning open to question. The next day he sent a

more detailed response which identified the employees who were offered time off. It did not, however, address other questions raised in Tautges' e-mail, such as how many hours the employees volunteered, the number of hours of time off each received and whether there had been other instances in the past where employees were offered time off for voluntary service to the community. This was all information to which the Union was entitled in order to evaluate the Weston Fest incident, but it appears that Zuleger did not feel that he was obligated to provide it. Again, the e-mail suggests that Zuleger was acting on the advice of counsel, but this does not change the fact that by withholding the information, Zuleger committed a violation of the statute. Further, the defensive tone of the second e-mail supports the Union's view that Zuleger did not feel the Union was entitled to the information requested and that his first e-mail should, therefore, be considered a refusal to comply.

Sec. 111.70(3)(a)3 allegations

As noted above, proof of a violation of Sec. 111.70 (3)(a)3 requires 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." SCHOOL DISTRICT OF MARINETTE, *supra*.

The record does not establish any hostile intent in Zuleger's initial decision to offer the Weston Fest days to employees who had volunteered at the event. First, there is no evidence of any pre-existing antipathy between Zuleger and the Union prior to the Weston Fest event. Four Fire Department employees received the July 27 e-mail, albeit one was a supervisory employee and two were fair share members. Nevertheless, one recipient was a regular member of the Union, so there was no apparent effort to conceal the Village's offer from the regular Union members. As far as the record indicates, the exclusion of Union members Rose Procknow and Evan McBain from the e-mail list may have been merely an oversight, or due to the fact that Zuleger did not have e-mail addresses for those employees. There is also no evidence that any Union member who volunteered at Weston Fest subsequently requested and was denied a complimentary day off. Thus, any finding that Zuleger was initially motivated by anti-union animus would be based upon pure speculation.

Subsequently, however, when the Union began making inquiries into the granting of the complimentary days, the situation changed. When Russ e-mailed Zuleger on September 11 asking for information about the issue, Zuleger explained that he acted within his discretion and then told Russ to "go back to work." The Village argues that Zuleger's comment may have been based on his frustration that Russ broke the chain of command by directing his request to Zuleger, rather than the Fire Chief or Captain Grod, but this is not reflected in Zuleger's testimony. The more likely explanation is that Zuleger was annoyed that what had been considered by him as a generous act was being questioned and that the Union was inquiring about something that he considered none of its business. This sentiment is also reflected in Zuleger's December 5 e-mail to Tautges and Russ, wherein he indicated he had

directed the Fire Chief to investigate complaining members for violations of the contract's code of conduct and wherein he made disparaging comments about Union members "grumbling and complaining." It is clear that at this point Zuleger's attitude toward the Union's activities was hardening and becoming hostile. Indeed, the nexus between the Union members raising the Weston Fest issue and Zuleger's threat of disciplinary action in response is practically directly stated. The Union's inquiry into the Weston Fest issue was protected concerted activity, of which the Village was aware. Zuleger's hostility toward that activity is shown in the disparaging comments in his e-mails and the indication in the December 5 e-mail that the protected concerted activity might result in discipline. This permits the inference that the threat of discipline was based, at least in part, on that hostility, thus establishing a violation of Sec. 111.70(3)(a)3.

The Union further asserts that the written reprimand issued to Jason Russ on April 30, 2010 was also based, at least in part, on hostility toward his protected concerted activity. The Union's argument is based upon allegations regarding a confluence of factors, including 1) the fact that the discipline occurred within a few months after the filing of the Union's initial complaint, 2) an inadequate investigation, 3) the fact that the other Firefighter involved in the incident, who admitted his actions, only received counseling, 4) basing the disparity in treatment between the Firefighters on reliance on an incident involving Russ 2-1/2 years earlier, which had not resulted in discipline, 4) a meeting between the Fire Chief and Village Administrator wherein the Administrator advised the Chief to issue a written reprimand and 5) the preparation of the letter of discipline prior to conducting an investigatory interview with Russ.

It should be noted that both Zuleger and Meilahn testified that the decision to issue Russ a written reprimand was Meilahn's. According to both, Zuleger's sole participation in the matter occurred when Meilahn informed him of the St. Clare's incident and that he was considering issuing him a written reprimand and Zuleger concurred. It should also be noted that there is no evidence in the record that Meilahn was aware of the Union's complaint at the time Russ was disciplined, or that he had ever expressed any animus toward the Union, or toward Russ for his Union activities. The crux of the Union's claim, therefore, is the coincidence of what it considers to be unjust discipline against a Union officer, combined with the ominous involvement of Zuleger, occurring within three months after the Union filed a complaint against the Village.

The problem with the Union's theory in my view is the lack of evidence of hostility toward the Union, or toward Russ's protected concerted activity, by Chief Meilahn, who issued the discipline. Had Zuleger issued the discipline the nexus would have been easier to discern, but so far as the record shows Zuleger's sole involvement was to concur in the conclusion Meilahn had already reached. It may well be that the discipline issued to Russ would not have survived a just cause analysis, but it was not grieved. The question, however, is not whether there was just cause for discipline, but whether there is sufficient evidence that the discipline was in any degree the result of hostility toward Russ's protected concerted activity. I find there is not. The discipline was issued by Chief Meilahn. As noted, there is no

evidence that Meilahn was ill-disposed toward either the Union or Russ's Union activity. Meilahn did meet with Zuleger before issuing the discipline, but he had already formed the opinion that Russ should receive a written reprimand before meeting with Zuleger, based on the reports from Kimlicka and a review of Russ's file. Zuleger did not direct Meilahn to issue the discipline, but only agreed with the conclusion Meilahn had already reached. To be sure, there are problematic aspects to the issuance of the discipline, especially as regards the quality of the investigation, the weight given to the 2007 incident and the disparity of the treatment of Russ vis-à-vis O'Rourke. In my view, however, these do not meet the standard of a clear and satisfactory preponderance of the evidence that is required to establish the Union's claim that the discipline resulted in some degree from hostility toward Russ's protected concerted activity.

Sec. 111.70(3)(a)1 allegations

Here, the Union bases its claims principally on the right of Union members to bargain through representatives of their own choosing and its contention that, by dealing directly with the employees, Zuleger interfered with the members' ability to exercise that right. Again, as stated above, intent is not a necessary element to a claim under Sec. 111.70(3)(a)1 and the existence of a reasonable tendency to interfere with the exercise of protected rights is sufficient to find a violation.

By acting unilaterally in awarding the Weston Fest days, Zuleger engaged in individual bargaining with the members without going through the exclusive representative. Whether or not he intended to do so, therefore, Zuleger's actions did have a reasonable tendency to interfere with the Union members' Sec. 111.70(2) rights. Likewise, when Zuleger retroactively approved Christiansen's day off without negotiating with the Union, he again engaged in individual bargaining in contravention of Sec. 111.70(3)(a)1.

The Union has also alleged that the Village engaged in disparate treatment by treating fair share members more favorably than regular bargaining unit members. The basis for this claim is the fact that two fair share members received the e-mails about the Weston Fest days, but only one regular member received it, and two Union members who volunteered at the event did not receive it. Also, it appears that fair share member Marty Christiansen may have been the only Department employee who actually took the day off. As noted above, I do not find hostile intent behind Zuleger's initial decision to offer the Weston Fest days and so the evidence does not support a finding that there was a deliberate effort to prefer fair share members over Union members in the sending of the e-mail. Likewise, although Christiansen may have been the only employee who took a Weston Fest day, it does not appear that any Union members applied for the day off, so it is not possible on this record to say that

Christiansen was treated more favorably than Union members. Nonetheless, the appearance of disparate treatment had a reasonable tendency to interfere or restrain the regular members in the exercise of their protected rights and, thus constituted a violation of Sec. 111.70(3)(a)1.

Dated at Fond du Lac, Wisconsin, this 19th day of May, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner