STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 1561, Affiliated with DISTRICT COUNCIL 48 OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, Complainant, vs. WAUWATOSA BOARD OF EDUCATION, Respondent.	Case XIII No. 12212 MP-53 Decision No. 8577-A

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. John S. Williamson, Jr., for the Complainant.
Lamfrom, Peck, Ferebee & Brigden, Attorneys at Law, by Mr. Willis B. Ferebee, for the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter, and the Commission having appointed Howard S. Bellman, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Section 111.07(5) of the Wisconsin Employment Peace Act, and hearings on such complaint having been held at Milwaukee, Wisconsin, on July 29, 1968, and October 4, 1968, before the Examiner, and the Examiner being fully advised in the premises,[1/] makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That the Complainant, Local 1561, affiliated with District Council 48, American Federation of State, County and Municipal

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1/ At the hearing on July 29, 1968, the Complainant made certain amendments of its complaint and the Respondent withdrew its answer. No evidence was presented and the Findings of Fact herein are based upon such pleadings.

Employees, hereinafter referred to as the Complainant, is a labor organization and has its offices at 615 East Michigan Street, Milwaukee, Wisconsin.

2. That Wauwatosa Board of Education, hereinafter referred to as the Respondent, is a Municipal Employer and has its principal offices at 1732 Wauwatosa Avenue, Wauwatosa, Wisconsin.

3. That the Complainant is the certified exclusive bargaining representative of certain employes of the Respondent.

4. That on approximately January 29, 1968, the Respondent's agent, D. Albrechtson, Supervisor of Cafeterias, sent a letter with enclosure to part-time cafeteria employes of the Respondent who are not represented by the Complainant; that said letter stated:

> "I have enclosed a copy of a letter of recommendation in regard to salary increases for part time people. Many of you have mentioned that the constant rate of $1.75 per hour is unjust. I am in complete agreement. The enclosed letter is a result of my dissatisfaction with the present salary system for part time employees. It is not fair to make the same salary without regard to your length of service or the responsibility that you bear. I hope you will recognize that when you receive your raises it is through the Wauwatosa Board of Education via my recommendations. I know that the union has been soliciting your support. However, they are doing so by offering things which they are in no position to give. By your supporting the union you are not giving me a chance to work for you."

and said enclosure stated:

> "I have reviewed the wages for the part time cafeteria employees. At the present time each one receives $1.75 regardless of length of service or responsibility. Consequently I am making the following recommendations.

	Step 1	Step 2	Step 3	Step 4	Step 5
Helper	1.75	1.80	1.85	1.90	----
Helper in Charge	1.82	1.87	1.92	1.97	----
Clerk	1.75	1.80	1.85	1.90	----

> This system is patterned after that of the full time employees. Hopefully, we should be able to eliminate some of the inequities now present.
>
> I would be glad to discuss this further at your convenience."

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

1. That Wauwatosa Board of Education, by sending the above-described letter and enclosure to its part-time cafeteria employes, which documents were intended to coerce said employes in the choice of their representative on questions of wages, hours and conditions of employment, and which impliedly promised improved wages and conditions of employment conditioned upon such employes not choosing the Complainant as their representative for such purposes, interfered with rights of such employes under Section 111.70(2), Wisconsin Statutes, and accordingly committed prohibited practices within the meaning of Section 111.70(3)(a)1 of the Wisconsin Statutes.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law the Examiner makes the following

ORDER

IT IS ORDERED that the Respondent, Wauwatosa Board of Education, its officers and agents, shall immediately

(a) Cease and desist from:

1. Interfering with, restraining or coercing its employes in the exercise of their right to engage in concerted activity by making promises, implied or actual, to employes of increased benefits in an effort to persuade them to forego their concerted activity on behalf of Local 1561, affiliated with District Council 48 of the American Federation of State, County and Municipal Employees, or any other labor organization of their choosing.
2. Engaging in any other conduct which interferes with, restrains, or coerces its employes in the exercise of their right to affiliate with or be represented by Local 1561, affiliated with District Council 48 of the American Federation of State, County and Municipal Employees, in conferences and negotiations with Wauwatosa Board of Education on questions of wages, hours and conditions of employment.

(b) Take the following affirmative action which the Commission finds will effectuate the policies of Section 111.70, Wisconsin Statutes:

1. Notify all of its employes by posting in conspicuous places in its facilities where all employes may observe them, copies of the notice hereto attached and marked Appendix "A". A copy of such notice shall be signed by the President of the Wauwatosa Board of Education and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter and reasonable steps shall be taken by Wauwatosa Board of Education to insure that said notice is not altered, defaced or covered by any other material.
2. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the receipt of a copy of this Order what steps Wauwatosa Board of Education has taken to comply therewith.

Dated at Madison, Wisconsin, this 17th day of February, 1969.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

Pursuant to the Order of an Examiner of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of Section 111.70, Wisconsin Statutes, we hereby notify our employes that:

WE WILL NOT make promises of benefit, implied or actual, to our employes in an effort to persuade them to forego their concerted activity on behalf of Local 1561, affiliated with District Council 48 of the American Federation of State, County and Municipal Employees, or any other labor organization of their choosing.

WE WILL NOT in any other manner interfere with, restrain or coerce our employes in the exercise of their right to affiliate with or be represented by Local 1561, affiliated with District Council 48 of the American Federation of State, County and Municipal Employees, in conferences and negotiations with Wauwatosa Board of Education on questions of wages, hours and conditions of employment.

Our employes are free to become, remain, or refrain from becoming and remaining members of Local 1561, affiliated with District Council 48 of the American Federation of State, County and Municipal Employees, or any other labor organization.

WAUWATOSA BOARD OF EDUCATION

By _____
President

Dated _____

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

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MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Respondent, on September 26, 1967, filed a petition with the Commission requesting an election pursuant to Section 111.70(4)(d), Wisconsin Statutes. Inter alia, the Respondent contended that a vote should be conducted among certain custodial and maintenance employes represented by the Complainant and that certain part-time cafeteria helpers, previously not included in the bargaining unit, also be permitted to participate in the polling on the issue of continued representative status for the Complainant. (The custodial and maintenance unit had been represented by the Respondent at least since March 6, 1963, when the Commission so certified after an election based on a stipulation by the parties.)[2/]

On February 28, 1968, the Commission dismissed the Respondent's aforesaid petition on the ground that no question concerning representation existed among the employes involved.[3/] The dismissal was reviewed by the Circuit Court for Dane County, and that Court, on August 2, 1968, affirmed the Commission's Order dismissing the petition.[4/]

2/ Decision No. 6219 (1963).

3/ Decision No. 8300-A (1968).

4/ Wauwatosa Board of Education v. WERC, (Wis. Cir. Ct.), 69 LRRM 2241 (1968).

In doing so, the Court agreed with the Commission that the part-time cafeteria helpers were properly not part of the bargaining unit represented by the Complainant, and that there was no proper legal foundation established for conducting a vote among them on the issues of representation or unit inclusion.

As found above, on approximately January 29, 1968, the Respondent sent the offending letter. This was during the pendency of the aforesaid petition and prior to the rejections by the Commission and the Court of the Respondent's request that the part-time cafeteria helpers be given a vote on the Complainant's status.

The instant complaint of unfair labor practices was filed on June 13, 1968. A hearing on the matter was opened on July 29, 1968. At that hearing certain stipulations and other arrangements were entered and discussed in efforts to settle the dispute voluntarily. The settlement efforts were not successful and at a second hearing session on October 4, 1968, which was subsequent to the Court's determination on the Respondent's petition, the Respondent moved "that the complaint be dismissed as moot in view of the Circuit Court decision." All post-hearing briefs were filed with the Examiner by November 25, 1968.

According to the Respondent's brief,

> "Fundamentally, the question to be determined here is whether an employer commits an unfair labor practice by attempting to discourage union membership when, at such time, no union claims or seeks to represent a particular group of employees, and even more, where a union most likely to be interested actively disclaims any interest in such groups."

The Complainant does not claim to represent the part-time cafeteria employes. The Respondent does not deny that the letter would be violative if such a claim were being made.

The Respondent argues that when employes are not engaged in concerted activities or there is no labor organization claiming to be, or attempting to become, their representative, a municipal employer may deliberately discourage unionism by granting generous wage increases, "and even when this program is specifically stated to his employees that it is done for such purpose" without committing any prohibited practice. It is further contended that the Commission and Court decisions on the representation case held that the employes involved herein "had no right to express their wishes" respecting representation. Therefore, the Respondent urges, the Commission and Court decisions rendered the present issues moot and not properly determined in favor of the Complainant.

Firstly, the Commission and the Court did not hold that the part-time cafeteria helpers had no right to union representation, but rather that the Respondent's petition did not serve to raise the issue of their wishes in that regard as it was not supported by a union claim to represent them or a manifest desire on the part of such employes to be so represented.

According to the Circuit Court's decision, the Respondent herein contended in the representation case that the part-time cafeteria employes "should be permitted to vote as to their wishes in the matter, i.e., whether they wish to join the original unit, form a separate unit with the full-time cafeteria employes, or remain unorganized." Therefore, had the Respondent been successful as a Petitioner, it may have occurred that the part-time cafeteria employes would have been included in an overall group voting on the issue of representation; and if the Respondent was successful in discouraging them regarding unionism, their voting strength could have contributed to the ouster of the Complainant from its status. Thus, it is entirely conceivable that the Respondent's tactics regarding the part-time cafeteria employes were part of a strategy directed at relieving the Respondent of the Complainant's activities with regard to all of the employes pertinent to the case raised by the petition.

But ignoring the above possibility of the Respondent's conduct having an effect upon the currently represented employes, the Examiner rejects the contention that a prohibited practice cannot be committed against employes unless they are represented or attempting to become so.

Section 111.70(3)(a)1 declares it a prohibited practice for a municipal employer to interfere with, restrain or coerce any municipal employe in the exercise of his rights under Section 111.70(2). That section provides that

> "Municipal employes shall have the right of self-organization, to affiliate with labor organizations of their own choosing and the right to be represented by labor organizations of their own choice in conferences and negotiations with their municipal employers or their representatives on questions of wages, hours and conditions of employment, and such employes shall have the right to refrain from any and all such activities."

The rights of self-organization and to freedom of choice regarding representatives are interfered with by employer promises and threats regarding improvements and deteriorations in wages, hours and conditions of employment which are conditioned upon how such rights are exercised. These rights are provided for all municipal employes whether or not their exercise is imminent and are enforceable as long as their violations are complained of in a proper and timely manner. The right to choose a representative with freedom may be latent while employes are content or uninformed; and it may remain so while the employer makes efforts to keep the employes content, and such employer efforts may be beyond legal reproach. But it is unrealistic to conclude that a municipal employer is not able to act in a manner disharmonious with the employes' rights while their rights lie dormant. A municipal employer's campaign to avoid unionization may be anticipatory and chill the employes' freedom of choice in a prohibited manner. It is the law that when employes begin to think about organization and/or affiliation, they should not be subject to interference in reaching their conclusions. Such interference may commence prior to the employes' initial thoughts on the subjects.

The Respondent contends that a municipal employer who, prior to any interest in organization on the part of its employes, threatens to discharge any employe who shows such an interest, commits no prohibited practice. The conduct is only prohibited, it is urged, if attempts to unionize are currently underway. Why such should be the case, and why such a threat is any less effective when strictly anticipatory is not explained to the Examiner's satisfaction. Furthermore, remote misconduct is not subject to remedies due to the one-year limit on filing of complaints.

Section 111.70 at (4)(a) incorporates the procedures set forth in Section 111.07. This includes the aforesaid one-year filing limitation at 111.07(14) and the requirement at 111.07(2)(a) that complaints be filed by a "party in interest." Counsel for the Respondent asserted at the hearing, in response to a question from the Examiner, that the Respondent is not contending that the Complainant is not such a "party in interest."

Finally, the complaint alleges violations of Sections 111.70(3)(a)1 and 2. The Examiner has found violation of 111.70(3)(a)1 only. Section 111.70(3)(a)2 prohibits employes conduct constituting "discrimination in regard to hiring, tenure or other terms or conditions of employment." The offensive letter which is the basis of this case promised changes in wages and conditions of employment but there is no indication that any actual changes occurred. Therefore, it is concluded that while the letter was violative of the employes' rights under Section 111.70(2) it did not constitute an act of discrimination, as the carrying-out of its promises may have.

Dated at Madison, Wisconsin, this 17th day of February, 1969.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Examiner