STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL #48, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, Complainant, vs. MILWAUKEE COUNTY, Respondent.	Case LVIII No. 17143 MP-281 Decision No. 12153-A

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Howard L. Janco, appearing on behalf of the Complainant.
Mr. Robert G. Polasek, Director of Labor Relations, and Mr. Patrick J. Foster, Assistant Corporation Counsel, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Milwaukee District Council #48, American Federation of State, County and Municipal Employees, AFL-CIO having, on September 10, 1973, filed a complaint with the Wisconsin Employment Relations Commission, wherein it alleged that Milwaukee County had committed prohibited practices within the meaning of the Wisconsin Municipal Employment Relations Act; and the Commission having appointed Marvin L. Schurke, a member of its 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, pursuant to notice, hearing on said complaint having been held at Milwaukee, Wisconsin, on November 29, 1973, before the Examiner; and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Milwaukee District Council #48, American Federation of State, County and Municipal Employees, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization having its principal offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208.

2. That Milwaukee County, Wisconsin, hereinafter referred to as the Respondent, is a municipal employer having offices at the Milwaukee County Courthouse, Milwaukee, Wisconsin; that, among other governmental services, the Respondent operates a health care facility known as the Milwaukee County General Hospital; and that George Hilburn is employed by the Respondent as a supervisor in the Dietary Department of said Hospital.

3. That, at all times pertinent hereto, the Respondent has recognized the Complainant as the exclusive collective bargaining representative of certain employes of the Respondent, including non-supervisory employes employed in the Dietary Department of Milwaukee County General Hospital; that the Complainant and the Respondent are parties to a collective bargaining agreement entered into on February 16, 1973 and effective through December 31, 1974; and that said agreement contained the following provisions pertinent hereto:

"PART I

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(D) MANAGEMENT RIGHTS. The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders. Included in this responsibility, but not limited thereto, is the right to determine the number, structure and location of departments and divisions; the kinds and number of services to be performed; the right to determine the number of positions and the classifications thereof to perform such service; the right to direct the work force; the right to establish qualifications for hire, to test and to hire, promote and retain employes; the right to transfer and assign employes, subject to existing practices and the terms of this agreement; the right, subject to civil service procedures and the terms of this agreement related thereto, to suspend, discharge, demote or take other disciplinary action and the right to release employes from duties because of lack of work or lack of funds; the right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy procedures and practices and matters relating to working conditions, giving due regard to the obligations imposed by this Agreement. However, the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discriminating against any employe or for the purpose of discrediting or weakening the Union.

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PART II

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(CC) TRANSFER POLICY.

(1) TRANSFER PRIORITIES. When a job vacancy occurs, employes holding the same classification requesting a transfer shall be given consideration in filling the opening prior to the job being filled in any other manner. Intradepartmental requests shall have preference over interdepartmental requests to transfer.

(2) INTRADEPARTMENTAL TRANSFERS. Employes desiring a transfer from one department unit to another under the same appointing authority and within the same classification shall indicate their desire to transfer on forms provided by the County. Such forms shall be prepared in duplicate, indicating the departmental unit to which a transfer is sought, with the original being filed with the County and the duplicate retained by the employe. The County shall maintain a file of such transfer requests and will, when a vacancy occurs in a departmental unit, review the file to determine whether a request for transfer to a vacant position in that

departmental unit has been made. When a vacancy occurs in a section, it shall be filled by the most senior qualified employe in the same department and classification who has a valid request for transfer on file, subject to the following conditions:

(a) No employe shall have more than two requests for transfer on file at any one time.

(b) No employe shall be entitled to transfer more often than twice annually at his request.

(c) Employes shall not be entitled to file a request for a transfer until they have completed their probationary period.

(d) For purposes of this section, seniority shall mean length of continuous service with Milwaukee County.

(e) Any employe refusing a transfer, when offered, to a position for which he has filed a request shall have his request removed from the file.

(f) The appropriate appointing authority of the program may defer the transfer of an employe until a replacement is found to fill his position; however, such transfer shall not be deferred for more than twenty (20) working days.

(g) Nothing herein contained shall limit the authority of the County to transfer employes within their job classification.

(h) Whenever an employe is denied a transfer for cause, whether he be the only applicant or the most senior of several applicants, the reason for denial shall be made known to him by the supervisor who rejected the transfer request.

. . .

(4) INVOLUNTARY TRANSFERS. When it becomes necessary that an employe be transferred from an area, section or department, the least senior employe in the affected classification shall be transferred first. An employe transferred by the County from an area, section, or department shall return to a position in the same classification in his original department when a vacancy occurs if he so requests. When two or more employes are transferred, the most senior employe shall return to his department and classification first, if he so requests. The County may transfer employes temporarily by seniority within classification from one department, which is overstaffed, to another department which is experiencing excessive work loads which it cannot meet with its existing staffing.

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PART IV

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(A) RESOLUTION OF DISPUTES.

(1) The disputes between the parties arising out of the interpretation, application or enforcement of this Memorandum of Agreement, including employe grievances, shall be resolved in the manner set forth below.

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(B) GRIEVANCE PROCEDURE.

(1) APPLICATION: EXCEPTIONS. A grievance shall mean any controversy which exists as a result of an unsatisfactory adjustment or failure to adjust a claim or disptue [sic] by an employe or group of employes concerning the application of wage schedules or provisions relating to hours of work and working conditions relating to hours of work and working conditions. The grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits and position classifications established by ordinances and rules which are matters processed under other existing procedures.

(2) REPRESENTATIVES. An employe may choose to be represented at any step in the procedure by representatives (not to exceed three (3) of his choice, except that as to the first step, the choice shall be limited to employe-representatives.)"

4. That, for a period of 12 to 15 years prior to any of the other events or facts relevant to this matter, supervisory employes of the Respondent in charge of the Main Kitchen division of the Dietary Department of Milwaukee County General Hospital have held meetings on alternate Thursdays at or about 1:15 p.m.; that supervisory and all non-supervisory personnel attend such meetings; that bi-weekly pay checks are distributed to non-supervisory personnel during such meetings; that changes of procedure and other subjects relating to the function and operation of the Main Kitchen are discussed during such meetings; and that issues arising in collective bargaining and grievances arising in the department are not a normal subject for discussion at such meetings.

5. That certain of the non-supervisory employes assigned to the Main Kitchen are classified as "Food Service Worker I"; that certain other of the non-supervisory employes assigned to the Main Kitchen are classified as "Food Service Worker II"; that the duties of the Food Service Worker II classification entail heavier work than the duties of the Food Service Worker I classification; that Food Service Worker II is considered to be a higher classification than Food Service Worker I; that there is no automatic progression from classification as Food Service Worker I into the classification of Food Service Worker II; and that advancement to the classification of Food Service Worker II by present employes presently classified as Food Service Worker I must be accomplished through competitive Civil Service examination.

6. That, on or about September 28, 1972, a grievance arose in the Main Kitchen, wherein the Complainant took the position that employes classified as Food Service Worker I had improperly been assigned to certain heavy work considered by the Complainant to be outside of the classification duties of Food Service Worker I; that such grievance was processed through the grievance procedure contained in the collective bargaining agreement between the Complainant and the Respondent; that such grievance was resolved on an unspecified date during or about the month of February, 1973; and that said grievance was resolved on the basis that certain positions would be reallocated as Food Service Worker II with no net increase in the work force.

7. That, on or about March 20, 1973, a dispute arose between the Complainant and the Respondent, wherein the Complainant took the position that Hilburn had improperly assigned employes classified as Food Service Worker I to perform certain tasks involving hot food which had theretofore normally been performed by employes holding the separate and distinct classifications of Cook I, Cook II or Cook III; that, on March 20, 1973, a grievance was filed under the collective bargaining agreement protesting said assignment; and that Sally Laib and Natalie LaPorte were among the Food Service Worker I employes signatory to said grievance.

8. That Thursday, March 22, 1973, was a pay day; that, in accordance with the established practice referred to in paragraph 4 hereof, the Main Kitchen employes were assembled at or about 1:15 p.m. on March 22, 1973 for a pay day meeting; that Hilburn conducted said meeting; that, during the course of said meeting, Hilburn raised the subject of the filing of grievances; that Hilburn made statements to the effect that, by filing grievances, employes classified as Food Service Worker I were causing the elimination of their own jobs and that those with least seniority would lose their jobs if Food Service Worker I positions were reallocated into higher classifications; that the Departmental Steward of the Complainant was scheduled off duty on that date and did not attend said meeting; that no request was made by any employe for the attendance of a representative of the Complainant at said meeting; and that the statements made by Hilburn were reasonably taken and understood by employes holding the classification of Food Service Worker I as threats to their employment made to discourage their pursuit of rights under the collective bargaining agreement by the filing of grievances.

9. That, approximately two weeks following the aforesaid meeting, Hilburn extended to Laib and to LaPorte offers for said employes to be transferred from the Main Kitchen to work in a Cafeteria on the premises of Milwaukee County General Hospital; that, in the case of Laib said transfer offer was based on Hilburn's knowledge of past expressions of dissatisfaction with her position made by Laib, and in the case of LaPorte on Hilburn's evaluation that LaPorte was unsuited to the work in the Main Kitchen; that such offers of transfer were not made in reprisal for the participation of Laib or LaPorte in the filing of the grievance dated March 20, 1973; that both such employes declined the offer of transfer; and that neither Laib nor LaPorte was transferred involuntarily and both continued as employes in the Food Service Worker I classification in the Main Kitchen.

10. That, coincident to some of the events detailed in paragraphs 4 through 9 hereof, LaPorte participated in a Civil Service examination for the classification of Food Service Supervisor I; that such position is classified two ranks above that of Food Service Worker I; that LaPorte achieved a passing grade on the written examination portion of the Civil Service examination; that LaPorte failed to achieve a passing grade on the oral examination portion of the Civil Service examination; that Hilburn and Dietary Department Head Pock completed and filed a report concerning the performance of LaPorte while under their supervision, wherein they noted certain perceived defects in LaPorte's performance; that such report was not made in reprisal for LaPorte's participation in the filing of a grievance; and that the failure of LaPorte to be listed as an eligible for promotion to the classification of Food Service Supervisor I was due solely to her failure to achieve a passing grade on the appropriate Civil Service examination and was not based upon the report filed by Hilburn and Pock.

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

CONCLUSIONS OF LAW

1. That Milwaukee County, Wisconsin, is a municipal employer within the meaning of Section 111.70(1)(a) of the Municipal Employment Relations Act; and that, at all times material hereto, George Hilburn has been a supervisory employe of the Respondent, acting within the scope of his authority.

2. That, by making statements tending to discourage the exercise by non-supervisory employes of Milwaukee County of the right to file and prosecute grievances which is secured to such employes in the collective bargaining agreement subsisting between Milwaukee County and Milwaukee District Council #48, AFSCME, AFL-CIO, which statements were reasonably taken by such employes to be threats to the continuation of their

employment with Milwaukee County, the Respondent, Milwaukee County, has interfered with, restrained and coerced municipal employes in the exercise of their rights under Section 111.70(2) of the Municipal Employment Relations Act and has committed prohibited practices within the meaning of Section 111.70(3)(a)1 of the Municipal Employment Relations Act.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

IT IS ORDERED that Milwaukee County, its officers and agents, shall immediately:

1. Cease and desist from making statements to employes which can reasonably be interpreted by such employes as threats to their employment, for the purpose of discouraging the exercise by such employes of their right to file and prosecute grievances, and from all other forms of interference, restraint and coercion of employes in the exercise of their rights under Section 111.70(2) of the Municipal Employment Relations Act.

2. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date hereof, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin, this 12th day of November, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEADINGS AND PROCEDURE:

In its complaint filed on September 10, 1973, the Union asserts that a supervisory employe of the County engaged in a pattern of illegal interference to discourage employes from filing of contractual grievances, and that the County refused to reprimand the supervisor for his actions. The Commission appointed the undersigned as Examiner on September 18, 1973 and notices were issued on the same date setting dates for hearing and the filing of an answer. On September 25, 1973 the County filed a Motion To Make More Definite and Certain. The Union voluntarily provided the information sought by the County, without need for a formal ruling by the Examiner, and the County thereupon did not seek a ruling on its Motion. Hearing in the matter was postponed, and the County filed an answer on October 26, 1973, wherein it denied any violation of the Municipal Employment Relations Act (MERA). Hearing was held, before the Examiner, on November 29, 1973 at Milwaukee, Wisconsin. The Complainant filed a brief on December 20, 1973. The transcript was issued on April 16, 1974, and it was then noted that no brief had been received from the County. Inquiry was made by the Examiner to determine whether the County's brief might have been filed and lost, and on May 15, 1974 the County waived the filing of a post-hearing brief.

STATEMENTS MADE DURING THE MARCH 22, 1973 MEETING:

The "Main Kitchen" wherein this case arose operates from 5:30 a.m. to 7:30 p.m. with two shifts of employes. An overlap of the shifts occurs at or about 1:15 p.m. and the management of the Dietary Department has long and consistently followed the practice of conducting a "pay day meeting" at or about that hour on alternate Thursdays, when pay checks are distributed and matters relating to the work of the Department are discussed. The Union's Department Steward routinely attends the pay day meeting if it occurs on a day when she is scheduled on duty. However, since the Main Kitchen operates seven days a week and employes work on a rotating schedule, instances do occur when a pay day meeting is held and the Steward is not present. It has not been the practice of the Union to send an alternate Steward or other representative to the Main Kitchen pay day meetings on days when the Department Steward is scheduled off duty, although the record herein indicates that such alternate representatives would have been permitted to attend if they made arrangements in advance to do so. It is clear that no request for alternate Union representation had been made on March 22, 1973, and that none had been denied by the County.

The factual background to supervisor Hilburn's comments is detailed in the Findings of Fact. Briefly, a grievance concerning assignment of work "out of classification" had recently been settled on the basis that low level positions would be replaced by higher level positions with no net increase in the work force. Another grievance concerning assignment of work out of classification had been filed two days previously. Although Hilburn denied that the latter grievance was the reason for his comments to the employes, it is clear that the recent dispute and grievance was fresh in the minds of the employes and that Hilburn's comments were taken as relating to the filing of the latter grievance. Hilburn claims that his comments were well-meaning: the grievants would win a battle but lose the war, since their grievances would prompt further reallocations of positions to higher Civil Service classifications for which they had not (or could not be) qualified. The employes took Hilburn's comments as a more direct threat: people would lose their jobs because they bucked the system. Even taking Hilburn's explanation of his purpose,

it is apparent that his underlying motive was to discourage the employes under his supervision from the filing of further grievances, whether or not those grievances had merit.

Hilburn's statements undoubtedly constitute an argument which might appropriately have been advanced by the management in grievance procedure meetings with the Union concerning the March 20, 1973 grievance. The Union officers or agents participating in the grievance procedure would be faced with making the decision of whether a potentially valid grievance might become a detriment to unit employes if pursued. There is little likelihood that such a legitimate consideration in bargaining might have been taken in that context as a threat directed personally to the grievant employes. On the other hand, pay day meetings were not a normal collective bargaining or grievance resolution forum, and the injection of the grievance filing subject into the pay day meeting placed Hilburn's comments in an entirely different context.

The Union is in error in asserting that the MERA contains no Declaration of Policy (see Section 111.70(6), Wisconsin Statutes), but the Examiner is in accord with the remainder of the Union's argument, to the effect that interferences with the machinery for peaceful settlement of disputes have the potential for undermining the collective bargaining process at its very heart. Whether interpreted with the meaning claimed by Hilburn or with the meaning understood by the employes, it is apparent that Hilburn's statements were made to discourage the employes from the exercise of their rights under the contractual grievance procedure. The conclusion follows that a technical interference, in violation of Section 111.70(3)(a)1 of MERA, has occurred.

OFFERS OF TRANSFER:

In two separate incidents subsequent to the March 22, 1973 meeting, supervisor Hilburn offered two of the employes who had signed the March 20, 1973 grievance transfer to the Cafeteria section of the Dietary Department. The record indicates that Hilburn did not consider the Cafeteria work less desirable than the work in the Main Kitchen, but that both of the affected employes did consider the Cafeteria to be the less desirable alternative. Neither employe had filed a transfer request under Part II, (CC), (2) of the collective bargaining agreement, but the Examiner finds nothing in the agreement which would prevent the management from soliciting for volunteers for an intradepartmental transfer.

Sally Laib was one of those who signed the so-called "hot food grievance" of March 20, 1973. Hilburn testified that he was aware of previous expressions of dissatisfaction made by Laib concerning her position in the Main Kitchen. A vacancy occurred in the Cafeteria and that vacancy was a subject of discussion between Hilburn and another supervisory employe of the County. In the presence of the other supervisor, Hilburn offered the transfer opportunity to Laib and Laib declined it. Laib's testimony that the offer was somehow conditioned on her having filed a grievance is in conflict with the testimony of both of the management witnesses to the conversation. Laib may well have perceived the offer as an extension of or in furtherance of the threat contained in Hilburn's March 22, 1973 comments. However, considering the testimony of all witnesses to the conversation, and considering the demeanor of those witnesses, the Examiner is unable to credit the testimony of Laib on this point. It is clear that Laib was permitted to continue in her same position, and that no action was taken against her, which is traceable to her participation in the March 20, 1973 grievance.

Natalie LaPorte was also one of those who co-signed the hot food grievance. LaPorte was the most senior among the employes in the Main Kitchen at the time she was offered a transfer to the Cafeteria, but her

seniority would not necessarily have been the greatest in the Cafeteria. The County submits in its defense that the transfer would have been offered to LaPorte because of her seniority, rather than in spite of it. Further, Hilburn testified that he was dissatisfied with LaPorte's work, considered her physically incapable of performing all of the work expected of her in the Main Kitchen, and assumed (without really knowing for sure) that she would be better off in the Cafeteria. It is clear from LaPorte's testimony that the transfer was offered to her strictly at her option, and that it was merely her feeling that the offer was motivated in reprisal for her filing of the grievance. The evidence does not sustain a finding of interference or discrimination on this point.

DENIAL OF PROMOTION:

Natalie LaPorte applied for and took a Civil Service examination for qualification to a classification two ranks above her present classification. She narrowly passed the written portion of the examination and failed on the oral portion of the examination, thereby failing to qualify for consideration for promotion. Shortly prior to the date set for the hearing herein, LaPorte went to the offices of the County Civil Service Commission to review her test results. She was then and there permitted access to a copy of the "Probst" report prepared by Hilburn and Pock, her present supervisors, in connection with her bid for the higher classification. Her supervisors had reported their dissatisfaction with LaPorte's work, and she took offense at their comments, believing them to be in retaliation for her participation in the March 20, 1973 grievance. The supervisor's report would have been considered in the event she passed the Civil Service examination, for the purpose of determining which among those certified should actually be promoted. However, in view of her failure to achieve a passing grade on the Civil Service examination, LaPorte's bid for promotion was not affected in any way by her supervisor's opinions. LaPorte's testimony is directly in conflict with that of Hilburn as to the conversation between them which followed. The Examiner is persuaded to credit the testimony of Hilburn, and to find that no further interference or discrimination has occurred.

Dated at Madison, Wisconsin, this 12th day of November, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner