STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES, AFSCME, AFL-CIO, Complainant, vs. JUNEAU COUNTY (PLEASANT ACRES INFIRMARY), Respondent.	Case VIII No. 17768 MP-345 Decision No. 12593-B

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

Examiner Sherwood Malamud having, on January 31, 1975, issued his Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, in the above entitled proceeding, wherein the above named Respondent was found to have committed prohibited practices within the meaning of Sections 111.70(3)(a)1 and 3 of the Municipal Employment Relations Act, and wherein the Respondent was ordered to cease and desist therefrom, and to take certain affirmative action with respect thereto; and the above named Respondent having, pursuant to Section 111.07(5) Wisconsin Statutes, timely filed with the Commission a petition for review and brief in support thereof, and the above named Complainant having filed a statement in opposition to the petition for review; and the Commission having reviewed the entire record in the matter, including the petition for review, the brief in support thereof, and the statement in opposition thereto, and being fully advised in the premises, and being satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order, as well as the Memorandum Accompanying same, should be revised;

NOW, THEREFORE, the Commission issues the following:

REVISED FINDINGS OF FACT

1. That Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization representing employes for the purposes of collective bargaining and has its principal offices at Madison, Wisconsin.

2. That Juneau County (Pleasant Acres Infirmary), hereinafter referred to as the Respondent, maintains a skilled care nursing home facility in New Lisbon, Wisconsin, hereinafter referred to as the Infirmary; and that the Respondent's principal address is the Juneau County Courthouse, Mauston, Wisconsin.

3. That Robert Kuhn, hereinafter referred to as Kuhn, was the Superintendent of the Infirmary for a period of nine years up to February 28, 1974, and that for the same period of time, his wife, hereinafter referred to as Mrs. Kuhn, occupied the position of Assistant Administrator of the Infirmary; that Kuhn was responsible for the execution of the policies, as determined by the Board of Trustees of the Infirmary, appointed by the County Board; and that in that regard Kuhn, among other responsibilities, was primarily responsible for the direction and supervision of Infirmary employes.

4. That during the summer of 1973, David Gourlie, Personnel Management Consultant to local governments for the State Bureau of Personnel of the Department of Administration of the State of Wisconsin, conducted a classification and pay plan study of employes of the Respondent; and that as part of that study, Respondent's employes, including employes at the Infirmary, completed certain job description questionnaires.

5. That Gladys Miller, hereinafter referred to as Miller, who was an employe of the Infirmary for approximately nine years through December 15, 1973, and Head Cook for the last four years of her employment, on November 24 1/ informed Head Nurse Velma Rettammel that she had maintained a record of food not suitable for patients, which Kuhn appropriated for his own use.

6. That on November 25 Infirmary employes received notification of their new wage rates to be effective January 1; that said new rates were based, in part, upon the study which had been conducted by Gourlie; that after discussing the new rates with Miller and other employes at the Infirmary, employe Darlene Kopsell wrote the following letter, dated November 25, to Gourlie on behalf of the Infirmary employes:

> "I am writing in behalf of the employees at Pleasant Acres-Juneau Co. Infirmary. We would appreciate it very much if someone from the State would visit us as a group or individually to answer many of our questions.
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> "First, all those questionaries [sic] we filled out we were told what we could put on them and no more. Many of us have more duties to perform and many of us know how to perform different things. One aide they keep on and just have her work in one place as she cannot hold up her end of the work and this aide put down on the questionaire [sic] that she has been employed 15 yrs. and she hasn't as she quit once for a period of time and then came back.
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> "We would like to know if we were supposed to get our raises split up - part in Jan - part in July and 1/2 of the longtvity [sic] Dec. of 74 & the other half Dec. of 75. I started in Dec. and if the time goes for a whole yr. from the 1st to the 1st I lose a yr. Our pay time goes from Dec. 19th to Jan. 18th. It just isn't the aides that would like to talk with someone it is also the cooks and cleaning ladies. The cleaning ladies do some jobs that are for a maintenance man to do like putting up & taking down storms & screens.
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> "Our head cook went to school for 2 yrs, and yet they pay some ladies head cooks wages on her day off and they never went to school and don't put groceries away or have any of her responsibilities.
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> "We are glad the State is helping to evaluate our jobs but we would like them to have all the true facts, not just what they wanted you to know. We would appreciate an answer and if you are unable to help if you would tell us who will.
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> "P.S. I am spokesman for the other workers until we hear from you so please don't tell our boss or I'll lose my job."

and that the employe activity leading to the writing of said letter, and the contents of said letter constituted concerted activity by

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1/ References to the months October, November, and December are to those months in 1973, and references to January, February and March refer to those months in the year 1974, unless otherwise specifically indicated.

Infirmary employes for their mutual aid and protection with respect to wages and working conditions.

7. That on November 28 Rettammel informed Kuhn of Miller's conversation with Rettammel regarding Kuhn's taking of Infirmary food for his personal use, and at the same time advised Kuhn that Infirmary employes were not aware that Kuhn's employment contract included food for personal use as part of Kuhn's compensation; that during the last week of November, or the first week of December, Gourlie phoned Kuhn and in said conversation read to Kuhn the letter which Gourlie had received from Kopsell; and that sometime during the first ten days of December Kuhn learned of a rumor being circulated in the community that he was allegedly "stealing" gasoline from the Respondent for his personal use.

8. That prior to December 8 employe Alice Miller 2/ and Miller had planned an employe Christmas party to be held on December 8, not on the premises of the Infirmary; that said plan included the extension of an invitation to Freida Reick, a former representative of the International Ladies Garment Workers Union, to speak on employe rights and the organization of a union; that Infirmary employes, who were invited to attend said party, were not advised of the planned appearance of Reick; but that immediately prior to December 8, Miller cancelled said party.

9. That on December 9 Kuhn interrogated Kopsell concerning her letter to Gourlie and advised Kopsell that said letter would create problems for him; that during said conversation Kopsell apologized for writing the letter; that also during said conversation, when Kuhn questioned Kopsell with regard to Miller's possible participation with respect to the letter, Kopsell informed Kuhn that Miller had participated in developing the contents thereof; and that during said conversation Kuhn told Kopsell that he knew Miller was trying to get a union, that he knew about the abortive December 8 party, its connection with a union, and Kuhn laughed because of its cancellation.

10. That, believing Miller was instrumental in writing the letter to Gourlie, notwithstanding Kopsell's claim that Miller's role was minor, and further believing that Miller was responsible for the rumors that he was stealing, Kuhn decided to meet with Miller; that in that regard Kuhn, on December 10, called Miller into his office, where he met with her for approximately two hours in the presence of Rettammel; that Kuhn apprised Miller of his contractual right to Infirmary food and complained about the rumor with respect to stealing gasoline; that Kuhn informed Miller that she would be terminated unless she apologized for claiming that he had called her names; that thereupon Miller so apologized; that thereafter, during said meeting, Miller advised Kuhn that the employes desired a union to represent them for the purpose of collective bargaining and indicated that an individual having union experience had been invited to speak at the cancelled Christmas party; that in response Kuhn indicated that the employes could have their meeting on the infirmary premises and that he would furnish coffee; and that at no time during this meeting did Kuhn threaten to discharge Miller because of her union activity.

11. That on December 10 LaVon Duenkel, a Nurses Aide, a satisfactory employe for the two and one-half years of her employment, requested a leave of absence, to commence later in the month, for medical reasons; and that on said date she was advised that a 30 day leave would be granted to her with the understanding that

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2/ Apparently not related to Gladys Miller.

she could return to work, unless she was replaced prior to the termination of her leave of absence.

12. That on December 13, Miller, Kopsell, and Jesse Haschke, also an Infirmary employe, prepared a document captioned "For New Or Better Management", which was circulated by Miller and Haschke, both on and off the Infirmary premises, among the present and former employes of the Infirmary, and during such activity Miller and Haschke requested that said present and former employes support said document by affixing their signatures thereto; that in the latter regard approximately 24 employes affixed their signatures, including Miller, Kopsell, Jesse Haschke, Alma Maries Bloor, Duenkel, Helen Lund, Nora Hollis and Louise Haschke; that Miller, in preparing, signing, and circulating said document did so for all of the following reasons, while other employes who affixed their signatures thereto did so for one or more of the following reasons: (a) to organize a union, (b) to seek improved wages and working conditions, and (c) to seek the removal of Kuhn so as to improve working conditions; and that such activity by said employes constituted concerted activity for their mutual aid and protection with regard to their working conditions.

13. That on December 14 Mrs. Kuhn overheard employes in the Infirmary kitchen discussing the document noted above, and thereupon notified Kuhn thereof; that Kuhn then began questioning employes regarding same, and as a result learned of the caption thereof, the approximate number of employes who had signed same, and that Miller was one of the prime instigators and circulators thereof; that, after gaining such knowledge, Kuhn telephoned District Attorney Richard C. Kelly and inquired whether an employe could be discharged for insubordination; that Kelly, in response, advised Kuhn that an employe could be discharged for any reason except union activity; that Kuhn thereafter, either on December 14 or 15, informed Lloyd Byington, President of the Infirmary Board of Trustees, that Miller's activities were creating problems at the Infirmary, and that, in order to resolve said problems, Miller had to be discharged; that thereupon Kuhn discharged Miller on December 15; and that Kuhn discharged Miller because (a) she participated with Kopsell in writing the letter to Gourlie, (b) she prepared, circulated and signed the document "For New Or Better Management", (c) she sought a union among Infirmary employes, and (d) he believed she sought to discredit him to obtain his removal as Superintendent.

14. That on December 15, after her discharge, Miller, along with a number of other employes, visited the home of Andrew Anderson, a member of the County Board, where they protested Kuhn's action in discharging Miller, and where they voiced complaints concerning Kuhn and the working conditions at the Infirmary; that on December 17 Miller and 17 other employes met with members of the County Ways and Means Committee, and the Chairman and Vice-Chairman of the County Board, at the County courthouse; that at said meeting Miller protested her discharge, accused Kuhn of stealing, called him a "raving maniac" and complained that Kuhn was harsh on the employes and the patients; that at said meeting said members of the County Board read the December 13th document, signed by the employes, and heard various employe complaints concerning working conditions at the infirmary; that various employes set forth that the purpose of the document was to indicate support for better or new management, and urged that Kuhn be replaced; that during the meeting Miller did not contend that she was discharged for union activity, nor was there any discussion by anyone present with regard to union activity; and that the employes in meeting with County Board member Anderson, and in meeting with the various County Board members at the courthouse, despite the lack of discussion regarding union activity, engaged in concerted activity for their mutual aid and protection with regard to their working conditions.

15. That on December 17 Duenkel commenced her leave, pursuant to the arrangements made on December 10; that on December 18 Kuhn initiated a conversation with Bloor at the latter's work station; that, noting Bloor's silence, Kuhn inquired as to the reason therefor; that Bloor advised Kuhn that the latter had called employes names; that during said conversation Kuhn informed Bloor that he was aware that she had been in attendance at the courthouse meeting on December 17; that thereupon Kuhn requested that Bloor accompany him to his office, where he demanded that Bloor apologize for her remarks regarding name-calling, and for attending unauthorized meetings, including said December 17 meeting; that Bloor refused to so apologize; and that thereupon, while giving "insubordination" as a reason therefor, Kuhn discharged Bloor because she refused to apologize for attending said meeting and for saying that he had called employes names.

16. That on December 22, the Ways and Means Committee of the County Board and the Board of Trustees of the Infirmary met for the purpose of discussing employe complaints, which had been presented at the December 17 courthouse meeting, and also for the purpose of determining a course of action with respect to the events transpiring at the Infirmary; and that the Ways and Means Committee suggested to the Board of Trustees that the latter initiate a grievance procedure to handle complaints of the Infirmary employes.

17. That, as a result of Bloor's discharge, Mrs. Kuhn changed the work schedule of laundry department employes, and as a result, Mrs. Kuhn laid off employe Lund on December 28.

18. That, within a few days after Duenkel had commenced her leave, her position was filled by an Aide, who quit employment after two weeks; that approximately three weeks after she commenced her leave, and during the hiatus between the aide's quitting and the hiring of a replacement, Duenkel contacted Rettammel to advise that she was able to return to work; that Rettammel did not advise Duenkel that the position had been filled, but informed her to call back within a few days to permit Rettammel the opportunity to discuss the matter with Kuhn; that thereafter Duenkel called Rettammel again, and Rettammel advised that she had not as yet talked to Kuhn, and that Duenkel should "forget it for a few days"; that when Duenkel called again on January 21, Mrs. Kuhn informed Duenkel that she had been replaced; and that, under such circumstances the failure to permit Duenkel to return to active employment constituted a discharge.

19. That on a date, either in December or January, Kuhn verbally reprimanded employe Mary Burch for attending meetings with County Board members, during which working conditions of the Infirmary were discussed; that during January Kuhn interrogated employe Nora Hollis concerning the latter's reasons for affixing her signature to the December 13th document, and whether Hollis was satisfied with the working conditions at the Infirmary; that, in response, Hollis indicated that she was not satisfied with said working conditions; that thereupon Kuhn suggested "Why don't you quit your job?"; that also during January Kuhn interrogated Louise Haschke as to whether Haschke disliked him personally; that Haschke responded that her "complaint" was not directed at Kuhn, but at the physical conditions of the Infirmary; and that Kuhn then informed Haschke that she was dismissed, but immediately thereafter relented and warned her that she had better watch her work.

20. That on January 25, the County Board, in regular meeting, dissolved the Board of Trustees of Pleasant Acres Infirmary, and established, in its place, the Pleasant Acres Infirmary Committee, hereinafter referred to as the Infirmary Committee, as a committee of the County Board; and that at the same meeting it was determined that the Infirmary Committee would establish a grievance committee and a procedure by which Infirmary employes could bring their grievances directly to the attention of the County Board.

21. That prior to January 25 Kopsell gave Respondent written notice that she intended to resign effective February 15; that on the evening of January 25 Kuhn confronted Kopsell on the Infirmary premises, while the latter was on duty, and shouted at her, shook his fist in her face, and accused Kopsell of spreading rumors that he had been fired; that Kuhn also accused Kopsell of "starting it all" by her letter to Gourlie; that Kopsell became extremely upset by Kuhn's conduct, and at the completion of her shift at 11:00 p.m., upon return home, Kopsell called the County Sheriff's department, and informed a Deputy Sheriff of Kuhn's harassment of her, and indicated that, because of Kuhn's overwrought condition, a disturbance might occur at the Infirmary; that thereupon a Deputy Sheriff went to the Infirmary and remained there for approximately two hours, during which no disturbance occurred; that Kopsell did not work on January 26 and 27, as said dates were her days off; that during the evening of January 28 Kopsell called County Board member Anderson to determine whether she should report for work the following day; that Anderson advised Kopsell to call the Chairman of the County Board in regard thereto; that thereupon Kopsell called George Klinker, the Chairman of the County Board, who advised Kopsell that she had been terminated as of January 25; that on January 29 the Infirmary Committee determined to pay Kopsell her salary, accrued vacation, and other applicable benefits, if any, through February 15, the effective date of her resignation; that Kopsell was paid accordingly; but that however her attempts to remove the termination from her personnel record, and to correct same to indicate that she had quit her employment were unsuccessful.

22. That on January 26 Kuhn submitted his resignation to the Respondent; that February 20 was the final day of his employment as Superintendent of the Infirmary; and that in a letter, dated January 31, over the signatures of the members of the Infirmary Committee, Miller was advised that said committee voted to sustain Kuhn's discharge of Miller.

23. That on February 7, a number of employes of the Infirmary met with Walter J. Klopp, a Business Representative of the Complainant, and authorized Klopp to request that the Respondent recognize the Complainant as the collective bargaining representative of the infirmary employes; that on February 8, the Infirmary Committee, unaware of the employe meeting with Klopp, established a procedure which contemplated the selection, by Infirmary employes, of grievance representatives and the establishment of a three-step grievance procedure, which provided for mediation at the third and last step thereof; that on February 9, Wyss posted a notice at the Infirmary announcing a meeting of Infirmary employes for February 11, to be conducted by the Infirmary Committee; that in a letter, dated February 8, over the signature of Klopp, and received by Wyss on February 11, Klopp requested that the Respondent recognize the Complainant as the collective bargaining representative of the Infirmary employes; that during the afternoon of February 11, after Wyss had received the aforementioned letter, the Infirmary Committee held a meeting with approximately 20 of the 40 Infirmary employes in attendance, wherein one or more members of the County Board said that employes had the privilege of joining a union, that the County was providing all the benefits that it could possibly provide, and that since the County could not improve those benefits the employes would only be out their union dues; that if they did not perform their work they could be fired, and that a union could not get their jobs back for them; that at said meeting Wyss presented the grievance procedure prepared on February 8; that while said meeting was in progress, Klopp telephoned the County Clerk's office and left the following message for the Infirmary Committee, which was delivered to Wyss at the conclusion of the meeting:

"Mr. Klopp, Wisconsin Council of County & Municipal Employees called to inform you that the meeting conducted

by the County Board this afternoon is in total violation of the Wisconsin Statutes of employees to organize, in their attempt to appoint a grievance committee.

"He further stated that they (the County Board) better get within the confines of the law or they may be faced with an Unfair Labor Practice charge."

24. That, despite the aforementioned message, the Infirmary Committee, a few days later, mailed a copy of said grievance procedure to Infirmary employes, and that said grievance procedure was set forth as follows:

"GRIEVANCE PROCEDURE FOR
PLEASANT ACRES EMPLOYEES

"Any grievance of an employee involving his employment at Pleasant Acres shall be settled in the following manner:

"1. The aggrieved employee or a committee of employees shall file the grievance in writing with the superintendent within three (3) working days following the date of the occurrence of grievance or the employee's knowledge of its occurrence. The Superintendent shall attempt to adjust the matter and shall respond to the employee in writing within three (3) working days following the filing of the written notice. Failure to respond shall constitute a denial of the grievance.

"2. If the grievance has not been settled to the employee's satisfaction, the employee or the committee of employees shall file the grievance in writing with the Pleasant Acres Infirmary Committee by mailing the written grievance in an envelope addressed to the Chairman of the Pleasant Acres Infirmary Committee within three (3) working days following the denial or response of the Superintendent. The Pleasant Acres Infirmary Committee shall respond to the employee or committee of employees in writing within thirty (30) days following the postmark of the envelope containing the written grievance. Failure to respond shall constitute a denial of the grievance.

"3. If the grievance remains unsettled to the employee's satisfaction, the employee or committee of employees may, within seven (7) working days following the denial or the response of the Board of Trustees, refer the grievance to mediation provided by the Wisconsin Employment Relations Commission.

"No grievance shall be entertained or processed unless it is filed within the time limits set forth above. If the grievance is not appealed within the time limits set forth above, it shall be determined to be settled on the basis of the last answer of the County."

25. That attached to the copy of the above grievance procedure was the following letter, over the signature of Wyss:

"Enclosed please find a copy of the grievance procedure for Pleasant Acres Employees enacted by the Pleasant Acres Infirmary Committee. The Committee has been advised by the District Attorney for Juneau County that the Committee should not participate in the organization of an employee grievance committee. The Wisconsin Council of County and Municipal

Employees has objected to our participation in forming such a committee and have accused us of engaging in an unfair labor practice. We, therefore, have decided that the employees themselves will have to decide whether or not to form a grievance committee, what shape such a committee should have and who should serve on the Committee.

"We can assure you that we intend to administer this grievance procedure in the fairest manner possible. We hope that you study the procedure and utilize it whenever you have a grievance. We believe that complete, fair and prompt hearings on grievances will assist the orderly administration of the Infirmary.

"Thank-you for your service to Juneau County.";

and that, however, the Respondent took no further action with respect to said grievance procedure.

26. That, at the suggestion of the County Board, the Infirmary Committee, after it had invited Miller, Duenkel, Bloor, Kopsell and Lund to be present, on February 15, conducted an investigation hearing with respect to the discharges of Miller, Duenkel and Bloor, the termination of Kopsell, and the layoff of Lund; that during said meeting Miller informed the Infirmary Committee that the December 13th document signed by the employes was intended to indicate support for a union; that it was only after Miller raised the possibility that she may have been discharged for such union activity that members of the Infirmary Committee inquired into her involvement with the union and Kuhn's knowledge thereof.

27. That on February 25 Bloor was reinstated with full back pay and benefits from the date of her discharge to the date of her return to work; that, however, the discharges of Miller and Duenkel, and the layoff of Lund, were not rescinded by any agent or agents of the Respondent; and that, however, Lund was returned to work on March 15 to a less desirable job with less desirable hours.

28. That the actions of Kuhn with respect to the discharge of Miller and Bloor, as well as the resultant layoff of Lund; and the action of Mrs. Kuhn in the discharge of Duenkel, as well as the termination of Kopsell by the County Board, as found heretofore, were motivated, in part, to discourage said employes, as well as other employes of Pleasant Acres Infirmary, from engaging in concerted activity, for their mutual aid and protection with respect to their conditions of employment; and thus interfered with the right of said employes to engage in concerted activity, for their mutual aid and protection with respect to their conditions of employment.

29. That Kuhn's interrogation of Kopsell, Hollis and Louise Haschke, and the activity of Kuhn with respect to the reprimand of Burch, the suggestion that Hollis quit her employment, his warning to Louise Haschke, and his harassment of Kopsell, all as found heretofore, were motivated to discourage said employes, as well as other employes of the Infirmary, from engaging in concerted activity for their mutual aid and protection with respect to their conditions of employment; and that said activity interfered with, restrained, and coerced said employes from engaging in such concerted activity.

30. That the activity of the Infirmary Committee, after learning that the Complainant had requested recognition as the collective bargaining representative for the Infirmary employes, by the mailing of copies of its proposed grievance procedure, and the letter accompanying same to infirmary employes, as found heretofore, interfered with the right of said employes to engage in concerted activity on behalf of the Complainant.

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

REVISED CONCLUSIONS OF LAW

1. That the activity of the employes of Pleasant Acres Infirmary with respect to:

(a) the participation of Darlene Kopsell and Gladys Miller in the letter written on November 25 to David Gourlie;

(b) the participation of Darlene Kopsell, Gladys Miller, and Jesse Haschke in the preparation and distribution of the December 13 document entitled "For New or Better Management", and the signing of same by Darlene Kopsell, Gladys Miller, Jesse Haschke, Alma Marie Bloor, Helen Lund, Louise Haschke, Nora Hollis, and other employes;

(c) employe meetings on December 15 at the home of County Board member Andrew Anderson, and on December 17 at the County courthouse with the members of the County Ways and Means Committee, the Chairman and Vice-Chairman of the County Board, during which employes present voiced complaints with respect to their working conditions at Pleasant Acres Infirmary;

constituted the exercise of the right, as set forth in Sec. 111.70(2) of MERA, to engage in concerted activity for their mutual aid and protection with respect to their wages and conditions of their employment.

2. That Respondent Juneau County, by the action of its agents, in discharging Gladys Miller, Alma Marie Bloor, and LaVon Duenkel, by terminating Darlene Kopsell prior to the effective date of her resignation, and by laying off Helen Lund, has engaged in, and is engaging in, prohibited practices within the meaning of Sec. 111.70(3)(a)3 and 1 of MERA.

3. That Respondent Juneau County, by the action of its agent Robert Kuhn, in interrogating Darlene Kopsell, Nora Hollis and Louise Haschke, in his coercive conduct toward Kopsell, Hollis and Haschke, by requiring Alma Marie Bloor to apologize for attending meetings, and by reprimanding Mary Burch, all in order to discourage said employes from participating in concerted activity for their mutual aids and protection, has engaged in, and is engaged in, prohibited practices within the meaning of Sec. 111.70(3)(a)1 of MERA.

4. That Respondent Juneau County, by its agents, interfered with employes in the exercise of their right to engage in concerted activity on behalf of Complainant Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, by mailing copies of its proposed grievance procedure and the covering letter to its employes, and thereby engaged in and is engaging in prohibited practices within the meaning of Sec. 111.70(3)(a)1 of MERA.

Upon the basis of the above and foregoing Revised Findings of Fact and Revised Conclusions of Law, the Commission makes the following

REVISED ORDER

IT IS HEREBY ORDERED that Respondent Juneau County, its officers and agents, shall immediately:

1. Cease and desist from:

(a) Discharging, laying off, or otherwise discriminating against employes, in order to discourage them from engaging in concerted activity for their mutual aid and protection with respect to the conditions of their employment.

(b) Reprimanding employes, suggesting that employes quit their employment, warning employes to watch their work, and harassing employes, or in any other manner interfering with, restraining and coercing employes in order to discourage them from engaging in concerted activity for their mutual aid and protection with respect to the conditions of their employment.

(c) Interfering with its employes in the exercise of their right to engage in concerted activity on behalf of Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO or any other labor organization.

2. Take the following affirmative action, which is found will effectuate the purposes of the Municipal Employment Relations Act:

(a) Offer to Gladys Miller immediate and full reinstatement to her former position as Head Cook, and further immediately offer LaVon Buenkel and Helen Lund reinstatement to their former positions, or their equivalent, without prejudice to their seniority or other rights and privileges previously enjoyed by them, and make said individuals whole for any loss of pay or benefits they may have suffered by reason of the termination of their employment, by payment to them the sums of money equal to that which each of them would have normally earned or received as employes, from the date of their terminations to the date of the unconditional offers of reinstatement, less any earnings they may have received during said period, and less the amount of unemployment compensation, if any, received by them during said period, and in the event that they received unemployment compensation benefits, reimburse the Unemployment Compensation Division of the Department of Industry, Labor and Human Relations in such amount.

(b) Expunge from the records of the employes any reference to the actions of the Respondent which have been found herein to have constituted prohibited practices.

(c) Notify all employes, by posting in conspicuous places on its premises, where notices to all Infirmary employes are usually posted, copies of the notice attached hereto and marked "Appendix A." Such notice shall be signed on behalf of Juneau County by the Chairman of the County Board. "Appendix A" shall be and remain posted for sixty (60) days thereafter. Respondent shall take reasonable steps to insure that notices are not altered, defaced or covered by other material.

(d) 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.

Given under our hands and seal at the City of Madison, Wisconsin this 7th day of January, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney, Chairman

Herman Torosian, Commissioner

I concur in part and dissent in part as set forth in the attached memorandum;

Charles D. Hoornstra, Commissioner

APPENDIX "A"

Pursuant to a Revised Order issued by the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employes that:

1. WE WILL offer to Gladys Miller, LaVon Duenkel, and Helen Lund immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights or privileges previously enjoyed by them, and we will make said individuals whole for any loss of pay or benefits each may have suffered by reason of the unlawful termination of their employment.

2. WE WILL expunge from our records any reference, (1) to the discharge of Gladys Miller, Alma Marie Bloor and LaVon Duenkel, (2) to the termination of Darlene Kopsell prior to the effective date of her resignation, (3) to the lay-off of Helen Lund, and (4) to any activity of any employe which concerned protected concerted activity.

3. WE WILL NOT discharge, layoff, or otherwise discriminate against employes, for the purpose of discouraging them from engaging in concerted activity for their mutual aid and protection with respect to their conditions of employment.

4. WE WILL NOT reprimand employes, nor suggest that they quit their employment, nor warn employes to watch their work, nor harass employes, nor in any other manner interfere with, restrain or coerce employes, in order to discourage them from engaging in concerted activity for their mutual aid and protection with respect to the conditions of their employment.

5. WE WILL NOT interfere with employes in the exercise of their right to engage in concerted activity on behalf of Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, or any other labor organization.

All of our employes are free to engage or not to engage, in concerted activity for their mutual aid and protection with respect to the conditions of their employment, and are also free to become, or not to become members of Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, or any other labor organization, subject to the conditions of a valid fair share agreement, if any, between Juneau County and Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, or any other labor organization.

Dated this _____ day of _____, 1976.

JUNEAU COUNTY

By _____
County Board Chairman

THIS NOTICE MUST REMAIN POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY MATERIAL.

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

The Examiner's Decision

The Examiner, in his decision, made the following Conclusions of Law with respect to the alleged prohibited practices:

"2. That Respondent, Kuhn, (1) interrogated and threatened Infirmary employes for attending the December 17 meeting at the home of Gladys Miller, and (2) discharged Marie Dloor for attending said meeting. That such actions interfered with, restrained, and coerced such municipal employes in the exercise of their right to engage in concerted activity within the meaning of Section 111.70(2) of the Municipal Employment Relations Act, and has engaged in and is engaging in, prohibited practices within the meaning of Section 111.70(3)(a)1 of the Municipal Employment Relations Act.

"3. That Respondent discriminated against Gladys Miller by discharging her for her participation in the writing of a letter on November 25, and for her desire to form a labor organization, and for her circulation of a petition on December 13, in order to discourage her in the exercise of her rights and in reprisal for the exercise of said rights has interfered with, restrained, and coerced Miller and all other municipal employes of said Infirmary in the exercise of their right to engage in protected concerted activity, and is engaging in prohibited practices within the meaning of Section 111.70(3)(a)1 and 3 of the Municipal Employment Relations Act.

"4. That the Respondent, by failing to reinstate LaVon Duenkel during a period when her former position was vacant and available to her, because of her signing of the December 13 petition, and because of her attendance at the December 17 meeting did so in reprisal for her exercise of her right as a municipal employe to engage in protected concerted activity within the meaning of Section 111.70(2) of the Municipal Employment Relations Act, and has engaged in and is engaging in, prohibited practices within the meaning of Section 111.70(3)(a)1 of the Municipal Employment Relations Act.

"5. That Respondent, by its layoff of Helen Lund and eventual reinstatement of Lund to part-time employment in the Infirmary kitchen and by its acceptance to Kopsell's resignation and payment to her of wages from January 25 through the date of her resignation, February 15, and by presenting a grievance procedure to Infirmary employes on February 11, has not violated Section 111.70(3)(a)1 or 3 of the Municipal Employment Relations Act or any other provision of said Act."

The Examiner ordered the Respondent to cease and desist from the activity found to be violative of the Municipal Employment Relations Act and to offer reinstatement to Gladys Miller and LaVon Duenkel and to make them whole for wages and other benefits lost by them as a result of their termination.

The Petition for Review

The Respondent timely filed a petition, as well as a brief in support thereof, requesting the Commission to review the Examiner's decision. The Respondent contends that the employes who were discharged, and ordered to be reinstated by the Examiner, were discharged for cause.

The Respondent argues that the Examiner erred in his finding that Duenkel was not recalled from a leave of absence because she had executed the December 13 petition and because she participated in the December 17 meeting to obtain Miller's reinstatement. Respondent contends that the record was lacking in sufficient evidence to establish that Kuhn was aware of such activity by Duenkel.

With respect to Miller, Respondent contends that Miller's attitude and conduct were not satisfactory, contrary to such a finding by the Examiner. The Respondent alleges that the record establishes that Miller was terminated because of her circulation of rumors and accusations with respect to Kuhn, thus undermining his authority.

The Respondent also takes issue with respect to the Examiner's conclusions that Miller was terminated because of her participation in the letter to Courlie and because of her desire to establish a labor organization. In that regard the Respondent argues that, although Kuhn was aware of Miller's participation therein, Kuhn did not object to Miller's activity in that regard, or that he considered such activity in reaching his determination to discharge Miller.

Respondent also contends that the Examiner erred in concluding that Bloor was discharged for the purpose of discouraging employe meetings. The Respondent argues that the record supports a finding that Bloor was attempting to undermine and to discredit Kuhn before the County Board. The Respondent also contends that the document "For New or Better Management" did not involve protected employe concerted activity since it was "a clear attempt to intervene into the management functions of the County Board and its chosen supervisor."

The Respondent would have the Commission reverse the Examiner's Conclusions of Law wherein he found the Respondent to have committed prohibited practices.

The Revised Findings of Fact

The Commission has extensively revised the Examiner's Findings of Fact in order to set forth the events more chronologically, to add findings deemed material to the issues, and to delete findings deemed erroneous, or otherwise inappropriate, as more fully discussed herein.

Kuhn's Acts of Interference, Restraint and Coercion

An employer may not make an inquiry of employes concerning the exercise of rights protected by MERA, except under exceptional circumstances. Such interrogation ordinarily will be treated as violative of Sec. 111.70(3)(a)1 of MERA. 3/ In City of Evansville, cited below, a supervisor inquired of an employe whether he belonged to the union. The employe inquired as to whether it made any difference. The supervisor responded, "You might just as well tell me because if you don't I'll find out anyway." The Commission held that such inquiry constituted an interrogation prohibited by Sec. 111.70(3)(a)1. In sustaining our conclusion the Wisconsin Supreme Court said:

> "* * * [T]he polling of employees in respect to union membership would be considered a restraint upon the employees' right to organize and [is] considered coercive unless the following safeguards [are] observed:

3/ Green Lake County (6061) 7/62; Rock County Home (6655) 3/64; Marathon County (6826) 8/64; City of Evansville (9440-B) 3/71 (Aff. Wis. Sup. Ct., 69 Wis. 2d 140, 1975).

"(1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.'"

The Supreme Court's holding cannot be confined to employer inquiries about unions. It includes inquiries concerning the exercise of any right protected by sec. 111.70(2), MERA, which includes the right:

> ". . . to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; . . ."

The Interrogation of Kopsell on December 9.

We have concluded that Kopsell's letter of November 25 to Gourlie constituted lawful, concerted activity for the mutual aid and protection of infirmary employes with respect to wages and working conditions. Miller participated in writing said letter, as quoted in full in paragraph 6 of the Findings of Fact. It was written shortly after Gourlie had done a wage survey for the county which affected the employes' wage levels. In essence the letter questions the accuracy of the wage survey, asks how the raises are to be paid, notes that some women are doing maintenance work which men perform, like placing and removing storms and screens, notes that substitutes for the head cook receive the same pay, though they lack the schooling of the head cook and do less work, and concludes that the employes want him to have the true facts, "not just what they wanted you to know."

We have found that Kuhn unlawfully interrogated Kopsell about the letter. The Examiner made no finding relative to the conversation between Kuhn and Kopsell on December 9 about the letter. Paragraph 8 of the Findings of Fact resolves conflicts in testimony and makes other findings material to the issues.

Kuhn claimed to be indifferent about the letter. He testified that Kopsell approached him to apologize for writing the letter to Gourlie, saying that Miller had influenced her, but he told her to forget it. Kopsell, on the other hand, testified that Kuhn "started in first" about the letter to Gourlie and then about the allegedly stolen gas and food, that he said the letter could get him into a lot of trouble and that Miller was the instigator, and that Kopsell responded that Miller only asked to have something included in the letter.

We have credited Kopsell. Kuhn's assertions that she approached him to apologize and that he said to forget it are inconsistent with the weight of other testimony on similar occurrences where Kuhn approached an employe and interrogated relative to participation in various activities relating to their working conditions, as set forth in our Findings of Fact, paragraphs 15, 19 and 21. His professed relative indifference to the letter is inconsistent with Kopsell's uncontradicted testimony that on January 25 Kuhn told her she had started it all by her letter, and his admission that, after learning of Miller's involvement in the letter from Kopsell, he decided it was time to talk with Miller and called her into his office the next day, December 10. To be sure, Kuhn was very concerned about the rumors of stealing gasoline and food. However, as evidenced by Kopsell's testimony (Tr. 91), Kuhn was aware of the rumors about stealing prior to his conversation

with Kopsell tying Miller to the letter. Further, Rattammel on November 28 had told Kuhn of her conversation of November 24 with Miller during which Miller stated Kuhn was taking county food for his own use. Thus, such timing and series of events discredit Kuhn's professed nonchalance with respect to the letter.

Accordingly, we have found that Kuhn interrogated Kopsell regarding her letter to Gourlie and then decided to meet with Miller because he believed the latter was instrumental in writing the letter and was responsible for the rumors of stealing food and gasoline.

There are no exceptional circumstances excusing Kuhn from the rule that an employer may not interrogate an employe concerning the exercise of protected rights. Kuhn did not seek to treat the grievances contained in the letter. Rather, he complained that the letter could cause him trouble. In this atmosphere of coercion, the implication was clear that it also might cause Kopsell trouble. His purpose was to find out who was behind it, as evidenced by his calling Miller into his office on learning of her involvement.

Given the absence of exceptional circumstances justifying the interrogation, the absence of the Evansville safeguards, such as secrecy and assurances against reprisal, and the generally coercive atmosphere, the Commission must conclude that the interrogation of Kopsell violated sec. 111.70(3)(a)1.

The Interrogations of Hollis and Haschke in January

After the interrogation of Kopsell, on December 13 a number of employes circulated and signed a petition calling for new or better management. We have concluded that the circulation and signing of this petition constituted protected concerted activity.

We have found that in January Kuhn asked employes Nora Hollis and Louise Haschke why they had signed the petition, 4/ These interrogations violated sec. 111.70(3)(a)1, because there are no exceptional circumstances justifying requesting reasons for exercising protected rights. In addition, the atmosphere of coercion had become particularly heavy, especially as a result of the previous discharges of Miller and Bloor.

Kuhn's Coercive Conduct Toward Employes

We have also found that, after asking Hollis for her reasons in signing the December 13 petition, Kuhn also inquired whether she was satisfied with her working conditions. To her negative answer, he asked why she did not quit her job. After Kuhn asked Haschke why she had signed the petition and whether she disliked him, Haschke said her "complaint" was directed at the faulty physical conditions at the employment site. Kuhn then discharged Haschke, but immediately relented and told her to watch her work. Finally, Kuhn reprimanded Mary Burch and demanded that Marie Bloor apologize for attending meetings with the County Board members during which complaints concerning working conditions were discussed. Kuhn's statements were inherently coercive in violation of Sec. 111.70(3)(a)1. Inquiring as to why an employe does not quit employment if dissatisfied with working conditions coerces the employe in the exercise of that employe's protected right to engage

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4/ This finding is substantially identical to the Examiner's finding, except that the Examiner failed to find that Kuhn asked Haschke why she signed the petition.

in concerted action to improve working conditions. Discharging an employe for objecting to working conditions due to the physical condition of the working environment totally destroys the freedom of choice an employe enjoys under MERA to make a concerted protest, by petition, or other lawful activity, with respect to those physical working conditions. An immediate reinstatement cures the discharge, but does not necessarily cure the coercion for having exercised such right. Similarly, reprimanding or requiring an apology from an employe for participating in a group complaint concerning working conditions frustrates the legislative purpose to permit employes to collectively air their grievances with impunity.

Kuhn's coercive propensities reached physical intimidation on January 25, when he confronted Kopsell, shouted at her, shook his fist in her face and accused her of having "started it all" by her November 25 letter to Courlie. Although Kuhn apparently had become exercised in the belief that Kopsell had reported incorrectly that Kuhn had been discharged, his coercion equally embraced Kopsell in the exercise of her protected right to write the letter to Courlie on behalf of herself and other infirmary employes.

Accordingly, we have concluded that Kuhn's conduct with respect to Hollis, Hauchke, Burch, Bloor and Kopsell, as set forth above, constituted interference, restraint and coercion in violation of sec. 111.70(3)(a)1 of MERA.

Modifications of the Examiner's Findings with Respect to the December 10 Meeting with Kuhn, Miller and Rettammel

On December 9 Kuhn learned from Kopsell that Miller had some involvement in the letter written on November 25 to Courlie. On the next day, December 10, Kuhn called Miller into his office for a two hour meeting, which was attended throughout by Rettammel, the Infirmary's head nurse. We have affirmed the Examiner's findings as to what transpired during said meeting, with certain modifications. Although in that meeting the union organizational theme of the planned December 8 party was discussed, we have deleted the Examiner's finding that Kuhn advised Miller he was aware of that theme. There is no record evidence to support this finding.

We agree with the Examiner that during this meeting Kuhn complained to Miller concerning the rumors that he was stealing, that he apprised Miller of his contractual right to infirmary food, that Miller told Kuhn she desired a labor organization to represent infirmary employes, and that Kuhn responded that employes could meet on infirmary premises if they desired, and that he would furnish the coffee.

The Examiner found that Kuhn demanded an apology from Miller and threatened to discharge her if she refused to do so. We have modified that finding to indicate that Kuhn informed Miller that she was terminated unless she apologized to him for alleging that he had called her names and that Miller apologized. Said revision more accurately reflects the testimony, especially that of Rettammel.

Our revised finding also sets forth that Kuhn did not threaten to discharge Miller because of her union activity, contrary to Miller's testimony. The Examiner made no finding on this point. We have credited Rettammel's testimony that Kuhn did not threaten to discharge Miller because of her union activity. We credit Rettammel because of her relative neutrality at the time of the hearing, since she had already resigned from employment, and there is nothing in the record, or in the Examiner's rationale to otherwise impeach her reliability.

Circulation of the Petition

The Commission had found that the employes on December 13 circulated and signed a petition headed "For New or Better Management" for the purposes of (a) organizing to form a union, (b) seeking to improve their working conditions by concerted action, and (c) concertedly seeking the removal of Kuhn as superintendent. The Commission has concluded that such activity was protected by sec. 111.70(2), MERA.

The Examiner found that the petition was not designed to elicit support for a union. He reasoned: (a) "For better" did not naturally import "for union", (b) Respondent presented several employe witnesses who testified that they were not advised of the purpose of the petition at the time of their signing same, and he resolved the "credibility" issue in their favor, and (c) Miller's testimony of purpose must be discredited, since on December 17, during the meeting with the County Ways and Means Committee, Miller failed to attribute a union organizational purpose to the petition. Nevertheless, the Examiner concluded that the signing and circulation of the petition was protected activity, because "it constituted another act in a course of conduct by employes to improve their working conditions." (Memorandum, p. 14)

The Commission disagrees with the Examiner's finding that the petition was not designed for a union organizational purpose. Undoubtedly "for better" does not mean "for union". We are not confined, however, to the words on a piece of paper in ascertaining the signers' purposes. We may review their testimony in making that determination. The Examiner conceded as much in finding that the purpose was to improve working conditions, since "for better or new management" itself does not imply "for better working conditions". Only testimonial evidence can support his finding of purpose to improve working conditions.

Reviewing the testimony to find purpose, twelve employes testified that they signed the petition for a union organizational purpose. 5/ The Examiner discarded this majority in favor of the testimony of a minority of employes. Drunasky testified that the purpose was to have Kuhn dismissed. Another employe, Vinz, testified that she signed the petition to indicate that she was Miller's friend, while a third employe, Lindley, testified that she signed the petition to obtain a meeting with the County Board to straighten things out. We can credit the testimony of said three employes without discrediting the testimony of the twelve employes. While the purposes of signing differed, such a difference does not impeach the testimony of the majority of employes any more than the majority impeaches that of the minority of the employes. We can perceive no reason to discredit the avowed union organizational purpose of the majority of the employes.

Nor can the Commission accept the Examiner's decision to discredit Miller's testimony that she had a union organizational purpose in circulating and signing the petition. The Examiner relied on the fact that Miller, in the December 17 meeting, failed to reveal such a purpose. In addition, the Examiner might have noted that, promptly following her discharge, in the December 15 meeting with County Supervisor Anderson, Miller made no mention of union. Her failure to do so is understandable because of the atmosphere of coercion which caused the employes to conceal their organizational purpose.

5/ Ropsell, Lund, Duenkel, Hollis, Jesse Haschke, Louise Haschke, Verwiebe, Carey, Burch, O'Connor, Bird and Miller.

Kopsell, for example, testified that the word "union" was avoided on the face of the petition out of fear of discharge. (Tr. p. 98). Moreover, the Examiner failed to consider the following: (a) the testimony of Gladys Miller that in November, Alice Miller, another employe, suggested that Gladys Miller contact Frieda Reick, a representative of a union not involved in this matter, for the purpose of organizing a union, and Reick's testimony that Alice Miller called her to express the interest of employes in a union; (b) the attempt of employes, including Gladys Miller to organize a party for December 8, which in part would feature Reick presenting information about unions; (c) Miller's spontaneous assertion to Kuhn on December 10 that the employes desired a union; and (d) the subsequent meetings in Miller's home with Frieda Reick, during which organizational rights were discussed. At the very least, the Examiner's statement, on page 14 of his Memorandum discrediting Miller's testimony concerning union activity in November, December and January, is contradicted by paragraph 13 of his Findings of Fact that Kuhn discharged Miller on December 15 because of her desire for a union, as well as the statement on page 15 of his Memorandum, that said desire formed the basis of Kuhn's decision for the discharge. Further, the Examiner's conclusion clashes with the testimony of Jesse Haschke that, in circulating the petition with Miller, employes were informed that its purpose was to seek support for a union, and the testimony of several employes who signed the petition indicating that they conferred with Miller regarding said purpose. 6/

The evidence, as the Examiner found, establishes that employes sought to improve their working conditions through the petition. Jesse Haschke desired a union to prevent Kuhn from cussing at employes. Louise Haschke explained that her motive in signing the petition was her dissatisfaction with the faulty furnace, leaky walls, dripping faucets, and other physical conditions of the working environment. Miller sought a union so as to attempt to control Kuhn's verbal abuse of employes and to reduce the number of additional tasks being assigned to her.

The Discharge of Miller

The Examiner found that Kuhn's decision to discharge Miller was made on the basis of "her involvement in the writing of Kopsell's letter to Gourlie, as well as her desire to establish a labor organization among Infirmary employes." We agree that said reasons partially motivated the discharge. However, we have also concluded that Kuhn discharged Miller for two additional reasons, namely, her participation in the preparation and circulation of the December 13th petition, and believed she sought to discredit Kuhn to obtain his removal as Superintendent.

6/ See testimony of Lund, Buenkel and Louise Haschke.

The Respondent posits that Kuhn testified that Miller's role in the petition was the final blow causing him to discharge her, but argues that the primary motive for the discharge was Miller's persistent efforts to discredit him, circulating the petition merely being another effort. These persistent efforts, the Respondent argues, consisted of Miller's activities in telling employes that Kuhn was stealing county food; community rumors, at least traceable to Miller's husband, that Kuhn was stealing County gasoline; and following her discharge, during the December 17 meeting with members of the County Ways and Means Committee, charging Kuhn with stealing, and calling Kuhn a raving maniac in need of a psychiatrist. In support of his contention Respondent cites the fact that during the December 17 meeting Miller made no mention of a union. Respondent further argues that Kuhn called Miller into his office on December 10 only after hearing of the rumors with respect to stealing, and that Kuhn sought to end such rumors by proving to Miller, through copies of receipts and a copy of his employment contract, that he was not stealing.

The Respondent notes that the petition of December 13, on its face, would alert no one that it was for a union organizing purpose, and that Kuhn's inquiries among employes disclosed other purposes, including support seeking to terminate him. Thus the Respondent argues that the petition was only an extension of Miller's crusade to discredit Kuhn and an effort to cause the County to terminate him, and therefore since Kuhn at the December 10 meeting proved to Miller that he was not stealing, Kuhn reasonably believed that the termination of Miller was the only method by which he could end Miller's vendetta toward him and thus prevent her from undermining his authority.

There are flaws in the Respondent's contention as to Kuhn's motives in discharging Miller. Rettammel, on November 20, informed Kuhn that Miller was accusing Kuhn of taking infirmary food for his own use. Kopsell's testimony with respect to her meeting with Kuhn on December 9, which testimony we have credited, establishes that Kuhn complained of the rumors with respect to his stealing food and gasoline. However, during said meeting Kopsell informed Kuhn that Miller had some involvement in the letter to Gourlie, which letter prompted said meeting with Kuhn. Kuhn indicated that said letter would cause him problems and further, Kuhn indicated that he was aware that Miller was attempting to get a union, and that he was also aware of the abortive Christmas party and its connection with union activity. Kuhn, by his own testimony, after the meeting with Kopsell, determined, it was time to meet with Miller, and he did so the following day. 7/

It cannot be ignored that during the December 10 meeting with Miller, after proving to Miller that he was not stealing, rather than terminating Miller on said date, he demanded and received an apology from Miller for claiming that Kuhn was calling employes names.

The Respondent would have the Commission disregard the concerted and/or union activity by Miller as affecting Kuhn's decision to discharge Miller. While the Commission agrees with the Respondent that Kuhn could not have reasonably concluded from the petition headed "For New or Better Management" that one of the purposes of said petition was to organize a union, the Commission however finds incredible Respondent's assumption, that Kuhn did not also perceive it as an

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7/ Contrary to the statement of our dissenting colleague, we do not agree that Kuhn's only motivation in meeting with Miller was to deal with the stealing rumors and the name-calling allegations. We note that Kuhn had learned from Rettammel on November 20, almost two weeks prior to the December 9 conversation with Kopsell, that Miller had said Kuhn was taking County food for his own use.

expression of dissatisfaction by the signators over the existing working conditions. In reaching said conclusion we find significant the fact that at the time of the December 13 petition, Kuhn had knowledge of: a) the Kopsell letter to Courlie relating to wages and working conditions; b) the planned December 6 Christmas party and its planned union organizational thesis and c) that employes were interested in organizing a union. We cannot ignore said knowledge of Kuhn in determining his reaction and understanding of said petition. Indeed, "New Management" indicated a desire to terminate Kuhn. However, given the events immediately preceding the circulation and signing of the petition, as well as Kuhn's knowledge of employe dissatisfaction over working conditions and wages as reflected in the Courlie letter, the Commission concludes the only reasonable inference is that Kuhn understood the term "better management" as an attempt by the signators of the petition to improve their wages and working conditions, which purpose is a protected concerted activity.

While Sec. 111.70(3)(a)3, MERA, prohibits encouragement or discouragement of "membership" in a labor organization, we construe the ban to include discrimination with respect to the exercise of any right protected by Sec. 111.70(2), MERA, such as writing the letter to Courlie and petitioning for improved working conditions, even if no union were contemplated at the time. We believe the Legislature intended to protect from discrimination any concerted activity which relates to wages, hours, conditions of employment and other mutual aid and protection of employes because such concerted activity is incipient to union activity. 8/

The Respondent argues that Kuhn's action in discharging Miller was primarily motivated because of the latter's efforts to discredit Kuhn and to seek his removal as Superintendent and therefore not violative of the Act, however, the record supports additional motives relating to Miller's protected, concerted and/or union activity, as noted heretofore.

In construing Sec. 111.70, Wis. Stats., now known as the Municipal Employment Relations Act, our Supreme Court, in Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis. (2d) 540, 8/67, consistent with its construction of the Wisconsin Employment Peace Act, 9/ held that a teacher could not be non-renewed when one of the motivating factors in such a determination was the teacher's concerted activity, no matter how many other valid reasons existed for such action.

Further, assuming that Kuhn's sole motive in discharging Miller was his belief that Miller's purpose in circulating the December 13 petition was to seek his removal as Superintendent, the majority would find Miller's discharge violative of the Act on the basis of the rationale set forth in Commissioner Roumatra's Memorandum in that regard.

8/ Accord: NLRB v. Erie Resistor Corp. (1963), 373 U.S. 221, 83 S. Ct. 1139, 10 L.Ed. 2d 308, 53 LRRM 2121, 2126.

9/ St. Joseph's Hospital v. WERB, 264 Wis. 396 (1953).

The Discharge of Bloor

The Examiner found that Kuhn discharged Bloor for attending the December 17 meeting for the purpose of discouraging employe attendance at such meetings where employes discussed working conditions. We have modified this finding only to show that Kuhn discharged Bloor for refusing to apologize for attending the December 17 meeting and for saying he had called employes names. 10/ In addition, we have deleted the Examiner's erroneous finding that the December 17 meeting occurred in Miller's home; it occurred in the courthouse.

Respondent does not take exception to the Examiner's finding that Kuhn discharged Bloor for attending the December 17 meeting. It argues, however, that the purpose of the discharge was not to discourage employe attendance at such meetings but was based on Kuhn's belief that the purpose of said meeting was to obtain his removal.

Participating in the December 17 meeting was protected activity within the meaning of Sec. 111.70(2), since at that meeting there was discussion of working conditions 11/ the petition, the desirability of removing Kuhn as Superintendent, and a protest of the discharge of Miller. 12/ Even if seeking Kuhn's removal were not protected activity, participation in the meeting would remain protected because its other purposes were protected. It follows, that discharging Bloor for participating in said meeting did interfere with her rights to do so, and was motivated to discourage her and others from doing so, all in violation of Sec. 111.70(3)(a)3 and 1.

10/ Even were the name-calling matter a proper ground for discharge, the discharge is unlawful because also it was based on Bloor's attendance at the December 17 meeting. See Muskego-Norway v. WERB, supra, and Kenosha Teachers Union v. WERC (1960), 39 Wis. 2d 196, 203, 158 N.W. 2d 914.

11/ Lobbying legislators for changes in governmental policy affecting job security is protected as action for mutual aid and protection even where the employer cannot control the acts of the legislative body. Kaiser Engineers v. NLRB (9th Cir. 1976), 538 F.2d 1379, 92 LRRM 3153, 3157. Here, the legislators constituted the decision making body of the employer, and the employe appeals were a fortiori protected. Furthermore, the right to present grievances is specifically granted. Sec. 111.70(4)(d)1, MERA.

12/ Generally, the protest of even a lawful discharge is protected activity. See Summit Mining Corp. v. NLRB (3rd Cir. 1958), 260 F.2d 884, 35 LC par. 71,903. The rationale was well stated by Learned Hand: "When all the other workmen in a shop make common cause with a fellow worker over his separate grievance . . . they engage in a 'concerted activity' for 'mutual aid and protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping . . . ." NLRB v. Peter Cailler Kohler Swiss Chocolates Co., Inc. (2nd Cir. 1942), 130 F.2d 503, 6 LC par. 61,187.

The Decision Not To Recall Duenkel

The Examiner found that the Respondent decided not to recall Duenkel because she signed the petition and participated in the December 17 meeting to obtain Miller's reinstatement. We agreed with only a slight modification. 13/

Respondent argues that this finding is in error because the record fails to show that Duenkel expressed a wish to return to work at a time when there was a vacancy. Therefore we have revised the Examiner's Findings.

We find that the failure to recall Duenkel at the end of her 30-day leave was in fact a discharge. She had been a satisfactory employe for two and a half years. On December 10 she asked for and received a 30-day medical leave of absence with the understanding that she could return unless a replacement were found before the expiration of the leave period. She began her leave on December 17. (See paragraph 10 of the Revised Findings of Fact.) Two other facts bear repeating: Duenkel signed the petition on December 13 and participated in the meeting of December 17.

Duenkel testified positively that it was about three weeks after December 17 when she called Rettammel to state her interest in returning to work at the end of her 30-day leave. (Tr. 123, 128). Duenkel had two additional telephone conversations, one with Rettammel and one with Mrs. Kuhn, before she learned on January 21 that she had been replaced. Kuhn testified that he hired Duenkel's replacement about a week after December 17, and that the replacement quit about two weeks or three thereafter.

Thus, Kuhn's own recitation of the time sequence confirms Duenkel's testimony that she expressed her availability about three weeks into her 30-day leave, after the first replacement had quit and before the second replacement was hired. Further, Duenkel's testimony is confirmed by the failure of Rettammel, in either of the two conversations, to state that the job had been filled.

The only reasonable inference is that Duenkel expressed her interest in returning to work at a time when her job was vacant and very close to the end of her 30-day leave. Inasmuch as her work performance had been satisfactory, her participation in the December 13 petition and the December 17 meeting emerge as the motive for the determination not to employ Duenkel. Such determination constitutes a discharge.

13/ We have found that the decision was based on Duenkel's signing the December 13 petition and attending the meeting with Miller and the County Board members. We do not confine the purpose of the meeting to gain Miller's reinstatement but by our description of that meeting recognize that it also sought Kuhn's removal, improved working conditions, etc.

The Layoff of Lund

The Examiner found that Bloor's discharge resulted in the layoff of Helen Lund. Respondent does not take exception to that finding and we have affirmed it. 14/ Lund eventually was recalled to work on March 15. We have found that she was returned to a less desirable job with less desirable hours. The basis of that finding is that prior to her layoff Lund worked in the laundry eight hours a week in a single shift, but after being recalled she worked in two four hour shifts, and in Lund's words, in "[s]ort of a flunky job -- helping the Cook in the kitchen." (Tr. 109)

The Examiner concluded that the layoff and reinstatement of Lund did not violate MERA. He reasoned that Complainant failed to tie Lund's layoff and reinstatement to the kitchen to an unlawful purpose or motivation. The Examiner ordered no relief to Lund for loss of pay during the period of her layoff.

We disagree with the Examiner's conclusion that the layoff of Lund did not violate MERA. It is irrelevant that there was no unlawful purpose or motivation in reinstating her to the kitchen. 15/ The earlier layoff violated sec. 111.70(3)(a)3 and 1 16/, because it directly resulted from the discharge of Bloor, which violated said same provisions. 17/

The Termination of Kopsell

By January 25 Kopsell had resigned effective February 15. On the evening of January 25, Kuhn accosted Kopsell. He complained that she had reported he had been fired. She denied it. He shook his fist in her face, backed her to the wall, and said she had started it all by her letter to Gourlie. Kopsell became very emotionally upset.

14/ The testimony of Dean Dickson, Kuhn's successor, was based on respondent's records and was introduced by respondent without objection. Dickson testified that prior to Lund's layoff, two full-time employes worked in the laundry. Bloor was one of the two. They were relieved on days off by various other people, Lund being one of them. After Bloor's discharge, three full-time employes were placed in the laundry and they relieved each other on days off, thereby eliminating the need for Lund's part-time service of relief on days off. (Tr. 288). Kuhn testified that the laundry reorganization resulted from Bloor's discharge and that Lund's layoff was a result of the reorganization. (Tr. 32)

15/ We have no doubt that the reinstatement of Lund to the kitchen was due to the respondent's unwillingness to unscramble the laundry reorganization so recently implemented as a result of Bloor's discharge.

16/ We do not conclude that the Lund layoff violated MERA as having been in response to her signing the petition on December 13.

17/ Compare Schott's Bakery, Inc. (1967), 164 NLRB NO. 59, 65 LRRM 1180, 1967 CCH NLRB par. 21, 318. There, an employe was discharged for inability to perform a job well. He had been transferred discriminatorily to that job. The administrative law judge reasoned: ". . .[I]nasmuch as the employer bears the responsibility for having discriminatorily created a situation which resulted in [the employe's] discharge, through no fault of his own, the employer must also bear the responsibility for the consequences which emanated from his unlawful action."

After Kopsell completed her shift, about two and a half hours after the confrontation with Kuhn, and after discussing the incident with her husband, she called the sheriff. Her stated purpose was her concern that Kuhn might work some harm on other employes. A deputy sheriff investigated, found no disturbance, and left.

Kopsell was next scheduled to work on about January 29. The prior evening, however, in conversations with County Board member Anderson and Board Chairman Klisken, the latter told Kopsell not to return to work, that she was terminated, but that she would be paid nevertheless to the date of her resignation. We accept Kopsell's inference that the reason for her termination was that she called the sheriff.

We believe Kopsell's conduct in calling the sheriff was protected activity under Sec. 111.70(2), MERA, as being for the mutual aid and protection of her co-workers. Nothing in this record warrants the inference that her conduct was immoderate or otherwise inappropriate. Although more than two hours had passed since Kuhn's outburst, the extent of the physical intimidation toward Kopsell, the effect of leaving her in tears, Kuhn's propensity for outbursts against employes, all combine to support Kopsell's belief that the presence of a peace officer was needed for the protection of her co-workers.

Accordingly, the termination interfered with Kopsell in the exercise of her right to take such concerted action. Although she suffered no monetary loss, we have ordered that any records suggesting she was terminated be expunged.

The Remarks of County Board Members on February 11

In its complaint, the Complainant alleged that on February 11 during a meeting attended by certain employes, members of the County Board made certain statements which constituted threats and intimidation. The Examiner found that on that date the Infirmary Committee met with 20 of the 40 Infirmary employes and that Board member Anderson stated that if employes joined a union they would only be out their union dues. In his memorandum, the Examiner noted the notes and testimony of employe Norma Vierkiebe that a County Board member also stated that selection of the Complainant as the employes' bargaining representative would not obtain the reinstatement of employes discharged prior to February 11. The Examiner discredited this testimony in favor of the denials of Wyss and Anderson. The Examiner concluded that the statement that the employes only would be out in their union dues if they joined a union did not disparage Complainant or place it in such disrepute as to interfere with employe rights. 18/

We agree with the Examiner that a statement was made by a County Board member that the employes only would be out their union dues if they joined a union. We have expanded our finding on this point to more fully reflect the statement made. 19/ We agree with the Examiner that this statement is not inherently coercive or otherwise an

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18/ Although the Complainant has filed no petition for review and is not, therefore, entitled to a review as of right as to the Examiner's findings, conclusions and orders adverse to it, we believe we may review the Examiner's decision as integrally related to our full review of all the issues presented in the Respondent's petition for review.

19/ We have found that "one or more members of the County Board said that the county was providing all the benefits that it could possibly provide, and that since the County could not improve those benefits the employes would only be out their dues."

interference with employe rights. An employer is not precluded from stating that it is paying as well as it can and noting the economic consequences of unionizing. Nor do we believe there was such a coercive atmosphere at this point in time as to render the statement chilling of employe rights. Kuhn had tendered his resignation. Members of the County Board by this time had shown a responsiveness to the employes' grievances and they had given notice of intent to erect a grievance procedure. In fact, the February 11 meeting discussed that procedure.

We have additionally found that during the meeting Wyss stated that he had heard there was a meeting of employes concerning joining a union and "that was their privilege." This finding is material on the question whether other statements and conduct of the Respondent reasonably could be understood as an interference with employe rights.

Finally, we do not accept the Examiner's discrediting of Vierwiebe's testimony that a union could not save employes' jobs. We have found that a member of the County Board said

> "That if they did not perform their work they could be fired, and that a union could not get their jobs back for them . . . ."

While Wyss denied making such a statement, Anderson testified he could have said that the union could in no way help those who were fired get their jobs back (Tr. 324). Thus, the Examiner mistakenly assumed both Wyss and Anderson denied making the statement. Therefore, there is no credibility resolution to make on this point. It follows that we are free to credit Vierwiebe's testimony to the effect that if an employe did not do his job he could be fired and a union could not get his job back.

This statement does not coerce or otherwise interfere with employes in the exercise of their rights. It simply states the truth that unionizing does not immunize employes for failure to perform their work. Had there been a coercive atmosphere at this time, we might be willing to make the inference that the statement had the effect of meaning the County would not bargain with a union as to whether certain reinstatements were warranted. Absent that atmosphere, such inference is unfounded.

Attempting to Establish the Grievance Procedure

The Examiner found that, after receiving notice of the Complainant's request for recognition as the employes' collective bargaining representative, members of the County Board, in the February 11 meeting, proceeded to present the grievance procedure to the employes and subsequently mailed it to the employes with a covering letter. The Examiner concluded there was no violation since the grievance procedure, having been planned as early as December 22, was not in response to the demand for recognition and the Respondent took no further steps toward implementing it.

While the activity of the agents of the Respondent in the preparation of the grievance procedure, at least prior to the message received by Wyss from Klopp, did not constitute acts of interference, restraint and coercion, the activity of said agents in mailing the grievance procedure and covering letter to the employes, in the opinion of a majority of the Commission, constituted acts of prohibited interference. The fact that the Infirmary Committee conceived the idea of a grievance procedure prior to its knowledge that the Union claimed to represent its employes is of no consequence given the facts herein, because the mechanics of the grievance procedure and its proposed implementation were not completed prior to said knowledge. Herein, the Infirmary Committee encouraged its employes to name a grievance committee and indicate a desire and willingness to proceed and implement the grievance

procedure even after it had knowledge of the Union's claim that it represented a majority of the Infirmary employes. Such action, the majority concludes, is tantamount to bargaining by the Infirmary Committee at a time when the County was aware the Union had made a request for union recognition.

Further, the majority draws attention to the third step of the grievance procedure which provides that, should the grievance not be settled in the two previous steps, the aggrieved employe or the employe committee may "refer the grievance to mediation provided by the WERC". As stated, said provision implies that the Respondent would be willing to engage in bargaining with either the aggrieved employe or the committee of employes with respect to the grievance. In the covering letter the Respondent stated "that the employes involved will have to decide whether or not to form a grievance committee, what shape such a committee should have and who should serve on the committee." This statement tended to discourage employes from seeking outside representation with respect to their grievances, and thus, in the opinion of the majority, constituted a prohibited act of interference. As indicated in our Findings of Fact, during the afternoon of February 11, after Wynn had received the letter from Klopp requesting that the Respondent recognize the Complainant as the bargaining representative of the Infirmary employes a meeting was conducted by the Infirmary Committee, with approximately one/half of the employe complement in attendance, during which one or more members of the County Board, while indicating that the employes had the privilege of joining a union, indicated that the Respondent was providing all the benefits that it could possibly provide and that the County could not improve those benefits. Yet despite knowledge of the request for recognition and the Klopp message as to the possible violation of the Wisconsin Statutes, the Infirmary Committee caused the grievance procedure and the covering letter to be mailed to the infirmary employes. While the evidence did not establish any explicit "anti-union" animus, a finding of such animus is not necessary to establish a violation of Section 111.70(3)(a)1 of MERA. Said provision is violated whenever acts are committed, which are likely to interfere with employe rights to engage in, or from engaging in "concerted action to seek union representation." 20/ Therefore, the majority of the Commission concludes that the Respondent, by such activity, committed a prohibited practice in violation of said section of MERA.

The Revised Order

Our revised order reflects the changes in our Findings and Conclusions. In light of our extended discussion explaining those changes, it is only necessary to add that we are satisfied the Revised Order is necessary to effectuate the purposes and policies of the Legislature in enacting MERA.

Dated at Madison, Wisconsin this 17th day of January, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney, Chairman

Herman Torosian, Commissioner

20/ Dane County (11622-A) 1/73; Village of Shorewood (13024) 9/74; City of Cudahy (13246-A, B) 8/75.

OPINION OF COMMISSIONER HOORNSTRA CONCURRING IN PART AND DISSENTING IN PART

While agreeing that the discharge of Miller was unlawful, I disagree with certain of the findings of fact underpinning that conclusion. More particularly, the evidence does not support the findings that Kuhn was motivated to discharge Miller because of her involvement in writing the letter to Courlie or because she sought a union among infirmary employes. The illegality of her discharge follows from the findings that Kuhn discharged her because she prepared, circulated and signed the petition for new or better management, her purposes in doing so being protected, and because he acted in the belief that she sought to obtain his removal as superintendent.

I also dissent from the majority's conclusion that the respondent interfered with the employes' rights by mailing the proposed grievance procedure to them. Since the county board representatives had promised to produce such a procedure prior to their knowledge of union activity, and not in response to union activity, it is not reasonable to conclude that fulfillment of that promise chilled or otherwise interfered with the employes in the exercise of their rights. It follows that I do not join the commission's cease and desist order emanating from this conclusion.

Finally, I set forth additional reasons in support of the commission's decision relative to Kuhn's interrogations of certain employes.

In all other respects, I concur with the results contained in the commission's findings, conclusions, orders and memorandum.

Kuhn's motivation in discharging Miller

In finding Kuhn's internal motivations, the task is to read his mind. The burden of proof is by a "clear and satisfactory preponderance" of the evidence, Section 111.07(3), Stats. Since it is impossible to see directly into a person's mind, the surrounding facts and circumstances must show the motivation by a clear and satisfactory preponderance of the evidence.

The majority finds that Kuhn was motivated to discharge Miller, inter alia, because of her involvement in the letter to Courlie and because of her union proclivities. The majority reasons: (1) Kuhn had knowledge of Miller's union activity and involvement in the Courlie letter; (2) on December 9, after learning from Kopsell of Miller's involvement in the Courlie letter, Kuhn decided to meet with Miller; (3) he met with her on December 10 and, rather than discharge her, he demanded that she apologize for having said he had called her names; and (4) the discharge followed the December 13 petition which showed unrest among a number of employes, which Kuhn must have identified with working conditions.

The first ground, Kuhn's knowledge of Miller's protected activity, is a condition precedent to find improper animus, but does not itself establish animus. In fact, an employer may discharge an employe for a lawful reason even though he welcomes the opportunity to do so because the employe engaged in protected activity. See Frost Morn Meats, Inc. v. NLRB, 296 F.2d 617, 620-621, 49 LRRM 2160 (5th Cir. 1961); M.R. & R. Trucking Co., 218 NLRB No. 169, 89 LRRM 1409 (1975); and Klate Holt Co., 161 NLRB No. 138, 63 LRRM 1481 (1966).

The majority's suggestion, that Kuhn was prompted to meet with Miller on December 10 because on December 9 he learned through Kopsell that Miller had participated in the letter to Courlie, contravenes the record. To be sure, Kuhn testified that after the Kopsell

conversation on December 9 he decided it was time to meet with Miller. The December 9 conversation, however, also included discussion about the rumors that Kuhn was stealing. In the next breath of this testimony, after explaining he thought it was time to meet with Miller, Kuhn stated that at the December 10 meeting he showed Miller his contract, thereby proving that he was not stealing, since food was a part of his compensation. 21/

Kuhn's failure on December 10 to exact an apology for the Gourlie letter or the union interest or otherwise to chastise Miller for the same, indicates their relative insignificance. The stealing rumors and the name-calling matter emerge as far more significant, since that is what they talked about.

I would join the majority's findings as to Kuhn's motivations if this record contained only Kuhn's knowledge of Miller's role in the Gourlie letter, his knowledge of her union activity, his decision to meet with her on learning of the same, and the discharge immediately after the subsequent petition for new or better management. On those facts alone, the claimed insight into Kuhn's internal motivations would be supported by sufficient evidence.

There are additional facts, however, which mask our capacity to see, by a clear and satisfactory preponderance of the evidence, that Kuhn was motivated by Miller's union proclivities and her role in the Gourlie letter. First, Kuhn wanted to meet with Miller on December 10 to dispel the stealing rumors and the name-calling allegation. 22/ The evidence for this is: (a) in the December 9 meeting with Kopsell, Kuhn complained about those rumors; (b) in the December 10 meeting with Miller, Kuhn produced receipts and a copy of his contract to show he was not wrongfully taking food or gasoline; (c) in the December 10 meeting, Kuhn exacted an apology from Miller, on penalty of discharge, for the name-calling allegation; and (d) nothing was said in the December 10 meeting, so far as this record shows, relative to the Gourlie letter or, for that matter, Kuhn's concern about Miller's union activity, Miller having injected that element into the conversation as a bromide.

Second, Kuhn had no notice that the petition concerned a union, wages, or working conditions. The Examiner correctly stated that "for better or new management," which headed up the petition, does not mean "for union." On its face, the petition aims at management, not wages, working conditions or unions. Kuhn thought the petition was aimed at him, and his inquiries apprised him that some people signed a blank piece of paper, some signed for new or better management,

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21/ "Q. * * * What happened then; if anything?
"A. After that I thought it was time to call her in the office and talk to her, which I did. I showed her my contract." (25)

22/ The majority notes that, by the time of the December 9 conversation with Kopsell, Kuhn had learned two weeks earlier that Miller told Rettammel she was aware Kuhn was making personal use of county food. In the December 9 conversation, however, Kuhn also told Kopsell he already was aware of Miller's union activity.

some signed as a friend of Miller's, and some signed to get a meeting (29,41). The testimony of employes corroborates his understanding, and the natural meaning of its heading, that the purpose of the petition was to have him fired. Sophie Brunasky said that in talking to Miller at the time she signed the petition, "it sounded like she wanted to dismiss Mr. Kuhn . . . . ." (206) According to Edna Vinz, Miller asked her to sign the petition to show Kuhn "that you are my friend." (279) Jessie Lindley testified that she thought the purpose of the petition was to get a meeting with the county board, that no heading was at the top of the paper when she signed, and that there was no mention about a union (267). Louise Maschke testified that Kuhn asked her about signing the petition: "he wanted to know what I had against him." (166)

Since the purpose of Kuhn's meeting with Miller on December 10 was to quiet the rumors about stealing and name-calling and since his knowledge of the petition was that Miller was behind it and it sought new or better management, not a union or improved wages or working conditions, Kuhn could only have perceived Miller's circulation of the petition as a continued effort to discredit him for having given her a dressing down three days earlier relative to the stealing and name-calling rumors. Having failed to still Miller by supplying her with proof that he was not stealing and by exacting an apology about name-calling, Kuhn believed outright discharge was necessary to prevent her from further efforts at discrediting him and from undermining his authority.

Thus, given Kuhn's high concern to dispel the rumors about stealing and name-calling, discussing those matters with Miller on December 10 and failing to bring up the union or the Gourlie letter, and the circulation of the petition bearing no notice that it related to working conditions, or wages or anything other than "new or better management," the inference of Kuhn's animus from knowledge of Miller's union interest and role in writing the Gourlie letter is speculative and not supported by a clear and satisfactory preponderance of the evidence.

The illegality of the discharge of Miller

Despite my dissent as to Kuhn's motivations in discharging Miller, I concur that the discharge violated sec. 111.70(3)(a)1 and 3, Stats., for two reasons. First, Kuhn acted in the belief that one of Miller's purposes was to obtain his removal as superintendent, and, under the facts of this case, such purpose was protected. Second, Miller also engaged in protected activity to get a union and better working conditions in circulating the petition; Kuhn admitted circulating the petition formed the basis of his discharge decision; and it is irrelevant if Kuhn genuinely was mistaken that Miller's purposes or motives in respect to the petition were protected.

The protected nature of Miller's conduct

Seeking Kuhn's dismissal was protected. While the selection of supervisors ordinarily is exclusively a management function, cf. City of Beloit v. WERC (1976), 73 Wis. 2d 43, 242 N.W. 2d 231, 237 (relating to the selection of evaluators), employes have a legitimate interest in who the supervisor is where their grievances are directly connected to the supervisor. See NLRB v. Phoenix Mutual Life Ins. Co. (7th Cir. 1948), 167 F.2d 983, 22 LRRM 2089, 203, 2094, cert. denied, 335 U.S. 845, 69 S.Ct. 68, 93 L.Ed. 395. Employe grievances relative to ineffective, negligent supervision which potentially holds an adverse impact upon the manner in which employes perform their jobs, or the safety of performance, are protected as being for the mutual aid and protection of the employes. See Dreis & Krump Mf. Co. v. NLRB (7th Cir. 1976), ___F.2d____, 93 LRRM 2739, 2744. Here, since the employes were concerned about the personal abuse they received from Kuhn, as well as the unsatisfactory working conditions resulting from his supervision, their conduct in seeking his removal was protected as being for their mutual aid or protection in respect to conditions of employment.

Concluding thus employes have a legitimate interest in who their supervisor is, however, does not mean that any activity taken toward his removal is protected. Thus, in Dobbs Houses, Inc. v. NLRB (5th Cir. 1963), 325 F.2d 531, 54 LRRM 2726, 2732, the court held unprotected an employe walkout in protest of the discharge of a favored supervisor as not being reasonably related to the end sought. Accord: Henning & Chandle, Inc. v. NLRB (7th Cir. 1975), 522 F.2d 1050, 90 LRRM 2381, 2385. Circulating and signing a petition, however, is not immoderate or otherwise unreasonable conduct. Nothing in this record shows that employe efficiency or work performance was impaired. Accordingly, Miller and the employes in concert with her engaged in protected activity in circulating and signing the petition even to the extent that its purpose was to have Kuhn removed as supervisor.

Even if seeking Kuhn's ouster were unprotected, however, Miller's conduct in respect to the petition was protected because it had other purposes, including the formation of a union and the improvement of working conditions. Dual purposes do not make the activity in support thereof unprotected even if one of the purposes is unprotected.

> "* * * Even if . . . the employees were also protesting the possibility that an unpopular co-employee would be selected to fill a newly vacant 'supervisory' employee position, the presence of mixed motives would not convert protected activities into unprotected ones." Kayo Visual v. NLRB (8th Cir. 1975), 516 F.2d 876, 89 LRRM 2367, 77 LC par. 10, 879.

The employer cites cases where unprotected activity did contaminate otherwise protected activity. The examiner, however, correctly noted that those cases dealt with defiant misconduct which justified discharges even though the employe was engaged in protected activity as well. 23/ Here, on the other hand, the mere circulation of a petition is not such misconduct; it is conduct reasonably related to the legitimate purposes involved.

The respondent relies on Joanna Cotton Mills v. NLRB (4th Cir. 1949), 176 F.2d 749, 24 LRRM 2416. There an employe, after being rebuked by a supervisor for operating gambling devices and for loitering around a female employe, used abusive and insulting language toward the supervisor and later circulated a petition for his removal. The court held the conduct unprotected because the employe's pique was too far removed from any protected purpose, such as wages, hours or conditions of employment, and the purpose of the co-signers merely was to get rid of an unpopular supervisor. Here, respondent contends, Miller circulated the petition merely out of anger at Kuhn for having dressed her down for the name-calling and stealing matters. Miller's motives, however,

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23/ In NLRB v. Blue Bell, Inc. (5th Cir. 1955), 219 F.2d 796, 35 LRRM 2549, an employe could be discharged for calling management representatives liars even though an organizational campaign was in progress. See also: Boaz Spinning Co. v. NLRB (5th Cir. 1968), 395 F.2d 512; 68 LRRM 2393 (calling employer a Castro dictator); NLRB v. Soft Water Laundry (5th Cir. 1965), 346 F.2d 930, 59 LRRM 2484 (use of vile epithet); NLRB v. Prescott Industrial Products Co. (8th Cir. 500 F.2d 6, 86 LRRM 2963 (employe's defiance of employer by seeking to speak at employer's pre-election meeting, though protected, was ground for discharge.

even if unsavory, are irrelevant since she also sought to organize a union and to express dissatisfaction with her working conditions, see Drein & Krump Mfg. Co., supra, n. 10, and her dissatisfaction and that of her co-workers was directly tied to working conditions caused by Kuhn's supervision.

The irrelevance of Kuhn's mistaken belief as to Miller's purposes

It is irrelevant whether Kuhn in good faith was mistaken as to whether Miller's conduct, in fact or in law, was for a protected purpose. Although in certain cases a violation of sec. 111.70(3)(a)1, Stats., may require that the employer know the employes were engaging in protected activity, 24/ such knowledge is not an indispensable ingredient. First, sec. 111.70(3)(a)1, Stats., does not state that knowledge is an essential ingredient. 25/ Second, honoring a good faith defense to conduct which in fact interferes with protected activity jeopardizes the conduct the legislature sought to protect. 26/ Third, a scienter requirement is at odds with the well established principle that a discharge is unlawful if based on mere suspicion that the employe has engaged in protected activity. 27/ Since the discharge of Miller for engaging in protected activity was inherently destructive of the exercise of protected rights, the defense of a good faith mistake as to Miller's true purpose is not available to the employer. 28/

Even if proof of knowledge were necessary, Kuhn admitted the requisite knowledge of employe protected activity by his testimony that he believed the purpose of the petition was to seek his ouster.

I join the commission's conclusion that the discharge of Miller violated sec. 111.70(3)(a)3, Stats., which makes it a prohibited practice for an employer to "encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment." This provision ordinarily requires

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24/ See Hotel & Restaurant Employees & Bartenders International Local 215 v. Billy Hoy's One-World Inn (10947-A and B), 8/72.

25/ Even in criminal law knowledge is an element of an offense only to the extent provided by statute. See sec. 939.23, Stats.

26/ "A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith. It is the tendency of those discharges to weaken or destroy the sec. 8(a)(1) [here, sec. 111.70(3)(a) 1] right that is controlling." NLRB v. Burnup and Sims, Inc. (1964), 379 U.S. 21, 85 S.Ct. 171, 13 L. Ed. 2d 1, 57 LRRM 2305.

27/ See NLRB v. System Analyzer Corp. (7th Cir. 1970), ___F.2d___, 73 LRRM 2784, 62 LAB. Cas. par. 10,704.

28/ Compare NLRB v. Great Dane Trailers, Inc. (1967) 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed 2d 1027, 65 LRRM 2465, where, in the context of a sec. 8(a)(3) violation under the National Labor Relations Act, 29 U.S.C. Sec. 151 et seq., which ordinarily requires proof of an ill-motive, the Supreme court said such proof is not required as to conduct which is inherently destructive of protected rights. Also see Burnup and Sims, supra, which held that a good faith mistake as to whether employes had engaged in misconduct was no defense to a discharge for activity which in fact was protected.

proof of employer motive to discriminate, 29/ but the relevant intent is presumed where the employer's conduct is inherently destructive of protected rights. 30/ Since Miller was one of the principals in writing the letter to Courlis, in planning a party featuring a union speaker and in circulating the petition, her discharge, even if only for circulating the petition, was inherently destructive of the exercise of those rights. In any event, Kuhn admitted he discharged Miller because of his animus toward her protected activity of seeking his removal.

Sending out the grievance procedure.

Members of the county board constituting the Infirmary Committee announced the formulation of a proposed grievance procedure during a February 11 meeting with a number of Infirmary employes. Although on the same day the committee had received knowledge of complainant's claim to represent the Infirmary employes for collective bargaining purposes, the committee mailed the grievance procedure to the employes alone with a cover letter after the close of the February 11 meeting. The examiner found no violation because the grievance procedure had been planned since the previous December 22 and was not in response to complainant's demand for recognition. I agree with the examiner.

The majority reverses the examiner. Although its conclusion of law is that the wrongful interference consisted in mailing the proposed grievance procedure and cover letter to the employes, what the majority finds offensive are the contents, namely, the provision for mediation in the proposed grievance procedure and the cover letter's expression of hope that the employes would "study and utilize" the proposed procedure, thereby manifesting the respondent's desire and willingness to implement the procedure and to bargain with the employes, such desire and willingness being an encouragement not to unionize.

I would concur with the majority if there were evidence that the Infirmary committee's conduct was calculated or motivated to discourage the employes from unionizing. There is no evidence thereof, and the majority admits it. It holds that, however innocent the motivations, the committee's conduct tended to or did interfere with the employes in the exercise of their rights.

The majority holds that the committee's expression of hope that the employes study and utilize a grievance procedure containing a provision for mediation constituted such discouragement of their interest in unionizing as to be an interference with their freedom of choice as to whether to unionize. There is nothing wrong, however, with an employer telling its employes that it hopes they will not unionize but will deal with the employer instead, so long as there is no promise of benefit or threat of reprisal contingent upon the outcome of the employes' choice. See: North American Phillips Corp. (1975), 217 NLRB No. 80, 89 LRRM 1530 (it is not interference for an employer to say it believes the union would be harmful to the employes); Picker Corporation (1976), 222 NLRB No. 49, 91 LRRM 1315 (employer could tell employes it preferred to deal with them on a one-to-one basis); and Rust Craft Broadcasting Co. (IBEW Local 1987)

29/ See Radio Officers' Union v. NLRB (1954), 347 U.S. 17, 74, S.Ct. 323, 98 L.Ed. 455, 33 LRRM 2417, 2427.

30/ Id., 33 LRRM at 2428.

(1974), 215 NLRB No. 143, 88 LRRM 1355 (solicitation of grievances without promise of benefit is no violation). Cf. WERC v. Evansville (1975), 69 Wis. 2d 140, 155-156; 157, 230 N.W. 2d 688.

Thus, even if the committee had expressed hope that the employes would not unionize, there would be no unlawful interference with their choice to do so. The infirmary committee, however, did not express such hope: its cover letter effectively leaves it to the employes to decide whether a union should be a part of the grievance procedure and, if so, to what extent.

The natural meaning of the letter is that the choice whether a union be involved belonged to the employes, especially since at the February 11 meeting a member of the county board explicitly stated, as the commission found, that whether the employes join a union is their privilege. The cover letter states that the district attorney had advised the county not to participate in the formation of a grievance committee. That would seem to evince an intent to leave it up to the employes and does not suggest that the employes should avoid a union. The next sentence says the complainant here had objected to county participation in forming a grievance committee. That would not mean the county intended to ignore the union's position or that the employes should ignore the union; it evinces an intent to be sensitive of the union's concern. The following sentence says that therefore the employes themselves should decide on the make-up of the committee. That permits the union to be the vehicle through which the employes express themselves. Certainly, there is no discouragement against involving the union by saying the employes should decide it, especially since the previous sentence cites the union's objection as a basis for leaving it up to the employes. Accordingly, I cannot accept the commission's conclusion that, by expressing its hope that the employes study and utilize a grievance procedure, announced and conceived long before knowledge of the union's claim, the respondent has interfered with the right of employes to make a free choice as to whether to associate with a union.

Of course, in expressing a hope as to what the employes will do, the employer must refrain from encouraging them by express or implied promises of benefits if they accede to that hope, or threats of reprisals if they do not. Nothing in the cover letter suggests promised benefits or threatened reprisals depending on the employes' choice.

Even assuming that the mere availability of a grievance procedure is a benefit, the ban on granting benefits not previously enjoyed does not apply where the decision to grant the benefit is made before knowledge of union activity, although the benefit is implemented after such knowledge. The reason for this exception is that in these circumstances there is no reason for employes to believe there is a hidden promise or threat hinging on their choice. See:

FMC Corporation (Teamsters Local 200) (1975), 216 NLRB No. 86, 88 LRRM 1523;

Switchcraft, Inc. (1974), 215 NLRB No. 92, 88 LRRM 1555;

McMillan Manufacturing Company (IBEW Local 2047), 220 NLRB No. 212, 90 LRRM 1475; and

Aircraft Hydro-Forming, Inc. (1975), 221 NLRB No. 117, 91 LRRM 1027.

Accord: NLRB v. Cleveland Trust Co. (6th Cir. 1954), 214 F. 2d 95, 25 Lab. Cas. par. 68,435. Contrary to the authorities, the majority

says it is irrelevant that the idea of a grievance procedure had been decided upon prior to knowledge of the advent of the union since neither the mechanics of the grievance procedure nor its proposed implementation were completed prior to said knowledge. What difference should that make? Since the guiding principle is that an employer's promise, announced prior to knowledge of union activity, gives employee no reason to perceive the promise as calculated to influence their decision whether to unionize, then receipt of the benefit as earlier promised would not be discerned as such influence. In fact, withholding a promised benefit only upon learning of the union more naturally would lead employee to believe that it was their choice to unionize which cost them the benefit.

Two recent cases support this dissent. In Litton Dental Products v. NLRB (4th Cir. 1976), F.2d , 93 LRRM 2714, 79 Lab. Cas. par. 11,706, an employer became alarmed at employe turnover. It learned its supervisor had rescinded company policy allowing coffee breaks and certain telephone privileges. It removed the supervisor. A vice-president then talked to the employes. The employes complained about the loss of coffee breaks, telephone privileges, and low wages. The vice-president said that those problems would be remedied, though not overnight. The new supervisor, before assuming his new duties, was apprised of the situation. Then the union demanded recognition. Subsequently, after the recognition demand, the new supervisor reinstituted the policy on breaks and telephones, and assured the employes that if any of them had questions or problems, the door to his office was open. Finding no violation, the court said:

> * * * "Improvement had begun, was afoot and well on the way to consummation prior to the appearance of any prospect of unionization. This is the decisive fact in the case. It utterly shatters all suggestion of an intent to thwart . . . its employees' joining a union."

In NLRB v. Otis Hospital (1st Cir. 1976), F.2d , 93 LRRM 2770, an employer in October announced a wage increase effective the next January, though the precise amount was not specified. In November the union petitioned for a representation election. The employer withheld the increase. The court found unlawful interference because: (a) the wage increase was promised prior to the union's appearance, and withholding only after the advent of the union obviously discouraged employes from exercising their right to organize; (b) the employer adduced no business justification for the withholding, such as good faith concern that implementation might itself be an unfair labor practice; and (c) announcing that the reason for the withholding was the advent of the union was an independent unfair labor practice.

Thus, having planned and promised in December and January to produce a grievance procedure, the respondent was free, and probably duty-bound, to stand by that promise, at least to the extent of indicating its willingness to abide its promise. That is all respondent did. It did not implement the procedure. It left it up to the employes whether it ever would be implemented.

The majority's decision, with all due respect, has two adverse consequences which are inconsistent with the legislature's purposes: (1) it will induce employers not to fulfill promises made to cure labor problems, thereby exacerbating strained relations; and (2) it will discourage employes from unionizing because they must pay the price of employer defalcations on their promises.

The findings and conclusions as to interrogations

Although I join the commission in all respects as to the findings, conclusions and order relative to Kuhn's interrogations of various

employes; I do not join the memorandum in support thereof, except as stated here.

The key fact during December and January, so long as Kuhn was on the job, was that an atmosphere of coercion permeated the employment relationship. The deep-felt aggrievements of the employes is illustrated by the relatively large numbers who signed the petition on December 13, and attended the meetings with various members and committees of the county board. Until February, when Kuhn's removal had become known, employes secreted their union proclivities. The confrontation of January 25 between Kuhn and Koppell, leaving the latter in tears and such fear for her fellow workers that she called the sheriff over two hours after the event, demonstrates the dimension of hostility. Perhaps most telling is Koppell's letter of November 25 to David Gourlie of the state department of administration, relative to the employes' wage level, in which she added the following post script:

> "I am spokesman for the other workers until we hear from you so please don't tell our boss or I'll lose my job."

Gourlie inexplicably read the letter to Kuhn. Then followed the events making up the record in this case: Kuhn interrogated Koppell about the letter; figuring Miller had much to do with it as well as the rumors that he was stealing, he called her into his office the following day; employes signed a petition calling for new or better management three days later; Kuhn fired Miller within two days; the employes gathered together and appealed to county board members, Bloor joining them and being a petition signer; Kuhn fired Bloor the day after the December 17 meeting with the ways and means committee; Buenkel was laid off as a result of Bloor's discharge; and Lund was not permitted to return to work at the end of a 30-day medical leave. Each incident aggravated the coercive atmosphere.

This case seriously raises the question whether we ought to hold that any employer inquiry of employes as to their protected activity is a prima facie interference in violation of sec. 111.70(3)(a)1, Stats., rebuttable only on an employer's showing of an extant need for the information. Compare Blue Flash Express (1954), 109 NLRB No. 85, 34 LRRM 1384, 1386. In any event, given the atmosphere of coercion, any employer inquiry of employes about their protected activity is proscribed by the supreme court's rationale in WERC v. Evansville (1975), 69 Wis. 2d 140, 156, 230 N.W. 2d 680, wherein the court adopted the federal rule permitting polling of employes under very narrow circumstances, but excluded the situation where the employer has engaged in unfair labor practices "or otherwise created a coercive atmosphere." Even were there no atmosphere of coercion, I would join the commission's findings that these interrogations were coercive.

Dated at Madison, Wisconsin this 17th day of January, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Charles D. Hoornstra
Charles D. Hoornstra, Commissioner

CERTIFICATION OF CONSULTATION WITH EXAMINER

This is to affirmatively certify, pursuant to the requirement of the supreme court, 31/ that, as to the commission's findings of fact involving determinations contrary to those of the examiner which also involved credibility resolutions, the full commission, before issuing its final decision, met with the examiner, consulted with him, and discussed with him his personal impressions of the witnesses in respect to their credibility. Further, the reasons for departing from the examiner's findings are explained in the memorandum in the instant decision.

Dated at Madison, Wisconsin this 12th day of January, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

_____
Charles D. Hoornstra, Commissioner

31/ See Appleton v. ILHR Department (1975), 67 Wis. 2d 162, 169-172, 226 N.W. 2d 497.