STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 594, AFSCME, AFL-CIO and VIRGINIA HERZBRUN, Complainants, vs. MILWAUKEE COUNTY, Respondent.	Case LXXIII No. 18864 MP-440 Decision No. 13479-A

Appearances:
Podell & Ugent, Attorneys at Law, by Mr. Alvin R. Ugent, appearing on behalf of the Complainants.
Mr. Robert P. Russell, Corporation Counsel, by Mr. Patrick J. Foster, Assistant Corporation Counsel, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Local 594, AFSCME, AFL-CIO and Virginia Herzbrun having, on February 21, 1975, filed a complaint with the Wisconsin Employment Relations Commission wherein they alleged that Milwaukee County had committed prohibited practices within the meaning of Section 111.70(3)(a)1 and 2 of the Wisconsin Municipal Employment Relations Act; and the Commission having appointed Marvin L. Schurke, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and, pursuant to notice, hearing on said complaint having been held at Milwaukee, Wisconsin on May 8, 1975, before the Examiner; and the Examiner having considered the evidence and arguments and being fully advised in the premises makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Local 594, AFSCME, AFL-CIO, hereinafter referred to as the Complainant Local, is a labor organization having its principal office at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53233; that Complainant Local is affiliated with District Council 48, AFSCME, AFL-CIO; that, at all times pertinent hereto, Virginia Herzbrun, hereinafter referred to as Herzbrun, was employed by Milwaukee County and was the President of the Complainant Local; that, at all times pertinent hereto, Richard Massman was the Assistant Director of District Council 48 and a representative of Complainant Local; and that, at all times pertinent hereto, Lorraine Kujawa was a steward of Complainant Local.

2. That Milwaukee County, hereinafter referred to as the Respondent, is a Wisconsin municipality having its principal offices at the Milwaukee County Courthouse, 901 North 9th Street, Milwaukee, Wisconsin 53233; that, at all times pertinent hereto, George T. Frohmader was employed by the Respondent as Director of the Children's Court Center; and that Frohmader was, in such capacity, authorized to act on behalf of the Respondent in matters and relationships involving the Respondent and its employes.

3. That, at all times pertinent hereto, the Respondent has recognized the Complainant Local as the exclusive collective bargaining repre-

sentative of employes in a bargaining unit including staff members employed by the Respondent at the Detention Section of the Children's Court Center, except supervisory and administrative personnel.

4. That the Detention Section of the Children's Court Center provides care and custody of alleged delinquents pending a final court disposition; that a particular ratio of detainees in the Detention Section, hereinafter referred to as the population, to employe staff members on duty is required; that the size of the population may vary without warning; and that a prediction of the number of employes who will be required at a particular time in the future is difficult.

5. That, prior to January 3, 1971, employes of the Respondent employed in the aforesaid collective bargaining unit were granted holidays on certain election days; that, through collective bargaining between the Respondent and the Complainant Local and its affiliates, all election day holidays except for the election day which occurs in November of each even-numbered year were eliminated as holidays, effective January 3, 1971, and, at the same time, personal days were substituted therefor; that, on November 4, 1971, the Respondent promulgated a policy and procedure on compensatory time, personal days and holidays for employes of the Detention section whereby, in pertinent part, employes would be allowed to routinely take personal days off, without disclosure of their reasons for doing so, when the population of the Center was low enough to allow such employe absence without replacement; that the same policy and procedure provided, further:

> "Special or emergency requests for personal days which would necessitate replacement of staff must include an exceptional reason.";

and that, subsequent to November 4, 1971, it was the practice of the Respondent to require employes to provide the Respondent with their reasons for doing so when making a request for a personal day for which a replacement employe, working on an overtime basis, would be necessary.

6. That, on February 16, 1973, the Complainant Local, through District Council 48, AFSCME, AFL-CIO, entered into a collective bargaining agreement with the Respondent to become effective after ratification and to remain in effect until December 31, 1974; that said agreement was made effective; that said agreement contained the following provisions pertinent hereto:

> "(P) HOLIDAYS-PERSONAL DAYS.
>
> (1) All regular full time employes hired on or before December 31, 1972, shall receive three (3) days leave per year known as 'personal days', in addition to earned leave by reason of vacation, accrued holidays and compensatory time.
>
> . . .
>
> (4) Personal days may be taken at any time during the calendar year in which they are accrued, subject to the approval of the department head.
>
> Supervisory personal shall make every reasonable effort to allow employes to make use of personal days as the employe sees fit, it being understood that the purpose of such leave is to permit the employe to be absent from duty for reasons which are not justification for absence under other existing rules relating to leave with pay.";

and that said agreement also established a five-step grievance procedure for the resolution of disputes concerning the interpretation of said agreement, beginning with an employe's oral explanation of his grievance to his immediate supervisor and, if not previously resolved, ending with final and binding arbitration before an umpire selected by the parties.

7. That, on or about September 3, 1974, Herzbrun contacted Frohmader, by telephone, and initiated a grievance on behalf of Grace Thomas, a former steward of Complainant Local, concerning the practice of requiring that employes provide reasons for requesting personal days if the absence would require an overtime replacement; that Frohmader responded by indicating that if employes were not required to provide reasons for requesting personal days, he would discontinue the practice of allowing employes to take personal days when overtime replacement would be necessary; that Herzbrun indicated to Frohmader that she considered his statement a threat and an attempt to prevent her from further pursuing the Thomas grievance; and that Frohmader denied that his position was a threat.

8. That Herzbrun pursued the Thomas grievance through the third step of the contractual grievance procedure; that, on October 10, 1974, a third-step hearing was held, before Frohmader, on the Thomas grievance and a similar grievance filed by another local of District Council 48; that Herzbrun, Kujawa, Thomas, Massman, and several administrative personnel of Respondent were present at said hearing; that, at said hearing, Frohmader agreed to discontinue the practice of requiring employes to provide reasons for requesting personal days, but again stated that personal days would not be available if overtime replacement was necessary; and that Frohmader also resolved to make greater efforts to ensure that employes would be able to utilize their personal days when the center population was low enough to permit employe absence without replacement.

9. That Complainant Local did not pursue the Thomas grievance thereafter, and did not refer said grievance to the umpire for final and binding arbitration.

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

CONCLUSIONS OF LAW

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

2. That statements made by Frohmader to Herzbrun and other Union representatives on the subject of discontinuance of overtime replacements for personal days did not tend to interfere with or discourage the exercise by non-supervisory employes of Milwaukee County of the right to file and prosecute grievances which is secured to such employes in the collective bargaining agreement subsisting between Milwaukee County and Milwaukee District Council #48, AFSCME, AFL-CIO; and that the Respondent, Milwaukee County, has not interfered with, restrained or coerced municipal employes in the exercise of their rights under Section 111.70(2) of the Wisconsin Municipal Employment Relations Act and has therefore not committed prohibited practices within the meaning of Section 111.70(3)(a)1 or 2 of the Wisconsin Municipal Employment Relations Act.

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

ORDER

IT IS ORDERED that the complaint of Local 594, AFSCME, AFL-CIO and Virginia Herzbrun be, and the same hereby is, dismissed on its merits.

Dated at Madison, Wisconsin this 29th day of October, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke /s/
Marvin L. Schurke, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEADINGS, PROCEDURE AND POSITION OF THE PARTIES:

On February 21, 1975, Local 594, AFSCME, AFL-CIO, and its President, Herzbrun, jointly filed a complaint with the Wisconsin Employment Relations Commission alleging that George T. Frohmader, Director of Children's Court Center and agent of Milwaukee County, had threatened the Complainants with recriminatory actions after Complainants had filed a contractual grievance, and had thereby violated Section 111.70(3)(a)1 and 2 of the Municipal Employment Relations Act. The consequences of the alleged threat are to limit the use of personal days to only those occasions when the Center's population is low enough to permit absence without replacement. Subsequent to the disposition of the Thomas grievance, employes are unable to take a personal day when the population is high, no matter how legitimate a reason they may have for requesting one. Complainants claim that they are therefore in a worse position than they were originally, when overtime replacement was available to employes seeking a personal day for an exceptional reason. The Complainants reason that, since this change in policy was made solely in response to the initiation of the Thomas grievance and would be dropped if the Thomas grievance were dropped, the change was intended to prevent this and later grievances from being processed. As such, it is alleged to constitute an unlawful attempt to punish or threaten employes who engage in protected union activities.

In its answer filed on March 31, 1975, Respondent denied the allegations of interference and requested that the Complainants' complaint be dismissed on its merits. The County claims that Frohmader's response to the Thomas grievance, rather than being a threat, was "merely an attempt to resolve the grievance to the satisfaction of everyone". Respondent also argues that Herzbrun and the Complainant Local were not truly threatened by Frohmader's remarks, as evidenced by the facts that: (1) Frohmader's statement did not prevent Herzbrun from further pursuing this grievance; (2) there has been no significant decrease in the number of grievances filed by members of Complainant Local; and (3) the representative of another local whose members are affected by the same policy heard Frohmader's statements but have not complained to the Wisconsin Employment Relations Commission about it.

Hearing was held on May 8, 1975 at Milwaukee, Wisconsin. The Complainants filed a brief on August 4, 1975. The Respondent filed its brief on August 18, 1975.

STATEMENTS MADE BY FROHMADER:

The Milwaukee County Children's Court Center Detention Section provides custody of children who are alleged delinquents and are awaiting final court disposition. The staffing requirements fluctuate according to the number of children being detained, Thus, the number of employes scheduled to be on duty may be well in excess of the minimum staff requirements when the detainee population is low, while the number of employes on duty may approach or be at the established minimum requirement when the population is high.

Under the terms of a collective bargaining agreement between the County and Milwaukee County District Council 48, AFSCME, AFL-CIO of which the Complainant Local is a part, employes are allowed three personal days a year for their own use. The agreement provides that scheduling of personal days is to be subject to the approval of the department head. Under the Children's Court Center, Detention Section,

policy and procedure established on November 4, 1971, requests made for personal days would be granted freely, subject to the minimum staffing requirements. In addition, the policy and procedure provided that:

> "Special or emergency requests for personal days which would necessitate replacement of staff must include an exceptional reason."

Thus, before employes were granted such special requests, they were required to provide the reason for their request to supervisory personnel, who would determine whether the reason was sufficiently urgent to justify incurring overtime replacement costs.

On or about September 3, 1974, Herzbrun called Frohmader by telephone to inform him that she intended to initiate a grievance in connection with the practice of requiring employes to provide exceptional reasons for taking personal days which would require overtime replacement. To this, Frohmader responded that if such reasons were not given, he would discontinue the practice of granting employes personal days when overtime would be required. Herzbrun claims to have interpreted this response as an attempt to prevent her from proceeding with this grievance. However, she did pursue the grievance through the grievance procedure, which culminated in a hearing before Frohmader where Frohmader publically re-iterated the position stated to Herzbrun on the telephone. This arrangement became the final result of the Thomas grievance. Employes were no longer allowed to take personal days when overtime replacement would be required, but they no longer were required to provide reasons for requesting any personal days.

LEGAL ISSUES:

Although the Complainants contend that they perceived Frohmader's proposal for a change in the personal day scheduling policy as a threat, their actions after the October 10 hearing belie this claim. Frohmader's proposal was incorporated in the final disposition of the Thomas grievance. The Complainants could have appealed that outcome and received a final ruling from the fourth step appeal tribunal, from the umpire or from the Civil Service Commission, but they chose not to do so. This failure suggests that the Complainants either doubted the chances of success of further appeal, (in which case, it is reasonable to expect that they would have simply dropped the grievance) or that they were satisfied with the ruling resulting from the October 10 hearing and did not consider it less desirable than the previous personal day scheduling policy. This latter inference is consistent with the testimony of Herzbrun. At the hearing, she was asked about Frohmader's decision at the October 10 hearing, and testified as follows at pages nine and ten of the transcript:

BY MR. FOSTER:

"Q All right. Now, the grievance--answer also provides that Mr. Frohmader voided that part of the directive to which he refers, regarding the exceptional reason for requesting overtime. Is that not correct?

A What do you mean 'voided'?

Q He voided it.

A Yes.

Q And that was one of the things that you were requesting when you filed the grievance?

A Right--which is one of the reasons we didn't go any farther with it."

Herzbrun was at least satisfied that the hearing provided a fair resolution of the issues. Since the ruling of the October 10 hearing embodied both Herzbrun's initial proposal to Frohmader concerning the personal day scheduling policy and his counterproposal, that counterproposal can hardly be viewed as a threat. Rather, it appears to have been a position taken to reach a compromise and a position which the Complainants ultimately found satisfactory.

In Milwaukee County, Case LVIII (12153-A, B) 3/75, an interference violation was found where a supervisor in the Dietary Department of Milwaukee County General Hospital told a group of cafeteria workers (who had been assembled for purposes other than discussion of grievances) that if they were to be successful in their prosecution of a grievance concerning the assignment of duties to them beyond the scope of their job classification, then several of their jobs would be eliminated. Those statements were reasonably taken by the employes to be threats against their employment due to their exercise of grievance rights under the collective bargaining agreement. Some similarities exist between the facts of that case and the facts of the instant case, but significant distinctions are also noted.

It is significant, in the view of the Examiner, that the comments made in the previous case were made to an assembly of employes rather than to Union representatives and cannot, in any sense, be viewed as a statement of the Employer's position in a negotiating forum. In that context, employes unfamiliar with union-management affairs could easily believe that the exercise of the grievance procedure created the possibility of loss of jobs, and such statements would thus have a natural effect of inhibiting the use of the grievance procedure. The instant case is distinguished by the fact that the alleged threat was first communicated to a Union official in the context of a conference in which a grievance was being presented by the Union official to the management. If the Union's theory of the case were to be adopted here, management representatives in the grievance procedure would be gagged and productive give and take of bargaining would be outlawed, particularly in cases such as this where, for some secondary reason, a management representative might wish to point out some legitimate consideration that the successful prosecution of one grievance might lead to the death of the goose which lays some related golden eggs.

It is also significant, in the view of the Examiner, that two, rather than one, contract interpretation questions exist in the instant case, and that one of those remains unresolved. In Milwaukee County, Case LVIII, a previous grievance resolution made it clear that the assignment of certain work to the employes involved was in violation of the agreement; and the employes were being asked, in effect, to permit the management to make further violations of the agreement without being exposed to further grievances of the same type. Here, it appears that Frohmader readily conceded that he had no contractual right to require employes to provide statements of reasons. However, a contract interpretation question remains as to whether Frohmader was correct in his underlying position that the County was not obligated to grant personal leave days to employes when a replacement would have to be called in on an overtime basis. Considerations of administrative efficiency and possible disruption of the Detention Section's operations, as well as the provision of the collective bargaining agreement between the parties which makes personal day scheduling "subject to the approval of the department head", would seem to support Frohmader's position favoring restrictions on personal day scheduling. Frohmader stated at the hearing herein that he

doubted his authority to grant overtime replacement for employes taking personal days. However, he did not appear to have questioned this authority until the initiation of the Thomas grievance, and he admitted that the current practice at the Detention Section is to use overtime replacement when a sudden rise in the population requires substitution for an employe whose request for a personal day has been granted in advance. The issue of whether this authority extended to routinely granting personal days whenever employes requested them, even though it would require overtime replacement, remains open. Moreover, the question of whether the contract required Frohmader to exercise this authority was never answered during the processing of the Thomas grievance. The Complainant Local has apparently never pursued this issue and, in fact, the legitimacy of Frohmader's position might be inferred from the failure of the Complainant Local to pursue the Thomas grievance further in the grievance procedure. The Examiner here makes no decision on a question for which no evidence has been introduced and which would be more appropriately addressed to a forum created by contract for contract interpretation.

While Frohmader's statements were perhaps harsh in the view of the Complainants, the Complainants have not shown that those statements were intended to have or actually and reasonably had the effect of inhibiting the prosecution of this or later grievances. Rather, in view of the context within which they were made and the contractual and administrative justifications Frohmader may have had in making them, the statements take on the appearance of a legitimate negotiating stance geared toward resolving a grievance dispute.

Dated at Madison, Wisconsin this 29th day of October, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke /s/
Marvin L. Schurke, Examiner