STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BEN OTTO, Complainant, vs. MILWAUKEE PUBLIC SCHOOLS, Respondent.	Case CXXXIV No. 30075 MP-1354 Decision No. 20005-B

Appearances:

Mr. Gerald E. Conen, Attorney at Law, 710 North Plankinton Avenue, Suite 740, Milwaukee, Wisconsin 53203-2445, appearing on behalf of Mr. Ben Otto.

Mr. Theophilus C. Crockett, Assistant City Attorney, 800 City Hall, Office of the City Attorney, Milwaukee, Wisconsin 53202, appearing on behalf of Milwaukee Public Schools.

Mr. Matthew R. Robbins, Goldberg, Previant, Uelmen, Gratz, Miller and Brueggeman, S.C., Attorneys at Law, 788 North Jefferson Street, Milwaukee, Wisconsin 53202, appearing on behalf of witness John Shurla.

ORDER REVISING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

Examiner Dennis P. McGilligan having, on June 16, 1983, issued Findings of Fact, Conclusions of Law and Order together with a Memorandum accompanying same, in the above-entitled matter, in which the Examiner concluded that the Commission did not have jurisdiction to consider allegations that the Milwaukee Public Schools violated Sec. 111.70(3)(a)4, Wis. Stats., concerning the events surrounding the Complainant's termination, and in which the Examiner refused to assert the jurisdiction of the Wisconsin Employment Relations Commission for the purposes of determining whether or not Milwaukee Public Schools had violated Sec. 111.70 (3)(a)5, Wis. Stats., and in which the Examiner issued an Order dismissing the complaint; and the Complainant having timely filed a petition requesting the Wisconsin Employment Relations Commission to review the Examiner's decision, and to issue an Order setting aside the Examiner's Findings of Fact and Conclusions of Law; and the parties having filed argument in support of and in opposition to the petition for review; and the Commission, having reviewed the entire record, including the Examiner's decision and the arguments of the parties in support of and in opposition to that decision; and the Commission being fully advised in the premises, and being satisfied that the Examiner's Findings of Fact and Conclusions of Law should be revised but that the Examiner's Order should be affirmed;

NOW, THEREFORE, it is

ORDERED

A. That the Findings of Fact made and issued by the Examiner in the above-entitled matter be, and the same hereby are, revised to read as follows:

FINDINGS OF FACT

1. That Ben Otto, hereinafter referred to as the Complainant, is an individual who resides in Milwaukee, and who was employed by Milwaukee Public Schools as a painter in its Physical Plant, Repair Division, from March 3, 1981 until January 7, 1983.

2. That Milwaukee Public Schools, hereinafter referred to as MPS, is a school district organized under the laws of the State of Wisconsin, and which employs various employes to attend to the maintenance of the physical facilities operated by MPS.

3. That MPS has recognized the Milwaukee Building and Construction Trades Council and its affiliated unions as the collective bargaining representative for its regular craft employes (Repair Division - Prevailing Wage Employes) 1/; and that Painters and Allied Trades Union, Local 781 affiliated with the Milwaukee Building and Trades Council, AFL-CIO, hereinafter referred to as Local 781 or as the Union, is the majority representative of an appropriate collective bargaining unit of which Mr. Otto was an individual member throughout his employment with MPS.

4. That MPS and Local 781 were not parties to any collective bargaining agreement covering the wages, hours and working conditions of the employes in the bargaining unit of which the Complainant was an individual member; and that MPS and Local 781 are not parties to any collective bargaining agreement which creates a formal grievance procedure or which incorporates any grievance procedure available to MPS employes under Civil Service Rules.

5. That the Complainant, since the date of his employment with MPS, wished to visit his brother who lived in the State of Oregon; that the Complainant accrued certain rights to paid vacation under the terms of applicable governing documents between March and December of 1981; that the Complainant ultimately decided to visit his brother over the Christmas holiday in 1981; that the Complainant approached his foreman, Thomas Thurow, regarding the scheduling of such a vacation and requested permission to be absent from work from December 16 or 17, 1981 until January 4, 1982; that the Complainant believed, at that time, that he could take this amount of time off by juxtaposing the seven and one-half days of vacation he believed he had accrued with certain unpaid holidays surrounding Christmas and New Year; that the Complainant testified that Thurow informed him he had only accrued two and one-half vacation days available for use in 1981, with the remaining five days not being available for use until 1982; that the Complainant testified he scheduled those two and one-half vacation days so that he could leave for Oregon on December 28, 1981; that December 28, 1981, was preceded by four unpaid holidays, and the Complainant was attempting to juxtapose those unpaid holidays with his two and one-half days of paid vacation to lengthen his visit with his brother, but that such a schedule would require the Complainant to take an unexcused absence for one-half day on December 28, 1981; that the Complainant approached Thurow to determine if he could use personal leave or could borrow one-half day from his 1982 vacation for use on December 28, 1981; that Thurow checked these possibilities with Ronald Allen, the Construction Project Supervisor for MPS, and was informed that the Complainant could not draw on his 1982 vacation and could not use personal leave for December 28, 1981; that Thurow informed the Complainant of this action by MPS; that at some time after being so informed by Thurow, the Complainant purchased a plane ticket to Oregon on a flight which left Milwaukee for Portland on December 24, 1981, and left from Milwaukee on that flight on that date; that the Complainant testified he attempted to return to Milwaukee on January 10, 1982, but that inclement weather delayed his return to Milwaukee until January 11, 1982; that the Complainant knew when he left for Oregon on December 24, 1981, that he would be taking one-half day on December 28, 1981, as an unexcused absence; that the Complainant did not call or write MPS between December 24, 1981 and January 10, 1982, regarding his whereabouts; that the Complainant testified he did not do so because he believed that he had been granted an authorized vacation through January 10, 1982; that Thurow testified that the Complainant never sought, and Thurow never granted, the Complainant any vacation in 1982 2/; that MPS treated the Complainant as having been absent without leave (AWOL) during the period the Complainant testified he believed he was on an authorized vacation; that on December 28, 1981, the Assistant Director of Repairs for MPS sent the Complainant the following letter:

> I have been advised you were denied vacation of one-half day for Monday, December 28, 1981.
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> Since you have not called in you are being treated as A.W.O.L., which means that before you return to work it is necessary for you to contact your foreman who will make an appointment for you to see Mr. Wisniewski.

1/ Milwaukee Board of School Directors, (12485) 2/74.

2/ See footnote 5, infra.

and that on January 7, 1982, Richard Pott, the Staffing Specialist, Classified Personnel Section for MPS, sent the following letter to the Complainant:

> The Director of Physical Plant has advised me that on the morning of December 28, 1981, you were absent without leave for 1/2 day and that you had previously been approved vacation for the afternoon of December 28, 1981, and December 29 and 30, 1981. You were scheduled to return to work on January 4, 1982. From January 4, 1982, through January 7, 1982, you have not reported to work nor called, in accordance with the call-in procedures. Your foreman has called your home on the mornings of the 5th, 6th and 7th, and was unable to contact you, however, he left a message on your answering service that he had called.
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> Therefore, in accordance with City Service Rule X, Section 5, you have been resigned from your position of Painter with the Milwaukee Public Schools effective at the close of business on January 7, 1982.
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> Rule X, Section 5, provides, "the absence of an officer or employee from duty for a period of three successive days or longer, without leave and without notice to the superior officer of the reasons for such absence and of his intention to return, may in the discretion of the department head and/or other superior officer be reported to the Commission as a resignation, and in such case the provisions of Section 63.43 of the Statutes and of Rule XIII regarding appeals from actions of removal, discharge or reduction shall not apply."
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> This action is taken by the direction and authority of the Secretary-Business Manager. If you have any questions concerning this matter, please contact this office.

6. That the Complainant called Thurow on the morning of January 12, 1982, regarding his termination; that this conversation did not produce any understanding between Thurow and the Complainant regarding whether or not the Complainant had been AWOL or had been on a properly authorized vacation; that the Complainant then called an attorney who instructed the Complainant to contact Local 781; that the Complainant did so and was instructed by a representative of Local 781 to contact Adrian Wisniewski, the Director of the Physical Plant Division for MPS; that on the morning of January 13, 1982, the Complainant met with Allen, Thurow and Wisniewski; that the grievant testified that at the start of this meeting Wisniewski asked him why he had not called in on December 28, 1981, and that the Complainant responded that he had injured his finger while out of town and that this injury precluded his calling in; that Allen testified that the Complainant's statements regarding the injury to his finger did not relate to an excuse for not calling in, but were related by the Complainant as an excuse for not reporting to work; that Allen testified that the finger appeared well healed on January 13, 1982; that the January 13, 1982, meeting involved some discussion regarding whether or not the Complainant had taken an authorized or an unauthorized vacation, and whether or not the Complainant valued his job; that on January 14, 1982, Allen called the Complainant and advised him that MPS considered the Complainant to have been AWOL and that he had been properly terminated under the relevant Civil Service Rules; that the Complainant asked Allen what further recourse he may have, and Allen replied that he did not know; that the Complainant, during the period following this conversation and preceding the filing of his WERC complaint on July 12, 1982, contacted representatives of the School Board, of Local 781,

resolution of the issues posed by the pleadings and by the record developed on those pleadings. The complaint, which is set forth in full in the revised Findings of Fact, has never been amended. It does not allege any violation of Sec. 111.70(3)(b), Wis. Stats., and does not name Local 781 as a party to the action. At no time subsequent to the filing of the complaint has Local 781 been made a party to the instant proceeding. Against this background, the sole issues posed for decision in this case center on Sec. 111.70(3)(a), Wis. Stats., and on the actions of the MPS.

Section 111.70(3)(a)1, Wis. Stats., makes it a prohibited practice for a municipal employer: "To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2)." Broadly speaking, the traditional means of analyzing whether a violation of this section has occurred "has involved a balancing of the interests at stake of the affected municipal employe . . . and of the municipal employer to determine whether, under the circumstances, application of the protections of the interference and restraint prohibitions would serve the underlying purposes of the Act." 4/ The underlying purpose of Secs. 111.70(2) and (3), Wis. Stats., is, broadly speaking, to promote peaceful employment relations by setting forth and providing means of enforcing certain employes rights to engage in or to refrain from certain "lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." In the instant case the focus of both parties' allegations, proofs, and arguments has been on the Complainant's termination. The Complainant asserts an interest in his job and in a hearing by which he could establish his right to the job. The MPS has asserted its interest to enforce its rules governing its employes. At root, these conflicting interests center on one fundamental disagreement between the parties regarding whether the vacation the Complainant took was authorized or not. 5/ The record does establish the nature and the depth of the Complainant's disagreement with the MPS on this point, but the existence of this disagreement, standing alone, does not establish that the Complainant's interests in the matter were interests protected by Sec. 111.70(2), or that the MPS acted in a fashion proscribed by Sec. 111.70(3)(a). MERA was not enacted to grant the Commission an unlimited authority to generally oversee an employer's employment relations decisions. Rather, MERA grants the Commission a limited authority to review contested cases raising issues of employe exercise of "lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection." The present case is not a contested case of that sort since no such lawful concerted activities have been demonstrated. The record demonstrates that the MPS acted in this case consistently with its understanding

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4/ Waukesha County, (14662-A) 1/78 at 23.

5/ The Examiner made a Finding of Fact that "Otto did not receive permission to be off work . . . during the first week of January, 1982." While we do not find any basis in the record to overturn this finding, the finding is not relevant to the resolution of the issues presented in the instant case.

of City Service Rule X, Section 5, which is the rule the MPS contends governed the Complainant's termination. The record will not support the conclusion that the MPS, by so acting, committed any act likely to interfere with, restrain or coerce the Complainant in the exercise of any right granted him under Sec. 111.70(2). In the absence of such an act, the MPS cannot be considered to have violated Sec. 111.70(3)(a)1.

Section 111.70(3)(a)4 makes it a prohibited practice for a municipal employer: "To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit . . ." An examination of the clear language of the statute demonstrates that a municipal employer's duty to bargain runs to a majority representative of the employes of a collective bargaining unit, and not to individual members of that bargaining unit. As our modified Findings of Fact demonstrate, MPS did not in any way impede the Union's ability to process the Complainant's dispute with MPS. In fact, MPS complied with requests from both the Complainant and Local 781 for meetings and for information regarding the Complainant's termination. The record will not, therefore, support a conclusion that the MPS committed any refusal to bargain in violation of Sec. 111.70(3)(a)4. The Commission's conclusion on this point has been set forth as a specific Conclusion of Law. Contrary to the Examiner's determination, we find no basis for declining to assert jurisdiction regarding the (3)(a)4 allegation. Rather, we have asserted jurisdiction and found no violation.

Section 111.70(3)(a)5 makes it a prohibited practice for a municipal employer: "To violate any collective bargaining agreement previously agreed upon by the parties . . ." As noted in our modified Findings of Fact, there is no collective bargaining agreement between Local 781 and the MPS. Thus, there is no basis whatsoever in the record upon which to conclude that the MPS committed any violation of Sec. 111.70(3)(a)5.

The record does not contain specific evidence or specific argument relating to a violation by the MPS of any of the remaining sections of Sec. 111.70(3)(a). Accordingly, the Commission has found that the MPS cannot be considered to have violated any of those sections.

The Complainant's remaining contentions demanding a reversal of the Examiner's Order do not afford any basis to question the conclusions reached above. The Complainant has contended that his termination by the MPS ignores his rights under fundamental notions of due process and under Sec. 63.44, Wis. Stats. Even assuming, for the sake of argument in this case, that such hearing rights exist, the Complainant has not established how these rights can be enforced by the Commission. The due process rights argued by the Complainant appear to be of a Constitutional origin, and the statutory rights argued by the Complainant arise not under the provisions of MERA, but under the provisions of the Civil Service Statutes. To be enforceable by the Commission, such rights would have to have a demonstrated basis under the provisions of MERA. In this case, no such basis has been shown to exist. Without such a basis these contentions cannot serve as a ground to question any of the conclusions reached above.

Thus, there is no basis to conclude that the MPS committed any violation of Sec. 111.70(3)(a), Wis. Stats., and the Commission has, accordingly, affirmed the Examiner's Order dismissing the complaint.

Dated at Madison, Wisconsin this 28th day of February, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner