STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BEAVER DAM EDUCATION ASSOCIATION, Complainant, vs. BEAVER DAM UNIFIED SCHOOL DISTRICT, Respondent.	Case XI No. 30779 MP-1415 Decision No. 20283-A

Appearances:
Mr. Bruce Meredith, Staff Counsel, Wisconsin Education Association Council, 101 West Beltline Highway, P.O. Box 8003, Madison, Wisconsin 53708, and Ms. Cindy Lepkowski, Law Clerk, appearing on behalf of the Complainant.
Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Steven Veazie, P. O. Box 1110, Madison, Wisconsin 53703, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Beaver Dam Education Association having, on December 8, 1982, filed a complaint with the Wisconsin Employment Relations Commission alleging that the Beaver Dam Unified School District had committed prohibited practices within the meaning of Sec. 111.70(3)(a)(1) and (4) of the Municipal Employment Relations Act; and the Commission having appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Beaver Dam, Wisconsin on March 17, 1983; and briefs having been filed by both parties with the Examiner by July 21, 1983; 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 Beaver Dam Education Association, hereinafter referred to as the Association, is a labor organization having its offices at 785 South Main, Fond du Lac, Wisconsin, 54935, and is the exclusive bargaining representative for all full-time and regular part-time teachers of the Beaver Dam Unified School District.

2. That Beaver Dam Unified School District, hereinafter referred to as the District, is a municipal employer engaged in the operation of a public school system, and has its principal offices at 705 McKinley Street, Beaver Dam, Wisconsin, and that at all times material herein Marvin Berg and Neal Winkler were respectively the District's Superintendent and Director of Instruction and its agents.

3. That the Association and the District were parties to a collective bargaining agreement covering the period July 1, 1981 to June 30, 1982 and said agreement provided, in pertinent part as follows:

ARTICLE I, RECOGNITION

D. Board Functions

1. It is agreed that the Board has, and will continue to retain, the exclusive rights and responsibilities to operate and manage the school system and its

programs, facilities, properties, and the teaching activities of its employees, unless such rights and responsibilities are specifically abridged, delegated, or modified by another provision of this Agreement. Included in these exclusive rights and responsibilities, but not limited thereto, are:

a. The direction of all the working force in the system, including the right to hire, promote, suspend, demote, discharge, discipline, lay off, or transfer employees, subject to the express provisions of this Agreement.

b. The determination of the size or composition of the working force, the allocation and assignment of work to employees, the determination of the work to be performed by the working force, the determination of policies affecting the selection of employees, the establishment of quality standards and the evaluation of employee performance, the determination of the competency and qualifications of the employees, and the determination of the hours of instruction.

c. The ultimate responsibility for the processes, techniques, and methods of teaching, and to select textbooks, teaching aids, and materials.

d. The determination of the management, supervisory, or administrative organization of the school and the selection of employees for promotion to supervisory, management, or administrative positions.

e. To determine the location of the school and other facilities, including the right to establish new facilities and to relocate or close old schools.

2. It is the understanding of the parties that the Board has, by law, been entrusted with the responsibility for the management of the district and to determine educational policy. In the exercise of this function, it may on occasion become necessary to alter existing policy, standard rule, or regulation. The board agrees that in the exercise of this function it will not act in an arbitrary or capricious manner or discriminate against any teacher because of his/her membership in or activities on behalf of the Association. If the implementation of a new policy impacts on the wages, hours, and working conditions of the members of the bargaining unit, the Board and the Association will bargain in good faith concerning the impact of the policy on the wages, hours, and terms and conditions of employment of unit employees.

3. The exercise of the foregoing powers, rights, authority, duties, and responsibilities shall be limited by the specific and express terms of this Agreement.

4. Unless the right is specified, nothing in the foregoing shall limit the BDEA's right to bargain

decisions of the Board relating to wages, hours, or working conditions.

ARTICLE VII. TERMINATION OF EMPLOYMENT

. . .

B. Layoff

. . .

6. If, within a teacher's reemployment rights period, the district has a vacant teaching position available for which that teacher is certified, the teacher shall be notified of such position and offered employment in that position, commencing as of the date specified in such notice. Under this paragraph, teachers on layoff will be contacted in reverse order of their layoff with respect to a position for which they are so certified. In the event two (2) or more teachers who are so certified were laid off on the same date, the Board shall select which such teacher shall be retained, taking into account the factors as set forth in Step 2 of paragraph 2 preceding.

7. Within ten (10) days after a teacher receives a notice pursuant to paragraph 6, he must advise the district in writing that he accepts the position offered by such notice and will be able to commence employment on the date specified therein. Any notice pursuant to paragraph 6 shall be mailed, registered - return receipt requested, to the last known address of the teacher in question as shown on the district's records. It shall be responsibility of each teacher on layoff to keep the district advised of his current whereabouts.

XII. GRIEVANCE PROCEDURE

A. Definition of Grievance

1. A grievance is defined as any dispute arising out of the interpretation or application of the specific terms and conditions contained in this Agreement.

2. The grievance procedure consists of a series of steps which an employee or groups of employees can follow in presenting a grievance.

3. The Association may file a grievance on behalf of a group of teachers provided that the subject matter of the grievance and the remedy are the same. The group grievance may initially be filed at Step 4 of the grievance procedure within ten (10) working days after the incident on which the grievance occurred or first became known. The Association shall clearly identify the teachers affected by the grievance. Teachers affected by the grievance shall be encouraged to sign the grievance. The Association P.R. & R. chairperson and president or building P.R. & R. representative shall sign the grievance.

4. The purpose of this procedure is to secure, at the lowest possible administrative level, equitable solutions to grievances which may from time to time arise. Generally, both

parties should agree that any proceedings shall be kept as informal and confidential as may be appropriate at any level of the procedure.

5. Nothing herein contained shall be construed as limiting the right of any teacher having a grievance to discussing the matter informally with any appropriate employee on the administrative staff.

B. Grievance to be reported in writing on a form subject to the following conditions:

1. Shall name the employee involved.

2. Shall identify the provisions alleged to be violated.

3. Shall state facts giving rise to the grievance.

4. Shall state contention of employee and the Association.

5. Shall specify relief desired.

C. Time Schedule

1. No grievance that arose prior to the effective date of this Agreement may be processed, unless by mutual consent.

2. New allegations may not be introduced that were not presented in "B" above.

3. All grievances shall be filed in written form within ten (10) school days after the incident on which the grievance occurred or first became known.

D. Steps of Procedure

Step 1 A teacher shall discuss his grievance promptly with his principal, either by himself or together with a representative of the Association.

Step 2 If the teacher is not satisfied with the disposition made at Step 1, he may, no sooner than two (2) school days and no later than five (5) school days after the Step 1 discussion, submit the grievance to the principal in writing, with two (2) copies to the building representative. Within five (5) school days after receiving such written grievance, the pricipal shall deliver his written answer to the teacher, with two (2) copies to the building representative.

. . .

and that the grievance procedure provides further additional steps which culminate in the arbitration of unresolved disputes.

4. That on April 7, 1982, a meeting took place which involved District Administrator Marvin Berg, Assistant Beaver Dam High School Principal Marty Richardson, Vocational Program Administrator Ted Sehmer, Association representative Don Thom, and David Laatsch, a teacher of vocational agriculture at the junior and senior high school levels; that Berg thought the purpose of the meeting was to discuss the summer agricultural program and curriculum, while

Laatsch thought it was to discuss his concern that he had initially been misplaced at the wrong summer salary level; that prior to the meeting, Berg had not been informed of Laatsch's claim concerning salary schedule placement, nor had he been aware that Laatsch intended to raise this issue at the meeting; that as of the date of said meeting, Laatsch had not filed a grievance concerning his summer salary schedule placement because he hoped to resolve the matter informally; that Laatsch told Richardson that he (Laatsch) wanted an Association representative present at the meeting; that Richardson initially indicated it was his choice (to have such representation); that Richardson later told Laatsch that while representation was unnecessary because union business was not going to be discussed, he nevertheless could have representation at the meeting if he desired; that Laatsch informed Richardson that he planned on having Association representation at the meeting; that Laatsch brought Association representative Don Thom with him to the meeting; that when Berg walked into the meeting room and saw Laatsch and Thom together, Berg stated that the presence of a union representative was unnecessary because the meeting concerned curriculum matters; that Laatsch replied that if his placement on the summer salary schedule and putting his summer program on his individual teaching contract was going to be discussed, he desired Association representation at the meeting; that Thom was allowed to stay at the meeting; that Laatsch introduced the subject of his placement on the salary schedule and contended that he should be given additional credit for summer school teaching; that after the subject of Laatsch's salary placement was discussed for approximately twenty-five minutes, Berg stated he would look into the matter; that Berg indicated to Thom that the remainder of the meeting with Laatsch would be concerned with the summer school program and that Thom's involvement was no longer necessary; that after Thom left the meeting, Berg told Laatsch that he "should not be concerned about this issue. It was irrelevant. It was not an important issue"; and that Berg and Laatsch then discussed the summer agricultural program including the length of the program, Laatsch's supervision and hours.

5. That on April 9, 1982, several days after the above meeting, Berg visited Laatsch at his farm; that Berg started the conversation by asking Laatsch about his farm and its operation; that although the record is unclear who changed the topic of conversation, the conversation thereafter changed to school business; that during part of this discussion, Berg told Laatsch that he "was being compensated for the work (he) was doing" and there was "no reason that (he) should be concerned with (his) placement on the summer pay schedule"; and that at the time of this visit, Laatsch did not have a grievance pending regarding his summary salary placement.

6. That Paula Loizzo was first employed by the Beaver Dam School District in the 1980-1981 school year; that she initially taught second grade and then took a one year leave of absence for child rearing purposes; that on February 24, 1982, while on her childrearing leave, Loizzo was notified that she would be laid off, effective with the 1982-1983 school year; that she subsequently filed the following grievance:

> TO: Mr. Marvin Berg, Superintendent
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> FROM: BDEA PR & R Committee
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> DATE: March 5, 1982
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> The following is a grievance referred to the Superintendent by the PR & R Committee of the BDEA. It regards the layoff of Paula Loizzo who has appealed to the PR & R Committee pursuant to the provisions of the Master Agreement.
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> EMPLOYEE INVOLVED: Paula Loizzo
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> PROVISIONS ALLEDGED TO BE VIOLATED: All applicable provisions of the Master Agreement including Article VII B.
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> FACTS GIVING RISE TO THE GRIEVANCE:
> -Paula Loizzo was given a layoff notice.
> -"Length of service" was the only reason cited for the selection of Paula Loizzo to be the teacher laidoff

-Paula Loizzo has at least two years of service to the district as defined in the master agreement (including the 1980-81 School Year and the 1981-82 School year during which time she was on a leave of absence pursuant to Article XI of the Master Agreement).
-At least one other teacher (Georgia Brisky) in the K-3 division has identical length of service.
-At least one other teacher (Dorothy Ralston) in the K-3 division has shorter length of service.
-All other facts relative to Paula Loizzo's employment in the district and all other facts relative to the employment of other teachers in the district that may be relative to this issue.

CONTENTION OF THE EMPLOYEE AND THE ASSOCIATION: Paula Loizzo's selection as the employee to be laidoff was improper and a violation of the Master Agreement.

RELIEF DESIRED: That Paula Loizzo be immediately issued a teacher's contract for the 1982-83 school year, and that she receive all salary and benefits that she is entitled to for that employment.

that on June 22, 1982, Loizzo met with Beaver Dam Junior High Principal Bob Hanson to discuss the curriculum aspects of a seventh grade social studies' position; that as of the time of this meeting with Hanson, Loizzo's grievance had not been resolved; that Loizzo was not accompanied by an Association representative to this meeting; that there was no resolution of said grievance at this meeting; that on June 25, 1982, Berg called Loizzo to set up a meeting to discuss a job offer for the 1982-1983 school year; that during the phone conversation, Berg told Loizzo "it is to your advantage to not have someone from the Union present. This is a suggestion for you"; that immediately after the phone call, Loizzo wrote down what Berg had said, repeated it to her husband and called Association representative Bob Shumaker and told him of the conversation; that the meeting between Berg and Loizzo was held on June 28, 1982; that as of the time of this meeting with Berg, Loizzo's grievance had not been resolved; that Loizzo was accompanied to the meeting by Association representative Shumaker; that there was no discussion or comments made at the meeting regarding Shumaker's presence; that during the course of the meeting, Berg offered Loizzo her choice of either a seventh grade social studies position or a third grade elementary position at the South Beaver Dam School, although the third grade position was initially suggested by Shumaker; that on July 7, 1982, Loizzo accepted the third grade elementary position at the South Beaver Dam School; that on August 11, 1982, Loizzo's grievance was resolved; that the terms of the grievance settlement are as follows: "A. Contract issued to Paula Loizzo for the 1982-83 school year. B. Paula Loizzo to be credited with 2 years of seniority"; that on September 13, 1982, the President of the Beaver Dam Education Association wrote Berg protesting his statement to Loizzo during their phone call arranging the June 28th meeting that it would "be to your advantage not to have a union official" (present at the meeting); and that Berg responded in writing on October 21, 1982, to this charge, although he did not deny making the statement.

7. That Lori Brereton is a second year teacher in the Beaver Dam School District; that she was non-renewed in the spring of 1982; that she filed a grievance concerning her non-renewal, which sought as a remedy that she "be issued an individual teaching contract for the 1982-83 school year"; that this grievance was resolved on July 22, 1982, by treating her non-renewal as a layoff; that the terms of the grievance settlement are as follows: "Lori Brereton's non-renewal notice will serve as the notice of layoff pursuant to Article VII, B. Lori Brereton will be placed on the recall list and will be credited with 1.275 years of seniority"; that as a result of this grievance settlement, she was eligible for recall if a position opened up within the District; that said settlement did not specify which position, if any, Brereton would be recalled; that on August 12, 1982, Director of Instruction Neal Winkler contacted Brereton by telephone to arrange a meeting between himself and Brereton to discuss possibilities for continued employment with the District for the 1982-83 school year; that during this phone conversation, Winkler allegedly told Brereton that there was no need for her to bring union representation to the meeting, and if she did, there would be no reason to meet; that the meeting between Brereton and Winkler was held on August 18, 1982; that Brereton did not have a grievance pending at either the time

of the August 12th phone call from Winkler or the August 18th meeting; that Brereton was not accompanied by an Association representative to the meeting; that Winkler asked Brereton at the brief meeting if she was interested in long term substituting; that no issues were resolved at the meeting; and that subsequently Brereton was recalled to teach part-time at Hyland Prairie Elementary School.

Based on the foregoing Findings of Fact, the Examner makes and issues the following

CONCLUSIONS OF LAW

1. That the Respondent committed a prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats., when Berg advised Loizzo on June 25, 1982, that it would be to her advantage to not have an Association representative present at the meeting they were arranging to discuss Loizzo's employe status for the 1982-83 school year.

2. That the Respondent did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)1, Stats., when Berg communicated with Laatsch on April 7 and 9, 1982, regarding his salary placement concern or when Winkler advised Brereton on August 12, 1982, that there was no need for her to bring representation to the meeting they were arranging to discuss Brereton's employe status for the 1982-83 school year.

3. That the Respondent did not engage in any individual bargaining with employes represented for purposes of collective bargaining by the Beaver Dam Education Association, and thus did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)4, Stats., by the acts of Berg and Winkler noted in Findings 4-7 above.

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

ORDER 1/

IT IS ORDERED that the Respondent Beaver Dam Unified School District, its officers and agents shall immediately:

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

1. Cease and desist from interfering with employes in the exercise of their rights under Sec. 111.70(3)(a)1, Wis. Stats.

2. Take the following affirmative action which the Examiner finds appropriate under the Municipal Employment Relations Act:

   (a) Notify all employes by posting in conspicuous places on its premises, where notices to all employes are usually posted, copies of the notice attached hereto and marked "Appendix A." "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.

   (b) 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.

IT IS FURTHER ORDERED, that all remaining portions of the complaint shal be, and hereby are, dismissed.

Dated at Madison, Wisconsin this 10th day of October, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Raleigh Jones, Examiner

APPENDIX "A"

Pursuant to an Order of an Examiner appointed by the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employe that:

1. WE WILL NOT threaten our employes that it would be to their advantage to not have an Association representative present at meetings which are called to resolve an employe's pending grievance.

2. WE WILL meet with representatives of the Beaver Dam Education Association whenever we are attempting to resolve an employe's grievance.

Dated this _____ day of _____, 1983.

BEAVER DAM UNIFIED SCHOOL DISTRICT

By _____

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 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

ASSOCIATION'S POSITION:

The Association alleges that the District violated Chapter 111.70 (3)(a)(1) and (4) on four separate occasions by implicitly threatening workers if they secured Association representation or pursued grievances. The Association submits that Berg on two occasions attempted to convince Laatsch to drop his grievance regarding his proper pay for the summer agricultural program. The first time was at the April 7, 1982 meeting when Berg raised the placement issue after Association representative Thom had left. Berg told Laatsch he should not be concerned with his placement on the summer pay schedule. Berg repeated this comment several days later when he visited Laatsch at his farm. While admitting that Berg's comments contain no direct threats, the Association argues the comments were intended to convince Laatsch not to file a grievance.

The other two instances of interference involve teachers who were told by District Administrators not to bring Association representatives with them to meetings which were being arranged. On June 25, 1982, Berg phoned Loizzo to arrange a meeting to discuss a job offer for the 1982-83 school year. During this conversation, Berg told Loizzo it was to her advantage not to have anyone from the union present at the meeting. On August 12, 1982, Winkler phoned Brereton to likewise discuss a job offer for the 1982-83 school year. Winkler told Brereton that there was no need for her to bring representation, and if she did, there was no reason to meet. Taken together, the Association contends that these actions show a pattern on the part of the Administration to undermine and circumvent the employes' collective bargaining representative and to intimidate employes from filing grievances or dealing with the Association's grievance representative.

The Association argues that this case does not primarily concern issues regarding an employe's right to representation at disciplinary hearings under Weingarten 2/ but rather it involves the right of employes and their union to be free from interference and intimidation. The Association contends that its case draws its strength from the concepts embodied in such cases as NLRB v. General Electric 3/ and Steelworkers v. NLRB (Dow Chemical Co.). 4/ Although District Administrators did not carry out the extensive conduct described in these cases, the Association claims that they were attempting to accomplish the same objectives as the employers in those cases: to denigrate the importance of the Association and to convince employes that management offered more rewarding and personally acceptable solutions to their problems than did the Association.

DISTRICT'S POSITION:

The District contends that it did not interfere, restrain or coerce the three employes involved not to have Association representatives present at meetings with administrators. It is emphasized that Loizzo and Laatsch actually had Association representatives present at the meetings with Berg. The meeting with Laatsch was called to discuss the summer school curriculum, and Berg did not even know about Laatsch's claim concerning salary placement until the start of the meeting when Laatch raised the issue. The claimed prohibited practice with regard to Loizzo and Brereton rests entirely on the allegations that Berg and Winkler tried to coerce them during telephone conversations not to bring Association representatives to meetings they were arranging. Berg told Loizzo that if she felt it was to her advantage to have a representative present at the meeting, then she would have to make that decision. Berg specifically denied telling Loizzo not to bring a union representative to the meeting. Winkler told Brereton that it was

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2/ NLRB v. Weingarten, Inc. 420 U.S. 251 (1975).

3/ NLRB v. General Electric 72 LRRM 2531 (2nd Cir., 1969), cert. denied, 397 US 965.

4/ Steelworkers v. NLRB (Dow Chemical Co.) 92 LRRM 2545 (3rd Cir. 1976).

not necessary for her to bring a union representative to the meeting, but that she could if she wanted. The District argues Winkler is a more credible witness than Brereton because Winkler kept detailed notes of both the phone conversations and the August 18, 1982 meeting, whereas Brereton did not.

The District also contends that the employes herein had no legal right to representation at the meetings involved based on Weingarten 5/ and the Commission cases which have applied the Weingarten standards, 6/ since discipline did not occur at the meetings. Additionally, the District did not engage in individual bargaining because these meetings were not called as part of the grievance procedure, but instead, were initiated by administrators to exercise authority under the "Board's Functions" clause of the labor agreement. The meeting with Laatsch was called to discuss the summer program and curriculum, while the meetings with Loizzo and Brereton were called as a courtesy to those employes after their recall from layoff to ascertain their interest in accepting existing or potential teaching vacancies before the District exercised the authority to assign work. The District submits that neither MERA nor the parties' labor agreement, require the presence of Association representatives at meetings involving a management function when a member of the bargaining unit is present.

DISCUSSION:

In order for the Complainant to prevail on its complaint of interference with employe rights, it must demonstrate by a clear and satisfactory preponderance of the evidence that Repondent's complained of conduct contained either some threat of reprisal or promise of benefit which would tend to interfere with employes exercise of rights guaranteed by MERA. 7/ It is not necessary to demonstrate that Respondent intended the conduct to have the effect of interfering with those rights. 8/

In this connection, the Commission has held in Waukesha County 9/

> ". . . some municipal employer actions that, in the broadest and most literal senses of the terms, 'interfere with' or 'restrain' municipal employes' exercise of Sec. 111.70(2) rights have been held not to violate Sec. 111.70(3)(a)1. (Citations omitted.)
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> "Rather, the traditional mode of analyzing whether a violation of those quoted terms as used in the applicable status has occurred has involved a balancing of the interests at stake of the affected municipal employes 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. ..." (Citations omitted.) 10/
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> It is the balancing analysis described above that must be applied on a case-by-case and issue-by-issue basis to determine whether, in any given set of circumstances, the municipal employer conduct involved interferes with or restrains employes in the exercise of their MERA rights. While the results of that balancing analysis may leave

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5/ NLRB v Weingarten, Inc., Supra, footnote 2.

6/ Waukesha County (14662-A) 1/78; Menomonie Falls (15650-C) 2/79; City of Milwaukee (17117-A) 1/80; City of Madison (17302-B) 3/80.

7/ City of Brookfield (Library), (19367-A) 11/82; Western Wisconsin V.T.A.E. District, (17714-B) 6/81; Drummond Jt. School District No 1 (15909-A); Ashwaubenon School District, (14774-A) 10/77.

8/ City of Evansville, (9440-C) 3/71.

9/ Waukesha County, Supra, footnote 6.

10/ Ibid.

> employes with lesser protections than they consider necessary, it should be noted that additional protections may be negotiated contractually. The Commission's determination herein relate to the requirements of, and limitations on, the right to representation under MERA. 11/

As noted above, the Association acknowledges it's case is not based on Weingarten, 12/ which established the right of a private sector employe to union representation at a disciplinary investigation or interview. Rather, the Association argues the Administration's conduct in these incidents undermined and circumvented the collective bargaining representative, and intimidated employes from filing grievances or dealing with the Association.

It is a clear principle of law that when a grievance procedure is established by a collective bargaining agreement, the right to process grievances without coercion or interference from an employer is a fundamental right protected by MERA. 13/ Likewise, it is also well settled that a union has a right to be present at the adjustment of grievances 14/ and that it is an unfair labor practice for an employer to adjust a grievance without affording the union the opportunity to be present at the adjustment. 15/ If the Association had a right to be present at any of the meetings involved herein because they involved the adjustment of grievances, then statements from district administrators to employes which interfered with the Association's right to be present would violate Sec. 111.70(3)(a)(1), Stats. If however, the Association did not have a right to be present because the meetings did not involve the adjustment of grievances, then the administrators statements to employes would not constitute a prohibited practice. Instead, it would constitute a lawful exercise of management rights.

The Examiner now turns to the factual situations addressed in the complaint.

DAVID LAATSCH:

There was obviously a misunderstanding between the parties as to the purpose of the April 12, 1982 meeting set up between Laatsch and Berg. Laatsch thought the meeting was to discuss his salary schedule placement, while Berg testified he was under the impression the meeting was called to discuss the summer program and curriculum. The Association admits in its reply brief that "while it is true that the Association was not able to elicit any direct testimony from Mr. Berg that he was aware of Mr. Laatsch's concerns over the summer program", 16/ it argues the timing of the meeting raises a strong inference of knowledge. Although the parties disagree as to the purpose of the meeting, there is agreement that the meeting was not called pursuant to the contractual grievance procedure. This was because Laatsch had not yet filed a grievance regarding his summer salary placement, but hoped to resolve the matter informally.

Since Berg had no idea at the start of the meeting that anything other than summer curriculum was going to be discussed, he was no doubt surprised to see an Association representative accompany Laatsch to the meeting. It was then that Berg made his statement that union representation was not needed at the meeting. Despite whatever misgivings Berg had about Association representative Thom being present at the meeting, Thom was allowed to stay during the discussion of salary placement. After Thom was excused from the meeting, Berg again raised the salary issue by telling Laatsch he "should not be concerned about this issue. It was irrelevant. It was not an important issue." The Association contends Berg's remarks to Laatsch were coercive and designed to denigrate the Association.

11/ City of Milwaukee (14873-B, 14875-B, 14988-B) 8/80.

12/ Supra, footnote 2.

13/ Harry Rydlewicz and Clarence Quandt (Village of West Milwaukee (9845-B) 10/71; Waunakee Jt. School District (14749-A) 2/77.

14/ Bethlehem Steel Co., 89 NLRB 341 (1950).

15/ Ibid.

16/ Association's Reply Brief, page. 2.

Here, Article XII, Sec. B, of the parties' collective bargaining agreement requires a "grievance to be reported in writing." At the time of the meeting with Berg, Laatsch had not filed a grievance. Absent the filing of a grievance, District officials were entitled to discuss personnel matters with Laatsch without an Association representative being present. 17/ If the Association's position were adopted, that would prevent an employer from meeting with or communicating with employes over any matters affecting an employe's employment relationship with the employer.

The grievance procedure also provides in Article XII, A, 5 that a teacher may discuss a "grievance" informally with a member of the administrative staff, although it does not indicate whether this informal discussion can occur before or after a grievance is filed. As previously noted, Berg had good faith misunderstanding as to Laatsch's intended purpose of the April 7th meeting and allowed Thom to stay at the meeting once it became clear that Laatsch wanted to discuss his summer salary placement. Even if the discussion that ensued constituted an "informal" grievance discussion pursuant to Article XII, A, 5, Berg's comments to Laatsch both before and after Thom left the room simply do not constitute a prohibited practice.

The second incident involving Laatsch occurred when Berg visited him at his farm on April 9th. The record does not indicate who raised the issue of salary placement during the conversation, but Berg told Laatsch that he "was being compensated for the work (he) was doing" and there was "no reason that (he) should be concerned with (his) placement on the summer pay schedule." 18/ Although Berg's comments did not contain any direct threats, the Association argues that indirect coercion was nevertheless present. This claim is without merit, however, as there simply is no basis for finding that such statements constituted a prohibited practice. For even if this conversation was an informal "grievance" discussion within the meaning of Article XII, A, 5, it is not clear from the record who raised the issue of Laatsch's salary placement. Although Berg probably visited Laatsch's farm for this very purpose, this act alone does not constitute a prohibited practice. The first meeting had brought Laatsch's concern regarding his summer salary placement to Berg's attention. An employer cannot be expected to ignore employe complaints and refuse to address problems brought to it by its employes. Such a result is not intended by MERA. The employer need not wait until the employe files a formal grievance before addressing the issue and trying to resolve it. This is especially the case here, where it was Laatsch, and not Berg, who initiated the subject at the first meeting. The protracted discussion of the issue that ensued was engaged in solely at Laatsch's instigation. 19/ As long as no formal grievance had yet been filed, both Laatsch and Berg were free to carry on their informal meetings and discussions, no matter what the time or place, in an effort to resolve the issue. This is exactly what occurred on April 9th at Laatsch's farm, although the record reveals that only a few brief remarks were made which touched on Laatsch's concern regarding his salary placement.

For the foregoing reasons, no Sec. 111.70(3)(a)(1) violation has been found in the facts involving Laatsch.

PAULA LOIZZO:

In deciding whether Berg's alleged statement to Loizzo in a phone conversation constituted a prohibited practice, it is first necessary to determine if the meeting being arranged was one relating to the adjustment of a grievance.

At the time of this phone call, Loizzo was laid off and had a grievance pending regarding her layoff. The substance of her grievance concerned whether she would be credited for seniority purposes for the year she was on a child

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17/ Waukesha County, Supra, footnote 6.

18/ Tr. page 71.

19/ In Baton Rouge Water Works Co., 246 NLRB 995, 103 LRRM 1056 (1979) the NLRB observed in a Weingarten case that the fact that the employer after informing an employe of disciplinary action, engaged in a conversation with the employe at his behest concerning the reasons for the discipline would not convert the meeting to one which Weingarten would apply.

rearing leave of absence, and the remedy sought was a teaching contract for the 1982-83 school year. Several days prior to Berg's call to her, Loizzo had met with Principal Hanson (without an Association representative being present) to discuss a possible seventh grade social studies' position. Since Berg's phone call followed her meeting with Hanson, Loizzo no doubt made the assumption that Berg intended to offer her this position at the meeting. Both Loizzo 20/ and Berg 21/ testified that the purpose of the meeting was to discuss a job offer for the 1982-83 school year. Therefore, the crux of the meeting was to discuss Loizzo's recall rights and where she wanted to teach. This is synonymous with the remedy Loizzo sought in her pending grievance of "a teacher's contract for the 1982-83 school year." Although the meeting was neither compulsory nor part of the contractual grievance procedure, the meeting could involve the adjustment of her pending grievance.

Therefore, it must next be determined if the employer interfered with the processing of this grievance. This requires a determination of what was said in the phone call involved.

There was conflicting testimony given by Loizzo and Berg as to exactly what was said in their June 25, 1982, phone call. Loizzo claims Berg said "it is to your advantage to not have someone from the union present. This is a suggestion for you." 22/ However, Berg testified that he told Loizzo "that if she felt that it would be to her advantage to have a representative, that she has to make that decision. We don't. That is an option for them." 23/ Berg specifically denied telling Loizzo not to bring a union representative to the meeting.

In the face of conflicting testimony given by Loizzo and Berg, it is necessary for the Examiner to make a credibility finding as to exactly what was said. The Examiner credits Loizzo's testimony for several reasons. First, Loizzo was very emphatic about what Berg said, and her conduct following the phone call supports her position. Immediately after the phone call she wrote down the remarks, repeated them to her husband, and called Association representative Shumaker and repeated the conversation to him. Presumably as a result of Loizzo's call to Shumaker, the President of the Beaver Dam Education Association wrote Berg a letter on September 13, 1982, protesting his statement to Loizzo. The letter attributes the following statement to Berg: it would "be to your advantage not to have a union official." Although Berg responded in writing on October 21, 1982 to this charge, he did not specifically deny making the statement. Second, in a relative sense, the phone conversation was one of far greater consequence to Loizzo than it was to Berg. To Loizzo, a laid off employe, the conversation with the District Administrator dealt with her possible reemployment with the District. To Berg, the conversation amounted to one of his many daily administrative duties. It is hardly surprising that Loizzo is better able to recall the specific language used, since the phone call had more importance to Loizzo than Berg. Finally, Loizzo's testimony does not serve to promote any self interest. Since her status at the time as a laid off employe is hardly the ideal position from which to fabricate a conversation calculated to embarrass the District Administrator, the Examiner can see no motive for Loizzo to falsify her testimony. Based upon the foregoing, the Examiner credits Loizzo's description of the June 25, 1982 phone call.

Given that Berg made the above-described statements to Loizzo in their phone call, the next question is whether such statements constitute a prohibited practice under Sec. 111.70(3)(a)1 of MERA. It has already been determined that the meeting which was being arranged in the phone call was one concerning the possible adjustment of a grievance. Berg's statement to Loizzo not to bring representation to the meeting interfered not only with Loizzo's protected right, but also with the Association's right to be present at the adjustment of grievances. It is immaterial that Loizzo brought Association representative Shumaker with her to the meeting and that Berg did not object to Shumaker's

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20/ Tr. page 59, 165.

21/ Tr. page 134.

22/ Tr. page 59, 166.

23/ Tr. page 138.

presence. This is because the legality of an employer's conduct or statement does not hinge on whether coercion results, but rather on whether such conduct has a reasonable tendency to interfere with employe rights. 24/

Accordingly, the undersigned finds that there was a violation of Sec. 111.70(3)(a)1 of MERA when Berg told Loizzo not to bring representation to the meeting in their June 25, 1982 phone call.

LORI BRERETON:

In deciding whether Winkler's alleged statement to Brereton in a phone conversation constituted a prohibited practice, it is first necessary to determine if the meeting being arranged was one relating to the adjustment of a grievance.

At the time of this phone call on August 12, 1982, Brereton did not have a grievance pending with the District. Although she had grieved her non-renewal, this grievance had been recently resolved on July 22, 1982. The terms of the grievance settlement were: "Brereton's non-renewal notice will serve as the notice of layoff pursuant to Article VII, B. Lori Brereton will be placed on the recall list and will be credited with 1.275 years of seniority." This grievance settlement did not specify where Brereton would teach, if and when she was recalled. This was the purpose of the August 18, 1982 meeting which Winkler called to arrange. Brereton knew when she received Winkler's phone call that she was eligible for recall if a teaching position became available within the District.

As was stated in the Examiner's discussion of the events involving Laatsch, since Brereton did not have a grievance pending at the time, the purpose of the meeting between she and Winkler could not have been the adjustment of a grievance. Therefore, Brereton was not entitled to an Association representative at the meeting. Although the meeting did concern her recall rights, Brereton testified that the extent of the meeting was that Winkler asked her if she was interested in doing some long term substituting. Such informational questions and responses do not constitute individual bargaining. 25/

Furthermore, Berg testified without contradiction that the District could recall an employe from layoff by simply notifying them by letter of the position to which they are being assigned for the school year. This means that the District was not obligated to hold such a meeting with Brereton but did so as a courtesy to ascertain her interest in potential teaching vacancies. Article VII, B, 6 and 7 of the labor agreement require only that the District notify the laid off teacher of an available position and then the teacher has ten (10) days to advise the District in writing that the employe accepts the position offered.

Although conflicting testimony was given by Brereton and Winkler as to what was said in their August 12, 1982 phone call, it is unnecessary for the Examiner to make a credibility determination. Assuming arguendo that Brereton's version of the phone conversation is credited, no prohibited practice was committed when Winkler made known his position in advance that Association representation was not permitted at the meeting since the Association did not have a statutory right to be present. 26/ Likewise, Brereton did not have a right to representation at the meeting, since municipal employes do not have an absolute right under MERA to be represented in every conference they have with their employer on questions of wages, hours and conditions of employment. 27/

For the foregoing reasons, no Sec. 111.70(3)(a)(1) violation has been found in the facts involving Brereton.

24/ Juneau County (12593-B) 1/77; Racine County (20327-B) 7/83.

25/ Madison Metropolitan School District (15629-A) 5/78; Milwaukee Board of School Directors (19477-A) 10/82.

26/ Waukesha County, Supra, footnote 6.

27/ Waukesha County, Supra, footnote 6. Likewise, the NLRB has applied the same principle in the private sector. See American Printing Co., 173 NLRB 73 (1968); Ingraham Industries, 178 NLRB 558 (1969).

THE INDIVIDUAL BARGAINING ALLEGATION:

The Examiner has considered the cases relied upon by the Association. The General Electric 28/ decision cited by the Association is the noted "Boulwarism" case, wherein General Electric made a single, take-it-or-leave-it contract proposal during negotiations to the union which it attempted to sell through a massive publicity campaign directed at the employes. Although finding that this conduct constituted an unfair labor practice, the court stated that its intent was not to forbid an employer from communicating with its employes during negotiations. In fact, an employer's right of free speech permits the employer to inform employes of the company's bargaining position, just so the company does not attempt to reach a separate agreement with the employes or the union local individually. 29/ The Examiner concludes the General Electric case is distinguishable from the facts in this case on the basis that the meetings between the school administrators and the employes involved were neither connected with contract negotiations nor individual bargaining.

The Dow Chemical 30/ case cited by the Association involved an employe complaint and suggestion process known as "speak out", which was unilaterally implemented by the company. The Court ruled that the "speak out" program was violative because of the potential that employe grievances could be adjusted or resolved without the presence of a union representative. The applicability of this case is limited exclusively to Loizzo who was the only employe involved who had a grievance pending at the time of her meeting. Since the Examiner has concluded that the meetings with Laatsch and Brereton did not involve the adjustment of grievances, Dow is distinguishable on that basis with regard to them.

Inasmuch as the evidence fails to demonstrate that the District engaged in individual bargaining with respect to any of the three employes herein, no violation of Sec. 111.70(3)(a)4 has been found.

CONCLUSION:

In summary, the undersigned finds that when Berg advised Loizzo on June 25, 1982, that it would be to her advantage to not have an Association representative present at the meeting they were arranging, this violated Sec. 111.70(3)(a)1, Stats. However, neither Berg's communication with Laatsch on April 7 and 9, 1982, regarding Laatsch's salary placement concern nor Winkler's advising Brereton on August 12, 1982, that there was no need for her to bring representation to the meeting they were arranging, violated Sec. 111.70(3)(a)1, Stats. None of the actions involved are found to violate Sec. 111.70(3)(a)4, Stats.

Dated at Madison, Wisconsin this 10th day of October, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones, Examiner

28/ NLRB v. General Electric Co., Supra, footnote 3.

29/ See Ashwaubenon School District No. 1 (14774-A) 10/77.

30/ Steelworkers v. NLRB (Dow Chemical Co.), Supra, footnote 4.