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-B

Appearances:

Mr. Bruce Meredith, Staff Counsel, Wisconsin Education Association Council, 101 West Beltline Highway, P. O. Box 8003, Madison, Wisconsin 53708, appearing on behalf of the Complainant.

Mr. Steven A. Veazie, Mulcahy & Wherry, S.C., Attorneys at Law, Suite 202, 131 West Wilson Street, Madison, Wisconsin 53701-1110, appearing on behalf of the Respondent.

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

Examiner Raleigh Jones having, on October 10, 1983, issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled proceeding, wherein he concluded that the Respondent had on one occasion committed a prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats., and further concluded that on two occasions Respondent had not committed prohibited practices and therefore dismissed those charges; and Complainant having, on October 24, 1983, filed a petition for Commission review of said decision; and Respondent having, on October 28, 1983, filed a cross-petition for Commission review of said decision; and the parties having filed briefs and reply briefs in the matter, the last of which was received on January 12, 1984; and the Commission having reviewed the record in the matter, and being satisfied that the Examiner's Findings of Fact should be affirmed, and that the Examiner's Conclusions of Law be revised in part, and that the Examiner's Order be affirmed.

NOW, THEREFORE, it is

ORDERED 1/

A. That the Commission affirms and adopts as its own the Examiner's Findings of Fact.

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final

(Continued on page two)

B. That the Commission affirms the Examiner's Conclusion of Law 3, renumbers it 2, and revises the balance of the Examiner's Conclusions of Law to read as follows:

> 1. That the Respondent, by the statements made by Marvin Berg on June 25, 1982, to Paula Loizzo referred to in Finding of Fact 6, did interfere with the exercise of her rights guaranteed by Sec. 111.70(2), and therefore, Respondent violated Sec. 111.70(3)(a)1, Stats.
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> 2. That the Respondent, by the statements made by Marvin Berg on April 7 and 9, 1982, to David Laatsch, referred to in Findings of Fact 4 and 5, and by the statements made by Neal Winkler on August 12, 1982, to Lori Brereton referred to in Finding of Fact 7, did not interfere with, restrain or coerce these employes in the exercise of rights guaranteed in Sec. 111.70(2) of MERA, and therefore, Respondent did not violate Sec. 111.70(3)(a)1, Stats.

1/ (Continued)

order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

C. That the Examiner's Order in the instant matter be, and the same hereby is, affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 4th day of May, 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

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, REVISING IN PART EXAMINER'S CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

Background:

In its complaint initiating this proceeding, the Complainant alleged that the District committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act by threatening three employes, each on a different occasion, for engaging in protected concerted activity and by attempting to bargain with these employes individually with respect to wages, hours and conditions of employment. The District denied that it had committed any prohibited practice.

The Examiner's Decision:

The Examiner found that, on April 7, 1982, the District Administrator, Marvin Berg, met with teacher David Laatsch and others to discuss summer curriculum. Prior to this meeting, Laatsch asked his Principal if he could have an Association representative present to which the Principal indicated that he could. Later, the Principal indicated to Laatsch that a representative was not necessary as Union business was not going to be discussed. Laatsch attended the meeting with Association representative Thom whose presence was challenged by Berg. Laatsch indicated that he wished to discuss his salary placement and the inclusion of his summer school assignment in his individual contract. These subjects were discussed and then Thom left, whereupon Berg told Laatsch that he "should not be concerned about this issue. It was irrelevant. It was not an important issue." On April 9, 1982, Berg visited Laatsch at Laatsch's farm and discussed his farm operation and during this conversation the subject of Laatsch's salary placement came up and 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." The Examiner concluded that the statements made by Berg did not violate Sec. 111.70(3)(a)1, Stats., because Laatsch had not filed a grievance at the time they were made and hence they were free to discuss the matters without the Association being present and the statements were not coercive.

The Examiner found that the District on February 24, 1982, gave a notice of layoff to teacher Paula Loizzo for the 1982-83 school year and that she filed a grievance alleging that said layoff violated the parties' agreement. The grievance was still pending when, on June 25, 1982, Berg called Loizzo to set up a meeting to discuss a job offer to her for the 1982-83 school year. During the conversation, Berg told her "it is to your advantage to not have someone from the Union present. This is a suggestion for you." Loizzo subsequently attended the meeting with an Association representative and accepted Berg's offer of a third grade teaching position. Her grievance was subsequently resolved on August 11, 1982. The Examiner concluded that Berg's statements interfered with Loizzo's processing of her grievance and, therefore, violated Sec. 111.70(3)(a)1, Stats.

The Examiner found that the District had non-renewed teacher Lori Brereton in the spring of 1982 and she grieved her non-renewal. The grievance was settled on July 22, 1982, on the basis that the non-renewal would be treated as a layoff. On August 12, 1982, the District's Director of Instruction, Neal Winkler, contacted Brereton by telephone to arrange a meeting to discuss possibilities for future employment. 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. The Examiner concluded that no prohibited practice was committed because Brereton had no right to the presence of a Union representative at this meeting and Winkler's statement was to the effect that representation would not be permitted. Brereton did attend the meeting and long term substitution was discussed.

The Examiner dismissed the charges that the Respondent had engaged in individual bargaining with the three employes.

Petition for Review:

The Complainant contends that the Examiner's conclusions with respect to statements made to Laatsch and Brereton were erroneous. The Complainant argues that the statements were coercive and tended to undermine the parties' collective bargaining representative. It particularly objects to the Examiner's statement that where the Association did not have the right to be present at a meeting between an employer and District representatives, that statements to employes would not constitute a prohibited practice. The Complainant asserts that an employer may undertake an otherwise lawful and legitimate act in such a manner as to make it unlawful. It contends that the Examiner failed to consider whether the statements tended to restrain or coerce employes in the exercise of rights guaranteed under Sec. 111.70(2)a, Stats., and based his decision solely on the grounds that no grievance was pending when the statements were made. The Association asserts that the Examiner therefore applied the wrong legal standard in reaching his conclusion. The District maintains that the employes did not have the right to a Union representative at the meetings with District representatives and the statements were perfectly permissible and did not constitute prohibited practices.

Cross-Petition for Review:

The District contends that the Examiner erred in finding that the District committed a prohibited practice by Berg's comments to Loizzo. It argues that the meeting of June 28, 1982, was not pursuant to the grievance procedure and was not conducted to resolve any grievance. It claims that the purpose of the meeting was to fill vacant positions and to discuss Loizzo's qualifications and Loizzo had no right to the presence of a Union representative. The District maintains that the June 25, 1982, call between Berg and Loizzo was an exercise of management rights and any statement concerning that meeting cannot constitute a prohibited practice. It argues that the charge of retaliating against Loizzo for her filing a grievance is rebutted by the District's offering her a teaching position for 1982-83. It contends that Berg could have told Loizzo to come to the meeting without a representative or there would be no meeting and such would not be a prohibited practice; however, where Berg merely suggested this, the Examiner determined it was a prohibited practice. The District asserts that the Examiner's decision should therefore be reversed. The Association contends that the District cannot say whatever it wishes merely because the employe does not have a right to Union representation. It insists that Berg's statements were coercive and whether or not she was entitled to a Union representative is irrelevant in determining that the District committed a prohibited practice.

Discussion:

The Complainant has the burden of proving by a clear and satisfactory preponderance of the evidence that the statements made by the District's agents contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain, or coerce municipal employes in the exercise of rights guaranteed by Sec. 111.70(2), Stats. 2/ It is not necessary to prove that Respondent intended to interfere with or coerce employes or that there was actual interference. 3/ Interference may be proved by showing that the Respondent's conduct had a reasonable tendency to interfere with the employer's right to exercise MERA rights. 4/ In each instance, the remarks as well as the circumstances under which they were made must be considered in order to determine the meaning which an employe would reasonably place on the statement. 5/ The same statement made in two different circumstances might be coercive in one and not in the other.

2/ Brown County, 17258-A (8/80); Western Wisconsin VTAE, 17714-B (6/81).

3/ City of Waukesha, 11486 (12/72).

4/ City of Brookfield, 20691-A (2/84).

5/ City of LaCrosse, 17084-C (4/82); WERC v. Evansville, 69 Wis. 2d 140 (1975).

The statement must relate to the exercise of some MERA right otherwise it does not violate the provisions of MERA. 6/ However, it does not follow that any and all statements made to an employe in a situation where the employe does not have a right upon request to the presence of a Union representative could not be unlawfully coercive. Any statement which threatens the employe in the exercise of MERA rights is a prohibited practice. 7/ It is necessary to apply these principles to the three instances raised by the complaint.

Berg-Laatsch Statements:

The Examiner concluded there was no interference by Berg's comments to Laatsch and stated in his Memorandum as follows:

> Although Berg's comments did not contain any direct threats, the Associaton 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.

We agree with the Examiner's conclusion. Under the circumstances presented in this case, we conclude that Berg's comments, reasonably interpreted, simply did not constitute a threat or promise of benefit likely to coerce or intimidate Laatsch in the exercise of his statutory rights. Therefore, we affirm the Examiner's finding that there was no violation of Sec. 111.70(3)(a)1 with respect to the Berg-Laatsch conversations.

Winkler-Brereton Statement:

The Examiner concluded that the District did not interfere with Brereton's rights "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." The evidence failed to demonstrate that Brereton was entitled upon request to the presence of an Association representative at the meeting with Winkler on August 18, 1982, and Complainant has conceded for the purposes of this proceeding that she was not entitled to Union representation. In that context, the charge of interference is not established by the Association's showing that the District made known in advance that Union representation will not be permitted. 8/ The District merely indicated that no representation was warranted and that no meeting would occur in the presence of an Association representative. Even in an investigative interview where there would be a statutory right of Union representation upon request, the District's statement involved herein would not have been coercive or unlawful. 9/ Winkler's statement, in the context in which it was made does not contain any threat or promise of benefit related to any of Brereton's MERA rights. Hence, we have affirmed the Examiner's conclusion that no violation of Sec. 111.70(3)(a)1, Stats., was committed by the District in that regard.

Berg-Loizzo Conversation:

The Examiner credited Loizzo's testimony with respect to the statements made by Berg and the record supports the Examiner's determination. Therefore, Loizzo's version is accepted. The circumstances surrounding the statement are that Loizzo had been laid off and had filed a grievance protesting the calculation of her seniority and her layoff. On June 17, 1982, the grievance was presented to the Respondent's Instruction and Personnel Committee, which was one of the steps of the grievance procedure. At the time of Berg's statement, the grievance remained unresolved. Several days prior to Berg's statement, Loizzo had met with the Principal to discuss a vacancy in a seventh grade social studies position. Loizzo

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6/ City of LaCrosse, 17084-D (10/83).

7/ County of Marinette, 20079-A (3/83); Brown County, 17258-A (8/80).

8/ See Waukesha County, 14662-A (1/78) at 25.

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

attended the meeting alone. The curriculum aspects of the position were discussed and Loizzo was interviewed to see if she was acceptable for the position. On June 25, 1982, Berg called Loizzo asking her to meet on June 28, 1982, to discuss a job offer for the ensuing school year. Loizzo agreed to meet then. She made no request for the presence of an Association representative and did not indicate one would accompany her. Berg then made the statement that it would be to her advantage not to have someone from the Union present and it was a suggestion for her.

The Examiner found that Berg's statement to Loizzo constituted interference with her right to process her grievance because the meeting which was being scheduled could have involved the adjustment of her grievance even though it was not a formal step of the grievance procedure. The Complainant contends that this finding is unnecessary. As we view it, however, the meeting clearly was not pursuant to the grievance procedure and Berg had indicated that the meeting was to offer her a position, hence this issue was different from those raised by her grievance. Therefore, the record does not support the Examiner's conclusion with respect to the adjustment of Loizzo's grievance.

The issue is whether Berg's statement contained a threat of reprisal or promise of benefit related to Loizzo's exercise of rights under MERA. As noted, from the Association's point of view the lawfulness of the statement does not depend on whether the District reasonably appeared to be attempting to avoid conversion of the June 28 meeting from a job interview into a grievance settlement discussion. For, in either context the Association views the statement as indirectly threatening Loizzo with adverse job security consequences if she involved the Association in her June 28, 1982, meeting with the District.

The District would have us characterize the statement merely as a reminder that in view of the limited purposes of the meeting, Loizzo would have no right upon request to have a representative present. Had that been the reasonable meaning of the statement, we would have found no violation. For, a MERA right to union representation upon request would not attach to a meeting called for the sole purpose of discussing an employe's qualifications for and interest in a particular vacancy.

However, Berg's description of the statement as a "suggestion" to Loizzo undercuts the notion that his statement is most reasonably understood as being a matter-of-fact advance notification of the nature of the meeting and the absence of a right to representation. Rather, in the context and word-to-the-wise manner in which it was made, the statement promises, albeit indirectly, that Loizzo will likely be treated more favorably by the District if she refrains generally from exercising any rights to Union representation that she may have in her efforts to maintain active employment in the District. Conversely, the statement indirectly threatens that she will be treated less favorably by the District if she enlists the Association's direct assistance in pursuing her objective of continued active employment within the District.

Under the circumstances, then, we conclude that Berg's statement had a reasonable tendency to interfere with Loizzo's exercise of MERA rights and a violation of Sec. 111.70(3)(a)1, Stats.

Individual Bargaining:

Complainant offered no persuasive arguments for concluding that the Examiner's determination that the Respondent had not engaged in individual bargaining with employes is erroneous and we have therefore affirmed the Examiner's decision that the District did not violate Sec. 111.70(3)(a)4, Stats.

Dated at Madison, Wisconsin this 4th day of May, 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