STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, Complainant, vs. TOWN OF MERCER. Respondent.	:	Case 5 No. 35731 MP-1771 Decision No. 23136-B

Appearances:

Mr. George M. Blauvelt, Attorney at Law, P. O. Box Q, Mercer, Wisconsin 54547, appearing on behalf of the Town.

Mr. Edward L. Guthman, Business Representative, Operating Engineers Local No. 139, AFL-CIO, 1007 Tower Avenue, Superior, WI 54880, appearing on behalf of the Union.

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER 1/

International Union of Operating Engineers, Local 139, having, on September 17, 1985, timely filed objections to the conduct of the elections, and on October 1, 1985, filed a charge wherein it alleged the Town committed prohibited practices by threatening employes with retaliation if they engaged in protected activity and supported the Union; and the Commission, having consolidated the election challenges and objections with the prohibited practice charge for purposes of hearing; and having appointed Jane B. Buffett, a member of its staff, to act as Examiner and to make and issue Proposed Findings of Fact, Conclusions of Law and Order; and the hearing having been conducted on January 29, 1986; and a stenographic transcript having been prepared and received on February 14, 1986; the parties having waived opportunity to file briefs; and the Examiner, having considered the entire record and the arguments of the parties, and being fully advised in the premises, makes and issues the following

PROPOSED FINDINGS OF FACT

1. That International Union of Operating Engineers, Local 139, AFL-CIO, hereinafter the Union, is a labor organization, having its offices at 1007 Tower Avenue, Superior, Wisconsin.

2. That Town of Mercer, hereinafter Town, is a municipal employer, having offices at Town Hall, Mercer, Wisconsin.

1/ Each party adversely affected by the Examiner's proposed decision shall have the opportunity to file objections to the proposed decision with the Commission pursuant to Section 227.09(2), Stats. Said objections must be received by the Commission within twenty (20) days of the date of service of the Examiner's proposed decision. Section 227.09(2), Stats., provides:

> (2) In any contested case which is a class 2 or class 3 proceeding, where a majority of the officials of the agency who are to render the final decision are not present for the hearing, the hearing examiner presiding at the hearing shall prepare a proposed decision, including findings of fact, conclusions of law, order and opinion, in a form that may be adopted as the final decision in the case. The proposed decision shall be a part of the record and shall be served by the agency on all parties. Each party adversely affected by the proposed decision shall be given an opportunity to file objections to the proposed decision, briefly stating the reasons and authorities for each objection, and to argue with respect to them before the officials who are to participate in the decision. The agency may direct whether such argument shall be written or oral. If an agency's decision varies in any respect from the decision of the hearing examiner, the agency's decision shall include an explanation of the basis for each variance.

3. That pursuant to the Union's petition for election among certain employes of the Town, filed March 12, 1985, a hearing was held on April 25, 1985; that on August 9, 1985 the Commission issued a Direction of Election in a unit consisting of: 2/

> All regular full-time and regular part-time employees of the Town of Mercer Street Department excluding supervisory, managerial and confidential employees.

and that on August 27, 1985 the Commission amended said direction to set forth an August 9, 1985 eligibility date.

4. That Town Chairman John Raabe directs the work of the Town's street crew, usually by daily contacts with employes during which he gives verbal directions regarding work to be done; that on such a visit to the Town garage, a few days prior to the September 13, 1985 above-mentioned election (see Finding 3, above), Raabe talked to employes regarding the election and told them the Town Board would not appreciate a Union victory; that employes John Kichak and William Thompson testified that Raabe additionally said that a Union victory would make it miserable, hard and tough on the employes; that Raabe testified that he did not say a Union victory would make it rough on employes but that if the Union won there would be some changes; that employe Joseph Hammond did not hear the above noted conversation, but during the same time frame, had a conversation with Raabe in which Raabe said to Hammond that he would like to have another year to work with the employes because the employes and the Town Board did not know what each other could do; and that Raabe also said to Hammond that people in Town probably would not like a Union victory, but he himself did not care what the outcome was as long as the work got done.

5. That mechanic Thompson asked Chairman Raabe for an allowance to compensate him for the use of his own tools on the job; that in response to that request, he received $50 every two weeks as a tool allotment; that one and a half months after the allotment's establishment, but before the election, the Town Board decided to eliminate the allotment, and that Raabe told Thompson he could take home his own tools and not use them while working for the Town.

6. That the Town Board's elimination of Thompson's tool allotment was not retaliation for protected, concerted activity.

7. That the Town, by creating and subsequently eliminating Thompson's tool allotment during the pendancy of the election, did not interfere with employes' exercise of their statutory right to self-organize.

8. That the Town's agent, Town Chairman John Raabe made threats of reprisals and promises of benefits that interfered, coerced and restrained employes in their exercise of their statutory right to self-organize.

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

PROPOSED CONCLUSIONS OF LAW

1. That Town of Mercer, by unilaterally eliminating Thompson's tool allotment, did not discourage membership in a labor organization by discriminating against him in regard to hiring, tenure or other terms or conditions of employment and, therefore, did not violate Sec. 111.70(3)(a)3 of the Municipal Employment Relations Act.

2/ The Commission also directed that an election be held in a unit consisting of:

> All regular full-time and regular part-time employees of the Mercer Sanitary District No. 1, excluding supervisory, managerial and confidential employees.

However, said Mercer Sanitary District election is not at issue herein.

2. That Town of Mercer, by creating and subsequently eliminating Thompson's tool allowance, did not interfere, restrain or coerce employes in their exercise of rights protected by Sec. 111.70(2)., Stats., and therefore did not violate Sec. 111.70(3)(a)1 of the Municipal Employment Relations Act.

3. That Town of Mercer, by remarks made to employes by Town Chairman John Raabe, interfered with employes rights to form, join or assist a labor organization, and thereby violated Sec. 111.70(3)(a)1 of the Municipal Employment Relations Act.

Based upon the foregoing Proposed Findings of Fact, and Proposed Conclusions of Law, the Examiner issues the following

PROPOSED ORDER

IT IS ORDERED that Town of Mercer, its officers and agents, shall immediately:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of their rights under Sec. 111.70(2), Stats.

2. Take the following affirmative action which the Examiner finds will effectuate the purposes of the Act:

> (a) Notify all of its employes by posting, in conspicuous places in its place of business where employes are employed, copies of the notice attached hereto and marked "Appendix A." That notice shall be signed by the Town Chairman and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.
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> (b) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of the Order, as to what steps have been taken to comply herewith.

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

Dated at Madison, Wisconsin, this 16th day of May, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Jane B. Buffett
Jane B. Buffett, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

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

WE WILL NOT in any other manner, interfere with, restrain or coerce our employes in the exercise of their rights to self organize to form labor organizations, to join or assist International Union of Operating Engineers, Local 139, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in other lawful concerted activities for the purpose of collective bargaining or any mutual aid or protection.

Dated this _____ day of _____, 1986.

TOWN OF MERCER

By _____
Town Chairman

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

TOWN OF MERCER

MEMORANDUM ACCOMPANYING
PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

PROCEDURAL BACKGROUND

The Union, on March 12, 1985, filed with the Wisconsin Employment Relations Commission a petition for election involving employes of the Town of Mercer. Pursuant to that petition, a hearing was held on April 25, 1985, during which eligibility lists were agreed to by the parties. On August 9, 1985, the Commission issued a Direction of Election in which it determined the employes in question were employed by two separate employers: Town of Mercer, and Mercer Sanitary District No. 1. 3/ The Commission ordered that a representation election be held in each employing unit among all regular full-time and regular part-time employes employed as of August 9, 1985. On September 13, 1985 the elections were held in Mercer. 4/ In the Town of Mercer election, ballots by the two employes on the eligibility list were cast without challenge, however, the ballots of seven voters not on the eligibility list were challenged by the Commission's election agent. Additionally, the Union timely filed an objection to the conduct of the election, as well as a complaint of prohibited practices alleging the Town violated Sec. 111.70(3)(a)3, Stats., by threatening employes with retaliation if they engaged in protected activity and supported the Union. The challenges and objections are addressed in a companion decision issued today, Town of Mercer, Decision No. 22826-C, (Buffett, 5/86) The instant decision addresses the complaint of prohibited practices.

POSITIONS OF THE PARTIES

Both parties offered opening statements and waived the opportunity to file briefs. The Union believes statements made to employes by Town Chairman John Raabe as well as the Town's action in eliminating employe William Thompson's tool allotment constituted prohibited practices. On the other hand, the Town apparently believes Raabe's statements were not threatening within the meaning of the Municipal Employment Relations Act.

DISCUSSION

I. DISCRIMINATION

Section 111.70(3)(a)3 Stats., provides that it is a prohibited practice for a municipal employer individually or in concert with others:

> 3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or any other terms or conditions of employment. . .

To establish such a violation, the Union must prove, by a clear and satisfactory preponderance of the evidence 5/ that:

(1) the employe was engaged in protected, concerted activity;

(2) the employer was aware of said activity;

(4) the employer's action was based at least in part upon said hostility. 6/

The Union does not specify what Town action it alleges was a prohibited practice, but presumably it is contesting the Town's elimination of the tool allotment since that is the only employment action in the record regarding hiring, tenure or conditions of employment. However, the Union offered no evidence that Thompson, the employe who suffered the loss of the tool allotment was engaged in protected, concerted activity. He was not a Town employe when the election petition was filed or when the election hearing was held. Nor does the Union argue or offer evidence that he actively supported the Union or was engaged in any other protected, concerted activity. Since the first element of a discrimination violation is not met, that portion of the complaint must be dismissed.

II. INTERFERENCE

A. Thompson's Tool Allowance

The complaint alleges the Town committed a prohibited practice by threatening employes with retaliation if they engaged in protected activity and supported the Union. This allegation asserts a violation of Sec. 111.70(3)(a)1, Stats., which provides it is a prohibited practice for a municipal employer individually or in concert with others:

> To interfere with, restrain or coerce employes in the exercise of their rights guaranteed in sub. (2) 7/

Under this section, a municipal employer may not make any unilateral changes in the wages, hours, and conditions of employment during the pendency of an election that would be likely to interfere with the employes' free choice in that election. 8/ It is not necessary to find that the employer acted out of hostility to the Union to establish such a violation 9/; however, a change during the pendency of an election is not a per se violation and no violation is established if the employer can prove a legitimate business reason for the change 10/ or a course of action that pre-dates the Union's organizational campaign. 11/

In this instance, Thompson asked Raabe for a tool allotment to compensate him for the use of his personal tools while he worked for the Town, which he received. Subsequently, the Town Board decided to eliminate this allotment. The record does not clearly indicate when the allotment was created and eliminated; only that Thompson was hired May 20, 1985 (after the filing of the petition and the related hearing), that the tool allotment lasted a month and a half, and that it was eliminated before the election. The record could equally well support two conflicting inferences: one, that Thompson asked for and received the tool

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6/ Employment Relations Department v. WERC, 122 Wis.2d 132, 140 (1985).

7/ (2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employes shall have the right to refrain from any and all such activities except that employes may be required to pay dues in the manner provided in a fair-share agreement.

8/ Grant County, Dec. No. 21567-A, (Honeyman, 8/84) aff'd by operation of law, Dec. No. 21567-B (WERC, 1/85). Fond du Lac County, Dec. No. 16096-B (WERC, 9/78).

9/ City of Evansville, Dec. No. 9440-C (WERC, 3/71).

10/ City of Sparta, Dec. No. 12778-A (Gratz, 12/74) aff'd by operation of law, Dec. No. 12778-B (WERC, 1/75).

11/ Fond du Lac County, supra.

allotment contemporaneously with the beginning of his employment and, two, that he was already employed by the town and not receiving the tool allotment before he asked for and received it. If the first inference were taken as accurate, the creation of the tool allotment would not constitute a change in the conditions of Thompson's employment. Given this ambiguous record, there is insufficient basis to conclude the creation of the tool allotment was an unlawful granting of a benefit during the pendency of an election.

A second question regarding the tool allotment is whether its elimination during the pendency of the election constituted a reprisal, interfering with employe rights. The Commission has ruled that in order for a withdrawing of a condition of employment to be an unlawful reprisal, the condition withdrawn must, inter alia be a customary condition, rooted in the employer's past practice, or the withdrawal must be accompanied by unlawful remarks. 12/ Since the evidence is unclear whether the tool allotment began contemporaneously with the beginning of Thompson's employment, or was created as a new condition of employment sometime afterwards, and thus was not an established and customary practice, there is insufficient evidence to conclude the removal of the tool allowance was an unlawful reprisal. Similarly, there is no allegation or evidence whatsoever that any Town representative made any statements linking the allotment elimination with union activity or the representation election. Thus, the allotment elimination did not interfere with employe rights.

B. Conversations between Raabe and the Employes

At the town garage, a few days before the election, Raabe spoke to the employes regarding the Town's attitude towards the Union and other related matters. His statements must be scrutinized to determine whether he merely exercised his right to free speech or whether he engaged in speech which tainted the atmosphere surrounding the election, making it improbable that employes could freely cast their ballots for or against the Union. 13/ In making such determination, the Commission has concluded the employer statements may not include threats of reprisals or promises of benefits based on employes' support or non-support of a union. 14/ There is agreement concerning some, but not all, of the statements Raabe is alleged to have made. Hammond testified without contradiction that Raabe said to him the following:

> Q. What if anything was said to you prior to the election held September --
>
> A. The only thing that Mr. Raabe ever said to me was he'd like to have one year to work with us 'cause he didn't know what we could do and we didn't know what he could do and that people in town probably wouldn't like it and he didn't care how we went, just so the work got done. (Tr. 12 & 13)

Similarly, there is no dispute Raabe said the Town Board and townspeople would not appreciate having a union.

There is, however, dispute as to what Raabe said to Kichak, Thompson and Dwyer regarding the likely result of a Union victory. Kichak testified to the following:

> A. Well, it was said that we could vote, you know, the way we wanted but the outcome might be hard for us, might make it miserable for us. (Tr. 9)

Thompson testified to the following:

12/ Washington County, Dec. No. 7694-C (WERC, 9/67).

13/ West Side Community Center, Inc., Dec. No. 19211-A (Shaw, 4/83) aff'd in relevant part, Dec. No. 19211-B (WERC, 3/84).

14/ Evansville, supra; Auswebenon School District, Dec. No. 14774-A (WERC, 10/77).

A. Well, what I recall is that things would be tough on us if we did get the union in, the Board wouldn't appreciate it, or the townspeople wouldn't appreciate it either, having union in there. (Tr. 15)

Dwyer did not testify.

Contradicting this testimony, Raabe testified to the following:

A. I don't feel that, making it rough on them, that statement was never made. I said there would be some changes, things would have to, things would probably change, all right? Things change every day. (Tr. 34)

It is unnecessary to resolve this credibility conflict. Even assuming, for the sake of analysis, Raabe's version is correct, and he did not use the words "hard" "miserable" or "rough" to describe the results of a Union victory, and he merely stated that there would be changes, that suggestion, in the totality of the circumstances, constitutes an unlawful threat.

In discussing probable consequences of a Union victory, an employer may lawfully make predictions regarding matters beyond its control; however, threats regarding matters it can control are prohibited. 15/ In this instance, Raabe did not explain what kind of changes he envisioned, 16/ and his use of the word "changes," without more, might be sufficiently ambiguous to be innocent if it stood by itself. However, in both the immediate context of the conversation and the larger context of other pre-election occurrences, the word takes on an ominous tone. Raabe had already said that some of the townspeople and the Town Board were upset about the possibility of Union representation of Town employes. The employes could reasonably infer 17/ that the changes mentioned in such context would be changes for the worse. The inference is especially plausible when the changes are mentioned by the Town Chairman, the person in authority who daily supervises employes' work.

The word "changes" takes on additional meaning in light of the elimination of Hammond's tool allowance. Thompson, one of the employes listening to Raabe at the town garage, experienced a loss of his $25 weekly tool allotment. Whatever the Town's reason for that change, there was no evidence that any reason was offered to Thompson. Consequently, such an act could easily be interpreted by Thompson as a display of the Town's power to control and change his wages, hours, and conditions of employment.

The threatening nature of Raabe's remarks are not diminished by the vagueness of the threat. Even general statements regarding unspecified adverse actions can be coercive. 18/ Likewise, the unlawfulness of Raabe's threat was not cured by his comment that "(I) didn't care how (the employes) went." This disclaimer was made to Hammond, and not to Kichak, Bock and Dwyer and therefore could not dissipate the effects of his statement to them regarding changes. Thus, given the surrounding circumstances, Raabe's remark about changes, spoken shortly before the election, was a threat which interfered with the employe's right to exercise their statutory rights.

15/ Evansville, supra.

16/ At the hearing he gave an example of such a change, but his testimony does not show that he gave that example to the employes during this conversation.

17/ The Commission standard for evaluating such statements is objective, not subjective. That is, it is not necessary to determine that the words were in fact perceived as threats but it is only necessary that a reasonable person in similar circumstances would perceive them as threatening. Juneau County, Dec. No. 12593-B (WERC, 1/77), Winnebago County, Dec. No. 16930-A (Davis 8/79), aff'd by operation of law (WERC, 9/79).

18/ Green Lake County, Dec. No. 6061 (WERC, 8/62), Brown County Dec. No. 17258-A (Houlihan, 8/80) aff'd by operation of law, Dec. No. 17258-B (WERC, 9/80).

Another issue is raised by Raabe's comment to Hammond that he wanted one more year because "he did not know what they could do and they did not know what he could do." Since there is no evidence that either Raabe or the employes intended to quit their respective positions, it would be reasonable for the employes to infer that "one more year" meant "one more year without the union." Furthermore, it would also be reasonable for them to infer that Raabe, in his words, "because you don't know what I can do," was suggesting he could create more favorable working conditions. This hint regarding improved conditions, linked to a request that the employes vote against the Union, was an impermissable promise of benefits. (The unspecific nature of the promise does not alter this determination. See footnote 18, above.) The promise, then, interfered with employes' statutory rights to self-organize.

Dated at Madison, Wisconsin, this 16th day of May, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Jane B. Buffett, Examiner