STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant, vs. MILWAUKEE BOARD OF SCHOOL DIRECTORS, Respondent.	Case 171 No. 35991 MP-1788 Decision No. 23232-A

Appearances:

Mr. Richard Perry, Perry, First, Lerner and Quindel, S.C., Attorneys at Law, 1219 North Cass Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Teachers' Education Association.

Mr. Stuart S. Mukamal, Assistant City Attorney, City of Milwaukee, City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, appearing on behalf of the Milwaukee Board of School Directors.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Milwaukee Teachers' Education Association filed a complaint with the Wisconsin Employment Relations Commission on November 13, 1985, in which it alleged that the Milwaukee Board of School Directors had committed prohibited practices within the meaning of the Municipal Employment Relations Act. The Commission, on February 10, 1986, appointed Richard B. McLaughlin, a member of its staff, to act as an Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(4)(a), and Sec. 111.07 of the Wisconsin Statutes. Hearing on the matter was conducted in Milwaukee, Wisconsin, on May 6, 1986. A transcript of that hearing was provided to the Examiner by June 18, 1986. The parties filed briefs by December 10, 1986.

FINDINGS OF FACT

1. The Milwaukee Teachers' Education Association (the MTEA) is a labor organization which has its offices located at 5130 West Vliet Street, Milwaukee, Wisconsin 53208.

2. The Milwaukee Board of School Directors (the Board) is a municipal employer which has its offices located at 5225 West Vliet Street, Milwaukee, Wisconsin 53201.

3. The MTEA and the Board are parties to a collective bargaining agreement in effect "from July 1, 1982, to and including June 30, 1985." That agreement contains, among its provisions, the following:

PART IV

TEACHING CONDITIONS AND EDUCATIONAL IMPROVEMENTS

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N. TEACHER AND SCHOOL SOCIAL WORKER EVALUATIONS

. . .

6. In the event a teacher receives a satisfactory evaluation card with an attachment where the evaluator(s) recommends a transfer should be taken under advisement, the teacher shall specify in writing whether he/she concurs in the recommendation for transfer. Where the teacher does not concur and

upon request of the evaluator(s) or teacher, the MTEA and the Division of School Services shall confer in the building with all parties to resolve the problem. If, as a result of the conference, the Division of School Services concurs in the recommendation of the evaluator(s) and before any action is taken in the matter, they shall:

a. Notify the teacher and the MTEA within ten (10) working days in advance that a conference has been scheduled with the Division of Human Resources involving the teacher, MTEA, the evaluator(s) and the Division of School Services. The notice will include a statement of the problem. The purpose of the conference shall be to explore possible areas of assistance necessary to overcome the difficulties which have been referred to in the evaluation report.

b. The decision of the Division of Human Resources shall be reduced to writing and, together with the reasons, furnished to the teacher and MTEA. If the MTEA and/or the teacher are not in agreement with the decision, the MTEA may proceed through the final step of the grievance procedure, starting at the third step.

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PART VII

GRIEVANCE AND COMPLAINT PROCEDURE

A. PURPOSE

The purpose of this grievance procedure is to provide a method for quick and binding final determination of every question of interpretation and application of the provisions of this contract, thus preventing the protracted continuation of misunderstandings which may arise from time to time concerning such questions. The purpose of the complaint procedure is to provide a method for prompt and full discussion and consideration of matters of personal irritation and concern of a teacher with some aspect of employment.

B. DEFINITIONS

1. A grievance is defined to be an issue concerning the interpretation or application of provisions of this contract or compliance therewith, provided, however, that it shall not be deemed to apply to any order, action or directive of the superintendent or anyone acting on his/her behalf, or to any action of the Board which relates or pertains to their respective duties or obligations under the provisions of the state statutes which have not been set forth in this contract.

2. A complaint is any matter of dissatisfaction of a teacher with any aspect of his/her employment which relates primarily to wages, hours and working conditions and which does not involve a grievance as defined above. It may be processed through the application of the third step of the grievance procedure.

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D. STEPS OF GRIEVANCE OR COMPLAINT PROCEDURE

Grievances or complaints shall be processed as follows:

FIRST STEP. Where a complaint is involved, a teacher shall, within five (5) working days after he/she knew or should have known of the incident, submit the same to the principal orally. Where a grievance is involved, the teacher shall

promptly, but in no case longer than thirty (30) working days after he/she knew or should have known of the incident, submit the same to the principal orally. The principal shall orally respond to the grievance or complaint within five (5) days. If the grievance or complaint is not adjusted in a satisfactory manner orally, the grievant or complainant shall, within two (2) working days, submit the same in writing to the principal. The principal shall advise the grievant or complainant of his/her disposition in writing within five (5) working days after receipt of the written grievance or complaint. A copy of the disposition shall be sent to the MTEA, the grievant or complainant, and the Office of the Superintendent.

SECOND STEP. If the grievance or complaint is not adjusted in a manner satisfactory to the employe or the MTEA within five (5) working days after receipt of the written answer, then the grievance or complaint may be set forth in writing by a representative of the MTEA.

. . .

J. PROHIBITED PRACTICES

In the event the MTEA alleges a prohibited practice, it shall put in writing the facts in the case. The MTEA and negotiator shall meet and discuss the appropriate route. Within ten (10) working days, the administration shall reply in writing what it believes is the appropriate route of processing the matter as presented. The MTEA shall then proceed in the appropriate manner. The initial filing of a prohibited practice allegation pursuant to this section shall constitute compliance with the time limits of the grievance procedure of the contract.

K. NONDISCRIMINATION CLAUSE

The MTEA and the Board agree that it is the established policy of both parties that they shall not discriminate against any employe on the basis of sex, race, creed, national origin, marital status, political affiliation, physical handicap, or union activities.

. . .

Grievances involving this section shall be presented to the Board. If the matter is not satisfactorily resolved within thirty (30) days of being filed with the Board, the MTEA may proceed in the following manner. Alleged violations of this section shall not be arbitrable. They shall be submitted to the WERC for determination as prohibited practices (contract violation) pursuant to Section 111.70(3)(a)(5), (sic) Wisconsin Statutes. They shall not be handled pursuant to Section J above.

4. Among the schools operated by the Board is Vieau School. Vieau is a K-8 educational facility. The curriculum taught at Vieau is a standard curriculum, but one-half of the educational program is bilingual, in which the curriculum is taught in Spanish and in English, while the other one-half is monolingual, in which the curriculum is taught only in English. The principal of Vieau during the 1984-1985 school year was Robert Koeper. The Board employed about thirty-five teachers at Vieau during the 1984-1985 school year. During that school year the Board had assigned to Vieau about fifteen paraprofessional teaching aides, referred to below as aides. Among the teachers employed by the Board at Vieau for the 1984-1985 school year were Dora Sargent, a teacher of monolingual second grade English; Robert Peterson, a fifth grade teacher in the bilingual program; Ms. Aries, a reading resource teacher; Ms. Tovar, a teacher in the bilingual program; and Mr. Novak, a physical education teacher in the monolingual program.

5. During the 1984-1985 school year Peterson served as the building representative at Vieau for the MTEA, while Sargent served as the alternate building representative at Vieau for the MTEA.

6. On March 5, 1985, Koeper conducted a meeting which included some of the Vieau teaching faculty. Among the teachers in attendance were Sargent and Peterson. A number of items were discussed at the meeting including Koeper's announcement that a Spanish as a second language program would be implemented in the, at the time of the meeting, very near future. Koeper noted that the Spanish program would be instituted for grades K-2 in the monolingual program and would involve the active role of an aide for from ten to fifteen minutes per class to introduce various Spanish words to students. This program will be referred to as the Program.

7. The idea for the Program first took form in the 1983-1984 school year in conversations between Koeper and Ms. Hernandez, a Spanish teacher. Koeper developed the Program with the participation of a number of people, most particularly Aries. At least the general outline of the Program was brought up by Koeper at a faculty meeting early in the 1984-1985 school year. Sargent and Peterson believe the March 5, 1985, meeting was the first time Koeper mentioned the active role of an aide in communicating the Spanish words to the monolingual students. Koeper believes this point had been brought up prior to the March 5, 1985, meeting.

8. After the March 5, 1985, meeting, Peterson discussed the Program with Mary Martin, another teacher at Vieau. Peterson voiced to Martin his concern that the aide's role in the Program might constitute a violation of the collective bargaining agreement mentioned in Finding of Fact 3. After the March 5, 1985, meeting, Sargent discussed the aide's role in the Program with another Vieau teacher, Karen Horst, and voiced to Horst her concern that the aide's role in the Program might violate the contract. Sargent decided to consult with Peterson about the issue, and approached Peterson in his classroom after the close of the school day on March 5, 1985. Sargent and Peterson discussed their concerns that the Program might violate the contract, but determined that neither of them was sure if their concerns were well founded. Peterson informed Sargent that he was busy that evening, and Sargent volunteered to call the MTEA offices to inquire regarding the contractual propriety of the aide's role in the Progam.

9. Sargent phoned the MTEA offices in the late afternoon of March 5, 1985, after her conversation with Peterson. Sargent was informed that no one who could assist her was then available, but that she could leave a message and would be contacted regarding the message. Sargent did leave a message, and after the close of the school day on March 6, 1985, Barry Gilbert, the Assitant Executive Director of the MTEA, contacted Sargent by phone. Sargent told Gilbert that Koeper had told the Vieau staff that an aide would teach Spanish in the monolingual classes at the K-2 level, and Sargent asked Gilbert whether an aide could perform such a role. Gilbert ultimately indicated to Sargent that the Program as she had described it would constitute a contract violation, and that he would raise the issue with Koeper.

10. On Friday morning, March 8, 1985, Gilbert phoned Koeper at Vieau. Gilbert and Koeper discussed the Program in limited detail. Gilbert did inform Koeper that the source of Gilbert's inquiry was a teacher at Vieau, but Gilbert did not offer, and Koeper did not request to learn, the identity of the teacher.

11. Koeper's immediate reaction to Gilbert's call was one of disbelief that the propriety of the Program would be questioned. After the call, Koeper took a walk around the school building. After the walk, Koeper approached Novak and told Novak that after all the planning and work in developing the Program, a roadblock had arisen regarding a complaint about the Program from someone who had yet to discuss the matter with Koeper. Novak responded by stating his own disbelief to Koeper. Koeper then approached Aries in her office. Koeper initiated the conversation by stating his concern that the Program would have to be put on hold. Koeper also voiced to Aries his concern that the complaining party had not yet approached him. At some point in this conversation Aries mentioned Sargent in conjunction with an incident in which Aries believed Sargent had complained about an aide's use of the teachers' lounge to tutor a student. Koeper next approached Tovar and expressed his concern that the Program had been called into question. Tovar responded by stating her own disbelief to Koeper. Sometime shortly before

lunch, Koeper approached Peterson. Peterson was in class, and Koeper called him into the hallway. Koeper initiated the conversation by informing Peterson that someone had called the MTEA regarding the Program. Peterson responded that he had not. Koeper then asked if Sargent had, and Peterson responded with a shrug of his shoulders. Koeper appeared somewhat annyoyed to Peterson.

12. Koeper left a note for Sargent to come to his office at 2:00 p.m. on March 8, 1985. Koeper did not offer Sargent any indication of what the requested meeting was to cover. Sargent received the note and, after she had taken her class to recess, reported to Koeper's office as requested. The meeting took place in Koeper's office. Koeper and Sargent were the only persons present. Koeper initiated the meeting by informing Sargent he had received a call from the MTEA regarding the Program. Koeper then told Sargent he could not understand why, if she had a question regarding the Program, she had not first approached him long before March 8, 1986. Koeper related to Sargent that her contact with the MTEA prior to him may not have complied with the contract, and that dealing with problems on anything other than a building level would break up the rapport Koeper felt he had built up with his staff. Koeper also told Sargent she had made disparaging comments regarding students and parents in the bilingual program and that her actions, including her contact with the MTEA on the Program prior to approaching him, could be considered to show her disfavor of the bilingual program. Koeper told Sargent that if she was not satisfied with the program at Vieau, he would assist her in developing a 281-T transfer request. Koeper informed Sargent that if she had a specific school she wished to teach at, a 281-T would be the easiest procedure to effect that wish, and that Koeper did not see Sargent's compatibility with the Vieau program. When Sargent responded, she addressed her perception that Koeper believed her conduct to create a disunifying force in the bilingual program. Sargent responded by stating to Koeper her daily routine and her belief that her routine and her conduct at Vieau could not constitute a disunifying force in the Vieau program, or any indication she did not approve of the bilingual program. The meeting ended when Sargent left to take her students back to class from recess. Sargent perceived Koeper's tone of voice and facial expressions during the meeting to evince extreme annoyance. Koeper perceived his own demeanor to evince his upset with the situation, and believes his tone of voice was louder than his normal speaking voice.

13. Sargent did not cry in Koeper's presence, but left the meeting sobbing. She was observed crying by fellow teachers, one of whom offered to take over her students until she felt more composed. Sargent declined the offer, brought her students back from recess and taught the remainder of the school day. After school, she approached Peterson in his classroom and told him of her meeting with Koeper. She later contacted Gilbert regarding her meeting with Koeper. Throughout her conversations with Peterson and Gilbert, Sargent was sobbing. Koeper believes that since March of 1985 Sargent has become somewhat more withdrawn at staff meetings, and does not talk as much as she once did about other teachers.

14. As of May 6, 1986, the Board used four types of evaluation cards: A 280 card for superior evaluations; a 281 card for satisfactory evaluations; a 281 card with a T card attached; and a 282 card for unsatisfactory evaluations. A 281 card with a T card attached, or 281-T card, is a satisfactory evaluation with a recommendation for a transfer to another building. Koeper has never issued a 281-T card in his twelve years as a principal for the Board. Sargent has never requested a transfer from Vieau, and has never expressly informed Koeper she was unhappy at Vieau or wished to leave. Koeper has never issued Sargent an unsatisfactory evaluation and did not discipline Sargent at any time before or after the March 8, 1985, meeting.

15. Sargent's contact with MTEA representatives after school on March 5 and 6, 1985, was lawful and reflected at least her own and Peterson's concerns. The March 8, 1985, meeting between Koeper and Sargent had a reasonable tendency to interfere with Sargent's consultation with the MTEA regarding the contractual propriety of the Program. At the March 8, 1985, meeting Koeper was aware of and hostile to Sargent's contact with the MTEA regarding the contractual propriety of the Program. Koeper's interrogation of Sargent regarding her contact with the MTEA and his coercive suggestion of a transfer to her during the March 8, 1985, meeting were motivated at least in part by Koeper's hostility toward Sargent's prior contact with the MTEA regarding the contractual propriety of the Program.

CONCLUSIONS OF LAW

1. Dora Sargent is a "Municipal employe" within the meaning of Sec 111.70(1)(i), Stats.

2. The MTEA is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

3. The Board is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

4. Koeper, by interrogating Sargent regarding her contact with MTEA representatives on March 5 and 6, 1985, by questioning her compatibility at Vieau School, and by coercively suggesting a transfer Sargent did not request, committed acts having a reasonable tendency to interfere with her exercise of rights granted under Sec. 111.70(2), Stats. Sargent's contact with MTEA representatives on March 5 and 6, 1985, is a lawful, concerted act protected by Sec. 111.70(2), Stats., of which Koeper was aware of and hostile to when he conducted the meeting of March 8, 1985. Koeper's interrogation of Sargent and his coercive suggestion of a transfer to Sargent during that meeting were motivated, at least in part, by his hostility to that lawful, concerted act. Koeper's conduct constitutes discrimination on the basis of union activity within the meaning of Part VII, Section K of the collective bargaining agreement noted in Finding of Fact 3 above, in violation of Sec. 111.70(3)(a)5, Stats.

ORDER 1/

To remedy its violation of Sec. 111.70(3)(a)5, Stats., the Board, its officers and agents, shall immediately:

1. Cease and desist from:

   a. Interrogating Dora Sargent regarding her exercise of rights protected by Sec. 111.70(2), Stats., including her right to contact the MTEA regarding matters arising under the collective bargaining agreement between the Board and the MTEA.

   b. Threatening or coercively suggesting the transfer of Dora Sargent from the Vieau School because of contact, protected by Sec. 111.70(2), Stats., between her and the MTEA.

2. Take the following affirmative action which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:

   a. Notify employes by posting in conspicuous employe notice locations in the Vieau School a copy of the notice attached to this Order and marked "Appendix A." This copy shall be signed by a responsible official of the Board, shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for a period of 30 days thereafter. Reasonable steps shall be taken to insure that this posted notice is not altered, defaced or covered by other material.

   b. Notify the Wisconsin Employment Relations Commission within 20 days of this Order what steps the Board has taken to comply with the Order.

Dated at Madison, Wisconsin, this 3rd day of April, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Richard B. McLaughlin, Examiner

(Footnote 1/ on Page 7).

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.

"APPENDIX A"

NOTICE TO ALL EMPLOYES

As ordered by the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we notify our employes that:

1. WE WILL NOT interrogate Dora Sargent regarding her exercise of rights protected by Sec. 111.70(2), Stats., including her right to contact the Milwaukee Teachers' Education Association regarding matters arising under the collective bargaining agreement between the Milwaukee Board of School Directors and the Milwaukee Teachers' Education Association.

2. WE WILL NOT threaten or coercively suggest the transfer of Dora Sargent from the Vieau School because of contact, protected by Sec. 111.70(2), Stats., between her and the Milwaukee Teachers' Education Association.

Dated at Milwaukee, Wisconsin, this ____ day of _____ , 1987.

Milwaukee Board of School Directors

By _____
Name

_____
Title

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Parties' Positions

The MTEA states the issue for decision thus: "Did the respondent, Milwaukee Board of School Directors violate Wis. Stats. 111.70 (3) (a) (1) (3) and (5) (sic) by discriminating against Ms. Dora Sargent for her union activities?" The MTEA argues initially that "Dora Sargent Was Engaged in Protected Activity." According to the MTEA, Sargent, in her discussion with Gilbert on March 6, 1985, reflected the concerns of at least three teachers, but that even if she voiced only her own concerns "a union representative's actions with regard to assertion of contractual rights . . . has been found to be protected concerted activity." It follows, according to the MTEA, that Sargent's March 6, 1985, conversation with Gilbert "is protected union activity." The MTEA then asserts that: "The Board Violated 111.70(3)(a)(1) (sic) By Interfering With Dora Sargent in the Exercise of Her Section 2 Rights." Specifically, the MTEA argues that Koeper's interrogation of Sargent and his threatened use of a 281-T card "had a devastating effect on Dora Sargent" and served to chill her own, as well as any other employe's, willingness to assume the responsibility of being a building representative. Beyond this, the MTEA asserts that Koeper's conduct on March 8, 1985, demonstrates that: "The Board violated 111.70(3)(a)(3) (sic) by Discriminating Against Dora Sargent in the Exercise of her Section 2 Rights." Because Koeper's conduct establishes Board violations of Secs. 111.70(3)(a)1 and 3, Stats., it follows, according to the MTEA, that the conduct also constitutes a violation of Part VII, Section K of the parties' collective bargaining agreement, and thus of Sec. 111.70 (3)(a)5, Stats. Anticipating Board arguments, the MTEA asserts that: "The Interrogation and Threats by Mr. Koeper" in violation of Sec. 111.70(3)(a)3, Stats., "Were In No Way Justified." Specifically, the MTEA argues that whether or not Koeper previously informed teaching staff of the role of the aide in the Spanish program, Koeper's conduct toward Sargent on March 8, 1985, was totally inappropriate. The MTEA further argues that agreement provisions governing the processing of grievances cannot "justify Mr. Koeper's conduct" since "the use of an informal procedure to determine the facts of a grievance prior to its formal initiation is proper and lawful." Specifically, the MTEA argues that this conclusion is necessary because the Board's assertion that the agreement obligates such inquiries to be made to the principal "clearly misstates the contract and an employee's right to communication with his/her bargaining representative" because "it was standard procedure to try and resolve potential grievances through phone calls to administrators and principals prior to initiating the formal grievance procedure," and because the "assertion of a contractual right" does not turn on the ultimate merits of the asserted right. The MTEA concludes that Koeper's conduct establishes Board violations of Secs. 111.70(3)(a)1, 3 and 5, Stats., and requests that "the Examiner so find and order the Board to cease and desist from interfering and discriminating on the basis of protected activity of bargaining unit members."

The Board states the issues for decision thus:

> Did the MBSD, through its agent, Mr. Robert Koeper, Principal of Vieau Elementary School, discriminate against Ms. Dora Sargent, a teacher at Vieau Elementary School, on the basis of "union activities," in violation of Section 111.70(3)a (sic) 1, 3 or 5 of MERA, during the course of a conversation held between themselves on March 8, 1985, following which no disciplinary action or any other form of adverse personnel action was taken against Ms. Sargent either by Mr. Koeper or by any other administrative official of the MBSD?
>
> If the answer to Question No. 1 above is "yes," what, if any, is the appropriate remedy?

The Board prefaces its argument with an extensive examination of the testimony which establishes, according to the Board, that "the MTEA has alleged no other basis for this complaint other than certain statements attributed to Koeper during the course of (a) conversation with Sargent." It follows, according to the Board, that "this case is largely concerned with a "one-on-one" question of credibility

between Koeper and Sargent concerning their conversation of March 8, 1985." An examination of the testimony establishes, according to the Board, that "Sargent's version of those events is not credible and . . . Koeper's version is" (emphasis from text). Turning to the relevant legal background, the Board asserts that "the citation of Sec. 111.70(3)(a)1 and 3, merely allege "derivative" violations . . . which are in no way different from the MTEA's allegation that the MBSD has committed a violation of the MTEA/MBSD Agreement (in particular, Part VII, Section K thereof)." From this the Board argues that it need "only address the alleged "union discrimination" claim addressed by Part VII, Section K of the MTEA/MBSD Agreement and Sec. 111.70(3)(a)5, Stats., and "disposal of that claim will of necessity dispose of the MTEA's remaining claims." The Board then argues that the MTEA bears the burden of proof, which in this matter "encompasses a two-part analysis." Regarding the first part, the Board argues that the MTEA must "demonstrate by a clear and satisfactory preponderance of the evidence that the MBSD's conduct contained either some threat of reprisal or promise of benefit which would tend to interfere with employe exercise of rights guaranteed by MERA" (emphasis from text). Regarding the second part, the Board argues that the MTEA must demonstrate "by a clear and satisfactory preponderance of the evidence that Koeper's actions on behalf of the MBSD were motivated at least "in part" by an anti-MTEA animus on his part." Regarding the first part of the MTEA's burden, the Board asserts that a review of the testimony establishes that Koeper's account of the conversation and of the events leading up to that conversation is credible while Sargent's is not. From this, the Board argues that "Koeper did not in any manner "threaten" Sargent or impermissibly infringe upon her exercise of any rights protected by MERA." The Board further argues that Sargent violated the provisions of the Part VII, Section D of the collective bargaining agreement by "declining to discuss her objections with Koeper first" before consulting Gilbert. The Board does not dispute that Sargent's consultation with a union representative can be considered "protected concerted activity" but argues that in this matter the parties have set forth in Part VII, Section D of the contract the method by which this "protected concerted activity" can be exercised. Sargent's refusal to bring the matter to Koeper first thus violated the parties' agreement. It follows, according to the Board, that Koeper's "insistence upon compliance with such a contractual requirement (by no means can) be construed as a prohibited practice under MERA." The Board concludes that "the MTEA's complaint of violations of Secs. 111.70(3)(a)1, 3 and 5, in conjunction with this matter are entirely baseless and unsupported either by the record or by applicable law." The Board contends that "this Complaint must be denied and dismissed in its entirety on its merits and with prejudice."

DISCUSSION

Background

The complaint alleges Board violations of Secs. 111.70(3)(a)1, 3 and 5, Stats. The complaint is atypical in that it has been specifically processed under the terms of a contractual provision -- Part VII, Section K. That section provides that the "MTEA and the Board agree . . . that they shall not discriminate against any employe on the basis of . . . union activities." The section establishes the broad policy involved in the first paragraph and establishes the procedure for processing "grievances" alleging violations of the policy in the third paragraph. The procedure created in the third paragraph specifically makes "alleged violations" of the section "not . . . arbitrable," and distinguishes alleged violations of the nondiscrimination section from other prohibited practices alleged by the MTEA and processed under Part VII, Section J. "Alleged violations" of Part VII, Section K are to "be submitted to the WERC for determination as prohibited practices (contract violation) pursuant to Section 111.70(3)(a)(5) (sic), Wisconsin Statutes."

Thus, the issue for determination in the present matter ultimately focuses on Sec. 111.70(3)(a)5, Stats. The factual issue is whether the Board, through the acts of Koeper toward Sargent has discriminated against her "on the basis of union activities." The parties' arguments establish that the relevant standards for determining the existence or non-existence of such discrimination are those developed by the Commission under Secs. 111.70(3)(a)1 and 3, Stats. The ultimate focus of the issue turns on Sec. 111.70(3)(a)5, Stats., because if a violation of the standards of Secs. 111.70(3)(a)1 and 3, Stats., has occurred, discrimination on the basis of union activities in violation of Part VII, Section K must be found. A violation of that contractual provision would, in turn, constitute a

violation of Sec. 111.70(3)(a)5, Stats., which makes it a prohibited practice for a municipal employer to "violate any collective bargaining agreement previously agreed upon the parties . . . " The focus of the discussion below, then, must be on Secs. 111.70(3)(a)1 and 3 Stats., but the ultimate findings entered above focus specifically on Sec. 111.70(3)(a)5, Stats.

Application of Sec. 111.70(3)(a)1, Stats., To the Facts

Sec. 111.70(3)(a)1, Stats., enforces rights granted by Sec. 111.70(2), Stats., which provides that:

> 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 . . .

Sec. 111.70(3)(a)1, Stats., enforces those rights by making it a prohibited practice for a municipal employer to "interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub.(2)." The Commission has interpreted Sec. 111.70(3)(a)1, Stats., to proscribe employer conduct that has a reasonable tendency to interfere with an employe's right to exercise rights granted under Sec. 111.70(2), Stats. 2/ To prove such proscribed conduct, it is not necessary to prove that an employer intended to interfere with employes or that there was actual interference. 3/ In sum, Sec. 111.70(2) Stats., affords Sargent the right to engage in certain "lawful, concerted activities" and Sec. 111.70(3)(a)1, Stats., prohibits the Board from acting in a manner which has a reasonable tendency to interfere with the exercise of such "lawful, concerted activities." In the present matter, the conduct in question is Sargent's approach to the MTEA for assistance in determining whether the aide's role in the Program violated the contract, and Koeper's response.

Although the Board asserts certain defenses exist which preclude a finding that Koeper's conduct violated the standards of Sec. 111.70(3)(a)1, Stats., there is no question that Sargent was engaging in the exercise of a "lawful, concerted activity" by consulting MTEA representatives. The testimony demonstrates that the aide's role in the Program had been discussed by at least four teachers and that Sargent's phone call to Gilbert reflected, at a minimum, Peterson's and her own concerns. Thus, the phone call manifested something more than "purely individual concerns." 4/ There is no dispute her call to Gilbert or his return call after the close of the school day was lawful. 5/ That her call sought clarification on whether the implementation of the Program would violate the contract establishes that the call was an act "for the purpose of collective bargaining."

Against this background, the issue regarding the application of Sec. 111.70(3)(a)1, Stats., is whether Koeper's response to learning of the call had a reasonable tendency to interfere with Sargent's exercise of her rights. The context and content of the March 8, 1985, meeting coupled with Koeper's demeanor throughout that meeting establish that the March 8 meeting did have a reasonable tendency to interfere with Sargent's exercise of rights protected under Sec. 111.70(2), Stats. Examination of the testimony does not support the Board's assertion that the issue presents a close " 1 on 1" issue of credibility between Sargent and Koeper. Finding of Fact 12, which summarizes the meeting, reflects almost entirely Koeper's testimony. The one exception is Sargent's response, and since Koeper could not recall any response by Sargent, there is no reason to doubt that she responded essentially as she testified. That part of her testimony has been included, however, only to complete the account of the meeting. There is no reason to consult Sargent's testimony since Koeper's account of the meeting,

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2/ Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84).

3/ Ibid.

4/ See City of LaCrosse et.al., Dec. No. 17084-D (WERC, 10/83).

5/ See Monona Grove School District et.al., Dec. No. 20700-G (WERC, 10/86).

standing alone, establishes a breach of the standards of Sec. 111.70(3)(a)1, Stats.

The coercive atmosphere of the meeting is persuasively prefaced by the context of the meeting itself. Koeper called Sargent to his office in the midst of the school day, without any indication of what the meeting was to cover. The meeting was "1 on 1" in Koeper's office. All of these factors are less persuasive indicators of Koeper's conduct of a dispassionate fact finding effort than indicators of a swift response to a perceived source of frustration.

The coercive overtones to the meeting are further highlighted by the content of the meeting. Again considering Koeper's testimony only, the meeting was initiated by Koeper's informing Sargent of the call he had received from the MTEA. Without any response from Sargent, Koeper then linked her to the call by questioning why she had not called him first if she had a question about the Program. Koeper's attempt to question Sargent regarding the source of the MTEA's call, standing alone, could establish a violation of the standards of Sec. 111.70(3)(a)1, Stats. The Commission, in Juneau County (Pleasant Acres Infirmary), 6/ stated:

> An employer may not make an inquiry of employes concerning the exercise of rights protected by MERA, except under exceptional circumstances. Such interrogation ordinarily will be treated as violative of Sec. 111.70(3)(a)1 of MERA.

No such exeptional circumstances exist in the present matter. The inquiry Sargent made of the MTEA was simply for guidance regarding the contractual propriety of the Program. Whether or not the Program actually constitutes a violation of the contract is irrelevant.

The coercive overtones to the meeting worsened as the meeting progressed. Koeper questioned the contractual propriety of Sargent's contact with the MTEA, and then, without any response from Sargent, broadened the scope of the meeting far beyond the Program or Sargent's phone call to the MTEA. In Koeper's words:

> I told her that this type of dealing with situations could lead to just breaking apart the rapport that I had built up amongst staff members, and that if she was not happy at the old school I'd be happy to work with her in developing a 281-T which, I felt, would allow her to pick a school that she -- would be more to her liking. 7/

Koeper further elaborated on this point thus:

> I said, you made comments to me about kids in our building, in our program, you've made comments to parents about kids, and now you are implying something here that can be construed as not in favor of the bilingual program. And I said, if you're not happy with our program in this building, I'd be very happy to work with you in developing a 281-T . . . I said, if you have a specific place you want to go, that's the easiest way to get you there, because I didn't see the compatibility with our program. 8/

It is undisputed that Sargent never requested a transfer and Koeper testified he could not recall if she made any comments at the meeting. Thus, the meeting had, by Koeper's own account, run from Sargent's inquiry to the MTEA to her compatibility with the Vieau program. By Koeper's own account the meeting never manifested a dialogue to examine Sargent's concern with the Program, but did in fact devolve to a questioning of her compatibility with the Vieau program. Sargent's response underscores the significance of the impact of the content of the meeting. She responded not to the Program or to her questions about the

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6/ Dec. No. 12593-B (WERC, 1/77) at 14, citations omitted.

7/ Transcript at 61.

8/ Transcript at 212.

Program, but to what she perceived as an attack on her role as a part of the Vieau program. This response is understandable, and an outcome reasonably to be expected to follow from Koeper's own account of the meeting. The linkage of her compatibility at Vieau to her call to the MTEA would inevitably have a tendency to chill her exercise of the right to contact the MTEA on subjects that could eventually rise to the attention of Koeper. Such rights are protected by Sec. 111.70(2), Stats. Koeper's testimony may well indicate this tendency became an accomplished fact, since Koeper stated he perceived Sargent to play a less active role at staff meetings in the time after March of 1985.

Koeper's demeanor further underscores the coercive nature of the meeting. By his own account he was upset and spoke in a louder than normal tone of voice. Coupled with the context and the content of the meeting, the coercive overtones to the meeting become even more apparent. Looking beyond his testimony offers persuasive reasons to believe he understated the degree of his own upset. Peterson stated that Koeper appeared somewhat annoyed during their conversation. This conversation occurred after Koeper's walk around the building and his conversations with various other teachers. Both the context and the content of the meeting Koeper had with Sargent would indicate he had not, by 2:00 p.m., successfully distanced himself emotionally from the frustration he felt at the questioning of the Program. The meeting itself, by his own account, had nothing to do with a dispassionate examination of the Program or of Sargent's concern with it, but much to do with his own reaction to the challenge to it. By his own account he remained upset throughout the meeting, and from Sargent's credible acount of her response, Koeper communicated his upset even more forcefully than he could recall.

Against this background, whether Koeper directly threatened Sargent with a transfer, and the related credibility concerns raised by the Board, are irrelevant. The violation of the standards of Sec. 111.70(3)(a)1, Stats., is apparent by Koeper's own account. He improperly questioned Sargent regarding her contact with the MTEA, which was a lawful, concerted act within the meaning of Sec. 111.70(2), Stats., and improperly linked that contact to Sargent's compatibility with the Vieau program. Whether he specifically threatened her with the transfer in so many words is irrelevant. His "offer of assistance" in effecting such a transfer for a teacher who had never requested one, in a "1 on 1" meeting in which he questioned her compatibility with the Vieau program in a louder than normal speaking voice conveyed an undeniable message to Sargent that her contact with the MTEA did have, and may continue to have, the undesired employment consequence of a transfer to a different school. Whether Koeper intended to, or specifically did, communicate this message is irrelevant to the finding of a Sec. 111.70(3)(a)1, Stats., violation. The context and content of the March 8, 1985, meeting coupled with Koeper's demeanor throughout the meeting are sufficient to establish conduct having a reasonable tendency to interfere in Sargent's exercise of her protected right to consult with her bargaining representative. This conduct is, then, violative of the standards of Sec. 111.70(3)(a)1, Stats.

The Board has asserted several defenses to a finding of a Sec. 111.70(3)(a)1, Stats., violation on the present facts. The bulk of those defenses are factual in nature and turn on the Board's argument that Koeper's account of the meeting must be credited over Sargent's. That the conclusions stated above can be grounded on Koeper's testimony alone addresses the Board's broad credibility arguments. Whether Koeper made the Vieau staff aware of the aide's role in the Program prior to March 5, 1985; whether or not Koeper acknowledged to Gilbert that the Program as contemplated on March 5, 1985, violated the contract; whether or not Koeper had a basis in fact to be annoyed with Sargent; whether or not Sargent made disparaging remarks about students and parents in the bilingual program; 9/ and that no disciplinary action followed the March 8, 1985, meeting are all irrelevant to the issues presented here. The protected nature of Sargent's contact with the MTEA and the impropriety of Koeper's interference with the exercise of that right stand unaffected by any conclusion that could be drawn from these asserted points.

9/ The Board does not assert and the record would not support a conclusion that Sargent contacted the MTEA in a deliberate attempt to undermine the Program for discriminatory reasons.

The final defense raised by the Board requires some discussion. That defense is that Sargent's contact with the MTEA before discussing the matter with Koeper violated the contract and precludes a finding that Koeper's conduct violates the standards of Sec. 111.70(3)(a)1, Stats.

Part VII, Section K affords no jurisdiction to interpret the provisions of the contract beyond the nondiscrimination clause itself. No attempt will, then, be made here to offer a binding interpretation of the provisions of the contractual grievance procedure. However, the provisions of that procedure must be examined to determine if those provisions, on their face, offer any support for the Board's asserted defense. The First Step of Part VII, Section D, read in light of the broad provisions of Part VII, Sections A and B, support the Board's assertion that the parties have bargained to bring "matters of personal irritation and concern of a teacher," as well as questions of contractual interpretation, which are to be formally processed, at the building level first. The Board's assertion goes much further, however, and argues that these provisions mandate that any part of the decision making process which may precede the formal processing of a complaint or a grievance must be brought by "a teacher . . . to the principal orally." The language of the grievance procedure is not specifically phrased to effect such a sweeping result. Under this broad view, Sargent would have technically breached the contract by discussing the March 5, 1985, staff meeting with Horst, and Peterson would have committed the same violation by discussing the meeting with Martin. There is no reason to believe that the parties' agreement contemplates no screening function for complaints and grievances by which teachers could consult each other or their bargaining representative before invoking the formal procedures of Part VII, Section D. In fact, the time limits contained in the First Step of Part VII, Section D imply that a teacher is granted a period of time to consider whether a given matter rises to the level of formal processing as a complaint or grievance. The Board has not pointed to any contract language which expressly limits a teacher's ability to consult with other teachers or their bargaining representative as a part of the decision making process preceding the filing of a formal complaint or grievance. In the present matter, when Sargent consulted Gilbert regarding the aide's role in the Program, she sought only background information. Nothing in the language of Part VII, Section D would obligate Sargent to seek that information only from Koeper. The language of Part VII, Section D, on its face, thus affords no support for the final asserted defense of the Board, and Koeper's violation of the standards of Sec. 111.70(3)(a)1, Stats., stands as stated above.

Section 111.70(3)(a)3, Stats., makes it a prohibited practice for an employer to "encourage or discourage a membership in any labor organization by discrimination in regard to hiring . . . terms or conditions of employment . . . " To establish a violation of this section, the MTEA must demonstrate that:

(1) Sargent was engaged in lawful, concerted activity protected by Sec. 111.70(2), Stats.;
(2) Koeper was aware of that activity;
(3) Koeper was hostile toward that activity; and
(4) Koeper's "forcible suggestion" of a transfer was, at least in part, based on that hostility. 10/

The first two elements have been discussed above. The evidence demonstrates that Sargent's phone call to the MTEA was a lawful, concerted activity, and Koeper's statements during the March 8, 1985, meeting demonstrate his awareness of that call.

The evidence also establishes that Koeper was hostile toward Sargent's actions in calling the MTEA. Gilbert's call to Koeper regarding the contractual propriety of the Program so upset Koeper that he toured the building before attempting to discuss the matter. His own account of his conversations with Novak, Aries, Tovar and Peterson indicate those conversations had less to do with a dispassionate discussion of the Program than with Koeper's venting of his deep frustration over the challenge to the Program. That his annoyance continued throughout this period of time is apparent, and this is the time during which he

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10/ City of Brookfield (Library), Dec. No. 20702-A (Nielsen, 7/84), aff'd in relevant part Dec. No. 20702-B (WERC, 4/86). See generally Employment Relations Dept. v. WERC, 122 Wis.2d 132 (1985).

his suspicion that Sargent was the source of the call. As noted above, the content and context of his meeting with Sargent as well as his demeanor throughout it, indicate he was never able to distance himself from the anger he felt at the challenge to the Program. This hostility was directed at both Sargent and the MTEA. Koeper specifically noted in his testimony the annoyance he felt toward Gilbert during the processing of Sargent's complaint. More significantly, however, Koeper stated throughout the March 8, 1985, meeting that he did not appreciate Sargent's bringing elements outside the Vieau School -- the MTEA -- into an active role in the matter. Koeper went so far as to link Sargent's contact with the MTEA with her compatibility with the Vieau program. In sum, the record demonstrates Koeper was hostile toward Sargent's contact with the MTEA.

Before proceeding it is necessary to qualify the scope of the conclusion regarding Koeper's hostility. The Board has asserted that Koeper has considerable experience in labor relations and has enjoyed successful interaction with MTEA representatives. This assertion does not offer a defense regarding Koeper's specific behavior on March 8, 1985, but does point to a need to touch on the scope of the present issues. The present matter is not a proceeding to examine Koeper's competence as an administrator or Sargent's proficiency as a teacher. The present matter does not pose general issues of either person's character. The present matter questions nothing more or less than certain specific behavior on the part of each person. That Koeper has been found to have evinced hostility toward Sargent's call to the MTEA does not necessarily mean he generally despises that union or that he is incapable of dealing with it. More precisely, in the present matter, the point is simply that Koeper tied so much of himself into the Program and took the challenge to it so personally that in this case he acted with hostility toward Sargent for her exercise of a statutorily protected right to consult with her bargaining representative. The complaint questions no more than that, and this decision addresses no more than that.

The final element necessary to demonstrate a violation of Sec. 111.70(3)(a)3, Stats., requires little discussion. Koeper's interrogation of Sargent and his coercive suggestion of a transfer vented the hostility he felt toward her for the call to the MTEA which ultimately prompted a delay in implementing the Program. His actions were based on that hostility in major part, if not entirely.

A final point raised by the Board must be addressed. The elements of proof necessary to establish a violation of the standards of Sec. 111.70(3)(a)3, Stats., have been demonstrated by the MTEA, but the Board questions whether any action taken by Koeper constitutes action rising to the level of the standards of Sec. 111.70(3)(a)3, Stats. Koeper's coercive suggestion of a transfer to Sargent, who had never requested one, is, standing alone, a significant act regarding Sargent's working conditions. This coercive suggesion, is, on the present facts, tantamount to the threat of a transfer. 11/ The threat of a transfer has previously been found to constitute action sufficient to establish a violation of the standards of proof under Sec. 111.70(3)(a)3, Stats. 12/ Beyond this, the significance of the threat of a transfer is established in the present record. That such action is unusual is demonstrated by the fact that Koeper has never issued a T-card in his experience as a principal. That the parties consider a transfer a significant employment event is demonstrated by the provisions of Part IV, Section N 6, which establish certain procedures to be followed when a transfer is recommended by an evaluator.

In sum, Sargent was engaged in a lawful, concerted act protected by Sec. 111.70(2), Stats., when she contacted the MTEA concerning the contractual propriety of the Program. Koeper was aware of that phone call, was hostile to Sargent's contact with the MTEA, and responded by coercively suggesting to Sargent that a transfer to another school be effected. The elements of proof necessary to

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11/ Crediting Sargent's account would establish Koeper's use of terms directly stating a threat. There is no reason to turn the present matter into a fight over credibility since the suggestion testified to by Koeper was a threat which used indirect terms.

12/ Milwaukee Board of School Directors (Riley Elementary School), Dec. No. 17104-A (Greco, 7/80). affd by operation of law Dec. No. 17104-B (WERC, 8/80).

establish a violation of the standards of Sec. 111.70(3)(a)3, Stats., have been proven by the MTEA.

The Board has questioned whether the MTEA can be said to have proven either alleged violation of Sec. 111.70(3)(a)1 or 3, Stats., by "a clear and satisfactory preponderance of the evidence," 13/ and whether a violation of Part VII, Section K can be found if the standards of either, but not both, of the statutory subsections at issue have been proven. Neither point requires extensive discussion. The quantum of proof can be a disputed point only when the outcome is in such doubt that the doubt must be resolved against one party or the other. That is not the case here. The second point is not relevant here since a violation of the standards of both subsections has been demonstrated. Since Koeper's conduct violated the standards of both Sec. 111.70(3)(a)1 and 3, Stats., a violation of Part VII, Section K of the labor agreement between the MTEA and the Board has been demonstrated, and the violation of Sec. 111.70(3)(a)5, Stats., necessarily follows.

The Remedy

The remedy ordered above requires little discussion. The Order entered above does not mention the Program, the contractual propriety of which is not at issue here. Koeper's actions appear to be rooted in the deep sense of pride and attachment he felt regarding the creation and the implementation of the Program. The record offers no reason to believe his pride was not well founded, since the Program appears to have been well-received. Nevertheless, Koeper chose to act in a manner which bore little relation to the Program and in fact went far beyond it, impacting on protected employe rights. The Order entered above addresses the employe rights and not the Program.

Because the Board has taken no disciplinary action toward Sargent since the March 8, 1985, meeting, the cease and desist element of the Order has been entered to declare and to affirm Sargent's rights concerning that meeting.

The affirmative action required of the Board centers on notice posting. The posting is restricted to the Vieau School because there is no persuasive reason to believe Koeper's actions had any impact beyond that school. The posting has been required to remedy any chilling effect on the exercise of protected employe rights that the March 8, 1985, meeting may have produced. Such an effect is not speculative here, since Sargent was observed weeping by other teachers following the March 8, 1985, interrogation. While the notice cannot reverse the events which occurred, it is designed to advise employes that the interrogation and its aftermath are redressible events.

Dated at Madison, Wisconsin, this 3rd day of April, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

13/ See Sec. 111.07(3), Stats.