STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 80, DISTRICT COUNCIL 48, AFSCME, AFL-CIO, Complainant, vs. WEST ALLIS-WEST MILWAUKEE SCHOOL DISTRICT, Respondent.	Case 52 No. 36910 MP-1847 Decision No. 23805-B

Appearances:

Podell, Ugent & Cross, S.C., Attorneys at Law, Suite 315, 207 East Michigan Street, Milwaukee, Wisconsin 53202, by Mr. Alvin R. Ugent, for the Union.

Foley & Lardner, Attorneys at Law, Suite 3800, 777 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-5367, by Mr. Herbert P. Wiedemann, for the District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Local 80, District Council 48, AFSCME, AFL-CIO, having, on April 30, 1986, filed a complaint with the Wisconsin Employment Relations Commission alleging West Allis-West Milwaukee School District had committed prohibited practices in violation of Sec. 111.70(3)(a)1, 2, 3, 4 and 5 of the Municipal Employment Relations Act; and hearing having been conducted on August 25, 1986, before Examiner Jane B. Buffett; and during said hearing, the Union having made a Motion to Quash Subpoena Duces Tecum through which the District sought to acquire certain information from the Union which the District believed was relevant to its defense; and the hearing having been adjourned to allow the parties to submit briefs in support of and opposition to said Motion, the last of which was received on September 15, 1986; and the Examiner having, on September 19, 1986, issued an order denying said Motion; and further hearing having been held on November 19, 1986, and a stenographic transcript having been prepared and received by December 9, 1986; and the parties having submitted briefs, the last of which was received January 15, 1987; 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 Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Local 80, District Council 48, AFSCME, AFL-CIO, hereinafter the Union, is a labor organization, having its offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin.

2. That West Allis-West Milwaukee School District, hereinafter, the District, is a municipal employer, having its offices at 9333 W. Lincoln Avenue, West Allis, Wisconsin.

3. That the Union is the exclusive bargaining representative of certain District employes in a bargaining unit consisting of all custodian and maintenance employes, truck drivers, storekeepers and cleaners, except for supervisors and confidential employes.

4. That at all material times the Union and the District have been parties to a collective bargaining agreement providing for final and binding arbitration, and, additionally, containing the following relevant provisions:

ARTICLE IV

UNION ACTIVITY

. . .

B. The Union shall furnish the names of stewards to their respective superiors. Stewards shall be permitted reasonable time to investigate and process grievances during regular working hours, provided other work operations are not stopped, or unduly slowed or hampered, and provided further that such stewards have notified their immediate department or division head or their representative in advance of such investigation or processing.

Those authorized Union representatives who are not employees of the Board shall be permitted reasonable access to Board work areas in order to conduct legitimate business. Such representatives must secure permission from the agency head or his authorized representative in order to meet with the employees during work hours.

No Union meeting shall be held on Board time.

ARTICLE XXIV

Miscellaneous

A. Working conditions. The parties agree that the working conditions in effect as of the date of this Agreement shall remain in effect unless changed by mutual agreement in writing.

5. That Gregory Radtke has been employed by the District for approximately ten years; that prior to July 1, 1985, he was a Custodian II at Jefferson School; that on May 29, 1985, the District posted a vacancy in the Storekeeper position; that the Custodian II and Storekeeper are in the same wage classification; that Radtke desired the lateral transfer to Storekeeper and applied for the position; that on June 13, 1985, Radtke was interviewed for said Storekeeper position by District Coordinator of Operations, Ronald Harvancik and Supervisor of Maintenance George Borski.

6. That for approximately the last five years, Radtke has been a union steward, representing the custodial employes; that at sometime prior to Radtke's June 13 interview, either Harvancik or Borski told Radtke that he would have to give up his position as steward of the custodians if he were granted the Storekeeper position; that Radtke discussed this statement with both Union President Tom Suter and District Council 48 Staff Representative Earl Gregory who told Radtke the District did not have the right to designate the union steward; that on June 13, 1985, Harvancik and Borski interviewed Radtke concerning the Storekeeper position, that in addition to asking questions regarding Radtke's qualifications for the position, Harvancik told Radtke he would have to consider giving up his stewardship of the custodians; and that Radtke responded that he was thinking about giving up the stewardship, anyway.

7. That Radtke was appointed to the storekeeper position, effective July 1, 1985; that during Radtke's probationary period, ending December 31, 1985, Harvancik deliberately refrained from discussing the stewardship with Radtke, pending Radtke's successful completion of the probationary period.

8. That sometime in January, 1986, Harvancik spoke to Radtke, telling him he would have to give up the stewardship, and asking who the new steward would be; and that Radtke did not answer Harvancik.

9. That on February 14, 1986, Harvancik sent the following letter to Suter:

Dear Mr. Suter:

As you are aware, Mr. Gregory Radtke has been representing our custodial staff as their Union Steward. Last July Greg took a lateral transfer from his Custodian II position at Jefferson School and was appointed to the position of Storekeeper.

In the past, the Storekeeper position was always represented by the steward for the maintenance men. I do not plan on

changing this arrangement. Also the acceptable arrangement is to have the custodian's steward be a custodian. Therefore, the current steward assignments must be changed.

I have not requested any changes sooner because I wanted Greg to "try" the Storekeeper position for several months to see if he'll be satisfied with that assignment. It is my understanding through several discussions with Greg that he likes the work and plans to remain as the Storekeeper for now.

Based upon the development of this situation, I feel it is now time to transfer the custodial stewardship to a member of the custodial staff.

Your attention and consideration of this matter will be appreciated.

Sincerely,

RONALD A. HARVANCIK,
Coord. of Maintenance & Operations;

and that Suter did not reply to this letter.

10. That on April 16, 1986, Suter, Harvancik and Borski met prior to the parties' first 1986 contract negotiation session to discuss the stewardship; that Harvancik told Suter that Radtke could not be steward; that Suter became angry, and said the District's attempt to interfere regarding the stewardship was probably an unfair labor practice, and an argument ensued; that Harvancik asked Suter what the District's alternatives were; that Suter said it had none; and that Harvancik said one alternative was to transfer Radtke back to the custodial position.

11. That sometime after receipt of the February 14, 1986 letter from Harvancik, or after a negotiation session in spring, 1986, Radtke went to Harvancik to talk about the dispute, and Harvancik stated again that if Radtke did not relinquish his stewardship, he would be returned to his former custodial position; but that Radtke was not transferred back to his former custodial position.

12. That the custodians, maintenance workers and cleaners originally had separate bargaining histories; that the three employe groups joined Local 80 at different times; that no permanent, regular steward has ever represented an employe group other than his/her own; that there has never been contract negotiation over the steward selection; that neither the collective bargaining agreement nor any other contractual document limits the Union's right to appoint stewards; and that no binding practice of the parties limits such Union rights.

13. That the District's agent, Harvancik, by suggesting he would return Suter to his former position if he did not relinquish his stewardship, made a statement that could reasonably be perceived as a threat of reprisal.

14. That there is no evidence the Union exhausted the Collective Bargaining Agreement's provision for final and binding arbitration of alleged contract violations.

CONCLUSIONS OF LAW

1. That West Allis-West Milwaukee School District, by suggesting to Gregory Radtke that Radtke would be returned to his former custodial position if he did not relinquish his position as union steward, interfered, restrained and coerced Radtke in the exercise of his rights guaranteed by Sec. 111.70(2), Stats., and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats.

2. That West Allis-West Milwaukee School District, by asserting that Gregory Radtke could not continue to be steward for the custodians, and by suggesting to Tom Suter and Gregory Radtke that Radtke would be returned to his former custodial position if he did not relinquish his position as union steward,

did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)2, 3 and 4, Stats.

3. That, inasmuch as the Union has not shown that it exhausted its contractual remedies regarding the alleged contract violation, the Examiner will not exercise the Commission's jurisdiction over the alleged violation of Sec. 111.70(3)(a)5, Stats.

ORDER 1/

IT IS HEREBY ORDERED that School District of West Allis-West Milwaukee, its officers and agents, shall immediately:

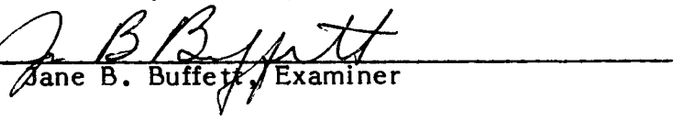
1. Cease and desist from interfering with, restraining or coercing employes in the exercise of their rights guaranteed by Sec. 111.70(2), Stats.

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 District Administrator 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.
>
> (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.

3. IT IS FURTHER ORDERED that the remaining portions of the complaint, alleging violations of Sec. 111.70(3)(a)2, 3, 4 and 5 Stats., shall be, and hereby are, dismissed.

Dated at Madison, Wisconsin, this 5th day of June, 1987.

By 
Jane B. Buffett, Examiner

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

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 Local 80, District Council 48, AFSCME, AFL-CIO 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.

FURTHERMORE, WE WILL NOT prevent any bargaining unit member from being a union steward.

Dated at West Allis, Wisconsin this _____ day of _____ , 1987.

By _____
District Administrator,
West Allis-West Milwaukee School District

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.

WEST ALLIS-WEST MILWAUKEE SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I. POSITIONS OF THE PARTIES

The Union asserts it has the right to appoint its stewards, and the District cannot limit that right by requiring that the steward work at a specific job site. It further asserts it has not bargained away this right by any contractual agreement with the District, and that no union constitution or internal Union governmental structure could limit that right. Regarding remedy, the Union asserts the District should be required to post appropriate notices, be ordered to cease and desist from threatening Mr. Radtke, and be required to make the Union whole for attorney's fees.

The District insists its actions were merely an effort to invoke a 30-year practice of having stewards of each employe group come from within group's own ranks. It emphasizes there is no evidence of any steward ever not being a member of the group the steward represents, and asserts the practice was related to the District's agreement to allow stewards to conduct their business during working hours. It further alleges Article XXIV A, providing for maintenance of working conditions, obligates the Union to maintain the alleged practice regarding stewards.

II. DISCUSSION

A. Alleged Violation of Sec. 111.70(3)(a)1, Stats. - Interference, Restraint or Coercion

Section 111.70(3)(a)1, Stats., provides that it is a prohibited practice for a municipal employer:

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

The referenced Subsection provides:

> (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 fair-share agreement.
>
> . . .

An employer may be found to have committed a prohibited practice either by taking an adverse employment action, or by threatening to take such an adverse action, in retaliation for an employe's exercise of a right protected by the Municipal Employment Relations Act, (hereinafter MERA). 2/ Such a threat is unlawful if it is reasonably likely to inhibit the employe's assertion of these MERA rights, regardless of whether the employer was motivated by anti-union hostility. Additionally, the standard is objective; it is not necessary to find that the employe felt threatened, but rather that a reasonable person in similar circumstances would be likely to feel threatened.

In this case, Radtke sought to continue his role as union steward after his transfer to the storekeeper position. Holding such a union office is clearly an integral part of the activities protected by subsection (2). (Note, in this regard, the record does not show the District objected to specific activities, as, for example, grievance meetings during working hours, nor does it show the

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2/ City of Evansville, Dec. No. 9440-C (WERC, 1/85) Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84).

District alleged that Radtke's stewardship obstructed its business operations. Rather, the District objected to his holding the office at all). In response to the Union's complaint, the District seeks to defend its actions by asserting it had an agreement with the Union regarding the stewards' selection and therefore it could lawfully insist that Radtke relinquish his stewardship. The alleged agreement, according to the District, provides that stewards must come from the ranks of the employes they represent, that is, the steward for the maintenance group must be a maintenance employe, the steward for the custodians must be a custodian, and the steward for the cleaners must be a cleaner. Since Radtke's new position is in the maintenance department, the District reasons, this agreement prevents him from continuing to be steward for the custodians.

The record, however, does not prove the existence of such an agreement. The District offers no documentation of the alleged agreement, or any testimony regarding an agreement that was not reduced to documentary form. Likewise, it does not offer any evidentiary support for its assertion that it received the right to limit steward selection as implied consideration for the Union's right to process grievances during working hours. The District's only supporting evidence was its undisputed testimony that, historically, stewards came from within the ranks of the employe group they represented. Given the differing bargaining histories of the three groups, it is not unlikely that such a pattern of representation would arise spontaneously. However, the District has not shown that this happenstance amounts to a bilateral agreement to limit designation of union stewards in this manner. Furthermore, in no way can this historical occurrence rise to the status of a clear and deliberate action necessary to effectively waive the Union's right to designate its stewards pursuant to its statutory right to engage in lawful, concerted activity for the purpose of collective bargaining or other mutual aid or protection. 3/

Having found that Radtke's right to be a steward in the maintenance department is a protected activity which the Union did not relinquish through bargaining, the Examiner turns to determine whether the District interfered with that right. On four occasions the District stated its view that Radtke could not continue to hold the steward's position: prior to the June 16, 1985 transfer interview; at that June interview; in January, 1986; and by its February 14, 1986 letter. On these occasions, Harvancik's references to the stewardship problem were brief, neutrally-stated, and did not contain any threats concerning consequences of Radtke's non-compliance. The District's mere advocacy of its belief that Radtke was not entitled to be steward for the custodians on those four occasions did not, by itself, constitute a prohibited practice.

The April 16, 1986 negotiating session between Union President Tom Suter, Harvancik and Borski is somewhat different from the earlier transactions. This was the first face-to-face encounter between Harvancik and the Union President over the issue. The two men disagreed about the respective rights of the Union and the District over the stewardship's selection. The encounter became a heated argument and Harvancik asked what the District's alternatives were. When Suter said the District had none, Harvancik suggested one alternative might be to transfer Radtke back to the custodial position. Although Harvancik's remark regarding an adverse employment action treds dangerously close to the margin of lawful behavior, it does not cross over into the area of prohibited practice. It was spoken not to the employe involved, but to the Union President, in the context of discussing contract administration, and in response to Suter's vehement statement of his position, in which he used the words, "no alternative." Harvancik's statement only amounts to the puffing of an earnest advocate.

3/ City of Brookfield, Dec. No. 11406-A (Bellman, 7/73) Aff'd, Dec. No. 11406-B (WERC, 9/73). Furthermore, the existence of ARTICLE XXIV-A, maintaining working conditions, does not cause the alleged past practice to achieve the standard of deliberateness necessary to create a legal waiver.

Harvancik's statement sometime thereafter, 4/ made directly to Radtke, is, however, another matter. In this instance, Harvancik was not speaking to the Union President, but directly to the employe who would suffer the consequences. Additionally, the statement was not in the context of a discussion of the parties' rights. Finally, since Radtke had been pressured by Harvancik the better part of a year, he could understandably perceive Harvancik's statement as not mere impulse, soon to be forgotten, but a serious threat. In the totality of these circumstances, it was reasonable for Radtke to believe that Harvancik would indeed return him to his former position if he did not relinquish his stewardship. Thus Harvancik's statement to Radtke was an unlawful threat, tending to interfere with Radtke's exercise of his MERA rights, and thereby constituting a prohibited practice.

B. Alleged Violation of Sec. 111.70(3)(a)2, Stats. - Domination

Section 111.70(3)(a)2, Stats., which provides, in pertinent part:

> It is a prohibited practice for a municipal employer individually or in concern with others:
>
> . . .
>
> 2. To initiate, create, dominate or interfere with the formation or administration of any labor employe organization or contribute financial support to it.
>
> . . .

To establish such a violation, a union must prove the employer was actively involved in creating and supporting a labor organization representing employes. 5/ The District's unsuccessful attempt to persuade Radtke to resign as steward for the custodians is not the kind of interference in internal union administration that causes the Union to be, in effect, a creation of the employer. The District's futile efforts did not jeopardize the Union's independence or its ability to represent the employes' interests as compared to the employer's interests, 6/ and that portion of the complaint is dismissed.

C. Alleged Violation of Sec. 111.70(3)(a)3, Stats. - 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 . . .

4/ Some of the dates of the record occurrences are uncertain. (See Findings five through eleven). The Examiner infers the conversation before the June 13, 1985 interview (See Finding six) took place sometime after May 29, when the vacancy was posted. The interaction referenced in Finding eleven took place in Spring 1986, since the comment to Suter took place April 13, at the start of contract negotiations, and Radtke believes his conversation with Harvancik was after a negotiating session. It should be noted that the exact dates of these two events are not dispositive, and the Examiner finds that Radtke's uncertainty regarding the dates does not discredit his unrebutted testimony regarding the substance of the interaction.

5/ Kewaunee County, Dec. No. 21624-B (WERC, 5/85) Dane County, Dec. No. 11622-A (WERC, 10/73).

6/ Western Wisconsin VTAE District, Dec. No. 17714-B (Pieroni, 6/81) aff'd by operation of law, Dec. No. 17714-B (WERC 7/81).

It is undisputed that, despite the District's threats, Radtke was not transferred back to his former custodial position. The District's unfulfilled threats, which did not result in any action regarding hiring, tenure, or any other terms of employment, could not, therefore constitute discrimination, and that portion of the complaint is dismissed.

D. Alleged Violation of Sec. 111.70(3)(a)4, Stats. - Individual Bargaining

The complaint alleges the District engaged in individual bargaining. Nevertheless, the Union did not present any argument or legal authority in its brief supporting the proposition that the facts in this case constitute individual bargaining and the Examiner concludes this legal theory has been abandoned. Additionally, the Union has not met its burden of proving this allegation by a clear and satisfactory preponderance of the evidence. 7/ Accordingly, that portion of the complaint is dismissed.

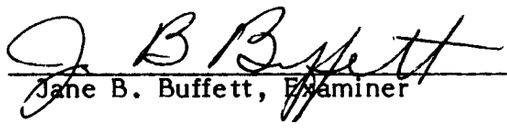
E. Alleged Violation of Sec. 111.70(3)(a)5, Stats. - Violation of the Collective Bargaining Agreement

The Commission has held that, generally, a party must exhaust any grievance and arbitration procedure in the parties' collective bargaining agreement as a condition precedent to the Commission's assertion of jurisdiction to determine the merits of an alleged contract violation. 8/ In this case, the collective bargaining agreement contains both a grievance procedure and provision for final and binding arbitration. However, neither party presented evidence or argument relating to the utilization and exhaustion of that procedure, and the Examiner declines to assert the Commission jurisdiction to determine that portion of the complaint, and hereby dismisses it.

Remedy

The Examiner has issued an order that the District cease and desist from interfering with employe rights and that it post appropriate notices. Insofar as attorney's fees are not required by any specific statutory language or by agreement between the parties, Commission policy denies such fees in this case. 9/ Additionally, the facts in this case do involve the kind of frivolous conduct envisioned by Commissioner Torosian in his dissent as the basis for awarding attorney's fees. Accordingly, the Union's request for the award of attorney's fees is denied.

Dated at Madison, Wisconsin this 5th day of June, 1987.

By 
Jane B. Buffett, Examiner

7/ Section 111.07(3), Stats.

8/ Winter Jt. School District No. 1, Dec. No. 17867-C, (WERC, 5/81).

9/ Madison Metropolitan School Distict, Dec. No. 16471-D (WERC, 5/81).