STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 1312, WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES, AFSCME, AFL-CIO,	:	
Complainant,	:	Case 64 No. 38108 MP-1915
v.	:	Decision No. 24288-C
JUNEAU COUNTY,	:	
Respondent.	:	

Appearances:

Mr. Jack Bernfeld, and Mr. Laurence Rodenstein, Staff Representatives, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719, appearing on behalf of the Union.

Melli, Walker, Pease and Ruhly, S.C., 119 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53701, by Ms. JoAnn Hart and Mr. Jack D. Walker, appearing on behalf of the County.

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

Examiner Jane Buffett issued her Findings of Fact, Conclusions of Law and Order in the above matter on January 20, 1987. The Examiner dismissed the amended complaint based on her conclusions that Respondent had neither individually bargained with employes in violation of Secs. 111.70(3)(a)4 and 1, Stats. nor interfered with, coerced or restrained employes in the exercise of their collective bargaining rights within the meaning of Sec. 111.70(3)(a)1, Stats., by certain complained of remarks made to employes Hoile, Severson, Stange and Hovde by County Board members Saylor and Brunner.

Complainant filed a timely petition for review on February 1, 1988, stating, inter alia, that Complainant was appealing from all of the Examiner's Findings of Fact and Conclusions of Law. On February 19, 1988, the Commission formally denied Respondent's February 2 motion alternatively seeking dismissal of the review petition or an order that Complainant be required to amend it to comply with the requirements of certain Commission Rules. The parties' briefing concerning merits of the petition for review was completed on March 28, 1988.

The Commission has reviewed the Examiner's decision, the record, and the parties' written arguments and is fully advised in the premises and satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order should be affirmed.

NOW, THEREFORE, it is hereby

ORDERED 1/

That the Findings of Fact, Conclusions of Law and Order issued by Examiner Jane Buffett on January 29, 1988 shall be and hereby are affirmed and adopted as

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1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in

(Footnote one continued on page two)

the Commission's Findings of Fact, Conclusions of Law and Order in the above matter.

Given under our hands and seal at the City of Madison, Wisconsin this 24th day of May, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephan Schoenfeld
Stephan Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

(Footnote one continued from page one)

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

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

JUNEAU COUNTY

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

BACKGROUND

In its complaint as amended at the outset of the hearing, the Union alleges that the County violated Secs. 111.70(3)(a)1, 3 and 4, Stats., by its agents' attempts to bargain individually with Courthouse unit employes on various occasions while the County was failing and refusing to negotiate with the Union over issues beyond the scope of the 1987 wage reopener. The complaint seeks an order declaring the County conduct unlawful and directing the County to cease and desist from such conduct in the future, to reinstate and make whole all affected unit employes, to post appropriate notices, and to reimburse the Union for the costs and representation fees in this proceeding.

In its answer, the County denied that it had committed the alleged prohibited practices, put the Union to its proof in several disputed areas of fact, and requested that the complaint be dismissed in its entirety.

DECISION OF THE EXAMINER

The Examiner found that during the period November 17-19, 1986, County Board members Saylor and Brunner made statements to individual Courthouse employes (each of whom was facing displacement or layoff in the wake of the County's cost cutting efforts) that if the Union would agree to implement certain contract concessions, the contemplated job eliminations would not be implemented. The Examiner concluded that those statements were lawful under standards set forth in Ahswaubenon Schools, Dec. No. 14744-A (WERC, 10/77), since they neither constituted threats of reprisal, promises of benefit, interference with employe rights, nor individual bargaining with the employes rather than with their majority collective bargaining representative.

In so concluding, the Examiner noted that none of the remarks invited the employes to abandon the Union to achieve better terms directly from the County, nor in any other way derogated or undermined the representative status of the Union. The Examiner found that the totality of the circumstances of the encounters indicated a lack of coercion. Each of the incidents took place by chance; in none did the County Board member intentionally seek out the employe. Employe Hoile, the Examiner noted, shared responsibility for initiating the chance exchange with County Board chairman Saylor when she mentioned to the people next to her that she thought the personnel cuts were unfair, to which the Examiner found Saylor's remark to be "a response rather than the opening volley of a campaign to pressure individual union members." The Examiner found that unplanned nature of the encounters to indicate that there was no strategy to coerce individual employes and that the encounters could be reasonably perceived as casual. The Examiner found the brevity of the meetings significant in concluding that they were not coercive. "In each instance," she noted, "the County Board member, after suggesting that the Union accept the reduced workweek, let the subject drop and the encounter ended. Neither Saylor nor Brunner responded to the employe's refusal to cooperate with any further remarks." Exr. Dec. at 8.

The Examiner explained that she found no threat of reprisal or promise of benefit in the remarks because "No reprisal or benefit would flow from the employe's action or inaction that differed from the course the Board had already committed itself to: personnel reductions if the desired budget cuts were not achieved by other means."

Finally, the Examiner rejected the Union's contention that the disputed remarks were rendered unlawful by the fact that the County had not proposed the workweek and retirement concessions during formal bargaining sessions with the Union. The Examiner reasoned that the County's position was well known to the Union prior to the time that it was reiterated to the employes by the County Board members in the disputed statements. Specifically, the Examiner stated, "It was well-known that the County would not lay off targeted positions if savings were accomplished in another manner: the most prominent suggestion being a reduction in the workweek and an increase in the employes' contribution to pensions. Staff

Representative Rodenstein formally learned of the County's position by Corporation Counsel Goerke's letter, dated October 31, 1986. At the request of Union President Nancy McCullick, Barrett discussed proposed lay offs and workweek reductions at a union meeting in mid-October, and Hoile testified the County's position was general knowledge and the subject of conversations around the Courthouse." Exr. Dec. at 9.

For those reasons, the Examiner dismissed the complaint in its entirety.

THE PETITION FOR REVIEW AND RESPONDENT'S ARGUMENTS IN SUPPORT THEREOF

The Petition for Review states that the Union is appealing from all Findings of Fact and Conclusions of Law; generally asserts that the Examiner's Findings of Fact are clearly erroneous, contrary to the preponderance of the evidence, and prejudical to the rights of the Union; and further generally asserts that substantial questions of law and administrative policy are involved.

In its brief in support, the Union argues that the Examiner's finding that Hoile "shared responsibility for initiating the exchange" with Saylor (Finding of Fact 13 and Examiner's Memorandum p. 8) is not supported either by the cross-examination of Union witness Hoile (TR. 24-25) or by the balance of the record, and is contrary to the direct testimony of Union witnesses Berkos (TR. 13) and Hoile (TR. 20) to the effect that Saylor turned around and then the "discussion" ensued.

The Union further argues that the Examiner's ultimate Findings of Fact 17 and 18 and the corresponding Conclusions of Law fail to recognize the extent to which the totality of the County's conduct exceeded the permissible limits of free speech as set forth in Ashwaubenon Schools, supra. Specifically, County Board Chairman Saylor and Finance Committee Chairman Brunner, the two most powerful individuals in County government, told three individual employes (whose positions were being written out of the budget) a uniform message to the effect that if they would get the Union people to accept 37.5 hours and a 3 percent reduction in their retirement, the County Board would rescind the job elimination motion it had passed a day or so before. This message was made repeatedly to individuals away from the negotiations table, outside the scope of the contractual wages-only reopener about which the parties were formally bargaining, and without ever having been raised at the negotiations proper.

The Union also argues that the Examiner failed to consider the actual coercive effect which Hoile testified Saylor's statements had on her, to wit, frightening and upsetting her. (TR. 106).

The Union further argues that the Examiner failed to properly apply Commission precedents to the facts of the case. It argues that in Brown County, Dec. No. 17258-A (8/80), aff'd by operation of law, -B (WERC, 9/80), the examiner found a general remark by the county executive to have improperly interfered with the rights of employes to "freely decide what form, if any, of statutorily protected conduct to pursue" when he told a probationary employe that the exclusive representative would find that if they keep pushing the issue in bargaining then we're just going to put the binders on them next year, and . . . they are not going to get anything." The Union argues that Saylor's and Brunner's remarks herein all carry the same "if-then" type message with its inherently coercive and intimidating purpose of frightening employes facing a loss of their jobs into influencing the results of the bargaining about the reopener in the direction sought by the County, to wit, concessions beyond the scope of the 1987 wage reopener. The Union asserts, "There is no statutory basis for permitting an employer to coerce and effectively blackmail individual employes into acting as subversive agents of the employer against the union."

The Union further argues that in Winnebago County, Dec. No. 16930-A (8/79) at 6-7 aff'd by operation of law, -B (WERC, 9/79), the Examiner found Sec. 111.70(3)(a)1, Stats., interference where CETA employes' "awareness of the linkage of unit members' protected activity with their loss of employment had a reasonable tendency to make said employes less likely to engage in concerted activities . . ." Here, the Union argues, the County sought to alter the course of negotiations at the bargaining table by coercion against rank and file individual employes away from the bargaining table. The Union emphasizes that in

a small rural community like Juneau County, the relative informality of the setting in which the disputed statements occurred is not uncommon for serious communications. In the Union's view, the Examiner's conclusion in these circumstances that the conversations could reasonably have been viewed by the employes as casual in nature is "plainly fanciful and not grounded in the totality of the circumstances" of record. Hoile clearly did not receive the remarks as casual and unthreatening.

The Union argues that the Examiner's reliance on the brevity of the conversations is misplaced since the inherently coercive content was not detracted from by the fact that the message was conveyed in a compact form.

The Union contends that, contrary to the Examiner's analysis, Corporation Counsel Goerke's October 31, 1986 letter regarding possible alternatives to layoffs including cuts in hours and retirement benefits did not amount to a request for bargaining with the Union over those issues. While the Union replied that it was ready and willing to negotiate about such matters, the County at no time thereafter requested such bargaining, showing that the County wanted to achieve its objective by coercing individuals rather than by negotiating directly with the majority representative.

In its reply brief, the Union argues that Goerke's October 31, 1986 letter offers only to enter into "meet and confer discussions" about a cut in hours and in retirement contributions, such that it cannot be deemed to be a demand to enter into collective bargaining within the meaning of MERA. In any event, the letter gave an unreasonably short period of 13 days after which the County stated it would have to "consider alternatives on a unilateral basis." Moreover, the Union notes, the Union had no obligation to bargain about the alternatives suggested by the County given the limited scope of the 1987 reopener negotiations, such that the County and not the Union had the obligation to affirmatively request bargaining on a broader scope. The Union argues that after effectively dooming good faith bargaining about alternatives to the job eliminations, Saylor and Brunner sought to circumvent the statutory bargaining procedure by engaging in threatening conduct to pressure individuals to bring about concessions from within the Union. In sum, the Union argues that because the cuts in hours and retirement contributions never became a subject of bargaining between the parties in the 1987 wage reopener, the statements of Saylor and Brunner could not have been a response to any comment of the employes concerning negotiations or concerning any County position taken in negotiations with the Union.

The Union further argues that the County agents' inherently coercive messages--expressed repeatedly within three days after the County Board's unilateral resolution to eliminate positions--was that "if you arrange for the Union to accept cuts not proposed in the ongoing negotiations process we will rescind our budgetary action and restore your job." These statements, the Union argues, have the requisite reasonable tendency to interfere with the rights of these and the other employes in the unit to bargain collectively through representatives of their own choosing. Citing, Racine Schools, Dec. No. 15915-B (Hoornstra, 12/77) and City of Evansville, Dec. No. 9440-B (3/71) aff'd -C (WERC, 3/71) and 69 Wis.2d 140 (1975). The Union considers the disputed statements here to be not only threats of layoffs but also promises of benefits. The statements forced the employes into giving up their Sec. 111.70(2), Stats., right to refrain from concerted activity as the only means available to restore their positions. The remarks thereby exceeded the coercive effect of the generalized threat of subcontracting held unlawfully coercive in City of Evansville, supra.

For those reasons, the Union requests that the Commission reverse the Examiner, hold that the County's conduct was unlawful, and grant the relief requested in the complaint. Regarding remedy, the Union asserts that the magnitude of the County's illegal actions demands that a make whole remedy be included for the unit employes affected by the County action along with such other and further relief that the Commission may deem appropriate.

RESPONDENT'S ARGUMENTS IN OPPOSITION TO THE PETITION FOR REVIEW

The County argues that the Union's contentions that the Examiner erred are without merit.

The County argues that the Examiner properly found that during the meeting recess involved, Saylor turned and commented to Hoile after Hoile had said to Berkos that she thought it was unfair that the Board was cutting positions. Hoile's testimony (at TR. 24-25) supports that conclusion and the Union's contention that the testimony of Berkos (TR. 13) and Hoile (TR. 20) contradicts the Examiner's Finding of Fact is incorrect. The County contends that neither of the latter two excerpts addresses the question of whether Hoile made any statements to Berkos before Saylor turned around, whereas at TR. 24-25, Hoile twice stated that she was talking to Berkos and Rohmer before Saylor turned around and that before Saylor turned around she said to Berkos and Rohmer that she thought it was unfair that positions were being cut. In the alternative, the County argues that regardless of the timing of the statement, Saylor's comment does not exceed the limits of employer free speech set out in Ashwaubenon Schools, supra.

The County further argues that because the Union's brief presents no arguments in support of its mere assertion that the disputed statements constituted individual bargaining in violation of Sec. 111.70(3)(a)4, Stats., the Union must be deemed to have dropped this claim, citing, Brown County, supra, at Note 2. In any event, the County argues, the Examiner's findings and conclusions dismissing that refusal to bargain allegation are supported by the evidence and applicable case law.

The County further argues that the record fully supports the Examiner's conclusion that the disputed statements could reasonably be perceived by the employes as casual and not threatening. The statements must be considered within the totality of the circumstances within which they were made, and the fact that the statements discussed a result which might be detrimental to employes does not convert those statements into unlawful threats. Citing, Janesville Schools, Dec. No. 8791-A (WERC, 3/69); Ashwaubenon Schools, supra; and Lisbon-Pewaukee Schools, Dec. No. 14691-A (7/76), aff'd by operation of law, -B (WERC, 6/76). There was no threat or implied threat associated with any of the three disputed statements. In each instance, the County argues, the comment arose after a brief, chance and casual encounter with a unit employe. None of the comments was more than a one sentence summary of the County's proposal already communicated to the Union. The employes were well aware of the County's proposal to the Union and of the County's bargaining position that layoffs would be necessary if there was to be an across-the-board increase in unit wages and of the alternative to job eliminations of a change to a 37.5 hour week or a reduction in County retirement contributions. In these circumstances, the County argues, the Examiner properly determined that "the totality of the circumstances of the disputed encounters indicate a lack of coercion." In any event, the County argues, the Union has failed to sustain its burden of proving coercion by a clear and satisfactory preponderance of the evidence.

The County further contends that the Union's reliance on Brown County, supra, and Winnebago County, supra, is misplaced. It argues that Brown County is inapposite because the comments involved there were not in response to any comment by the employe about negotiations, were not a factual statement of the county's bargaining position, were not a single statement as opposed to a series of comments focused on the same message, and were not a factual statement regarding the present bargaining as opposed to a threat of future retaliation in future bargaining. It argues that Winnebago County is inapposite because Juneau County's action of laying off the affected employes herein was undertaken to save money and was not taken in retaliation for protected concerted activities by employes or the Union.

The County contends that the Union incorrectly applies Commission case law when it argues that the County failed to put the questions of alternatives to layoffs before the Union in the bargaining process. The County argues that the County discussed its perceived need to lay off employes to accomodate its budget cuts at the first bargaining session in August, 1986 and again at the September bargaining session. It discussed alternative ways of cutting the budget at open meetings attended by the Union president and other unit members. Thereafter, at the request of the Union president, the Personnel Committee chairman attended a Union meeting to explain the alternatives the County was considering and supplied written copies of alternative ways of cutting the personnel expenses. The County then sent the October 31, 1986 letter offering to bargain alternatives to layoffs,

but the Union did not ask to bargain or make any proposals in response. The County's subsequent elimination of positions was by resolution specifically providing that if the Union agreed to the 37.5 hour workweek or to a pay freeze and 3% retirement contribution reduction, the Board's job elimination action would be rescinded. The Union, however, did not ask to bargain after the resolution was passed. In these circumstances, contrary to the Union's arguments, the County had offered to bargain about alternatives and it was the Union's responsibility to respond by making a proposal or raising the issue at a bargaining session. Citing, Racine Schools, 19357-D (1/87); and City of Appleton, 18451-B (6/82).

The County argues that the Examiner properly applied Ashwaubenon Schools and Janesville, supra, so as to conclude that the statements were lawful in that they did not contain any threat of reprisal or promise of benefits, they resulted from chance, unplanned encounters in a casual context and they were limited to a one sentence factual statement of the County's position already presented to the Union. Moreover, the Examiner properly applied the objective test--i.e., did the conduct have a reasonable tendency to interfere, was it reasonable for employes to perceive it as threatening--and properly gave no weight to Hoile's self-serving subjective testimony concerning how the employes said they felt about the statements. Citing, Town of Mercer, 23136-B (5/86) at Note 17, aff'd -C (WERC, 7/86).

For those reasons, the County requests the Commission to entirely affirm the Examiner's findings, conclusions and order. In the alternative, the County argues that the remedy for any prohibited practice violation found herein must necessarily be limited to a cease and desist order and an order to bargain, if applicable. The decision to lay off employes was lawfully made for economic reasons. The complaint does not allege otherwise nor could such an allegation be supported. Hence, the County argues, there is no basis on which to reverse the County's lawful decision to layoff, by means of the reinstatement remedy requested by the Union.

DISCUSSION

As the Examiner properly noted, the decisional standard for a case of this kind is as stated in Ashwaubenon Schools, supra, at 7-8:

> Just as employes have a protected right to express their opinions to their employers, so also do employers enjoy a protected right of free speech in public sector collective bargaining. Accordingly, employers have long enjoyed the right to tell their employes what they have offered to their union in the course of collective bargaining. However, notwithstanding labor relations modeled on the NLRA favor "uninhibited, robust, and wide-open debate in labor disputes," employers' statements must stop short of coercion, threats or interference with employe rights, and the employer statements must not constitute bargaining with the employs rather than their majority collective bargaining representative. (footnotes omitted.)

In determining whether an employer statement exceeds the bounds of free speech, the totality of circumstances surrounding the statement are to be taken into account, see, e.g., Janesville Schools, supra, and the fact that a development detrimental to employes is referred to in the statement is not per se indicative of a violation. Id.

In our view, a basic premise underlying the Examiner's decision is that before the disputed statements occurred, the County had effectively communicated to the Union that the County was willing to agree to reduce the contractual Courthouse workweek to 37.5 hours with resultant reductions in take-home pay or to freeze wages and reduce the County's retirement contributions sufficiently to produce a $125,000 saving, as alternatives to implementing the contemplated job eliminations. We share the Examiner's view that the County had, in fact, communicated that position to the Union before the disputed statements occurred. Specifically, we consider Corporation Counsel Goerke's October 31 letter to Union Staff Representative Rodenstein to have done so and to have offered to bargain

concessionary alternatives to the contemplated job eliminations and associated displacements and layoffs. That letter specifically advances both the ideas of a change to a 37.5 hour workweek and, in the alternative, of the employes picking up some percentage of the payment of their retirement, as available alternatives to pay cuts and personnel cuts in achieving the County's objective of a $125,000 reduction in personnel costs. Because the parties' Courthouse agreement reopener was limited to "1987 wages" only, the County was in no position to demand or insist upon bargaining about workweek and retirement contribution concessions at the formal bargaining sessions or anywhere else. Neither Rodenstein's statement in his reply letter that the Union was willing to negotiate with the County about such proposals nor the fact that such proposals were not mentioned by either party during the Highway unit mediation/investigation meeting on November 10, 1987, negates the fact that the County had communicated its abovenoted position to the Union in its October 31 letter. The County had also previously communicated to the Union that layoffs would be imposed if there were to be across the board wage increases in the unit, at least at the September formal Courthouse unit bargaining session, and perhaps also at the August session.

The foregoing communication to the Union of the County's positions occurred prior to the complained of statements. None of the complained of statements was inconsistent with the County's position as previously communicated to the Union. Furthermore, as the Examiner noted, the County Board members were not attempting to reach any agreement with the employes directly or to otherwise undermine the representative status of the Union.

For those reasons, we concur with the Examiner that no individual bargaining violation can be said to have occurred on the instant facts.

There remain the Union's contentions that, in the totality of circumstances surrounding them, the disputed statements constituted unlawful interference and/or coercion. The Union views the statements, taken together, as a pattern of conduct on the County agents' part the actual impact and reasonable tendency of which was to interfere with and coerce the employes in the exercise of their rights to bargain collectively through the Union or to refrain from engaging in such activities. The Union sees the statements as both threats of reprisal (layoff or displacement if no such Union concessions were forthcoming) and promises of benefits (cancellation of the job eliminations if the Union concessions were forthcoming), and that taken together the statements reflected an organized campaign to coerce employes facing layoff or displacement to pressure the Union from within to agree to sufficient concessions to avoid the impending job eliminations.

We share the Examiner's conclusion that the disputed statements, viewed individually or all together, did not constitute threats or promises and were, instead, within the range of lawful employer free speech described in Ashwaubenon Schools, supra.

Upon review of the testimony concerning Saylor's remark to Hoile, we find that the record supports the Examiner's Finding of Fact 13 and her related Memorandum discussion at p.8. Berkos' TR.13 testimony on the point was as follows:

> . . . we were seated behind Mr. Saylor in the County Board room, and he turned around, and we began to talk to him, and Ms. Hoile began to talk, and Mr. Saylor said at that time if Barb (Hoile) could convince the Union to go to a thirty-six and a half hour work week, we could avoid making those cuts. . . .

That testimony permits but does not require the conclusion urged by the Union that Saylor turned around before Hoile had commented to Berkos that the lay offs were unfair. However, it is also consistent with the Examiner's characterization of the incident which had Hoile addressing herself to others (her boss, D.A. Berkos, and Asst. D.A. Rohmer) but not talking to Saylor, prior to Saylor turning around and responding with the disputed statement. Hoile's TR.20 direct examination testimony on the point was that:

> Mr. Saylor was sitting in front of us, or myself, and Mr. Berkos, and Mr. Rohmer, and Saylor turned around, and we talked, and we discussed some things, and it came up if you people who are going to be laid off could get the union to accept thirty-six or thirty-seven and a half hours, we wouldn't have to lay you off.

That testimony also permits but does not require the conclusion urged by the Union. However, it also permits the conclusions that Saylor's statement followed an assertion by Hoile that the cuts were unfair and that Saylor did not turn around and make the statement until he heard Hoile's assertion about the unfairness of the cuts to Berkos and Rohmer. On cross-examination at TR. 24-25, Hoile testified as follows:

> Q Well, who were you talking to before Mr. Saylor turned around?
>
> A No one. Just Mr. Berkos and Mr. Rohmer.
>
> Q What did you say to Mr. Berkos, and Mr. Rohmer?
>
> A I --
>
> Q What is the other name?
>
> A Rohmer.
>
> Q What did you say to Mr. Berkos, and Mr. Rohner before Mr. Saylor turned around?
>
> A I think I said something to Dan, and to Jack that I thought it was unfair that they were cutting the positions.
>
> Q At that point Mr. Saylor turned around?
>
> A I don't exactly remember when he turned around. People were mingling around. I don't remember. I didn't come back and write it down. I don't remember.
>
> Q At that point that Mr. Saylor turned around, it was pretty clear the committee was proposing to eliminate your position isn't that correct?
>
> A A number of positions, yes.
>
> Q Including yours?
>
> A Yes.

In that testimony, Hoile states that she was talking to Berkos and Rohmer before Saylor turned around and that she had said to Berkos and Rohmer that "it was unfair that they were cutting the positions" before Saylor turned around. That she further testified that she did not "exactly" remember when Saylor turned around does not negate the rough order of events described in her immediately preceding answers. Regardless of when Saylor turned around, it appears from the above testimony that Saylor's statement regarding the 37.5 hour workweek concession followed Hoile's assertion that the cuts were unfair. For those reasons, we concur with the Examiner that Saylor's statement to Hoile was a response to Hoile's accusation of unfairness.

As the County argues, the context of each of the other disputed statements was also nonthreatening and noncoercive. Charlotte Stange sought out and initiated the conversation with Board member Brunner whom she found "nice, and polite and pleasant to us" (TR. 37) and which exchange she characterized as a "joking" one (TR. 40). Robert Severson acknowledged that another employe rather than himself normally answers Judge Brady's phone (TR. 58), such that the call cannot fairly be viewed having been directed to Severson in the first instance.

In addition, the Examiner properly assessed the reasonable tendency of the statements to interfere with or coerce employes, rather than giving weight to subjective evidence about how the affected employe witnesses felt about the disputed statements. See, e.g. Racine Schools, supra, at 7-8. Furthermore, we concur with the Examiner that in light of the County's previous statements at the bargaining table and its statements of position to the employe group addressed at the Union President's request, to the Union President in written summaries of alternatives, and to the Union Staff Representative in Goerke's October 31 letter, it was clear that, "No reprisal or benefit would flow from the employe's action or inaction that differed from the course the Board had already committed itself to: personnel reductions if the desired budget cuts were not achieved by other means." Exr. Dec. at 8. The brevity and non-argumentative nature of the disputed statements further support the Examiner's conclusion that the statements were noncoercve and nonthreatening in nature.

Accordingly, we agree with the Examiner that the County's conduct herein was within the bounds of lawful employer free speech. The statements reiterated the County's position previously communicated to the Union, and they did so without threats of repirsal, without promises of benefit, and without bypassing or undermining the exclusive representative status of the majority representative.

For all of those reasons, we have affirmed the Examiner's decision in its entirety. 2/

Dated at Madison, Wisconsin this 24th day of May, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

2/ The Examiner's Conclusions of Law dealt only with the Union's Sec. 111.70(3)(a)1, Stats. allegation of interference/coercion and its Sec. 111.70(3)(a)4 and 1, Stats., allegation of individual bargaining. The Union did not press its allegation of Sec. 111.70(3)(a)3 and 1, Stats., discrimination in its arguments either to the Examiner or to the Commission in this review. Suffice it to say that the Examiner's order and our affirmance thereof dismiss the discrimination allegation, as well. The Union amended the complaint so as to withdraw its Sec. 111.70(3)(a)5, Stats., violation of contract allegation at the outset of the hearing. (TR. 3).