STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 2698, AFSCME, AFL-CIO, Complainant, vs. ROBERT HESSLINK, Respondent.	:	Case 17 No. 38736 Ce-2060 Decision No. 24817-A

Appearances:

Mr. Donald W. Becker, Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of Local 2698, AFSCME, AFL-CIO.

Mr. Robert M. Hesslink, Jr., Hesslink Law Offices, S.C., Suite 200, 6200 Gisholt Drive, Madison, Wisconsin 53713, appearing on behalf of Robert Hesslink.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Local 2698, AFSCME, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission on April 29, 1987, in which it alleged that Robert Hesslink had committed prohibited practices within the meaning of Sec. 111.70 (3) (c), Stats. Scheduling of the complaint was held in abeyance to permit the parties to engage in settlement discussions. On September 10, 1987, the Commission 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, Stats. The Respondent filed an answer to the complaint on September 24, 1987. Hearing on the matter was conducted in Portage, Wisconsin, on October 26, 1987. A transcript of that hearing was provided to the Examiner by November 2, 1987. The parties filed briefs and reply briefs by January 7, 1988.

FINDINGS OF FACT

1. Local 2698, AFSCME, AFL-CIO (the Union), is a labor organization which has its offices located at 5 Odana Court, Madison, Wisconsin 53719.

2. Robert M. Hesslink, Jr. (Hesslink), is an attorney who represents various municipal and private employers. Hesslink maintains his law offices at Suite 200, 6200 Gisholt Drive, Madison, Wisconsin 53713.

3. The Union serves as the exclusive collective bargaining representative for certain personnel employed by Columbia County (the County) at a facility known as the Columbia County Home (the Home). Included among the employes represented by the Union are certain Licensed Practical Nurses (LPNs). 1/ Since May of 1986, the Union's staff representative serving those employes has been Laurence Rodenstein.

4. The Union and the County have been parties to a number of collective bargaining agreements covering the Home employes represented by the Union. Among those agreements is an agreement which, by its terms, is in effect from July 1, 1986, through June 30, 1989. That agreement contains, among its provisions, the following:

1/ The Union was certified as the exclusive bargaining representative of this unit in 1972, Case XIII, No. 16916, ME-958, Dec. No. 11068 (WERC, 7/72). The classification of LPN was originally included by stipulation in the certified unit. A unit clarification petition was filed by the Union in 1975, seeking the inclusion of the position of LPN II in the unit. The Commission held that those employes were properly included. Columbia County Home, Dec. No. 13536-A (WERC, 7/75).

APPENDIX B

Columbia County agrees to provide employees of the County Home a wage increase or decrease equivalent to the wage and benefit distribution of the composite rate granted by the State of Wisconsin for the period of July 1, 1986 through June 30, 1989; except that in any one year period, the average wage increase shall not exceed 2.0%.

For example, the labor component of the composite rate was 72.5% for the audit period 1/1/85 to 12/31/85. The labor component of this composite rate would be applied as the wage and benefit distribution factor for the period 7/1/86 through 6/30/87. For example, of (sic) the composite rate for 1986-87 is 5% higher than the year previous, then each employee would be entitled to an increase equal to 5% x .725 = 3.6%. Annual wage adjustments will be implemented as either a percent across the board, or cents across the board (percent of unit average) as chosen by the local for any one year period during the term of agreement.

Columbia County agrees not to layoff, including any partial reduction in hours, unless occupancy falls below 95%; and further, Columbia County agrees not to sell, lease or subcontract the home or any operation or function thereof, during the term of this agreement. Wage adjustments for all other employees of the County Home in general, shall not exceed any increase, nor be less than any wage decrease provided herein during the term of this agreement; however, management reserves the right to make individual wage adjustments as are necessary in its opinion for the best interests of the Home. Once each year, the Employer shall notify the Union of any such adjustment for nonunit employees referenced above.

5. On December 4, 1986, the County Home Administrator informed Rodenstein, by mail, of the County's intention to implement the 1986-87 wage adjustment so as to provide nonunit employes a 2.06% increase.

6. On or about December 10, 1986, the Union filed a general grievance on behalf of all unit employes for the action described in Finding of Fact 5 above. In the grievance, the Union alleged that the County violated Appendix B of the agreement when nonunit employes were provided a raise in excess of 12¢ per hour. The grievance was timely processed through the contractual grievance procedure.

7. Sometime on or about January 26, 1988, James Meier, the then incumbent Corporation Counsel for the County, called Hesslink to determine, among other things, what Hesslink would charge to handle two matters for the County. Meier's contact of Hesslink was motivated, at least in part, by Meier's concern that he would soon be leaving the County Corporation Counsel position to assume another position. The two matters were the grievance noted in Finding of Fact 6, and the unit status of LPNs employed by the County at the Home. After Meier had mailed him a copy of the wage appendix from the collective bargaining agreement, Hesslink, on or about January 28, 1987, called Gerald Baldowin, the Home's Administrator, to request information regarding the grievance and regarding the County's use of LPNs at the Home. After receiving a response from Baldowin on or about January 29, 1987, Hesslink directed an associate to perform some legal research regarding the grievance. Hesslink offered Meier an opinion regarding the merits of the grievance by phone sometime on or about February 4, 1987. Meier requested written confirmation of Hesslink's opinion, which Hesslink supplied on or about February 5, 1987. On February 12, 1987, Hesslink phoned Rodenstein, who was not available. On February 16, 1987, Rodenstein returned Hesslink's call.

8. The conversation between Rodenstein and Hesslink on February 16, 1987, covered at least the following points: Hesslink expressed to Rodenstein his opinion that due to the formula contained in Appendix B of the collective bargaining agreement, the Union, if it won the grievance, would assure its unit of a smaller wage increase in the next succeeding year; Hesslink expressed his opinion to Rodenstein that the grievance was silly; Hesslink informed Rodenstein that he had been retained by the County to look into the unit status of the LPNs

employed by the County at the Home; and Hesslink informed Rodenstein that Baldowin wished to have the LPNs out of the unit. During the course of this conversation, Rodenstein explained in detail to Hesslink the Union's rationale for processing the grievance, and never indicated any willingness to abandon that grievance. Rodenstein perceived the conversation as a communication from Hesslink that the County was so angry at the Union's processing of the grievance that the County wished the LPNs out of the bargaining unit. Rodenstein perceived the conversation as a communication from Hesslink that the Union could either pursue the grievance and face a unit clarification regarding the LPNs, or withdraw the grievance and not face a unit clarification regarding the LPNs. Hesslink did not, during the course of this conversation, use the terms "threat" or "threaten," but Rodenstein did perceive the conversation as a threat. At least part of Rodenstein's perception of the threat was based on the fact that Hesslink had successfully litigated the exclusion of certain LPNs from a bargaining unit of Sauk County employes represented by AFSCME. Rodenstein viewed the then pending grievance as a significant matter of principal, but one which would not produce a direct and immediate financial benefit to unit members. After the February 16, 1987, conversation, Rodenstein called the President of the Union to inform her of the conversation.

9. Sometime after February 16, 1987, Hesslink discussed with Baldowin the the February 16 conversation with Rodenstein. Both before and after February 16, 1987, Hesslink directed that certain legal research be performed regarding the unit status of the LPNs employed at the Home. Hesslink reported the results of this research and his opinion of the implications of that research to Baldowin sometime after February 16, 1987, but before mid-March of 1987.

10. On March 5, 1987, the Columbia County Home Committee met. Baldowin was present at this meeting, Hesslink was not. The minutes of that meeting read, in relevant part, as follows:

> On the update of Union grievance related to wage rate dispute, it is in arbitration. Being the opportunity to withdraw the grievance, if consideration was given to time and one half on a temporary basis for off weekend for L.P.N.'s until nursing staffing was resolved, was not accepted. It was recommended that we proceed with unit clarification for L.P.N.'s.
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> Motion by Mr. Lloyd, seconded by Mr. Anderson and carried to proceed with unit clarification for L.P.N.'s and that Attorney Robert Hesslink, Jr. be notified accordingly.

11. On March 20, 1987, Hesslink, purporting to act on behalf of Columbia County, filed a petition to clarify the bargaining unit. This petition's sole purpose was to exclude all LPNs from the unit.

12. Hesslink did not have an established or continuing relationship with the County as an advocate before the events noted in the preceding Findings of Fact. The County retained Hesslink to process the grievance sometime shortly after he rendered his written opinion on the merits of the grievance to Meier on or about February 5, 1987. The County retained Hesslink to litigate the unit clarification sometime in March, 1987. The record does not establish that Hesslink in fact used the February 16, 1987, conversation to convey, either in his own capacity or in his capacity as an advocate for the County, that the unit clarification noted in Finding of Fact 11 would be asserted for the purpose of coercing the Union to drop the grievance noted in Finding of Fact 6. The record does not establish that the unit clarification noted in Finding of Fact 11 fails to state a colorable claim under the Municipal Employment Relations Act (MERA), or that the County asserted that unit clarification in bad faith.

CONCLUSIONS OF LAW

1. The Union is a "Labor organization" within the meaning of Sec. 111.70 (1) (h), Stats., which represents individuals who are each a "Municipal employe" within the meaning of Sec. 111.70 (1) (i), Stats., and who, while employed by the County at its Home, are employed by a "Municipal employer" within the meaning of Sec. 111.70 (1) (j), Stats.

2. Hesslink is a "person" within the meaning of Sec. 111.70 (3) (c), Stats.

3. Hesslink did not, in his February 16, 1987, phone conversation with Rodenstein, do any act prohibited by Sec. 111.70 (3) (a) 1, Stats., on behalf of or in the interest of the County, and thus did not commit any prohibited practice under Sec. 111.70 (3) (c), Stats.

ORDER 2/

The complaint filed by the Union on April 29, 1987, is dismissed.

Dated at Madison, Wisconsin, this 16th day of March, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

2/ 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.

WISCONSIN COUNCIL 40, LOCAL 2698, AFSCME, AFL-CIO

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Background

The complaint alleges that Hesslink violated Sec. 111.70 (3) (c), Stats., by threatening, in the February 16, 1987, conversation, to bring a unit clarification if the Union would not drop a pending grievance, and by acting to effect that threat by asserting a unit clarification petition after the Union had refused to drop the grievance. Hesslink's answer denies certain facts alleged by the Union, and asserts four affirmative defenses. The first is that "(t)he complaint fails to state a claim for relief under Wis. Stat. (Sec.) 111.70 (3) (c) or on any other basis." The second is that: "Had the respondent made the statements alleged in the complaint, he would not have been acting within the scope of his authority and hence would not have been acting "on behalf of or in the interest of" a municipal employer or municipal employee . . . " The third is that "(t)he actions of the respondent are protected by absolute prosecutorial immunity." The fourth is that: "The actions of the respondent alleged in the complaint, even if they had occurred, are specifically authorized by the provisions of Wis. Stat. (Secs.) 111.70 (5) and (6).

The Parties' Positions

In its initial brief, the Union, after a review of the record, argues that the present matter presents two fundamental issues, one of which is factual and one of which is legal:

> First, what was the content of the telephone conversation between Hesslink and the Union's representative, Rodenstein. Second, were the actions of Hesslink violative of the Union's rights under Chapter 111.

Regarding the factual issue, the Union argues that Rodenstein's and Hesslink's testimony, together with the March 5, 1987, minutes of the County Home Committee, establish that Hesslink threatened Rodenstein on February 16, 1987, that the County would proceed with the unit clarification regarding the LPNs unless the Union withdrew the wage grievance. Regarding the legal issue, the Union contends that reading Secs. 111.70 (2), (3) (a) 1, and (c), Stats., together in light of relevant Commission case law establishes that Hesslink, "whether acting with specific authority or acting on his own," acted to interfere with the protected rights of the employes represented by the Union. As the Union puts it:

> The threat by Hesslink -- the either/or ultimatum -- gave the clear message to the Union that unless this grievance is withdrawn, I am going to dismantle your union. Whether or not the unit clarification petition was successful, the defense would be expensive. This total frontal attack on the right to grievance arbitration is violative of sec. 111.70 (3) (c) as it relates to sec. 111.70 (3) (a) (1) and sec. 111.70 (2).

The Union concludes by requesting the following:

> The actions of Hesslink must be declared a prohibited practice. In addition, Hesslink must be ordered to reimburse the Union for its costs involved in having his action declared a prohibited practice.

In his initial brief, Hesslink, after a review of the record, argues that:

> . . . there are two separate reasons why the complaint must be dismissed in this case, regardless of the union's theory. First, the complaint, on its face, does not allege a violation of MERA. Second, the evidence does not support the facts alleged by the union in its complaint.

Regarding the first reason, Hesslink argues that Secs. 111.70 (3) (a) 2 and (3) (b) 5, Stats., together "make it a prohibited practice for either the employer or an employee to take action designed to implant or include supervisors within the union structure." It follows, according to Hesslink, that "to the extent that LPN's were even arguably "supervisors" under MERA, both the county and the union had, not only the legal right, but also a positive duty, to have the question resolved by the commission under the provisions of Wis. Stat. (Sec). 111.70 (4) (d) 2.a." Hesslink contends that an analysis of relevant case law establishes that the unit clarification petition filed regarding the LPNs can not "reasonably be construed as "frivolous," or as merely a "sham" or "facade" used soley to gain the county bargaining leverage on the grievance." Both the MERA and relevant case law establish, according to Hesslink, that a municipal employer does not commit a prohibited practice "by offering to (or threatening not to) trade its rights to an arguably valid unit clarification for favorable treatment on a pending grievance." Beyond this, Hesslink asserts that Secs. 111.70 (1) (a), (1) (g), and (6), Stats., create a class of negotiations conduct "which is specifically protected, and encouraged" by MERA, and that the conduct alleged by the complaint, whether or not characterized as a threat, falls within this protection. Regarding relevant case law, Hesslink cites Monona Grove School District, 3/ and contends that the Commission, in that case, "considered and rejected . . . (t)he very position which the complainant seeks to assert in this case." Regarding his second main line of argument, Hesslink argues that "the facts do not establish the communication of a threat." Specifically, Hesslink argues that the March 5, 1987, minutes can support a number of inferences other than that drawn by the Union, but, in any event, support his contention that he was not authorized to act on the County's behalf regarding the unit clarification until after the February 16, 1987, conversation. Regarding that conversation, Hesslink contends: "(T)he issue is not so much one of credibility as it is of the reasonableness of the complainant's interpretation of what was said . . . " While the record indicates, according to Hesslink, that Rodenstein may have perceived the February 16, 1987, conversation as a threat, "the subjective concerns of Mr. Rodenstein cannot serve as a basis for a finding of a prohibited practice." It follows, according to Hesslink, that the complaint must be dismissed.

In reply to Hesslink's brief, the Union argues that a review of the record establishes that "Hesslink threatened the Union; . . . the threat was real; . . . (and) the threat was illegal." The Union specifically challenges Hesslink's reading of Commission case law, including the Monona Grove case noted above. The Union concludes its reply thus:

> Rather than being a question of interpretation, as suggested by Hesslink, the issue is one of credibility. The clear testimony and contemporaneous notes of Rodenstein are set against the weak, hedging testimony of an experienced labor attorney. The only conclusion is that the threat was made to file a unit clarification petition if the wage grievance was not withdrawn.
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> The second issue is a legal one--what is the effect of the threat within the context of Section 111.70 (3) (c) Wis. Stats. The threat constitutes an interference with the protected activity of a grievance arbitration. The threat in the present context is distinguishable from bargaining table negotiations.

In reply to the Union's brief, Hesslink notes that "there are two points, one factual and one legal, raised by the Union which require a short response." The first point, according to Hesslink, is that the record will not support the Union's assertion that Hesslink discussed the February 16, 1987, conversation with Baldowin prior to the March 5, 1987, meeting of the County Home Committee. The second point, according to Hesslink, is that the Union's use of legal authority is deficient, since ". . . (i)n each of these cases . . . the "threat" at issue was communicated directly to the employee and the action threatened was an action which was within the direct and unilateral control of the employer." Beyond this,

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3/ Dec. No. 20700-G (WERC, 10/86).

the present matter does not, according to Hesslink, involve any protected right, since "the inclusion of supervisors within a collective bargaining agreement is not a right or interest protected by MERA."

Discussion

Before discussing the merits of the complaint, it is necessary to touch on the four affirmative defenses raised by Hesslink, since those defenses pose the possibility that no view of the facts alleged by the complaint could support a prohibited practice finding.

No evidence or argument has been submitted regarding the third defense which, accordingly, plays no role here.

The first and fourth defenses can be addressed together. Hesslink correctly notes that the assertion of a unit clarification before the Commission questioning the unit status of LPNs has been common and can not, standing alone, be characterized as an illegal act. Beyond this, Hesslink persuasively argues that an attorney's attempt, on behalf of a municipal employer/client to negotiate the settlement of matters in litigation is permissible under the broad mandates of Secs. 111.70 (5) and (6), Stats. From this, Hesslink contends that the assertion of legally proper actions can not, under any view of the facts at issue here, form a basis for a prohibited practice finding. The contention that the unit clarification asserted here, or any attempt to trade that matter against a pending grievance, is protected by the MERA presumes that the unit clarification was processed in good faith, which presents a disputed issue of fact. If, for example, the County asserted the unit clarification with the knowledge that no circumstances had changed since the last Commission determination on the point, and for the sole purpose of interfering with the Union's assertion of an arguably valid grievance, then there would be no reason to believe any protection exists under MERA for such acts. That unions and employers have in the past asserted valid questions regarding the unit status of LPNs would offer no defense for the frivolous filing of a unit clarification with the Commission. This is not to say the County's processing of the unit clarification at issue here was undertaken in bad faith, but rather to say that the issue is factual in nature, and requires that the merits of the allegations of the complaint be addressed.

The second defense demands the presumption of a disputed fact which is the scope of Hesslink's authority to act on behalf of the County regarding the two matters at issue here. The defense presumes Hesslink had, or attempted to assert, no such authority, but this presents disputed facts which demand, not obviate, a review of the merits of the complaint.

It is now necessary to turn to the factual merit of the complaint. A review of the facts of present matter, in light of the elements of proof required by Sec. 111.70 (3) (c), Stats., establishes that the Union has failed to demonstrate "by a clear and satisfactory preponderance of the evidence" 4/ any violation by Hesslink of that section. Applied to the allegations of the present complaint, Sec. 111.70 (3) (c), Stats., requires proof that: (1) Hesslink, as a "person," (2) committed "any act prohibited by" Section 111.70 (3) (a) 1, Stats., (3) "on behalf of or in the interest of" the County. The first element of proof is not in dispute here. Regarding the second element, it should be noted that there is no evidence Hesslink "caused" anyone else to commit any act proscribed by MERA, and that there is no contention or persuasive evidence that the alleged threat would violate any provision other than Sec. 111.70 (3) (a) 1, Stats. Finally, for the purposes of discussing the alleged threat, action "on behalf of or in the interest" of the County is presumed to also cover action "to influence the outcome of any controversy as to employment relations."

While the first element of proof is not disputed, the record will not support a finding that the Union has met the second or third elements of proof. The establishment of a violation of the standards of Sec. 111.70 (3) (a) 1, Stats., is essential to meeting the second element of proof of Sec. 111.70 (3) (c), Stats. To establish a violation of Sec. 111.70 (3) (a) 1, Stats., it is necessary for the

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4/ Secs. 111.70 (4) (a), and 111.07 (3), Stats.

Union to establish that the February 16, 1987, conversation contained some threat of reprisal which had a reasonable tendency to interfere with employe exercise of rights guaranteed by Sec. 111.70 (2), Stats. It is not necessary to prove actual or intentional interference. 5/

The only right guaranteed by Sec. 111.70 (2), Stats., present here, is an employe's right to process a grievance through the contractual grievance procedure, in this case through a union advocate, without interference. That such a right is recognized by MERA has long been recognized by the Commission. 6/ There is no persuasive evidence to indicate the grievance did not present a colorable contractual claim, even if the Union did not ultimately prevail on the merits. 7/

It is now necessary to examine the content and the context of the February 16, 1987, conversation between Hesslink and Rodenstein to determine if that conversation violated the standards of Sec. 111.70 (3) (a) 1, Stats. 8/ In the present matter, the content of the statements made on February 16, 1987, can not be specifically determined. Neither Rodenstein nor Hesslink could specifically recall the precise language used, although Rodenstein could recall that Hesslink did not expressly use words such as "threat" or "threaten" to convey his message. Thus, evidence on the conversation turned primarily on the witnesses' conflicting interpretations of the conversation. Rodenstein's recall was more specific and unequivocal than Hesslink's. The Union has drawn on this to contend that the present matter can be fully resolved as a fundamental issue of credibility, based solely on the content of the conversation. That content, according to the Union, demonstrates the clear communication of a threat.

Even restricting the analysis of the February 16, 1987, conversation to content alone will not support the Union's contention that this matter is resolvable as an issue of credibility. This is so because neither witness' account can be fully credited or discredited on the basis of the other's demeanor as a witness. Nothing in Rodenstein's demeanor as a witness indicated his testimony is not credible. Fully crediting his testimony on demeanor alone, however, establishes only that he sincerely believed Hesslink sought to threaten the Union's processing of the grievance with a "counter suit" of a unit clarification. The problem remains of establishing that Rodenstein's sincerely held interpretation of the communication of a threat is well founded on objective fact. To determine that, Rodenstein's interpretation of the conversation must be rooted in corroborative evidence regarding the context of the "threat." As will be discussed below, such corroborative testimony does not exist. Contrary to the Union's contention, Hesslink's testimony can not supply the necessary corroboration. Hesslink denied making any offer couched as a threat, but did acknowledge communicating to Rodenstein that he was involved in the potential unit clarification, and further that he regarded the grievance as silly. Nothing in Hesslink's demeanor indicated he was communicating anything other than his honest interpretation of the conversation. What this conflict in the testimony dictates is that evidence of the context of the "threat" is crucial regarding both the objective existence and the significance of the alleged threat.

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

6/ Harry Rydlewicz and Clarence Quandt (Village of West Milwaukee), Dec. No. 9845-B (WERC, 10/71).

7/ "While the specific facts of each case must always be considered, in our view the filing and processing of a grievance advancing colorable claims according to a contractual grievance procedure can and should be presumed to be protected activity absent a strong showing to the effect that the grievance is wholly unlawful in manner of presentation or purpose." Monona Grove School District, Dec. No. 20700-G (WERC, 10/86) at 24.

8/ "In each instance, the remarks as well as the circumstances under which they were made must be considered in order to determine the meaning which an employe would reasonably place on the statement." Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84) at 5.

Evidence regarding the context of the "threat" will not support the Union's assertion that the February 16, 1987, conversation constitutes a violation of the standards of Sec. 111.70 (3) (a) 1, Stats. The first relevant factor is that even assuming Hesslink offered to assert the unit clarification if the Union did not drop the grievance will not establish a violation of Sec. 111.70 (3) (a) 1, Stats., since, as the Commission stated in Monona Grove:

> . . . the filing of a unit clarifiction petition advancing colorable claims under MERA . . . can and should be presumed to be protected activity absent a strong showing to the effect that the (unit clarification petition) is wholly unlawful in manner of presentation or purpose. 9/

The reference to "protected activity" in Monona Grove can not be directly applied to the County or to Hesslink as its advocate since the designation of "protected activities" has been used by the Commission as a shorthand reference to behavior falling within Sec. 111.70 (2), Stats., which affords certain rights to municipal employes. 10/ However, the underlying policy considerations are relevant here. Sec. 111.70 (6), Stats., expressly makes "voluntary settlement through the procedures of collective bargaining" public policy, and also provides that "(i)f such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement . . . " At issue here is the County's presentation of a unit clarification and allegedly, a coercive attempt to link that matter to a pending grievance. The Commission has described unit clarification proceedings thus:

> Unit clarification proceedings . . . are conducted by the Commission as an adjunct of our jurisdiction over representation disputes under Section 111.70 (4) (d), to provide an orderly impartial proceeding for the review of collective bargaining units. This is done in order to relieve labor organizations and Municipal Employers of an area of dispute. 11/

Thus, unit clarification proceedings fall within the broad mandate of Sec. 111.70 (6), Stats. So does the attempt to settle multiple claims in litigation, as the Commission noted in Monona Grove:

> Offering to trade off or even drop legal proceedings in one or more forums is not an unusual practice in labor relations. Without evidence of other coercive circumstances, such actions do not constitute the kind of coercion prohibited by MERA. 12/

Evidence of the "other coercive circumstances" referred to by the Commission in Monona Grove to "render otherwise protected activity unprotected" 13/ is lacking here. Regarding the "threat" itself, it is of some significance that the alleged threat, if made, was communicated to Rodenstein and not directly to Home employes. 14/ Standing alone, this is not a defense to the alleged Sec. 111.70 (3) (a) 1, Stats., violation. However, the record shows no evidence that Rodenstein felt intimidated or that Hesslink had any reason to believe Rodenstein would feel intimidated. Yet Hesslink's "threat" to employes, if such a threat was made, demanded that Rodenstein communicate the threat, and there is no evidence that Rodenstein was intimidated in any way, or susceptible to communicate any intimidation to Home employes. Beyond this, the "threat" involved was not within

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9/ Monona Grove School District, Dec. No. 20700-G (WERC, 10/86) at 24.

10/ Ibid., and see City of LaCrosse, Dec. No. 17084-D (WERC, 10/83).

11/ City of Green Bay, Dec. No. 12682 (WERC, 5/74) at 3.

12/ Dec. No. 20700-G at 26.

13/ Dec. No. 20700-G at 24.

14/ Compare West Allis-West Milwaukee School District, Dec. No. 23805-B (Buffet, 6/87), aff'd Dec. No. 23805-C (WERC, 11/87).

Hesslink's or the County's unilateral control, since it relied on intervening Commission action to be effective. The record offers no reason to conclude that the Union was susceptible to the economic coercion of "defending" the unit clarification. Thus, the "dismantling" of the unit which the Union refers to, turned primarily on the potential merit of the County's unit clarification petition. The Union does not dispute that the unit clarification, without regard to the February 16, 1987, conversation, was legally proper, and there is no evidence of bad faith in the County's assertion of the claim. Against this background, whether the County prevailed on the merits or not, the assertion of the unit clarification can not be considered a threat, or evidence of "coercive circumstances" surrounding the February 16, 1987, conversation.

Beyond this, the Union has not demonstrated what Hesslink or the County could gain by the "threat." There is no evidence to indicate why the County felt so deeply about the grievance that any threat was needed. Rodenstein testified that Hesslink informed him on February 16, 1987, that Baldowin wished the LPNs out of the unit. The desire to have supervisory employes excluded from a unit, standing alone, is not improper. 15/ If Baldowin was angered by the grievance there is no evidence to demonstrate why. What evidence there is lies in Hesslink's testimony, which the Union seeks, on other points, to discredit. The minutes of the Home Committee meeting on March 5, 1987, offer no assistance here. As Hesslink points out, those minutes are susceptible to a number of interpretations and, in any event, shed no light on why the Home Committee felt upset about the grievance. What Hesslink might have gained in his own capacity or in his capacity as representative for the County is not apparent. Both Hesslink and Rodenstein agree that the grievance had little financial impact on either party. Hesslink's testimony that the grievance might permit the County to realize a slight financial benefit in the next contract year stands unrebutted. The record is, then, silent on why Hesslink or the County would feel so deeply about the grievance to resort to threatening the Union.

In sum, the record demonstrates that Rodenstein and Hesslink dispute the appropriate interpretation of the content of the February 16, 1987, conversation. A determination based on demeanor alone can not resolve this point. A review of the context of the conversation offers no basis to believe the County sought to, or did interfere, within the meaning of Sec. 111.70 (3) (a) 1, Stats., with the Union's processing of the wage grievance. The sincerity of Rodenstein's belief that Hesslink sought to threaten the Union has been established. However, the record will not support extending the sincerity of this belief into a conclusion that Hesslink's conversation had a reasonable tendency to interfere with Home employes' exercise of rights granted them under Sec. 111.70 (2), Stats. Since there has been no demonstration of a violation of Sec. 111.70 (3) (a) 1, Stats., the Union has failed to meet the second element of proof for a Sec. 111.70 (3) (c), Stats., violation.

Nor has the Union carried its burden of establishing the third element of proof. What evidence there is on the scope of Hesslink's authority is that the County had not retained him to litigate the unit clarification until sometime after February 16, 1987. There is no direct evidence that the County authorized Hesslink to threaten the Union, and no circumstantial evidence to support inferring such authority was given. The difficulty of direct evidence on this point, given the attorney/client privilege, must be noted. 16/ However, some persuasive evidence demonstrating why Hesslink in his own or in his representative capacity would be interested or would gain from such a threat could afford a basis to make the inference the Union seeks. Yet such evidence is lacking here. Why the "threat" at issue here would be in the County's interest is not apparent on the present record. Beyond this, in the absence of a showing that the County

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15/ See City of Wausau, Dec. No. 6276 (WERC, 3/63), and Menomonee Falls Joint School District #1, Dec. No. 11669 (WERC, 3/73).

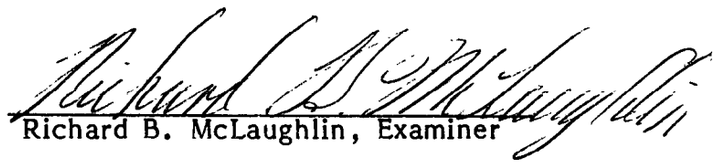
16/ Sec. ERB 10.17 Wis. Adm. Code incorporates the evidentiary standards of Sec. 227.45 (1), Stats., which provides that: "The . . . hearing examiner shall give effect to the rules of privilege recognized by law." Secs. 905.01 and 905.03, Stats., establish the "Lawyer-client privilege." Sec. 905.03 (4) (a), Stats., has not been put at issue here.

acted in bad faith to assert the unit clarification, there is no reason to conclude an attempt to trade the unit clarification for the grievance would constitute a MERA violation. The Union has failed, then, to establish the third element of proof to a Sec. 111.70 (3) (c), Stats., violation.

To find the Union had met its burden of proof on the present record would be less a remedy for improper employer, or employer representative, conduct than an inhibition to settlement discussions. Since the Union has failed to meet its burden of proof, the complaint has been dismissed.

Dated at Madision, Wisconsin, this 16th day of March, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner