STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CEDAR GROVE-BELGIUM EDUCATION ASSOCIATION, Complainant, vs. CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, Respondent.	Case 14 No. 41477 MP-2173 Decision No. 25849-B

Appearances:
Mr. Bruce Meredith, and Ms. Valerie Gabriel, Staff Counsel, Wisconsin Educat
Davis and Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin, 53202, by Mr. Mark F. Vetter, and Mr. Lon D. Moeller, appearing on behalf of the Respondent District.

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

Examiner Coleen A. Burns having on December 21, 1989 issued Findings of Fact, Conclusions of Law and Order in the above matter wherein she dismissed the portion of the complaint filed by the Cedar Grove-Belgium Education Association which alleged that the Cedar Grove-Belgium Area School District had committed certain prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 3, Stats., and wherein she deferred to grievance arbitration the portion of the complaint alleging violations of Secs. 111.70(3)(a)4 and derivatively (3)(a)1, Stats.; and the Association having filed a petition with the Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats.; and the parties thereafter having filed written argument in support of and in opposition to said petition, the last of which was received on July 19, 1990; and the Commission having reviewed the matter and concluded that the Examiner's decision should be affirmed in part and reversed in part;

NOW, THEREFORE, it is

ORDERED 1/

A. Examiner's Findings of Fact 1-11 are affirmed.

B. Examiner's Finding of Fact 12 is reversed to read:

> 12. Sternard's comments to O'Keefe in mid-December, 1988, and on or about February 23, 1989 did have a reasonable tendency to interfere with, restrain, or coerce employes in the exercise of their rights guaranteed by Sec. 111.70(2), Stats.

C. Examiner's Finding of Fact 13 is modified to read:

> 13. Bowden's comments to Gee on December 14, 1988, that Gee would not need union representation and that Gee and Williams could represent each other, and Bowden's comments to Gee and Williams that she didn't want a grievance, did not have a reasonable tendency to interfere with, restrain, or coerce Respondent's employes in the exercise of rights guaranteed by Sec. 111.70(2), Stats.; and that such comments do not demonstrate that Bowden is hostile to the Association, or any employe, for engaging in protected concerted activity.

D. Examiner's Conclusion of Law 1 is reversed to read:

> 1. That Complainant has demonstrated by a clear and satisfactory preponderance of the evidence that Principal Sternard made statements to Lois O'Keefe in mid-December, 1988 and in February, 1989, which interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed by Sec. 111.70(2), Stats.

E. Examiner's Conclusions of Law 2-5 are affirmed.

F. Examiner's Conclusion of Law 6 is reversed to read:

> 6. That the District, through Principal Sternard's December, 1988 and February, 1989 remarks to O'Keefe, did violate Sec. 111.70(3)(a)1, Stats.

G. Paragraph 1 of the Examiner's Order is affirmed.

H. Paragraph 2 of the Examiner's Order is set aside and the following Order adopted:

> 2. That Respondent Cedar Grove-Belgium Area School District, its officers and agents, shall immediately:
>
> A. Cease and desist from interfering with, restraining or coercing District employes in the exercise of rights guaranteed by Sec. 111.70(2), Stats.
>
> B. Take the following affirmative action which the Commission finds will effectuate the policies and purposes of the Municipal Employment Relations Act:
>
> (1) Notify all employes by posting in conspicuous places where bargaining unit employes are employed copies of the Notice attached hereto and marked "Appendix A". Such copies shall be signed by the Superintendent of Schools and shall be posted immediately upon receipt of a copy of this Order for sixty (60) days. Reasonable steps shall be taken to insure that said Notice is not altered, defaced or covered by other material.
>
> (2) 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.

The portion of the complaint which alleges that the Respondent Cedar Grove-Belgium Area School District violated Sec. 111.70(3)(a)1, Stats. by conduct other than that of Principal Sternard in December, 1988 and February, 1989 is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 9th day of May, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and 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.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore 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

(Footnote 1/ continues on page 4.)

(Footnote 1/ continued from page 3.)

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.

CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT

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

BACKGROUND

The Complaint

The Association's December, 1988 complaint alleged:

1. (a) The District is a municipal employer within the meaning of Section 111.70(1)(j). Its address is 50 Union Avenue, Cedar Grove, Wisconsin 53013.

(b) At all times material herein, the following individuals have acted as agents of the District: Ms. Mary E. Bowden, District Administrator, Mr. Ron Sternard, Principal, Cedar Grove High School.

2. The Association is a labor organization within the meaning of Section 111.70(1)(h). For the purpose of these proceedings, its address is Debra Schwoch-Swoboda, 411 North River Road, West Bend, Wisconsin 53095 (414/338-6128).

(b) At all times material herein, the Association has been the bargaining agent for all certified, professional staff. This has included all regular part-time instructional staff.

3. On or about August 21, the Association filed a grievance over what it perceived was unfair treatment for Mr. Moore, a part-time physical education instructor. The grievance alleged, inter alia, that Mr. Moore was not being compensated sufficiently for his part-time work. In late October, a more specific grievance was filed challenging Mr. Moore's compensation.

(b) As a result of said grievance, the District reviewed the schedules of other part-time employes in the District and apparently unilaterally determined that three other part-time employees were being assigned insufficient duties under the terms of their individual contracts.

4. On or about November 15, Ms. Terry Williams, a part-time (.8 FTE) physical education instructor, was asked by Mr. Sternard to come into his office. At that meeting, Mr. Sternard told Ms. Williams that a grievance was being filed over Mr. Moore's work schedule and it did not appear that the District could justify the amount of her part-time contract, given Mr. Moore's. Mr. Sternard then told her that she would be given additional work assignments.

(b) About two weeks later, Ms. Williams was assigned substantial additional duties.

5. On or about December 9, Mr. Sternard spoke with Ms. Kathy Gee, a part-time (.5 FTE) math teacher.

(b) Mr. Sternard told Ms. Gee that he was going to have to give her additional study halls because Ms. Bowden had done some more figuring and concluded that all part-time employees were short of work and that additional work had to be given. She was told that she would get an additional three hours of work.

(c) At present, Ms. Gee is awaiting final word as to the actual changes in her schedule.

6. On or about December 8, Mr. Sternard spoke with Ms. Lois O'Keefe, a part-time (.55 FTE) band instructor. He told her "your union is having you work an extra hour a week." He then told her if she had any questions she should talk to the Association president. Ms. O'Keefe then went to her Association representative who knew nothing about it. Both then

went to see Mr. Sternard, who then explained that the front office had instructed him to make some changes. He then told both of them about all the changes being made in part-time assignments. He stated that Ms. O'Keefe would have to work one additional hour.

(b) At present, Ms. O'Keefe is currently awaiting the specifics of her additional assignments.

7. At no time material herein, did the District bargain, or even discuss with the Association, any of the additional assignments set forth in paragraphs 4 -6 with the Association.

8. The assignment of additional duties to be done by part-time staff without additional compensation directly affects the wages, hours and working conditions of bargaining unit employees and, as such, is a mandatory subject of bargaining.

9. (a) During May, District Administrator Bowden informed two bargaining unit employees that one of them would be required to write a curriculum over the summer.

(b) By practice, all such work had been voluntary.

(c) The assignment of such required work constitutes a mandatory subject of bargaining.

(d) At no time material herein, did the District bargain, or even discuss, with the Association, any of the additional assignments with the Association the additional required work.

10. (a) During the spring of 1988, the District proposed restructuring the school day from a seven to eight period day.

(b) The district asked employes as individuals to formulate positions as to how this change should be implemented.

(c) The requested information from the employees concerned matters which directly affected employees' working conditions and, as such, was a mandatory subject of bargaining.

(d) At no time material herein did the District bargain the impact of the changes in the work day with the Association.

11. By the acts and conduct set forth in paragraphs 4 - 9, the District violated Section 111.70(3)(a)1.4, Stats. by unilaterally changing the terms and conditions of employment of bargaining unit employees without bargaining with the union.

12. By the acts and conduct set forth in paragraphs 4 - 9, the District violated Section 111.70(3)(a)1.4, Stats. by engaging in individual bargaining with bargaining unit employees.

13. By the acts and conduct set forth in paragraphs 4 - 10, the District violated Section 111.70(3)(a)1.4, Stats. by engaging in a pattern of behavior designed to undermine the collective bargaining representative.

14. By the acts and conduct set forth in paragraphs 4 - 6, the District violated Section 111.70(3)(a)1.3, by retaliating against bargaining unit employees because of the protected concerted activities of the union and individual bargaining unit members.

WHEREFORE, the Association asks that the district be found to have committed the prohibited practice alleged herein and be ordered to take the appropriate remedial actions, including but not limited to: enjoined from implementing the above changes in working conditions without fulfilling its bargaining

obligation, required to reimburse employees for any additional work performed, to post the appropriate notices and to take such other equitable relief as may be required.

. . .

The District filed an Answer to said complaint on February 1, 1989 which stated in pertinent part:

1. Answering paragraphs 1(a) and 1(b), Respondent admits the same.

2. Answering paragraphs 2(a) and 2(b), Respondent admits the same.

3. Answering paragraph 3(a), Respondent admits that the Complainant filed a grievance on October 31, 1988, alleging that part-time physical education teacher Stephen Moore was working more than 50% of a full-time position rather than the 40% specified in his individual employment contract, but denies the remainder of the allegations contained therein.

4. Answering paragraph 3(b), Respondent admits that upon receiving the aforementioned grievance, Respondent reviewed the teaching assignments of Mr. Moore, as well as the assignments of all other part-time teachers it employs. Respondent determined that, based upon Moore's teaching assignments, his employment contract should be adjusted from 40% to 46%, and that the assignments of three other part-time teachers, Terri Williams, Kathy Gee and Lois O'Keefe, should be increased to reflect their contracted percentages of employment.

5. Answering paragraph 4(a), Respondent admits that Mr. Sternard met with part-time (.80 FTE) physical education instructor Terri Williams to review her teaching assignments and to inform Ms. Williams that her teaching assignments would have to be increased in order to match the 80% specified in her employment contract, but denies the remainder of the allegations contained therein.

6. Answering paragraph 4(b), Respondent admits that, as of December 2, 1988, Ms. Williams was assigned an additional five (5) hours per week to write the Health Education curriculum, but denies and objects to the Complainant's characterization of the same.

7. Answering paragraphs 5(a) and 5(b), Respodent admits that Mr. Sternard met with part-time (.50 FTE) math teacher Kathy Gee, on or about December 9, 1988, to review her teaching assignments and to inform Ms. Gee that her teaching assignments would have to be increased in order to match the 50% specified in her employment contract, but denies the remainder of the allegations contained therein.

8. Answering paragraph 5(c), Respondent denies the same, and further alleges that, as of December 20, 1988, Ms. Gee was assigned an additional three (3) hours of study hall supervision per week.

9. Answering paragraph 6(a), Respondent admits that Mr. Sternard met with part-time (.55 FTE) band instructor Lois O'Keefe, on or about December 9, 1988, to review her teaching assignments and to inform Ms. O'Keefe that her teaching assignment would have to be increased in order to match the 55% specified in her employment contract, but denies the remainder of the allegations contained therein.

10. Answering paragraph 6(b), Respondent denies the same, and further alleges that Ms. O'Keefe started her additional assignment of one (1) hour of instrumental music lessons on December 16, 1988.

11. Answering paragraph 7, Respondent admits the same.

12. Answering paragraph 8, Respondent denies

and objects to the same inasmuch as said paragraph states an unsubstantiated legal conclusion.

13. Answering paragraph 9(a), Respondent lacks sufficient information on the basis of the Complaint to confirm or deny the same.

14. Answering paragraph 9(b), Respondent lacks sufficient information on the basis of the Complaint to confirm or deny the same.

15. Answering paragraph 9(c), Respondent denies and objects to the same inasmuch as said paragraph states an unsubstantiated legal conclusion.

16. Answering paragraph 9(d), Respondent lacks sufficient information on the basis of the Complaint to confirm or deny the same.

17. Answering paragraph 10(a), Respondent denies the same.

18. Answering paragraph 10(b), Respondent lacks sufficient information on the basis of the Complaint to confirm or deny the same.

19. Answering paragraph 10(c), Respondent denies and objects to the same inasmuch as said paragraph states an unsubstantiated legal conclusion.

20. Answering paragraph 10(d), Respondent denies the same and further alleges that it has made no decision in this regard which would impact upon the teachers' working conditions.

21. Answering paragraph 11, Respondent denies and objects to the same inasmuch as said paragraph states a legal conclusion, and further denies each and every allegation contained therein.

22. Answering paragraph 12, Respondent denies each and every allegation contained therein.

23. Answering paragraph 13, Respondent denies each and every allegation contained therein.

24. Answering paragraph 13, Respondent denies each and every allegation contained therein.

AFFIRMATIVE DEFENSES

25. As for its first affirmative defense, Respondent alleges that Complainant has failed to state a claim upon which relief can be granted.

26. As for its second affirmative defense, Respondent alleges that the Complainant has not filed a grievance or exhausted its conclusive remedies under the grievance/arbitration procedure as set forth in Article XII - GRIEVANCE PROCEDURE of the collective bargaining agreement between the Complainant and Respondent, and, therefore, the Wisconsin Employment Relations Commission does not have jurisdiction over this matter.

WHEREFORE, Respondent demands that the Complaint be dismissed in its entirety on the merits, that reasonable attorneys' fees and costs be awarded Respondent on the grounds that the action is frivolous, and that such other and further relief be awarded as the Examiner may deem just and equitable.

. . .

On February 21, 1989, the District moved to defer to contractual grievance arbitration the Association's allegations and claims set forth in paragraphs 4-8, 11, 12 and 14 of the complaint.

On February 28, 1989, the Association filed a motion to amend its original complaint by adding the following allegation:

> The Cedar Grove-Belgium Education Association hereby moves to amend its prohibited practice complaint as follows. Paragraph 6 shall now read:

> 6.(a) In mid-December, 1988, District Administrator Bowden summoned employees Gee and Williams to her office over the noon hour. During that meeting, she told both employees that they did not need union representation, and thereafter disclosed terms of their new part-time assignments.
>
> (b) After this disclosure, Ms. Bowden told both employees that she did not want a grievance filed over the changes. Thereafter she read to them from a document on insubordination. Ms. Bowden then informed both employees that if they were insubordinate they would be disciplined.
>
> Each old paragraph from 6-14 will be renumbered as 7-15. Paragraph 16 will be created to read as follows:
>
> 16. By the act and conducts as set forth in paragraph 6, the District violated Sec. 111.70(3)(a)1, by implicitly threatening employees with adverse employment action if they engage nin protected concerted activity.

During a March 2, 1989 hearing, the Examiner granted the District's motion to defer as to the Secs. 111.70(3)(a)4 and derivative 111.70(3)(a)1, Stats. allegations. She denied the deferral motion as to the independent Sec. 111.70(3)(a)1 allegations as well as to the Sec. 111.70(3)(a)3, Stats. allegation. During said hearing, the Examiner also granted both the Association's February 28 motion to amend its original complaint and an Association motion to withdraw the allegations contained in paragraph 10 of the original complaint.

On March 15, 1989, the Association moved to further amend its complaint by dropping the allegations contained in paragraph 9 of the original complaint and adding the following allegation:

> 10. On or about February 23, 1989 Principal Ron Sternard discussed with Ms. O'Keefe her potential testimony in the prohibited practice hearing originally scheduled for March 2, 1989. During the course of that conversation, Principal Sternard expressed his disappointment to O'Keefe that she had become involved in litigation sponsored by the union and spoke disparagingly of her potential testimony at the hearing.
>
> . . .
>
> 15. By the acts and conduct set forth in paragraph 10 the District interfered with an employee's right to participate in protected concerted activity, including the right to testify in Commission proceedings.

During an April 6, 1990 hearing, the Examiner granted the March 15 motion to amend. The District answered the Association's February 28 and March 15 amendments by denying same.

The Examiner's Decision

The Examiner dismissed all of the complaint allegations which she had not already deferred to grievance arbitration.

As to the Association's interference allegations, she concluded that remarks by Principal Sternard and District Administrator Bowden to part-time employes did not include implicit or express threats of reprisal and thus were not violative of Sec. 111.70(3)(a)1, Stats. She further concluded that these remarks did not evidence animus toward the Association.

As to the Association's discrimination allegation, she concluded that the District's decision to increase employe work assignments was based exclusively upon a bona fide business concern that the District appropriately respond to the allegations of the Moore grievance. She thus determined that no violation of Sec. 111.70(3)(a)3, Stats. had occurred.

POSITIONS OF THE PARTIES ON REVIEW

While our Discussion section of this decision will incorporate certain specific arguments made by the parties, the parties generally make the following arguments.

The Association

The Association contends that although the Examiner's factual findings disclose pervasive anti-union animus by District representatives, the Examiner erroneously concluded that: (1) no Sec. 111.70(3)(a)1, Stats. violations occurred because the anti-union sentiment was clothed with the appearance of cordiality; and (2) no violations of Sec. 111.70(3)(a)3, Stats. occurred because she accepted the District's marginal proof as to why its actions were not retaliatory. The Association asserts that the Examiner effectively applied a "beyond a reasonable doubt" standard instead of the appropriate "clear and satisfactory preponderance" standard to dismiss the Association's allegations.

The Association asserts that if the Commission affirms the Examiner's decision, the Commission will have effectively eliminated Sec. 111.70(3)(a)1 and 3, Stats., because it will have determined that a union cannot meet its burden of proof whenever, as always occurs, management produces some colorable basis to justify its statements and actions.

The Association asks that the District be found to have violated Sec. 111.70(3)(a)1 and 3, Stats., and be ordered to reimburse the individually affected teachers for the additional work caused by the District's illegal action.

The District

The District urges the Commission to affirm the Examiner. It argues that the Association's prohibited practice complaint is simply a part of the Association's litigation strategy which seeks the termination of Superintendent Bowden. As with all other pieces of this litigation strategy, the District contends that the Association has failed to meet the applicable burden of proof.

DISCUSSION

Alleged Violations of Sec. 111.70(3)(a)1, Stats.

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

> 1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).

Section 111.70(2), Stats. describes the rights protected by Sec. 111.70(3)(a)1, Stats. as being:

> **(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. . .

Violations of Sec. 111.70(3)(a)1, Stats. occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. 2/ If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employe(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights. 3/ However, in recognition of the employer's free speech rights and of the general benefits of "uninhibited" and "robust" debate in labor disputes, employer remarks which inaccurately or critically portray the employe's labor organization and thus may well have a reasonable tendency to "restrain" employes from exercising the Sec. 111.70(2) right of supporting their labor organization generally are not violative of Sec. 111.70(3)(a)1, Stats. unless the remarks contain implicit or express threats or promises of benefit. 4/ Similarly, employer conduct which may well have a reasonable tendency to interfere with employe exercise of Sec. 111.70(2) rights will not be found violative of Sec. 111.70(3)(a)1, Stats. if the

---

2/ WERC v. Evansville, 69 Wis. 2d 140 (1975).

3/ Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84); City of Brookfield, Dec. No. 20691-A (WERC, 2/84); Juneau County, Dec. No. 12593-B (WERC, 1/77).

4/ Ashwaubenon Joint School District No. 1, Dec. No. 14474-A (WERC, 10/77); Janesville Board of Education, Dec. No. 8791 (WERC, 3/69).

employer had valid business reasons for its actions. 5/

As to the alleged violation of Sec. 111.70(3)(a)1, Stats. which arose out of a conversation between District Administrator Bowden and employes Gee and Williams, the Examiner made the following Findings of Fact:

> 8. That on December 12, 1988, UniServ Director Debra Schwoch-Swoboda sent the following letter to Bowden;
>
> > Dear Ms. Bowden:
> >
> > It has come to the CGBEA's attention that Administrators of the District have had discussions with individual bargaining unit members regarding additional work assignments during the school day. These discussions apparently were generated as a result of a grievance filed by the Association over the appropriate salary for Mr. Stephen Moore. It is our understanding that most, if not all, of the part-time staff have been contacted individually to discuss the assignment of additional duties without additional pay.
> >
> > The Association believes that such conduct constitutes unlawful individual bargaining in violation of Section 111.70(3)(a)4, Wis. Stats. Please cease all such activity. If you wish to alter the payment schedule for part-time work, you must bargain any such change with the Association.
> >
> > If you have any questions, please contact either myself, or if I am not available, Mr. Bruce Meredith, Esq. at the WEAC offices (800-362-8034).
> >
> > Copies of this letter are being sent to all part-time employes. However, any conversations you may have with these employes will be challenged regardless of whether any individual employe may wish to talk with you over such work. Salary negotiations must be conducted through the appropriate Association officials.
> >
> > Thank you for your cooperation.
>
> on December 13, 1988, O'Keefe sent Bowden and Sternard the following letter:
>
> > I have received a letter from the union stating that your request of me to work one extra hour per week is an illegal practice. I have no way of knowing if this is an illegal practice or not.
> >
> > I am going to continue to do what the administration asks of me. I will be adding an hour to my existing schedule on Friday, which means that I will begin teaching at first hour instead of second hour.
> >
> > I sincerely hope that the administration and the union can resolve this issue.
>
> on December 14, 1988 Bowden summoned Gee and Williams to a meeting in Bowden's office; the Association's letter of December 12, 1988 and O'Keefe's letter of December 13, 1988 were received by Bowden prior to this meeting; while waiting for Williams to arrive, Bowden told Gee that she would not need union representation and that the two teachers could represent each other; neither Gee nor Williams asked for union representation; when Williams arrived, Bowden explained how she had derived their additional assignments; Bowden then stated that she had heard a rumor that the

---

5/ City of Brookfield, supra, footnote 3/.

part-time people might be considering not doing what they were told to do, that she thought highly of them, that she did not want either of them to get into any kind of a disciplinary problem, and that she didn't want a grievance; Gee responded by saying that Gee did not know where Bowden had heard that the part-time employes weren't willing to accept the additional assignments because the Union had advised the part-time employes to take any additional hours that they had been assigned; Williams responded by saying that she had received a letter from the Association telling her to perform the duties and that she was going to perform the duties; Bowden told Williams and Gee that she had a document on insubordination and asked Williams and Gee if they wished a copy of the document; Williams and Gee responded "No"; Bowden then proceeded to read from the document as follows:

> **Insubordination charge is tough to defend**
>
> Self-help. "The Lord helps them who help themselves." Unfortunately, this truism may not always be true where teachers and administrators are concerned.
>
> A teacher who relies on "self-help" and refuses to perform a directive which the teacher feels is unjust or illegal could be disciplined or fired for insubordination. Self-help is particularly risky since discipline for refusing to obey a direct order can be very difficult to beat. The Lord may help those who help themselves, but in most instances, arbitrators will not. In fact, discipline for insubordination has been sustained even where the arbitrator found the employer had no legal right to give the order in the first place. Nevertheless, the arbitrator found that the employe should have "obeyed first and grieved later."
>
> Even arbitrators will not require a teacher to obey every whim of a supervisor. Orders which humiliate an employe or endanger his or her personal safety need not be obeyed. However, arbitrators are quick to apply the obey now, grieve later rule.
>
> If you believe that an order is improper, it is best first to comply with the order and then seek advice from your local teachers' rights committee or some other local leader. They will help you to decide if you should file a grievance or take other action. Remember, time is important; do not wait but seek advice immediately.

upon conclusion of this reading, Bowden told Williams and Gee that if they were to be insubordinate, they would be terminated; the meeting ended with small talk, at which time Bowden was friendly; Bowden did not state that the meeting was disciplinary in nature; neither Gee nor Williams was disciplined; Bowden called the meeting because she was concerned that there was truth to the rumor that part-time people were considering not performing the additional assignments; during the meeting, Bowden sought to avoid future problems by (1) fully explaining the procedure used to recalculate the assignments and (2) explaining that failure to work as assigned is a disciplinary offense; Bowden does not recall the source of the rumor; prior to the meeting of December 14, 1988, Bowden asked Sternard if Gee and Williams were doing the additional assignment, but that Bowden did not receive a satisfactory answer; and that Bowden did not make any statement during the December 14, 1988 conversation which demonstrated hostility toward the Association, or any employe, for engaging in protected, concerted activity.

. . .

> 13. Bowden's comments to Gee on December 14, 1988, that Gee would not need union representation and that Gee and Williams could represent each other, and Bowden's comments to Gee and Williams that she didn't want a grievance, do not contain either a threat of reprisal, nor a promise of benefit, which would tend to interfere with, restrain, or coerce Respondent's employes in the exercise of their rights guaranteed by Sec. 111.70(2), Stats.; and that such comments do not demonstrate the Bowden is hostile to the Association, or any employe, for engaging in protected concerted activity.

In her Memorandum, the Examiner concluded her discussion of this allegation with the following analysis:

> Complainant does not claim and the record does not indicate that Bowden's tone or manner was hostile or threatening at any point during the meeting. Indeed, Gee's testimony that, during the reading of the document on insubordination "I had a lot of other things on my mind at the time. I really wasn't listening," indicates that Gee considered the meeting to be rather innocuous. Generally speaking, an employe who feels threatened or intimidated pays attention to what is being said.
>
> Contrary to the assertion of Complainant, the record does not provide a basis to discredit Bowden's testimony concerning the content of the material which she read to Williams and Gee. Accordingly, the Examiner is persuaded that, in the latter portion of the meeting, Bowden read from a document which addressed the principle of work now, grieve later and expressly recognized an employe's right to file grievances. Such a reading militates against a finding that Bowden's earlier statement expressed, or implied, a threat of retaliation for filing grievances.
>
> Given the record as a whole, the Examiner is persuaded that, during the meeting of December 14, 1988, Bowden was seeking to avoid future problems by (1) fully explaining the procedure used to recalculate the assignments and (2) explaining that failure to work as assigned is insubordination and that insubordination is a disciplinary offense. Given the circumstances presented herein, the reasonable construction of Bowden's remarks, i.e., that she didn't want a grievance, is that Bowden was indicating that she was not seeking further problems, rather than that she would take adverse action should such problems arise. Contrary to the argument of Complainant, the record does not demonstrate that, during the meeting with Gee and Williams, Bowden made any statements which were violative of Sec. 111.70(3)(a)1, Stats., or which evidenced union animus. (Footnotes omitted)

The Association argues that Bowden's remarks should have been found violative of Sec. 111.70(3)(a)1, Stats. by the Examiner. However, even if the remarks in question are not independent violations in and of themselves, the Association contends that the remarks demonstrate an extremely hostile attitude toward the Association and thus support a conclusion of anti-union animus by the District. The Association asserts that the Superintendent's comments to the employes regarding possible termination and her desire to avoid the filing of additional grievances demonstrate a heavy handed preference for dealing with employes directly instead of through the Association. The Association argues that Bowden's conduct is indicative of the type of person who had a motive to retaliate against union activity.

The District contends that Dr. Bowden's December 14, 1988 meeting with Terri Williams and Kathy Gee was not designed to retaliate against the Association for filing the Moore grievance or to undermine the support of the Association's membership. Bowden called the meeting to address her concerns that Williams and Gee might be unwilling to perform their additional teaching assignments, or worse yet, reject the assignments. Because she thought highly of both teachers, Bowden did not want Williams or Gee to be subject to discipline or discharge for possible insubordination. She also wanted to explain to them how the additional assignments were determined and to answer any question that they may have. Dr. Bowden did not threaten, coerce or interrogate either teacher at the meeting. Her statement that representation by the Association at the meeting was not necessary was intended to reassure Williams and Gee that the meeting did not concern a disciplinary matter. Indeed, neither teacher was disciplined as a result of the meeting. Further,

the District argues Bowden's alleged comment that she did not want a grievance filed reaffirms the fact that she called the meeting in order to fully explain the procedure used to determine their part-time teaching assignments and to advise Williams and Gee that failure to perform the additional assignments would constitute insubordination, a dischargeable offense.

We affirm the Examiner's Findings of Fact as to the conversation between District Administrator Bowden and employes Gee and Williams as well as her conclusion that the conversation was not violative of Sec. 111.70(3)(a)1, Stats. Under all the circumstances so ably discussed by the Examiner, Bowden's remarks could most reasonably be understood by an employe as expressing an interest in explaining the employer's position on the additional assignments and avoiding a future problem as opposed to expressing an implicit threat of adverse action if either employe exercised their Sec. 111.70(2) right to file a grievance.

As to the alleged violation of Sec. 111.70(3)(a)1, Stats., which arose out of a December, 1988 conversation between Principal Sternard and employe O'Keefe, the Examiner made the following Findings of Fact:

> 7. That Lois O'Keefe is employed by the District as an instrumental music teacher; in the fall of 1988, she was assigned to teach the entire day on Tuesdays and Thursdays and to teach Fridays, starting one hour late and finishing one hour early; she was issued a 55% contract for this schedule; one day in mid-December, 1988 she was summoned to Sternard's office; when she arrived Sternard said only: "The union says you have to work an extra hour per week. If you have any questions, talk you your union"; when O'Keefe started to ask for an explanation, Sternard repeated the statement "If you have any questions, ask your union"; either later the same day or the next day, O'Keefe met with Association Representative Hubie Nett and together they went to Sternard's office to seek a clarification of Sternard's remarks; Sternard clarified his remarks by stating "Because of the Steve Moore grievance, all the part-time contracts are being re-evaluated, and you have to work extra time"; when O'Keefe questioned Sternard regarding the nature of the extra hour's work, Sternard replied "I don't know", Sternard then replied either "You'll have to ask her" or "You'll have to ask the administration office"; Sternard then paused and said "Well, I suppose it should be a teaching hour"; when O'Keefe asked when the extra hour would begin, Sternard replied "he supposed right away"; O'Keefe began working the extra hour per week the next Friday that she was due in Cedar Grove; the extra hour was worked by starting an hour earlier on Fridays; Sternard and O'Keefe enjoyed a good working relationship and Sternard did not relish the fact that he had to tell O'Keefe that she would be assigned additional duties; Sternard considered the additional work assignments to be due to the conduct of the Association and Bowden and considered himself to be in the middle of a controversy not of his own making; and that the Association did not say that O'Keefe, or any other employe, had to work more hours.
>
> . . .
>
> 12. Sternard's comments to O'Keefe, in mid-December, 1988, that "The Union says you have to work an extra hour per week" and Sternard's comments to O'Keefe during the conversation which occurred on or about February 23, 1989, do not contain either a threat of reprisal, nor a promise of benefit, which would tend to interfere with, restrain, or coerce Respondent's employes in the exercise of rights guaranteed by Sec. 111.70(2), Stats.

In her Memorandum, the Examiner concluded her discussion of this allegation with the following analysis:

> While Sternard denies making the statement "The Union says you have to work an extra hour per week," the Examiner does not credit this denial. Not only is it evident that O'Keefe has a clearer recollection of events, it is likely that Sternard would have made such a remark. It is evident that Sternard enjoyed a good working relationship with O'Keefe and did not relish the fact that he had to be the bearer of bad tidings, i.e., that O'Keefe would be assigned additional work. It is equally evident that Sternard considered himself

> to be caught in the middle of a controversy not of his own making. Given these circumstances, it is likely that Sternard would have chosen to deflect O'Keefe's displeasure upon another, whom he thought mor culpable for the decision, i.e., the "union." To be sure, the "union" did not say that O'Keefe, or any other employe, had to work more hours. That decision rested solely with Bowden. However, an inaccurate portrayal of union conduct is not sufficient, per se, to demonstrate a violation of Sec. 111.70(3)(a)1. Rather, the test is whether the statement, construed in light of surrounding circumstances, contains either a threat of reprisal for engaging in protected, concerted activity or a promise of benefit for refraining from such activity. Sternard's statement does not contain either.
>
> While Complainant may not wish to be assigned responsibility for the additional assignments, Complainant's filing of the Moore grievance did precipitate the evaluation of the part-time contracts. Upon the conclusion of this evaluation, Bowden agreed with the assertion contained in the grievance, i.e., "that a female part-time teacher is being compensated for more hours than she is scheduled to work." Where, as here, an adjustment in an employe's working conditions is a bona fide response to matters raised in a grievance filed by a union, it is not violative of Sec. 111.70(3)(a)1 for an employer to link the adjustment to the union's contract. At times, the filing of a grievance on behalf of one employe will have adverse consequences upon another employe. While it may be true that the employe who is adversely affected will have lost confidence in the union, MERA does not protect a union from suffering such a consequence. Under the circumstances presented herein, Sternard's statements "blaming" the Association for O'Keefe's additional assignment are not violative of Sec. 111.70(3)(a)1, Stats.

The Association contends that when Supervisor Sternard told employe O'Keefe that she would be performing extra work without additional pay because of the Association's actions, the District thereby violated Sec. 111.70(3)(a)1, Stats., and demonstrated anti-union animus. The Association argues that such remarks clearly infer to employes that the Association was at fault for their plight and that employes should reconsider their support of the Association. The Association also asserts that the supervisor's remark provides support for the Association's theory that the additional work assignments were retaliatory and not based on the application of some "unknown abstract formula", as the District argues.

The District asserts that Sternard's statement did not contain a threat or promise of benefit and simply reflected his role as a middleman who had been directed to advise O'Keefe that her part-time assignment was being adjusted and who had no particular knowledge of the Moore grievance or District Administrator Bowden's subsequent review of all part-time assignments.

We affirm the Examiner's Findings of Fact as to the remarks of Principal Sternard to employe O'Keefe during a mid-December, 1988 conversation. However, we reverse her conclusion that said remarks did not violate Sec. 111.70(3)(a)1, Stats. Sternard's comments which blamed the Association for the additional work assignment, although subsequently clarified during a follow-up conversation, constituted a misstatement which had a reasonable tendency to be coercive of O'Keefe's interest in further involvement with the Association. 6/

As to the alleged violation of Sec. 111.70(3)(a)1, Stats., which arose out of a February, 1989 conversation between Principal Sternard and employe O'Keefe, the Examiner made the following Findings of Fact:

> 9. That on or about February 23, 1989, Sternard went to O'Keefe's office to ask her questions concerning prior enrollments in music classes; as Sternard prepared to leave, O'Keefe asked him "What's up?"; Sternard replied "I'm not supposed to talk about it", paused, and then continued "but as long as you've asked, it can't be considered", paused, and then continued "It has to do with the grievance that you've filed with the other part-time teachers"; Sternard then remarked that he felt that O'Keefe was the kind of person who would be standing up for herself and not

6/ WERC v. Evansville, supra, footnote 2/, at pages 151-154.

going along with the union activities; O'Keefe recalls that Sternard appeared to be surprised that she "would have done it"; O'Keefe responded that she had not really heard about the grievance and attempted to "dodge the issue"; O'Keefe then informed Sternard that she felt that they had a good working relationship and that she didn't want anything to destroy it; O'Keefe also told Sternard that she felt that it was a personal issue, that it was not between Sternard and herself, but rather, that it was between the administration and the union, and that she hoped that she and Sternard could have a good relationship; O'Keefe informed Sternard that she had not initiated anything, that it was just something that had happened, and that she had "just sort of got sucked into it"; Sternard responded that relations had become strained at Cedar Grove, that he was not sure who he could trust anymore, and that he sometimes ended up lying because he was not sure who he could talk to or trust; Sternard then spoke about the upcoming complaint hearing, stating that O'Keefe was going to get on the stand and "recriminate" against him; O'Keefe responded "No", that she didn't feel that she would be doing that and that she would be just telling the truth; Sternard then returned the conversation to the subject of grade books and O'Keefe's enrollments; O'Keefe did not feel threatened during the conversation about grade books and enrollments, but did feel threatened when Sternard began referring to the instant complaint proceedings because Sternard's face was red, his veins were sticking out of his neck, and the doors were closed; O'Keefe did not ask Sternard to stop discussing the complaint proceedings, nor did she tell him that she was uncomfortable with the discussion; Sternard considers O'Keefe to be an excellent teacher and a super lady; and that Sternard had not known O'Keefe to lie.

. . .

12. Sternard's comments to O'Keefe, in mid-December, 1988, that "The Union says you have to work an extra hour per week" and Sternard's comments to O'Keefe during the conversation which occurred on or about February 23, 1989, do not contain either a threat of reprisal, nor a promise of benefit, which would tend to interfere with, restrain, or coerce Respondent's employes in the exercise of rights guaranteed by Sec. 111.70(2), Stats.

In her Memorandum, the Examiner concluded her discussion of this allegation with the following analysis:

> Crediting O'Keefe's testimony, the Examiner is persuaded that, approximately one week before hearing in the instant complaint, O'Keefe's immediate supervisor, Sternard, made statements to O'Keefe, at a time when the two were alone in her office, with the doors closed, which indicated that the supervisor was surprised that O'Keefe would participate in the complaint proceedings and indicated that the supervisor was concerned that O'Keefe's statements at hearing would reflect badly upon the supervisor.
>
> By participating in a complaint proceeding before the WERC, O'Keefe is exercising a right guaranteed by Sec. 111.70(2), Stats. While Sternard's comments do not contain an express threat of retaliation for engaging in protected activity, under some circumstances, such statements would have a reasonable tendency to imply such a threat, i.e., a warning that employes who participate in complaint proceedings and testify unfavorably against supervisors will be viewed with disfavor and suffer adverse consequences. The question becomes whether such an implication is warranted herein.
>
> At hearing, O'Keefe and Sternard were in agreement that O'Keefe initiated that portion of the discussion which centered on the complaint proceedings. O'Keefe's testimony demonstrates that, when Sternard finished questioning O'Keefe about her enrollments, he prepared to leave and was stopped by O'Keefe's question "what's up?" Regardless of whether the enrollment

information was intended for use in the instant proceedings, or for the determination of future contracts, the record indicates that Sternard was prepared to leave O'Keefe's room without mentioning the complaint proceedings. Thus, the Examiner is persuaded that Sternard did not seek O'Keefe out for the purpose of discussing the complaint proceedings and that his remarks were not premeditated.

Given O'Keefe's testimony concerning Sternard's red face and bulging neck veins, it is evident that Sternard was exhibiting extreme emotion. It is not evident, however, that Sternard was exhibiting anger or hostility toward O'Keefe. Indeed, it is O'Keefe's testimony that, when Sternard made the statement that he felt that O'Keefe was the kind of person that would be standing up for herself and not going along with union activities, Sternard "just seemed surprised that I would have done it I guess." (Footnote omitted)

According to O'Keefe's testimony, prior to making the statement about recrimination, Sternard talked about general relationships in Cedar Grove, how the atmosphere had become very strained, and that he no longer knew whom he could talk to or trust. The content of the conversation, within the context of Sternard's and O'Keefe's good working relationship, suggests that Sternard's comments to O'Keefe were not threatening, but rather, confiding.

The statements made by Sternard to O'Keefe do not contain either an explicit threat of reprisal for engaging in protected, concerted activity, nor an explicit promise of benefit for refraining from such activity. Construing Sternard's statements within the context of surrounding circumstances, it is not reasonable to construe Sternard's remarks as implying such a threat of reprisal or promise of benefit. Rather, the most reasonable construction of Sternard's remarks is that Sternard was simply venting his frustration and unhappiness about the fact that there was so much controversy between the administration and staff to a member of the staff whom he thought he could trust.

While being exposed to such employer sentiments may, indeed, have a chilling effect upon an employe's willingness to assist a union in general, as well as upon the employe's willingness to support the Union in processing a grievance or complaint, MERA does not protect employes, or unions, from all such effects. It is not unlawful, per se, for an employer to express dissatisfaction, disappointment or unhappiness over the fact that an employe has engaged in protected concerted activity, such as filing grievances or complaints. That is, the employer is not required to continuously wear a happy face. Rather, the prohibition arises when such expressions contain either a threat of reprisal or promise of benefit which would have a reasonable tendency to interfere with, restrain, or coerce municipal employes in the exercise of their rights guaranteed by Sec. 111.70(2), Stats. For the reasons discussed supra, the Examiner is not persuaded that Sternard's statements to O'Keefe contain such a threat of reprisal or promise of benefit.

In reaching this conclusion, the Examiner has given consideration to Gee's testimony concerning a conversation between Gee and Sternard which, according to Gee, occurred in late November, 1988. (Footnote omitted). Gee recalls that, as she was working at her desk, Sternard sat down at her desk and thanked Sternard for "remaining aloof as to what's going on at the school as far as the grievance that Steve had, and the other things that were going on in the school." (Footnote omitted) While Sternard denies making such a statement, the Examiner does not credit this denial. The existence of such a statement does not alter the Examiner's conclusion that Sternard's statements to O'Keefe are not violative of Sec. 111.70(3)(a)1, Stats.

The Association argues that the Examiner correctly found that the supervisory employe made emotional remarks to an employe which communicated: the supervisor's negative view of employes who relied on unions for protection;

his opinion that the employer/union relationship had become so strained that he felt it necessary to lie on occasion; and his concern that the employe would testify at the prohibited practice hearing in a manner critical of him. The Association urges that these remarks were not only clearly coercive, and thus violative of Sec. 111.70(3)(a)1, Stats., but also demonstrate the District's anti-union animus. The Association argues that the Commission should reject the Examiner's subjective analysis of this conversation as being that of a supervisor confiding in an employe with whom he had a good relationship after the employe had "opened the door" for such remarks. Applying the appropriate objective analysis to the conversation, the Association asserts the supervisor's remarks clearly had a reasonable tendency to interfere with, restrain or coerce employes in the exercise of rights under Sec. 111.70(2), Stats., and also demonstrated anti-union animus.

The District contends that Sternard's remarks contained no threat or promise of benefit and reflected his own personal frustrations with the amount of litigation initiated by the Association and the necessary time and resources diverted away from the educational mission of the District to defend such litigation.

While we affirm her Finding of Fact 9, we reverse the Examiner's conclusion that Principal Sternard's remarks to O'Keefe in late February, 1989 were not violative of Sec. 111.70(3)(a)1, Stats. Even in the context of a good working relationship, the cumulative effects of Sternard's comments and his agitated manner, as reflected in Examiner's Finding of Fact 9, had a reasonable tendency to interfere with O'Keefe's willingness to freely participate and truthfully testify in the prohibited practice hearing before the Examiner, as well as with O'Keefe's inclination to be supportive of the Association, both rights the Examiner correctly found to be guaranteed by Sec. 111.70(2) and thus protected by Sec. 111.70(3)(a)1, Stats. Thus, we have found Sternard's remarks violative of Sec. 111.70(3)(a)1, Stats.

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

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

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

To establish that Respondent has engaged in discrimination in violation of Sec. 111.70(3)(a)3, Complainant must prove each of the following factors:

> (1) that employes have engaged in protected, concerted activity;
>
> (2) that the employer was aware of such activity;
>
> (3) that the employer was hostile to such activity; and
>
> (4) that the employer's complained of conduct was motivated at least in part by such hostility. 7/

As to the alleged violation of Sec. 111.70(3)(a)3, Stats. which arose out of the District's decision to increase the workload assignments of employes Gee, Williams and O'Keefe, the Examiner made the following Finding of Fact:

> 11. That Bowden reevaluated the contracts of Gee, Williams and O'Keefe to determine whether there was any merit to Complainant's assertion, contained in the Moore grievance of October 31, 1988, that a female part-time teacher was being compensated for more hours than she was scheduled to work; upon reevaluation of the part-time contracts of Respondent's three female part-time teachers, i.e., Gee, Williams and O'Keefe, Bowden determined that the three were being compensated for more hours than each was scheduled to work; and that, thereafter, Bowden directed Sternard to increase the assignment of each of the three teachers by an amount which Bowden considered necessary to ensure that each teacher was working the hours for which she was being compensated.

In her Memorandum, the Examiner concluded her discussion of this allegation with the following analysis:

> In summary, it is evident that Bowden's decision to reevaluate the part-time contracts of Gee, Williams

7/ Muskego-Norway v. WERB, 35 Wis. 2d 540 (1967).

> and O'Keefe was precipitated by the filing of the Moore grievance. The Examiner, however, is not persuaded that Bowden's conduct involved unlawful retaliation. Rather, the Examiner is persuaded that Bowden's decision was based upon bona fide business concerns, i.e., the need to determine whether there was any merit to an assertion contained in the Moore grievance, i.e., that a female part-time teacher was being compensated for more hours than she was scheduled to work. The Examiner is further persuaded that, following the examination of the part-time contracts, Bowden made a determination that three female part-time teachers, i.e., Williams, Gee and O'Keefe, were being compensated for more hours than they were scheduled to work and, thereafter, decided to assign additional work to each teacher. As with the decision to review the part-time contracts, the decision to increase the assignments of Williams, O'Keefe and Gee was based upon bona fide business concerns.
>
> Contrary to the argument of Complainant, the record does not warrant a finding that Bowden was hostile to the Association or any employe for engaging in protected, concerted activity, nor does it demonstrate that Bowden's decision to increase the work assignments of Gee, Williams and O'Keefe was motivated, in any part, by such hostility. Accordingly, the Examiner finds no violation of Sec. 111.70(3)(a)3, Stats.

As to the increased workload for all part-time staff which followed the Association's filing of the Moore grievance, the Association urges the Commission to conclude that the District was motivated to take said action, in part, by hostility toward the filing of the grievance and thus engaged in discriminatory economic retaliation. The Association argues that the record does not support the District's contention and the Examiner's Finding that the workload adjustments were based on application of a workload formula. Further, the Association contends that even if the Commission concludes that the District's formula existed, the application of the formula following the grievance produced a harsher and thus discriminatory impact on employes than prior formula applications had produced.

Contrary to the District's claim that a desire to avoid a claim of sex discrimination prompted the District to increase the workload of part-time female employes, the Association argues that the District's action was not only prohibited by the Equal Pay Act but also cast the Association in the worst possible light. The Association argues that given the availability of other valid responses which did not denigrate the Association, the District choice of "leveling down" employe pay clearly was based on anti-union animus.

The District asserts the decision to adjust the part-time teaching assignments of Williams, Gee and O'Keefe was made during the course of the District's investigation into Moore's grievance after open discussions with grievant Moore, Association representatives, and the District's own legal counsel. Significantly, the adjustment of the part-time teaching assignments of Williams, Gee and O'Keefe were made after the District had thoroughly investigated the allegations of sex discrimination and unfair treatment contained in the Moore grievance and had increased Moore's teaching contract from 40% to 46% of a full-time position. The adjustment was made in accordance with the District's established practice and authority under the parties' collective bargaining agreement to both determine and adjust part-time teaching assignments. Despite the Association's protests to the contrary, and as clearly found by the Examiner, the District's decision in this regard was motivated by a legitimate concern to avoid a claim of sex discrimination and was not motivated by any hostility toward the Association.

We concur with the Association's assessment that the existence and application of the so-called "work load formula" to the assignments of Gee, Williams and O'Keefe plays a critical role in the disposition of the Sec. 111.70(3)(a)3, Stats. allegation. The Examiner analyzed this facet of the case as follows:

> In a letter dated January 24, 1989, Respondent's attorney advised Complainant that, since August, 1984, initial part-time contracts issued to teachers were calculated in accordance with the above formula. At hearing, Bowden confirmed that, since 1984, initial part-time contracts had been issued to Dill, Moore, Pechacek, and Preston. 8/ In response to questioning

---

8/ The letter of 1/24/89 indicated that there were five teachers who were issued initial contracts in accordance with the formula. At hearing, however, Bowden stated that the reference to the fifth teacher, Williams, was in error.

from Complainant's counsel, Bowden applied the formula to Dill, Pechacek and Preston. 9/ In each case, the application of the formula produced a percentage which was less than the percentage of the contract which had been issued. When questioned regarding this discrepancy, Bowden indicated that she had, in fact, considered factors other than those set forth in the formula.

Bowden recalls that Dill was the only applicant for the position and had indicated that he would not work for less than a thirty-five percent contract. Thus, while the application of the formula produced a thirty-one percent contract, Bowden issued a thirty-five percent contract. Pechacek, who by application of the formula was entitled to a 40% contract, received a 50% contract. According to Bowden, she allowed Pechacek extra prep time because Pechacek was involved in a new "at risk" program, which required the development of new curriculum. Bowden acknowledged that the application of the formula to Preston's work hours would produce a 13% contract. Bowden recalls, however, that she issued a contract at one and one-half the formula product, i.e., 20%, to compensate Preston for the fact that Preston was teaching two subjects during the same period, i.e., Art I and Art II.

As Complainant argues, Respondent's assertion, contained in the letter of January 24, 1989, that the formula had been used to determine the part-time contracts of other part-time employes was offered as a defense to Complainant's allegation that Respondent had engaged in discriminatory conduct in making additional assignments to Gee, Williams and O'Keefe. As Complainant further argues, the assertion that the formula had been used to determine the part-time contracts of other employes was contradicted by Bowden's testimony at hearing, which demonstrated that the application of the formula to each of the other contracts, produced a percentage which was less than the percentage of the contract which had been issued. While Respondent's attempt to justify the additional assignments by an erroneous assertion does support Complainant's argument that Bowden's claimed rationale for the decision to increase the work assignments is pretextual, the record, as a whole, persuades the Examiner otherwise.

Bowden did not seek to evade answering the questions which demonstrated that the contracts were not issued in accordance with the formula contained in the letter of January 24, 1989. Upon consideration of Bowden's demeanor at hearing, and the record as a whole, the Examiner is persuaded that, regardless of the accuracy of the letter of January 24, 1989, Bowden was truthful when she described the process used to determine prior part-time contracts. Crediting Bowden's testimony, the Examiner is persuaded that the formula set forth in the letter of January 24, 1989 had been used by Bowden prior to the point in time that she increased the assignments of Gee, Williams and O'Keefe. The formula, however, served as a base-line guide. As Bowden deemed necessary, she considered factors other than those set forth in the formula. It is not evident that any of the other factors considered by Bowden in previous years are applicable to Gee, Williams or O'Keefe. The fact that Bowden applied the formula to Gee, Bowden and Williams does not demonstrate discriminatory treatment.

To be sure, Principal Sternard was not conversant with the formula. Sternard, however, was not responsible for determining contract percentages, or issuing part-time contracts. Given Bowden's rather autocratic management style, it is not surprising that Sternard was not coversant with the formula. Accordingly, Sternard's ignorance of the formula does not warrant the conclusion that the formula was not in use prior to the instant dispute.

We find her analysis persuasive and have affirmed her Findings of Fact as

---

9/ Bowden was not asked to apply the formula to Moore's initial contract. Moore's 1988-89 contract was grieved. When the grievance was resolved, Moore's contract was adjusted from 40% to 46%. The 46% was derived by using the formula (T. p. 186).

to same. We are satisfied that the work load formula provided the basic structure for the District's response to the Moore grievance and that the District did not apply the formula in a manner influenced by hostility toward the Association.

As to the Association contention that the District's response was violative of the Equal Pay Act, we need not and do not express an opinion as to this assertion. The Association correctly argues that if the District's response is violative of the Equal Pay Act, an inference can be drawn that the District's desire to avoid a sex discrimination claim was a pretext for its action and that the District's true motive was retaliatory. Equally available if the Association's understanding of the Equal Pay Act is correct is an inference that the District was acting on a good faith but erroneous understanding of its obligations under the discrimination law. Critical to acceptance of the inference which the Association asks us to draw from its Equal Pay Act argument is the underlying question of whether the District possessed hostility toward the protected concerted activity of the Associationn or employes. Without persuasive evidence of such hostility, the Association's inference becomes less reasonable than the alternative inference we posed above. We, like the Examiner, have reviewed the record and found no persuasive evidence of hostility toward the protected concerted activity herein. While we acknowledge that the Association's admitted campaign to have Bowden fired can reasonably be seen as producing generic hostility by Bowden toward the Association for said efforts, it does not necessarily follow that her hostility toward those who seek to end her employment will motivate her to retaliate against the Association whenever employes engage in protected concerted activity with the Association's assistance.

Thus, we have affirmed the Examiner's dismissal of this allegation.

Alleged Violations of Sec. 111.70(3)(a)4, Stats.

The Examiner deferred this allegation to grievance arbitration. Thus, she continues to have jurisdiction over same and has made no final decision as to the merits of said allegation. The Association has not asked that we review this portion of the Examiner's decision and we make no determinations herein as to the propriety of this interlocutory Examiner order. Either party has the right to file a petition for review after the Examiner's final resolution of this allegation.

Dated at Madison, Wisconsin this 9th day of May, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

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 Municipal Employment Relations Act, we hereby notify our employes that:

1. We will not interfere with, restrain or coerce District employes in the exercise of their rights guaranteed by Sec. 111.70(2), Stats.

Dated this _____ day of May, 1991.

By _____
for the Cedar Grove-Belgium School District

THIS NOTICE MUST BE POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.