

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL #518, AFSCME, AFL-CIO, BARRON	:	
COUNTY HIGHWAY DEPARTMENT EMPLOYEES,	:	
	:	
Complainant,	:	Case 82
	:	No. 42298 MP-2236
vs.	:	Decision No. 26065-A
	:	
BARRON COUNTY,	:	
	:	
Respondent.	:	
	:	

Appearances:

Mr. James A. Ellingson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 68, Rice Lake, Wisconsin 54868-0068, appearing on behalf of Local #518, AFSCME, AFL-CIO, Barron County Highway Department Employees.

Mulcahy & Wherry, S.C., Attorneys at Law, by Ms. Kathryn J. Prenn, 715 South Barstow Street, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Barron County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Local #518, AFSCME, AFL-CIO, Barron County Highway Department Employees having, on June 1, 1989, filed a complaint with the Wisconsin Employment Relations Commission alleging that Barron County had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2 and 3 of the Municipal Employment Relations Act, herein MERA; and the Commission having, on June 22, 1989, appointed Coleen A. Burns, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats.; and hearing on said complaint having been held in Barron, Wisconsin on July 12, 1989; and the parties having filed briefs which were exchanged on October 9, 1989; and the parties having reserved the right to file reply briefs which right neither party exercised and the record was closed on November 7, 1989; and the Examiner having considered the evidence and the arguments of counsel and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Local #518, AFSCME, AFL-CIO, Barron County Highway Department Employees, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and is the exclusive collective bargaining representative of employes in a bargaining unit consisting of all full-time, regular seasonal and student employes of the Barron County Highway Department but excluding the highway commissioner, patrol superintendent and confidential employes; and that its principal offices are located at 5 Odana Court, Madison, Wisconsin 53719.
2. That Barron County, hereinafter referred to as the County, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and has its offices located at the Barron County Courthouse, 330 E. LaSalle Avenue, Barron, Wisconsin 54812; and that at all times material hereto Walter S. Knutson, the County's Highway Commissioner, and Gene Anderson, the County's Road Superintendent, have acted on behalf of the County.
3. That the Union and the County are parties to a collective bargaining agreement covering the period of January 1, 1989 through December 31, 1989 which provides, in pertinent part, as follows:

Article 11 - Layoff and Rehiring of Laid Off Employees

Section 11.01: When it becomes necessary to reduce the work force, seniority and job qualifications shall be the guide so that an orderly, acceptable process will be followed. Disputes concerning the qualifications, under this article, of employees shall be referred to the grievance procedure, as contained in Article 13 of this Agreement.

Section 11.02: In rehiring persons, seniority and job qualifications shall prevail. The County reserves the right to be the judge of qualifications. Should the Union feel that an employee may have a grievance in connection with the rehiring of a person, the matter shall be referred to the grievance procedure outlined in Article 13.

Section 11.03: Employees laid off under the terms of this article shall be notified of recall by certified mail, return receipt requested, to the last known address of the employee as shown on the County's record. Employees shall then notify the County within twenty (20) calendar days of intent to exercise rehiring rights. Reinstatement shall be made without loss of benefits accrued from prior years service in this County; however, this shall not include insurance. Employees laid off under the terms of this article shall possess recall rights for two (2) years. No benefits shall accrue during the period of layoff.

. . .

Article 26 - Management's Rights

Section 26.01: The County possesses the sole right to operate the County government and all management rights repose in it subject to the pro-visions of this contract and applicable law. These rights include, but are not limited to the following:

- A. To direct all operations of County govern-ment;
- . . .
- E. To relieve employees from their duties for legitimate reasons;
- . . .
- I. To determine methods, means and personnel by which County operations are to be conducted;
- J. To take action which is necessary to carry out the functions of County government in situations of emergency;
- K. To determine the kinds and amounts of services to be performed as pertains to County operations; and the number of positions and kinds of classifications to perform such services;

. . .

The reasonableness of County action taken pursuant to this Article is subject to the grievance procedure.

4. That in March, 1989, Commissioner Knutson after consulting with Road Superintendent Anderson and taking into consideration public criticism for having too many people around and the amount of work available, determined that a layoff was necessary; that the County laid off the nine least senior employes in the Highway Department from April 3, 1989 to May 1, 1989 due to a lack of work in the Highway Department and public criticism for having too many people around; and that no grievance was filed concerning the layoffs.

5. That Highway Commissioner Knutson was on vacation nearly the entire month of February, 1989, returning on March 6, 1989; that while Knutson was on vacation, the Union filed at least one grievance; that Road Superintendent Anderson, who was in charge of the Highway Department while Knutson was on vacation, believed that the Union Stewards had increased their level of activity while Knutson was on vacation in an attempt to drive Anderson crazy;

that Anderson does not consider Michael Brackee to be a good steward and believes that a union steward engaged in improper conduct by asking employes to file grievances when the employes were not interested in filing a grievance; that Anderson worked hard to obtain work for the Highway Department employes; that in early 1989, Anderson assigned employes to paint certain of the County's trucks which was essentially a make work project; that Town Chairman complained to Anderson about the repainting, members of the public wrote letters to local newspapers criticizing the repainting, and, as a result of the public controversy, Anderson was called to a special meeting of the County Highway Committee to explain why he was repainting the trucks; and that Anderson was hostile toward the Union for engaging in protected, concerted activity.

6. That on February 21, 1989, Michael Brackee, an employe in the County Highway Department and a union steward, had a conversation with Superintendent Anderson; that the conversation was general in nature; that Anderson told Brackee that if Brackee, and unidentified others, didn't stop stirring things up, there would be a layoff, that he (Anderson) had worked hard to keep the men working, and that Knutson had given Anderson authority to layoff; and that Anderson also asked Brackee what was going on.

7. That on February 27, 1989, Michael Peterson, a Highway Department employe and Union President, had a meeting with Superintendent Anderson concerning a grievance involving bridge crew pay; that during the meeting Anderson told Peterson that "you guys" had been causing trouble, that Knutson had heard about it, and that Knutson had told Anderson that if the employes didn't straighten up, he was to lay off five now and six more later; that Anderson also stated that he was receiving a lot of heat; that Peterson had heard some of the criticism concerning the painting of trucks; that less than one week prior to this conversation, Anderson and Brackee were discussing bridge crew pay when Anderson "blew up" and yelled words to the effect that "you guys are always complaining"; that when Brackee attempted to explain that the discussion was intended to be the first step in the grievance procedure, Anderson lead Peterson, who had been observing the conversation, to Peterson's beat truck; and that when Peterson asked what Anderson wanted him to do on his beat, Anderson told Peterson to shut-up, get in the truck and go.

8. That on March 17, 1989, Russell Marske, a County Highway Department employe, approached Anderson, indicated there was a rumor circulating concerning layoffs, and asked if he was going to be laid off; that Anderson told him he wouldn't be laid off because there was a two-year difference in seniority between Marske and the next less senior employe; that Anderson indicated that there could be more layoffs, that it was a bad time to rock the boat, and that he was creating work; and that Marske, who was hired on May 14, 1984, was laid off once, from March 4, 1985 to April 16, 1985.

9. That in March, 1989, Richard Dreyer, a County Highway Department employe, had a conversation with Anderson in the old shop in Barron during the course of which Anderson stated that there was probably going to be a layoff if things don't get straightened around; that Dreyer, who did not consider Anderson's statement to be a threat, thanked Anderson for the notice of the layoff; and that at the time of the conversation, Dreyer and a fellow employe, Joe Klingelhoets, were painting trucks.

10. That in the late fall of 1988 or spring of 1989, Anderson approached Joseph Fall, a County Highway Department employe, to discuss a grievance in which Fall was seeking operator pay; that when Fall suggested that they discuss the matter with Mike Brackee, a Union Steward, Anderson indicated that he could not speak to Brackee, but that he could speak with Mike Peterson, the Union President; that Fall understood Anderson to be telling Fall that Anderson had trouble communicating with Brackee; that Anderson also told Fall that may be he should have his own man in there; and that Fall did not feel threatened by this statement and did not suggest to the Union that they get another steward.

11. That after the layoffs had taken place, Superintendent Anderson had a conversation on April 13 or 14, 1989 with Daniel Hoff, one of the employes who had been laid off; that Hoff asked when he would be returning to work; and that Anderson stated that if there wasn't a change in the Union, there would be more layoffs, there was plenty of work out there, it was the Union's griping that caused the layoff in the first place and the layoffs would last a couple more weeks.

12. That Superintendent Anderson had a conversation in April, 1989 with another employe, Joe Klingelhoets, who was on lay-off at the time of the discussion, wherein he indicated that if the Union was not straightened out, he would lay off six more men and that layoffs would occur in November and in ensuing years until the Union was straightened out.

13. That during a subsequent conversation with Klingelhoets, which occurred on an unknown date in 1989, Anderson made a statement that he was going to see that anybody involved in the activities would lose between four and five thousand dollars off their income.

14. That in April, 1989, Richard Dreyer, one of the employes who was

laid off, had a chance meeting with Commissioner Knutson at the bank in Cumberland and asked Knutson how long the layoff would be; and that Knutson responded "it shouldn't be very long, depending on how active they get."

15. That the 1989 road work was nearer to the hot mix plant, than in other years, resulting in the need for fewer men and trucks than in years past; and that the record taken as a whole fails to establish by a clear and satisfactory preponderance of the evidence that there was any reduction in employe overtime which was motivated, in whole or in part, by hostility on the part of the County toward the Union or any employe for engaging in protected concerted activity.

16. That the record taken as a whole fails to establish by a clear and satisfactory preponderance of the evidence that the County's lay off of Highway Department employes was motivated, in whole or in part, by hostility on the part of the County toward the Union or any employe for engaging in protected concerted activity.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the County has not been shown to have committed any prohibited practice within the meaning of Secs. 111.70(3)(a)1, 2 or 3, Stats. by its layoff of Highway Department employes from April 3 to May 1, 1989.

2. That the County, by the statements of Road Superintendent Anderson on February 21, 1989 to Michael Brackee, on February 27, 1989 to Michael Peterson, on April 13 or 14, 1989 to Daniel Hoff and on an unknown date in April, 1989 to Joe Klingelhoets, referred to Findings of Fact 6, 7, 11 and 12, respectively, did interfere with, restrain or coerce employes in the exercise of rights guaranteed in Sec. 111.70(2), Stats., and therefore, the County did violate Sec. 111.70(3)(a)1, Stats.

3. That the County, by the statements of Road Superintendent Anderson on March 17, 1989 to Russell Marske, on an unknown date in March, 1989 to Richard Dreyer, on an unknown date in late fall, 1988 or the spring of 1989 to Joseph Fall, on an unknown date in 1989 to Joe Klingelhoets, referred to in Findings of Fact 8, 9, 10 and 13, respectively, did not interfere with, restrain or coerce employes in the exercise of employe rights guaranteed by Sec. 111.70(2), Stats., and therefore, did not violate Sec. 111.70(3)(a)1, Stats.

4. That Complainant has not demonstrated by a clear and satisfactory preponderance of the evidence that Road Superintendent Anderson has made any statement to David Brodt which is violative of Sec. 111.70(3)(a)1, Stats.

5. That the County, by the statement made by Commissioner Knutson in April, 1989 to Richard Dreyer referred to in Finding of Fact 14, did not interfere with, restrain or coerce employes in the exercise of rights guaranteed in Sec. 111.70(2), Stats., and therefore, did not violate Sec. 111.70(3)(a)1, Stats.

6. That the County has not been shown to have initiated, created, dominated or interfered with the formation or administration of the Union, nor any other labor organization, nor has it been shown to have discriminated in regard to hiring, tenure or other terms of employment to encourage or discourage membership in the Union, or any other labor organization, and therefore, has not violated Secs. 111.70(3)(a)2 or 3, Stats.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 1/

IT IS ORDERED that, Respondent Barron County, its officers and agents, shall immediately:

1. Cease and desist from violating Sec. 111.70(3)(a)1, Stats., by interfering with, restraining or coercing employes in the exercise of their rights guaranteed in Sec. 111.70(2) of the Municipal Employment Relations Act.
2. Take the following affirmative action that the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:
 - (a) Notify all employes in the bargaining unit represented by the Union by posting in con-spicious places on the Highway Department premises where notices to employes are usually posted, copies of the notice attached hereto and marked

Appendix "A" which shall remain posted for sixty (60) days. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by other materials.

- (b) Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days of the date of service of this Order, as to what steps it has taken to comply herewith.

IT IS ALSO ORDERED that with the exception of the violations of Sec. 111.70(3)(a)1, Stats., found in Conclusion of Law 2, the complaint is hereby dismissed in its entirety.

Dated at Madison, Wisconsin this 26th day of January, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Coleen A. Burns, Examiner

(See Footnote 1/ on page 6)

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- 1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

APPENDIX "A"

NOTICE TO ALL HIGHWAY DEPARTMENT EMPLOYEES
REPRESENTED BY LOCAL #518, AFSCME, AFL-CIO

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 the above employes that:

1. WE WILL NOT interfere with the Highway Department employes in the exercise of their rights under Section 111.70(2) of the Municipal Employment Relations Act by making statements which contain a threat of reprisal to employes who engage in protected concerted activity.
2. WE WILL NOT in any other or related matter violate Sec. 111.70(3)(a)1 of the Municipal Employment Relations Act.

Dated this ____ day of _____, 1990.

By _____
Barron County

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

BARRON COUNTY (HIGHWAY DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

BACKGROUND

In its complaint initiating these proceedings and as amended at the hearing, the Union alleged that the County had committed prohibited practices in violation of Secs. 111.70(3)(a)1, 2 and 3, Stats., by the County's layoff of nine employes in April, 1989, by reducing overtime, and by statements made to employes by Highway Commissioner Knutson or Road Superintendent Anderson from February, through April 1989. The County answered the complaint admitting that it laid off nine employes in April, 1989 but alleged that these layoffs were

due to the fact that the work load did not require a full complement of employes. The County denied committing any prohibited practices and sought dismissal of the complaint, as amended.

UNION'S POSITION

The Union contends that Road Superintendent Anderson was insulted when employes did not appreciate his efforts to obtain work for them to avoid layoffs. It submits that the evidence clearly established that Anderson felt threatened by Union grievances or the possibility of Union grievances. It claims that Anderson openly expressed his dislike for the chief steward and that his method of operation was to have one on one talks with individual employes and then make threats of layoffs or a reduction in overtime or some other form of retaliation against perceived Union activities. It maintains that Anderson used threats to get the Union to back off grievance processing and to replace the chief steward with someone less militant. It asserts that Anderson failed to deny many of the statements attributed to him and the County offered no defense to the charges except to attack the witnesses' credibility.

The Union admits its charge against Commissioner Knutson is less clear than those against Anderson but given Anderson's conduct, it claims that it is unlikely that Knutson was unaware of his actions. It alleges that Knutson's statement to Dreyer cannot be misconstrued and Knutson was a willing participant with Anderson in intimidating and coercing Union members. It submits that when Anderson and Knutson failed in their efforts to coerce the Union, they retaliated by reducing overtime, laying off nine employes and threatened further layoffs unless the Union shaped up. It requests that the complaint be sustained and the requested relief be granted.

COUNTY'S POSITION

The County contends that the layoff of the nine employes for the month of April, 1989, was in accordance with the collective bargaining agreement. It points out that no grievance was filed over these layoffs, underscoring the Union's tacit acknowledgement of the County's right to layoff employes. It further notes that its decision to layoff was consistent with the past practice of laying employes off in the spring due to the weather and a lack of work. It claims that in 1989, this past practice was followed and all the layoffs were due to a lack of work because brush cutting had been caught up on, crack filling for the State had been lost, the weather was such that snow plowing was not required and it was too early to start road work or to crush rock. The County asserts it made work for employes by repainting two trucks but layoffs still became inevitable due to a lack of work. Thus, according to the County, the circumstances support the conclusion that the layoffs were consistent with and in accordance with well established past practice and the parties' Agreement.

The County argues that the Union has failed to meet its burden of proving by a clear and satisfactory preponderance of the evidence that the County has committed any prohibited practices. The County contends that a review of the testimony of the Union's witnesses reveals that the Union has failed to meet its burden of proof. It submits that Dreyer's testimony was that Superintendent Anderson told him there would be a layoff and Dreyer thanked him for the notice and he did not believe his being told of the layoff was a threat. It notes that in Dreyer's conversation with Commissioner Knutson at the bank in Cumberland, Dreyer admitted that Commissioner Knutson never referred to the Union but Dreyer surmised he meant the Union. The County claims that Fall's testimony relates to his assignment to a beat or to a Cat operator's position and Fall admitted he had the choice of jobs but asked Superintendent Anderson to speak to Union Steward Brackee and Anderson merely stated he (Anderson) couldn't talk to Brackee.

The County questions the testimony of Russell Marske because Marske could not recall any statement attributed to Superintendent Anderson that the Union was not running the place or that Marske had been laid off in 1985. It submits that Marske's testimony lacks credibility and veracity and should be entirely discounted.

With respect to the testimony of Michael Peterson, the County submits that Peterson and Anderson met on February 27, 1989 to discuss pending grievances and that a problem with bridge crew pay was resolved. It denies that any statement was made by Superintendent Anderson that if the employes didn't shape up, five employes would be laid off with another six to be laid off in the future.

The County seriously questions the testimony of Michael Brackee as to his credibility and veracity. It notes that Brackee admitted that Anderson had worked hard to keep employes busy. It further points out that Brackee's testimony on subcontracting was refuted by Commissioner Knutson who demonstrated that none of the layoffs resulted from any subcontracting on the part of the County.

The County submits that Klingelhoets' testimony downplaying Anderson's role in his getting employed and his reluctant admission that Anderson would try to keep employes on the payroll if he could, as well as the improbability

of layoffs in November about which Klingelhoets testified Anderson had threatened, make his testimony not credible.

The County questions the entire testimony of Davit Brodt based on his demeanor and the non-responsive, disjointed and combative nature of his testimony. As to Daniel Hoff, the County notes that Hoff testified he does not have much of a problem with Superintendent Anderson, that Anderson tries to keep employes busy and keeps them at higher pay rates even when working at lower-pay jobs.

The County contends that there was no evidence of anti-union animus toward any of the laid off employes noting that six of the nine did not testify and there was no showing that "lack of work" was a pretext for the layoffs. It submits that the timing of the layoffs was consistent with past practice and there was nothing unusual about the 1, 1989 layoff decision. It asserts that none of the known "union activists" were impacted by the layoff and there was no evidence of discrimination and no violation of Sec. 111.70(3)(a)3, Stats., as there was no proof the County intended to encourage or discourage membership in the Union.

The County insists there was no violation of Sec. 111.70(3)(a)1, Stats., because the evidence failed to show that any statement contained a threat of reprisal or promise of benefit which would tend to interfere with employe's protected rights. The remarks as well as the circumstances under which they were made, according to the County, contained no express or implied threats.

The County claims that it did not violate Sec. 111.70(3)(a)2, Stats, because proof of a violation requires a showing of "domination," i.e., active involvement in creating or supporting a labor organization, which was not done in this case. The County requests that the complaint be dismissed in its entirety.

DISCUSSION

Interference - Sec. 111.70(3)(a)1, Stats.

Section 111.70(3)(a)1, Stats., provides that it is a prohibited practice for a municipal employer: "To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2)." In order for the Union to prevail in its complaint of interference with employe rights, it must demonstrate by a clear and satisfactory preponderance of the evidence that the County's complained of conduct contained either some threat of reprisal or promise of benefit which would tend to interfere with employes' exercise of rights guaranteed by MERA. 2/ It is not necessary to prove that the County intended to interfere with or coerce employes or that there was actual interference. 3/ Interference may be proven by showing that the County's conduct had a reasonable tendency to interfere with the employe's right to exercise his/her MERA rights. 4/ In each case, the conduct as well as the circumstances surrounding the conduct must be considered in determining the meaning which an employe would reasonably place on the conduct. 5/ The conduct must relate to the exercise of some MERA right, otherwise it does not violate the provisions of MERA. 6/

Richard Dreyer testified that he had a conversation with Superintendent Anderson at the old shop in Barron during the course of which Anderson said that there was "probably going to be a layoff if things don't get straightened around." 7/ Dreyer thought that the phrase "if things don't get straightened around" was a reference to the Union because Dreyer believed that, at the time of the conversation, Anderson was not getting along with the Union and that there were some bad feelings between Anderson and the Union. 8/ Dreyer recalls that he thanked Anderson for the advance notice of the layoff and that he did not consider Anderson's statement to be a threat. 9/ According to Dreyer, he thought Anderson was "just telling me that there was going to be a lay-

2/ Barron County, Dec. No. 23391-A (Burns, 7/87) aff'd by operation of law Dec. No. 23391-B (WERC, 8/87); City of Brookfield, Dec. No. 19367-A (Shaw, 11/82), aff'd Dec. No. 19367-B (WERC, 12/83).

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

4/ City of Brookfield, Dec. No. 20691-A (WERC, 2/84).

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

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

7/ TR-8.

8/ Id.

9/ TR-10-11.

off." 10/ When asked whether he understood that the lay-off was due to lack of work, Dreyer responded "No, there was something that I wasn't familiar with going on." 11/

Anderson's account of the conversation varies from that of Dreyer. Anderson recalls that, at the time of the conversation, Dreyer was in the old shop and that Dreyer and Joe Klingelhoets were painting trucks. 12/ According to Anderson, he told Dreyer "I'm catching so much heat on painting these trucks" and that "you better plan on maybe a lay-off because I can't be creating this work." 13/ Anderson recalls that Dreyer thanked him for the notice of the lay-off. 14/

While Anderson did not confirm that he made the statement attributed to him by Dreyer, neither did he deny making the statement. Upon consideration of Dreyer's demeanor at hearing, as well as the record as a whole, the Examiner is persuaded that Anderson did make the statement attributed to him by Dreyer. The question then becomes whether the statement is violative of Sec. 111.70(3)(a)1, Stats.

It is not evident that at the time of the conversation, approximately three weeks prior to the April layoff, Dreyer was active in Union affairs, or had engaged in any protected, concerted activity. Nor is it evident that the conversation between Anderson and Dreyer involved any discussion of the Union or union activity. Construing the remarks attributed to Anderson by Dreyer in light of surrounding circumstances, it must be concluded that the remarks are too equivocal to reasonably give rise to the inference that Anderson was making any reference to the Union, union activity, or any other protected, concerted activity.

Neither the remarks attributed to Anderson by Dreyer, nor the remarks Anderson recalls making, contain an express threat of reprisal or promise of benefit which would tend to interfere with employe's exercise of MERA rights. Nor, given the circumstances presented herein, would it be reasonable to construe the remarks as implying such a threat of reprisal or promise of benefit. The remarks are not violative of Sec. 111.70(3)(a)1, Stats.

Dreyer also testified to a conversation which he had with Commissioner Knutson at a bank in Cumberland in April, 1989. Dreyer recalls that he asked Knutson about the length of the layoff and that Knutson responded "well, it shouldn't be very long, depending on how active they get." 15/ Dreyer surmised that Knutson was referring to the Union because, at the time, "things were being said back and forth." 16/ While Knutson could not recall making such a statement, the Examiner credits Dreyer's testimony that such a statement was made.

The meeting between Dreyer and Knutson was happenstance. It is not evident that their conversation involved any discussion of the Union, or any Union activity. Construing Knutson's remark in light of surrounding circumstances, it is not reasonable to infer that Knutson was referring to the Union, or any protected, concerted activity. Rather, it is likely that Knutson was referring to employe work activity, i.e., indicating that as the work activity increased, layoffs would end.

Complainant's argument that Knutson's statement is violative of Sec. 111.70(3)(a)1 relies upon surmise and conjecture. The record fails to establish, by a clear and satisfactory preponderance of the evidence, that Knutson's statement to Dreyer contains any threat of reprisal or promise of benefit which would tend to interfere with employes' exercise of MERA rights.

In the late fall of 1988 or spring of 1989, Anderson approached Joseph Fall to discuss a grievance in which Fall was seeking operator pay. 17/ Fall recalls that when he suggested that they discuss the grievance with Mike Brackee, a union steward, Anderson stated that he could not speak to Brackee, but that he could discuss the matter with Mike Peterson, the Union President. 18/ Fall understood Anderson to be telling Fall that Anderson had trouble

10/ Tr-11.

11/ Id.

12/ TR-177.

13/ Id.

14/ Id.

15/ T. p. 9.

16/ Id.

17/ TR-18.

18/ TR-19.

communicating with Brackee. 19/ When asked by Respondent's counsel whether it was true that Anderson did not indicate that the employees should get a different steward, Fall replied that Anderson said "maybe you should have your own man in there." 20/ Fall stated that he did not feel threatened by this statement and did not respond to this statement by suggesting to the Union that they get another steward. 21/ According to Fall, it was not his place to worry about the steward, because the steward was selected by the union committee. 22/

As Anderson recalls the conversation, he told Fall that it was a waste of time to discuss the matter with Brackee and that Brackee was not a good man for a steward. 23/ Anderson denies that he made any statement indicating that the Union ought to elect somebody else steward. 24/

While Fall and Anderson do not have exactly the same recollection of the conversation, both agree that Anderson indicated that Anderson could not discuss the matter with Brackee. Fall understood Anderson to be saying that Anderson had trouble communicating with Brackee. There is no reason to conclude that Fall's understanding is incorrect. Anderson's statement, i.e. that he could not talk to Brackee, does not contain a promise of benefit or a threat of reprisal which would tend to interfere with employees' exercise of MERA rights.

It is evident from Anderson's testimony at hearing that Anderson does not consider Brackee to be a good steward. Thus, it is likely that Anderson would have made a statement suggesting that Brackee be replaced. The Examiner credits Fall's testimony that Anderson said "Maybe you should have your own man in there."

Just as employees have a protected right to express their opinions to their employers, so also do public sector employers enjoy a protected right of free speech. 25/ Recognizing that labor relations policy is best served by an uninhibited, robust and wide-open debate, the Commission has found that neither inaccurate employer statements, nor employer statements critical of the employees' bargaining representative, even those which may reasonably give rise to the inference that the employee's bargaining representative has acted improperly or irresponsibly, that it does not represent the views of the employee, or that its bargaining positions may not benefit its membership, are violative of Sec. 111.70(3)(a)1, per se. 26/ The test is whether such statements, construed in light of surrounding circumstances, express or imply threats of reprisal or promises of benefits which would reasonably tend to interfere with, restrain, or coerce municipal employees in the exercise of rights guaranteed by Sec. 111.70(2), Stats. 27/

Anderson's remarks to Fall were critical of a union steward and contained a suggestion that the union steward should be replaced. However, construing Anderson's remarks in light of surrounding circumstances, the remarks do not express, or imply, either a threat of reprisal or a promise of benefit for replacing, or failing to replace, Brackee as steward. The Examiner is not persuaded that Anderson's statements to Fall contain either a threat of reprisal, or a promise of benefit, which would reasonably tend to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Sec. 111.70(2), Stats.

Russell Marske described a conversation which occurred on or about March 17, 1989. According to Marske, he had heard a rumor that there would be layoffs and asked Anderson if he would be laid off. 28/ Anderson responded that Marske would not be laid-off. Marske recalls that Anderson made the

19/ TR-22.

20/ TR-23.

21/ Id.

22/ Id.

23/ TR-172.

24/ TR-174-5.

25/ Ashwaubenon School District No. 1, Dec. No. 14774-A (WERC, 10/77).

26/ See generally: Janesville School District, Dec. No. 8791-A (WERC, 3/69); Lisbon-Pewaukee Jt. School District No. 2, Dec. No. 14691-A (Malamud, 6/76); Drummond Joint School District No. 1, Dec. No. 15909-A (Davis, 3/78); and Brown County (Sheriff-Traffic Department), Dec. No. 17258-A (Houlihan, 8/80).

27/ Id.

28/ TR-27.

statement that "if the Union was going to give him anymore trouble or whatever, that six more of you would be laid-off," one of whom would be Marske. 29/

Anderson did not deny that he indicated that there could be more layoffs, but did deny that he used the work "six." 30/ As Anderson recalls the conversation, he said "It's a bad time to rock the boat. I'm creating work." 31/ Rightly or wrongly, Anderson believed that employes had publicized the truck painting, thereby generating public criticism of his attempts to create work. 32/ According to Anderson, "rocking the boat" meant that employes should not be publicizing his make work efforts because it made it difficult to continue to create work. 33/

The most reasonable interpretation of the remark attributed to Anderson by Marske is that if the Union engages in protected, concerted activity, employes will be laid-off. Thus, the statement attributed to Anderson by Marske does contain a threat of reprisal which would tend to interfere with employes' exercise of MERA rights. At issue is whether Anderson made such a remark.

The record demonstrates that Marske, who was hired on May 14, 1984, was laid off once, for a period of six weeks in March and April of 1985. 34/ When counsel for Respondent asked Marske if he had been laid off by the Respondent. Marske responded "Not that I can recall I did." 35/ When counsel for Respondent clarified the question by asking if Marske had been laid off for six weeks in 1985, Marske responded "I don't recall, I really don't." 36/ When counsel for Respondent asked whether the Grievant's layoff would have been due to lack of work, Marske responded "I wish I could remember." 37/

Respondent argues that Marske's inability to recall a single layoff, of six weeks duration, raises a serious question as to Marske's ability to accurately recall prior events. The Examiner agrees. Marske's reliability as a witness is also brought into question by the nature of his response when questioned as to what Anderson said during their conversation. Marske responded: "Well, the statement was that if he -- if the union was going to give him anymore trouble or whatever, that six more of you would be laid off, I would be included in that six." 38/ The Examiner considers Marske's use of the term "or whatever" to be an indication that Marske was not certain about the content of Anderson's statement. Considering Marske's demeanor at hearing, as well as his testimony at hearing, the Examiner is not persuaded that Marske has an accurate recollection of the conversation with Anderson. Accordingly, the Examiner has not credited Marske's testimony concerning the content of Anderson's remarks during their conversation.

Crediting Anderson's testimony, and considering the fact that Anderson did not deny that he mentioned future layoffs, the Examiner is persuaded that Anderson made a statement which linked future layoffs and "rocking the boat."

Prior to the April layoffs, there had been union activity which was viewed with disfavor by Anderson. 39/ It is not evident, however, that Marske was a union representative or activist or that Marske had filed any grievances or complaints. Protected, concerted activity was not the topic of the discussion between Marske and Anderson. Rather, the purpose of the conversation, which was initiated by Marske, was to find out if there was truth to the rumor that Marske would be laid-off. Given these circumstances, it is not reasonable to infer that Anderson's reference to "rocking the boat" was a reference to union activity, or any protected, concerted activity. Given the truck painting controversy, it is not unlikely that Anderson was telling Marske what could occur when make work became subject to criticism by the general public. Complainant has not shown, by a clear and satisfactory preponderance

29/ TR-28.

30/ TR-157.

31/ Id.

32/ Id.

33/ Id.

34/ County Ex. #1.

35/ TR-29.

36/ Id.

37/ TR-30.

38/ TR-28.

39/ TR-161-162.

of the evidence that Anderson made any statement to Marske which contained a threat of reprisal or a promise of benefit which would tend to interfere with employes' exercise of MERA rights. Accordingly, the Examiner has not found Anderson's remarks to Marske to be violative of Sec. 111.70(3)(a)1, Stats.

Michael Peterson, Union President, testified that on February 27, 1989, he and Anderson had a discussion on a grievance concerning bridge crew pay. Peterson stated that during the course of this discussion, Anderson told Peterson that "you guys had been causing trouble," that Walt (Knutson) had heard about it, and that Walt had told Anderson that if the employes didn't straighten up, five employes would be laid off now and six more later. 40/ Peterson recalls that Anderson stated that he had been receiving a lot of heat about the complaints that were there. 41/ Peterson stated that he did not believe that these complaints involved criticisms for having people work at a time when there was insufficient work. 42/ In his later testimony, Peterson acknowledged that Anderson was keeping everyone busy, that Anderson had been criticized for having employes paint a fairly new truck, and that Peterson had heard some of this criticism. 43/

Peterson also recalled that less than one week before the February 27, 1989 conversation, Anderson and Brackee were discussing the bridge crew pay when Anderson "blew up" and hollered words to the effect that "you guys are always complaining." 44/ Peterson recalled that when Brackee tried to explain that the discussion was intended to be the first step in the grievance procedure, Anderson lead Peterson, who had been observing the conversation, out to Peterson's beat truck. 45/ When Peterson asked what Anderson wanted him to do on his beat, Anderson told Peterson to shut-up, get in the truck and go. 46/

While Anderson did not expressly deny making the statements attributed to him by Peterson on February 27, 1989, Anderson's account of the conversation varies from that of Peterson. As Anderson recalls the conversation with Peterson, he asked Peterson "Can't we quiet things down," "I'm getting heat from the Cumberland bunch, 47/ and I'm getting heat from Town Chairman for creating work," "This is a bad time of the year." 48/

The Examiner finds Peterson's testimony to be credible. Giving consideration to the fact that Anderson was addressing a union officer, during a meeting on a grievance, within one week of another meeting in which Anderson evidenced anger because the stewards were "complaining," it would be reasonable for Anderson to construe the remarks attributed to Anderson by Peterson as indicating that the union stewards had been causing trouble by engaging in protected, concerted activity such as filing grievances and that if the stewards and other employes did not stop such activity, employes would be laid off. Construing the remarks attributed to Anderson by Peterson, in light of surrounding circumstances, the remarks imply a threat of reprisal which would reasonably tend to interfere with, restrain or coerce municipal employes in the exercise of rights guaranteed by Sec. 111.70(2), Stats. Accordingly, the Examiner has found Anderson's remarks to Peterson to be violative of Sec. 111.70(3)(a)1, Stats.

Considering the record as a whole, the Examiner is not persuaded that, in fact, Anderson intended to link the threat of layoff to the filing of grievances, or any other protected, concerted activity. It is likely, as Anderson claims, that Anderson was telling Peterson that the employes were not doing themselves a favor by publishing Department activities because public scrutiny would make it difficult to continue to create work and, without work, there would be layoffs. Thus, it is conceivable that Anderson was not linking layoff to employe or union complaints, but rather to the aftermath of such complaints, i.e., public criticism of the Department's make-work activity. However, the fact that Anderson may not have intended the construction which has resulted in the finding of interference does not preclude the finding of interference.

40/ TR-33-34.

41/ TR-35.

42/ TR-36.

43/ TR-38.

44/ TR-36, 39.

45/ Id.

46/ TR-36.

47/ TR-161.

48/ Id.

Michael Brackee, Union Steward, related a conversation which he had with Anderson on February 21, 1989. According to Brackee, Anderson indicated that if "we" didn't stop stirring things up, that there would be a layoff, that he worked hard to keep the men working, and that, according to Knutson, Anderson had the authority to decide whether or not to lay-off. 49/ It is clear that when Brackee used the term "we," that he was referring not only to himself, but also to others. The "others," however, are not identified. Thus, it is not clear whether Anderson was referring to employees in general, union stewards, or some other individuals.

While Anderson did not expressly deny making the statements attributed to him by Brackee, his account of the conversation differs from that of Brackee. Anderson recalls that he asked Brackee "what do you want Mike?" "What do you want us to do? Is there anything we can do to solve these problems?" 50/ Anderson recalls that Brackee responded "We want to be recognized." 51/

Brackee agrees that Anderson asked him something to the effect to "Now what's the problem, Mike? What's going on?" 52/ Brackee denies that he responded by stating that "we want to be recognized" and believes that he did not make any response. 53/

As Anderson's testimony reveals, he believed that, as soon as Knutson had left on vacation, the stewards were filing grievances and complaining constantly. 54/ According to Anderson, there were more complaints and grievances than normal, 55/ the stewards "were really pushing" 56/ and he heard reports that the Union was going to drive him "crazy" while Knutson was gone. 57/ According to Anderson, half of the complaints and grievances did not make sense. 58/ The complaints referred to by Anderson involved complaints about tearing down the shed in Cumberland and the make-work truck painting. 59/ Given these concerns, as well as the evidence that Anderson had been working hard to keep the men working, it is not inherently incredible that Anderson would make the remarks attributed to him by Brackee. When asked whether he made any statement to Brackee about lay-offs, Anderson responded "I say very little to Mike Brackee. I'm very careful around Mike." 60/ The undersigned does not consider this to be a denial that he mentioned layoffs. Upon consideration of Brackee's demeanor at hearing, Anderson's failure to expressly deny that he made the statements attributed to Brackee, and the likelihood that Anderson would make such statements, the Examiner credits Brackee's testimony concerning the content of Anderson's statements.

To be sure, Brackee does not claim and the record does not warrant a finding that Anderson expressly linked the threat of lay-off to protected, concerted activity. However, given the fact that Anderson was addressing a union steward, one may reasonably interpret "stirring things up" to be a reference to union activity, such as filing grievances. Construing Anderson's remarks in light of surrounding circumstances, the remarks reasonably imply that if Brackee, engages in protected, concerted activity, then there will be lay-offs. Regardless of Anderson's intent in making such remarks, the remarks imply a threat of reprisal which would reasonably tend to interfere with an employe's right to exercise the rights guaranteed by Sec. 111.70(2), Stats. Therefore, the remarks are violative of Sec. 111.70(3)(a)(1), Stats.

According to Joe Klingelhoets, he and Anderson had a conversation concerning the union which occurred in April, 1989, while Klingelhoets was on layoff. As Klingelhoets recalls the conversation, Anderson was talking about problems with the Union and said "If you fuckers don't get this union

49/ TR-47.

50/ TR-162.

51/ Id.

52/ TR-50.

53/ Id.

54/ TR-161.

55/ Id.

56/ TR-162.

57/ TR-164.

58/ TR-194.

59/ Id.

60/ TR-162.

straightened out, I'm going to lay six more men off." 61/ Klingelhoets recalls that Anderson indicated that the lay-offs would occur in November and in ensuing years "until we get this union straightened out." 62/ Klingelhoets also recalled a second conversation with Anderson which occurred later, apparently after the employees had been recalled from layoff, when Anderson said that he was going to see to it that anybody involved in the activities would lose between four and five thousand dollars off of their income. 63/ Klingelhoets understood Anderson to be referring to loss of overtime monies. 64/

When first questioned concerning the conversation with Klingelhoets, Anderson declined to discuss the conversation, maintaining that each had agreed that the conversation would be off of the record. 65/ In later testimony, Anderson denied that he had ever sworn at an employe and denied that he had threatened a November lay-off. 66/ Anderson could not recall making any of the other statements attributed to him by Klingelhoets. 67/

The fact that a conversation may have been "off-the-record" does not preclude the Examiner from considering whether the conversation gives rise to a violation of MERA. Anderson denies that he swore at Klingelhoets or that he mentioned a November layoff. Since Klingelhoets' other testimony stands unrebutted and is not inherently incredible, it has been credited herein. A statement indicating that layoffs would occur unless the Union "straightened out," contains a threat of reprisal which would reasonably tend to interfere with an employe's right to exercise the rights guaranteed by Sec. 111.70(2), Stats. By making such a statement, Anderson has violated Sec. 111.70(3)(a)1, Stats.

While the Examiner has credited Klingelhoets' testimony concerning the second conversation, both the statements attributed to Anderson and the evidence of the circumstances surrounding these statements are too vague to warrant a finding that the "activities" referred to by Anderson are union activities, or any other protected, concerted activity. The record fails to demonstrate by a clear and satisfactory preponderance of the evidence that Anderson's comments during the second conversation with Klingelhoets are violative of Sec. 111.70(3)(a)1, Stats.

Upon consideration of David Brodt's demeanor at hearing, his inability or unwillingness to be responsive to many of the questions he was asked during hearing, and his evident hostility towards Anderson, the Examiner does not consider Brodt to be a reliable witness and has not credited David Brodt's testimony. The record fails to demonstrate by a clear and satisfactory preponderance of the evidence that Anderson has made any comment to David Brodt which is violative of Sec. 111.70(3)(a)1, Stats.

Daniel Hoff testified that he had a conversation with Anderson on either April 13 or April 14, 1989. Hoff recalls that he was on lay-off and had gone to the shop to find out when he would be recalled to work. 68/ Hoff further recalls that Anderson stated that he had plenty of work out there, that the Union's griping was the reason for the lay-off, and that if there wasn't a change in the Union, there would be six more lay-offs. 69/

Anderson did not deny making the statements attributed to him by Hoff. The statements attributed to Anderson by Hoff are not inherently incredible and there is no basis to conclude that Hoff is not a reliable witness. Crediting Hoff's testimony, the Examiner is persuaded that Anderson made a statement which indicated that there would be a lay-off unless there was a change in the union. Such a statement contains a threat of reprisal which would reasonably tend to interfere with the exercise of employe rights guaranteed by Sec. 111.70(2), Stats., and, thus, is violative of Sec. 111.70(3)(a)1, Stats.

Domination - Section 111.70(3)(a)2, Stats.

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- 61/ TR-66.
 - 62/ TR-66-67.
 - 63/ TR-67.
 - 64/ Id.
 - 65/ TR-167-168.
 - 66/ TR-179.
 - 67/ TR-179.
 - 68/ TR-103.
 - 69/ TR-101-102.

It is a prohibited practice for a municipal employer individually or in concert with others to initiate, create, dominate or interfere with the formation or administration of any labor or employe organization or contribute financial support to it. To violate this provision, there must be active involvement of a magnitude which threatens the independence of the labor organization as the representative of employe interest. 70/ The level of interference occasioned by Anderson's remarks is fully addressed in the Sec. 111.70(3)(a)1 violations found above, and does not rise to the level of interference required to establish a violation of Sec. 111.70(3)(a)2. Nor is it evident that the County engaged in any other conduct violative of Sec. 111.70(3)(a)2, Stats.

Discrimination - Section 111.70(3)(a)3, Stats.

Section 111.70(3)(a)3 provides:

. . .

It is a prohibited practice for a municipal employer individually or in concert with others: To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment.

. . .

In order to prevail on its complaint alleging a violation of this subsection, the Union must prove that:

- 1)The employes were engaged in lawful and concerted activities protected by the Municipal Employment Relations Act; and
- 2)The employer had knowledge of those activities; and
- 3)The employer was hostile toward those activities; and
- 4)The employer's action was based, at least in part, on hostility toward those activities. 71/

Complainant alleges that Respondent has laid off employes and denied employes overtime opportunities because the Union and employes have engaged in protected, concerted activity.

Highway Commissioner Knutson was on vacation nearly the entire month of February, returning on March 6, 1989. While he was away, the Union filed at least one grievance with Road Superintendent Anderson, i.e., concerning the bridge tenders pay. Anderson, who was in charge of the Highway Department while Knutson was on vacation, believed that the Union Stewards were "really pushing" while Knutson was gone and had increased their level of activity in order to drive Anderson crazy. 72/ Anderson also believed that one steward was engaging in improper conduct by asking employes to file grievances when the employes were not interested in filing grievances. 73/ Anderson's testimony provides a sufficient basis to warrant a finding that Anderson was hostile toward the Union for engaging in protected, concerted activity.

In summary, the record demonstrates that prior to the April, 1989 layoffs, the Union was engaged in lawful and concerted activities protected by MERA. The record further demonstrates that Respondent's agent, Anderson, had knowledge of these activities and was hostile toward these activities. Anderson, however, did not make the decision to layoff employes in April, 1989.

Rather, the decision was made by Knutson. Neither the evidence of Knutson's conversation with Dreyer, discussed *supra*, nor any other record evidence demonstrates that Knutson was hostile toward the Union, or any employe, for engaging in protected, concerted activity. To be sure, Knutson consulted with Anderson prior to making the decision to layoff. It is not evident, however, that Anderson's hostility toward the Union was a factor in the decision to layoff. Knutson maintains that the decision to layoff was governed by two factors, i.e., lack of work and public criticism for having too many people around. 74/ The record does not demonstrate otherwise.

70/ Barron County, Dec. No. 23391-A (Burns 7/87) aff'd by operation of Law, Dec. No. 23391-B (WERC, 8/87).

71/ Cedar Grove-Belgium Area School District, Dec. No. 25849-A (Burns, 12/89).

72/ TR-161-162; 164.

73/ TR-192-193.

74/ TR-119.

In reaching this conclusion, the Examiner has considered the statements which Anderson made to employees prior to, during and after the layoff. As discussed supra, Anderson mentioned lay-offs in conversations with Brackee, Peterson, Marske, and Dreyer. Anderson, however, did not explicitly mention the Union, union activity, or any protected, concerted activity during these conversations. Rather, Anderson indicated that lay-offs would or could occur if Brackee, and unidentified others, didn't "stop stirring things up"; if the employe's "didn't straighten up"; if employes "rocked the boat," and "if things don't get straightened around." As discussed supra, the Examiner is satisfied that some of these statements made by Anderson, construed in light of surrounding circumstances, reasonably imply a threat of retaliation, i.e., lay-off, for engaging in protected, concerted activity. Thus, the Examiner has found some of Anderson's statements to be violative of Sec. 111.70(3)(a)1, Stats. However, given the evidence of the public criticism surrounding Anderson's attempts to create work, i.e., the truck painting, and Anderson's belief that this public criticism was generated by employe complaints, it is likely that Anderson was indicating that if the employes didn't stop generating public criticism of Highway Department activities, the public criticism would result in lay-offs. While the employe complaints to the public may be protected, concerted activity, the public criticism engendered by the complaints, i.e., that there are too many employes for the available work, is not. The reference to "things getting straightened around" could be a reference to a need to have an increase in available work, or better weather conditions. Construing these statements made by Anderson in light of all the record evidence, the Examiner is not persuaded that Anderson made any statement which demonstrates that the County's decision to layoff employes was due, in any part, by hostility towards the Union or any employe for engaging in protected, concerted activity.

Anderson's statements to Hoff and Klingelhoets are more troublesome. Each conversation occurred during the April, 1989 lay-off. Anderson told Hoff that the Union's griping caused the lay-off in the first place and that there was plenty of work. Anderson told Klingelhoets that if the Union was not straightened out, there would be more lay-offs until the Union straightened out. While these statements of Anderson give rise to the inference that the decision to lay-off was motivated, at least in part, by hostility towards the Union for engaging in protected, concerted activity, the Examiner considers the inference to be rebutted by the other record evidence. Upon consideration of the record as a whole, the Examiner is persuaded that Knutson's testimony, i.e., that the lay-offs were motivated by lack of work and public criticism for having too many people around, is entitled to be credited herein.

Union Steward Brackee and other Union witnesses apparently believe that Respondent's claim of lack of work is subject to attack because the County had contracted out work which could be performed by bargaining unit personnel. Assuming arguendo, that the County did contract out work which could be performed by bargaining unit personnel, such a fact would not persuade the Examiner that Knutson's claim of lack of work is unfounded. Since work which is contracted out is not available to bargaining unit personnel, it, ipso facto, results in less work for bargaining unit employes. It not being evident that Respondent's decision to let contracts was motivated, in any part, by hostility toward the Union, or any employe, for engaging in protected, concerted activity, it is immaterial to the determination of the instant dispute whether or not the contracting was responsible for the lack of work. 75/

The evidence fails to establish by a clear and satisfactory preponderance of the evidence that the layoffs were based even in part on hostility toward concerted activities protected by MERA. Respondent argues and the evidence establishes that the layoffs were due to public criticism for having too many people around and to a lack of work. The evidence indicates that Anderson sought to keep employes working to avoid layoffs by the painting of the trucks but he was criticized by the public, and in turn, the County Supervisors were made aware that there was a lack of work in the Highway Department. 76/ The evidence of poor weather conditions, 77/ the lack of crack filling 78/ and brush cutting, 79/ as well as it being too early to start crushing, 80/ all support Respondent's contention that the layoffs were due to a lack of work.

75/ The issue of whether such contracting out of work is violative of the parties' collective bargaining agreement is not before the Commission.

76/ TR-119, 152, County Ex-2.

77/ TR-155.

78/ TR-120.

79/ TR-154.

80/ TR-155.

The record fails to demonstrate that there was any decrease in overtime which was based in whole, or in part, by hostility toward the Union, or any employe for engaging in protected, concerted activity. Rather, the record demonstrates that any decrease in overtime was due to legitimate business reasons such as the fact that the road work was nearer to the hot mix plant, resulting in the need for fewer men and trucks than in years past. 81/

Conclusion

Based on the above and the record as a whole, the Examiner has found no violation of Secs. 111.70(3)(a)2 and 3, Stats. by the County, and therefore, has dismissed those portions of the complaint, as amended, alleging a violation of those sections. The Examiner has found that the County, by Anderson's statements to Klingelhoets, Peterson, Hoff, and Brackee to have violated Sec. 111.70(3)(a)1 of MERA and has ordered appropriate remedial action.

Dated at Madison, Wisconsin this 26th day of January, 1990.

By _____
Coleen A. Burns, Examiner

81/ TR-187-188.