STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 2085, AFSCME, AFL-CIO, Complainant, vs. RICHLAND COUNTY (SHERIFF'S DEPARTMENT), Respondent.	Case 75 No. 43463 MP-2311 Decision No. 26352-A

Appearances:
Mr. Laurence Rodenstein, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719, appearing on behalf of the Complainant.
Mr. Benjamin Southwick, Corporation Counsel, 130 West Court Street, Richland Center, Wisconsin 53581, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Local 2085, AFSCME, AFL-CIO, having on January 9, 1990, filed a complaint with the Wisconsin Employment Relations Commission alleging that Richland County had violated Secs. 111.70(3)(a) 1 and 3, Stats., by carrying out retaliation against Local 2085 and threatening future retaliation against a bargaining unit employe for engaging in any future protected concerted activity; and the Commission having appointed Mary Jo Schiavoni, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in this matter as provided in Sec. 111.07(5), Stats.; and hearing on said complaint having been held on May 10, 1990, in Richland Center, Wisconsin; and the transcript having been received on May 14, 1990; and the parties having completed their briefing schedule on June 8, 1990; and the Examiner, having considered the evidence and arguments of the parties and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainant, Local 2085, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization and the exclusive bargaining representative for certain of the County's employes in a unit consisting of employes of the Richland County Sheriff Department, including deputy sheriffs, investigators, radio operators and office clericals but excluding confidential employes, the sheriff and chief deputy sheriff of Richland County; and that the Union's principle place of business is 5 Odana Court, Madison, Wisconsin 53719.

2. That Respondent Richland County, hereinafter referred to as the County, is a municipal employer with its offices located at 181 W. Seminary, Richland County Courthouse, Richland Center, Wisconsin 53581; and that the County's principle representatives and agents at all times material hereto, are Sheriff Frederick Schram and Chief Deputy Thomas Hougan.

3. That at all times material hereto the Union and the County have been parties to a series of collective bargaining agreements, the most recent covering the period of 1989-90; that said agreement contains the following provisions:

ARTICLE IV - MANAGEMENT RIGHTS

> 4.01 The Employer shall have the sole and exclusive right to determine the number of employees to be employed, the duties of each of these employees, the nature, hours and place of their work, and all other matters pertaining to the management and operation of Richland County and Richland County Sheriff Department, including the hiring and promotion of employees. The Employer shall have the right to demote, suspend, discharge or otherwise discipline employees for just cause.
>
> The Employer has the exclusive right to assign and direct employees, to schedule work and to pass upon the efficiency and capabilities of the employees, and the Employer may establish and enforce reasonable work rules and regulations. Further to the extent that rights and prerogatives of the Employer are not explicitly granted to the Union or employees, such rights are retained by the Employer. However, the provisions of this article shall not be used for the

use of undermining the Union or discriminating against any of its members.

. . .

ARTICLE XIV - HOURS OF WORK, WAGES AND CLASSIFICATION

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14.03 Overtime: Overtime opportunities which must be assigned to unit employees under and as limited by Section 14.10 will be split between full-time employees on the preceding and following shifts according to seniority. If said employees are unavailable or unwilling to work, then said work shall be offered to other full-time employees according to seniority. If said employees are also unavailable or unwilling to work, then the County may offer same to regular part-time employees on the same basis as was offered to full-time employees, subject to the provisions of Section 14.10. Overtime for the employees covered by this agreement shall be paid at the rate of one and one half the employee's straight time hourly rate. All compensable time shall count as time worked for computation of overtime. The sheriff must authorize all overtime, except in his absence, overtime shall be authorized by the chief deputy. Overtime will be paid for in the check following the day period in which the overtime was earned.

. . .

14.10 The Employer and the Union agree that work normally performed by regular employees shall not be performed by casual or temporary employees, except as provided in this section. Regular part-time employees will not be used to reduce the unscheduled work opportunities of regular full-time employees. In case of a temporary unscheduled vacancy that the Employer intends to fill, regular full-time employees shall be given an opportunity to work before all other employees are utilized, even if this results in overtime, for the first such unscheduled day. If regular full-time employees are unavailable or unwilling to work, regular part-time employees shall then be given such opportunity. If neither regular full- (sic) employes may be utilized.

Moreover, the parties agree that there are circumstances where the use of regular part-time, casual or temporary employees is essential to provide for coverage of regular full-time and regular part-time employees in their absence, as well as to meet unusual demands on the department which cannot be handled by the regular employees alone. These situations are as follows:

A) Scheduled absences, and unscheduled absences where the duration of such unscheduled absences extends more than one (1) work day. In such instances, regular part-time, casual and temporary employees may start work on the second day of such unscheduled absence. Part-time employees shall be called first. Scheduled days off shall not be counted in calculating an absence and absences shall be tracked by employee. This provision does not obligate the Employer to offer overtime to any employee for scheduled absences, or for unscheduled absences starting with the second day.

B) Regular staffing is not sufficient to meet unusual demands on the department.

4. That at all times material hereto, a dispute existed between the parties, which is the subject of pending grievances, as to whether Section 14.03 applies in those situations in which there are no unscheduled absences but the County as the employer seeks to bring in extra help; that the crux of said dispute is whether the full-time employes must be called in pursuant to Section 14.03 or whether the Sheriff is free to specify other employes without respect to seniority.

5. That on or about November 21, 1989, a conversation arose between Sheriff Schram and a bargaining unit employe, Deputy/Dispatcher/Jailer Dorothy Ryan; that Sheriff Schram and Chief Deputy Hougan had made a decision earlier in the day to call in extra help should the snowstorm worsen; that when the

snow did not stop, Hougan decided to call in the additional personnel; and that he went to the dispatch window and instructed Ryan to call specific employes, who were not the most senior full-time employes, to report during the current shift.

6. That Ryan was at the time a trustee of the Union and had been a union official when the pending grievances were filed; that she was aware of the pending grievances; that when Hougan specified the two names of employes whom he desired to have called in, Ryan objected; that she told Hougan "it's an overtime opportunity. It should be filled as such;" that she told Hougan "if you do it that way, I'm going to file a grievance;" that Hougan responded "well, that's the question;" that Ryan reiterated her comment; and that they discussed the pending grievances specifics.

7. That Hougan did not pursue the matter of whom should be called in at that time indicating to Ryan to "hold off, and I'll [Hougan] go find out what I'm going to do;" and that he left Ryan's window and reported to Sheriff Schram, basically informing Schram that if they called in the employes he was specifying, Ryan was going to file a grievance.

8. That a few minutes later, Schram approached Ryan; that he said, "who's running this department, you or me?"; that he continued by saying, "what are you doing telling us how we can and can't call extra help?"; that Ryan replied something to the effect that she was trying to save them [referring to the County] a grievance; that Schram commented on the grievances pending; that Ryan stated "It's not decided, and it's my opinion that it's an overtime opportunity;" that Schram then said "just for that, he wasn't calling anybody in;" that they continued the discussion; that Schram basically told Ryan "I don't give a damn about your grievance. Just do as you're told;" that, as he was leaving the dispatch window, Schram turned around and came back towards Ryan; and that he shook his finger at Ryan while saying "Dorothy, you better change your attitude right now."

9. That no other employes were offered the extra duty on November 21, 1989; and that Schram himself worked the remainder of the shift.

10. That four days prior to the incident Ryan received an evaluation to which the Union does not object; that in said evaluation Sheriff Schram made certain written comments to Ryan with respect to her "attitude," and that said evaluation stated that Ryan "has problems with her attitude."

11. That Schram's statements contained in Finding of Fact 8, specifically the statements beginning "just for that . . ." and "Dorothy, you better change your attitude," directly and indirectly threatened Ryan in the exercise of her protected concerted and union activities.

12. That the instant complaint was filed on January 9, 1990; that the County failed to file an answer prior to the hearing on May 10, 1990; but that Sheriff Schram did file an affidavit on April 4, 1990 with four copies in which he responded to the allegations contained in the complaint.

Based on the foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. That the Union has not shown that it would be prejudiced by a waiver of the requirements of ERB 12.03(6), and therefore, the waiver of said requirements is appropriate in order that the matter be adjudicated on its merits; and that the affidavit filed on April 4, 1990, constitutes sufficient answer to the pleadings contained in the complaint such that ERB 12.03(7) is inapplicable.

2. That the County, by the statements made by Sheriff Frederick Schram on or about November 21, 1989 to Dorothy Ryan did interfere with, restrain, and coerce employes in the exercise of their rights under Section 111.70(2) of MERA and therefore, Richland County has committed a prohibited practice within the meaning of Section 111.70(3)a 1, Stats.

3. That the County, by Sheriff Schram's cancellation of the call-in of two employes on November 21, 1990, acted in retaliation for Dorothy Ryan's attempt to exercise her protected concerted rights; and that said reprisal discouraged Ryan and others from exercising their right to engage in protected concerted activity pursuant to Section 111.70(2) of MERA and therefore, Richland County has committed a prohibited practice within the meaning of Section 111.70(3)a 3 and 1, Stats.

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

ORDER

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

1. Cease and desist from:

(a) Threatening employes or in any other manner interfering with, restraining or coercing employes in the exercise of their right to engage in concerted activity on behalf of the Local 2085, AFSCME, AFL-CIO or any other labor organization.

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

(Footnote 1/ continued on page 5)

(b) discriminating against its employes with respect to failing and refusing to offer additional work opportunities in order to discourage employes participation in activities on behalf of Local 2085, AFSCME, AFL-CIO or any other labor organization.

2. Take the following affirmative action designed to effectuate the policies of Section 111.70, Stats.:

(a) Pay to the original two employes which Chief Deputy Hougan intended to call in backpay for the remainder of the shift on November 21, 1990.

(b) Notify all of its employes by posting in conspicuous places on its premises, where notices to all its employes are usually posted, a copy of the Notice attached hereto and marked Appendix "A". Such copy shall be signed by the Chief Executive of Respondent Richland County, and shall be posted immediately upon receipt of a copy f this Order, and shall remain posted for thirty (30) days after its initial posting. Reasonable steps shall be taken by said Chief Executive to insure that said Notices are not altered, defaced or covered by other materials.

(c) Notify the Wisconsin Employment Relations Commission, in writing, twenty (20) days from the date of the receipt of this Order of what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 24th day of July, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Mary Jo Schiavoni, Examiner

1/ Continued

examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

APPENDIX "A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Municipal Employment Relations Act, we hereby notify our employes that:

1. WE WILL NOT threaten employes with retaliation for the purpose of discouraging their activities on behalf of or membership in Local 2085, AFSCME, AFL-CIO or any other labor organization.

WE WILL NOT in any other manner, interfere with, restrain or coerce our

employes in the exercise of their rights to self organization, to form labor organizations, to join or assist Local 2085, AFSCME, AFL-CIO or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in other lawful concerted activities for the purpose of collective bargaining or any mutual aid or protection.

Richland County

By _____

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

RICHLAND COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITION OF THE PARTIES

The Union argues that ERB 22.03 directs the Commission through subsection (6) and (7) to dismiss the County's answer. It maintains that the sum-total of the County's insufficient and inadequate "effort" constitutes a legal admission as to material facts contained in the complaint by either failing to answer or filing an insufficient answer.

With respect to the merits, the Union stresses that interference can take the form of objectionable statements as well as objectionable conduct. Pointing to case law where employers told employes possible problems could result if a grievance were filed, the Union contends that Schram's conduct as well as his remarks to Ryan constitute interference. According to the Union, the timing of Schram's statements coming only a few days after Ryan's evaluation in which her attitude was mentioned can reasonably be interpreted as resulting in interference with her protected right to use the grievance procedure. It submits that Schram's conduct in working as a unit employe was retaliatory conduct for Ryan's statements.

The County argues that Schram's affidavit should be accepted as sufficient answer to the complaint; and if not, that the time for answering be extended to the date of hearing pointing out that the Union has not and would not suffer prejudice should the Examiner take either course of action.

On the merits, the County argues that the incident involving Schram and Ryan is a mere extension of the underlying dispute as to who is entitled to be called in and that said incident is a situation where management reflected its frustration. According to the County, Hougan gave Ryan a direct order to call certain employes in to work which she did not follow as she should have. Because Ryan did not verbally indicate that she intended to follow the order, a legitimate instance of frustration on the part of Sheriff Schram arose. This is the case because the County had previously experienced attitude problems with Ryan, namely her work attitude towards fellow employes and the public.

The County denies that it committed interference or retaliatory acts against employes for their union activities. It submits that the incident is nothing but legitimate frustration on the part of the County when an employe failed to carry out a legitimate order given to her. The County asks that the complaint be dismissed in its entirety.

Pleadings and Procedure

In its complaint filed on January 9, 1990, the Union asserts that the County engaged in illegal interference and retaliation to discourage employes from engaging in protected concerted activity. The Commission appointed the undersigned as Examiner on March 8, 1990 and notices were issued on the same date setting dates for hearing and the filing of an answer. The answer along with four copies was due on or before April 17, 1990. On April 4, 1990, Sheriff Frederick Schram filed an original affidavit and four copies. The County did not, however, file a formal answer at anytime prior to the hearing.

At the hearing, the Union moved to have the Examiner accept the allegations contained in the complaint as true based upon the County's failure to file a timely answer. This inaction, it alleges, constitutes an admission of and a waiver by the County as to the material facts contained in the complaint. The Union cited ERB 22.03(6) in support of its motion.

The County opposed the Union's motion on two grounds. It argued that Schram's April 4, 1990 affidavit, while not in the proper form of an answer, did by its substantive claims serve as an answer and the County's response.

Secondly, it argued that it should be allowed to orally answer at the hearing and did orally deny the allegations contained in the Complaint.

The undersigned denied the Union's motion at the hearing ruling that the April 4 affidavit constituted a sufficient answer. The Union then moved to have the answer stricken based upon its being untimely filed. The County also moved that the time for filing the answer be extended to April 3, 1990, the date on the affidavit. Both motions were denied at hearing, but the County was permitted to establish good cause for late filing of said answer. The matter was then left for argument in post-hearing briefs.

In its brief, the Union renewed its request that the answer be stricken contending that the sheriff's affidavit is insufficient and inadequate and constitutes a legal admission of the allegations contained in the complaint pursuant to ERB 22.03(7).

ERB 12.03(6) 1/ to the contrary, the Commission has consistently refused to find that failure to file an answer in a prohibited practice case constitutes a waiver of hearing as to the material facts alleged in the complaint. 2/ Moreover, ERB 5.01 expressly permits an examiner to waive any requirements of the Rules unless a party can show prejudice would result from this action. 3/ Because the Union has been unable to demonstrate that any prejudice has occurred as a result of the County's failure to file an answer or by its filing of the sheriff's affidavit in lieu of an answer, this Examiner finds its permissible and appropriate to waive the requirements of ERB 12.03(6) to better effectuate the purposes of MERA. The authority for said waiver of ERB 12.03(6) requirements is ERB 5.01. 4/ Accordingly, the Examiner has not found that failure of the County to answer constitutes an admission of and a waiver by such a party of a hearing as to the material facts alleged in the complaint.

Sheriff Schram, whose actions are the basis of the Union's allegations that the County committed prohibited practices, did file an affidavit in which he directly addressed the allegations contained in the Union's complaint. The affidavit placed the Union on notice as to what the County's position was with respect to the specific allegations set forth in the complaint. The Examiner, pursuant to the liberal construction to be given to the Rules of the Commission as set forth in ERB 5.01 finds that the affidavit served as a sufficient answer such that ERB 12.03(7) does not apply.

Merits

Three witnesses testified at the hearing about the discussion which occurred on November 21, 1989. Sheriff Schram was called adversely by the Union. It then presented Dispatcher Ryan. The County presented Chief Deputy Hougan.

Although much of the testimony adduced at hearing was uncontradicted, where discrepancies as to the facts exist, the Examiner credited the testimony of Ryan over that of Schram. This is the case because on several occasions during both direct and cross-examination when asked to respond to specifics about his conversation with Ryan, Schram simply could not recall what was said. (Tr. 15: 2-25, 16:1-2, 18: 7-10, 23: 1-7, 24: 23-25, 25: 24-25). Moreover, Schram neither denied nor rebutted Ryan's version of the conversation. Ryan testified convincingly and in great detail under extensive cross-examination. Her testimony need not be reiterated here in its entirety as it is reflected in the Findings of Fact 5, 6, 7, and 8. Hougan basically corroborated Schram's testimony up to the point when Schram approached Ryan, but differed in his assessment or conclusion that Ryan was being insubordinate. While Hougan confirmed that he heard Schram tell Ryan "I don't care about filing a grievance, do what you're told," he did not hear Ryan's response because he was far away from both of them. Upon cross-examination, Hougan conceded that he did not hear any of the conversation between Schram and Ryan. Thus, Ryan's version of the events is that generally credited by the Examiner.

In order for the Union to prevail on its allegation that the County interfered with employe rights, it must prove by a clear and satisfactory preponderance of the evidence that the statements made by the County's agent contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain, or coerce municipal employes in the exercise of

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1/ ERB Chapter 22 refers to procedures relating to prohibited practices pursuant to Sec. 111.84, Stats. ERB Chapter 12 refers to procedures relating to prohibited practices proscribed by Sec. 111.70, Stats.

2/ Brown Deer School District, Dec. No. 25884-A (McLaughlin, 6/89); School District of West Allis-West Milwaukee, Dec. No. 20922-B (Schiavoni, 11/83); School District of Walworth, Dec. No. 16550-A (Davis, 9/78); and City of Milwaukee, Dec. No. 8017 (WERC, 5/67).

3/ Oneida County, Dec. No. 25229-A (Gratz, 7/88); State of Wisconsin (DOA), and Dec. No. 15759-B (WERC, 3/80).

4/ Oneida County, Dec. No. 25229-A (Gratz, 7/88).

rights guaranteed by Sec. 111.70(2), Stats. 5/ Furthermore, the Union need not show that the County "intended" the conduct to have the effect of interfering with those rights. 6/ But rather, interference may be proved by showing that the County's conduct had a reasonable tendency to inhibit or limit employes in their exercise of the rights set forth under MERA. 7/ The remarks as well as the circumstances under which they were uttered must be considered when determining whether a violation has occurred. 8/

There is no question that Ryan was engaged in protected concerted activity during her conversation with Schram. Resort to the contractually established grievance procedure and processing grievances under that procedure have been found to be fundamental rights included within the employes' right to representation. 9/ Advocating for the Union's position with respect to the disposition of grievances and informing the municipal employer of one's intent to file a grievance is also activity guaranteed under Sec. 111.70(2), Stats.

Schram's initial statements to the effect of "who's running this department, you or me?" did not contain either express or implied threats or promises of benefit. Neither does the remark "I don't give a damn about your grievance. Just do as you're told." However, Schram's response to Ryan's contention that calling in the additional help was an overtime opportunity, i.e., "just for that, [I'm] not calling anyone in" and his shaking his finger at her and warning "Dorothy, you better change your attitude" both would tend to chill Ryan in the exercise of future protected concerted rights under MERA.

In the context of her advocacy for the Union's position, the first statement asserts punitive action for persisting in the exercise of her Sec. 111.70(2) rights. The second statement delivered, even as a word-to-the-wise, threatens, albeit indirectly, that Ryan will be treated less favorably by the County if she continues to advance the Union's interest. 10/ This is especially the case given that Ryan's "attitude problem" was raised a few days earlier during an evaluation.

Under the circumstances, it must be concluded that Schram's statements to Ryan had a reasonable tendency to interfere with her exercise of MERA rights and constitute a violation of Section 111.70(3)(a)1, Stats.

Although not addressed in its brief, the Union in its complaint also maintains that the County violated Sec. 111.70(3)(a)(3) and (1) derivatively. In order to prevail on its allegation that a violation of this subsection occurred, the Union must prove that an employe was engaged in the concerted activities protected by MERA, that the County was aware of those activities and hostile towards those activities and that the County's action was based at least in part on hostility towards those activities. 11/ Here, Schram was frustrated and angry at what he perceived to be Ryan's insubordination. He was frustrated over her insistence that the call-in was overtime and hostile to her lawful concerted activities. His action in cancelling the call-in of any employe was made in retaliation for Ryan's exercise of her MERA rights and was a prohibited practice within the meaning of Sec. 111.70(3)(a)(3) and derivatively, (1), Stats.

Dated at Madison, Wisconsin this 24th day of July, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Mary Jo Schiavoni, Examiner

5/ Brown County, Dec. No. 17258-A (Houlihan, 8/80); Beaver Dam Unified School District, Dec. No. 20283-B, (WERC, 5/84).

6/ Beaver Dam Unified School District, supra; City of Waukesha, Dec. No. 11486 (WERC, 121>2)

7/ Village of Maple Bluff, Dec. No. 25718-A (Buffett, 4/89); Juneau County (Pleasant Acres Infirmary), Dec. No. 12593-B (WERC, 1/77).

8/ Beaver Dam School District, Ibid; City of La Crosse, 17084-C (WERC, 4/82); WERC v. Evansville, 69 Wis. 2d 140 (1975).

9/ Harry Rydlewicz and Clarence Quandt (Village of West Milwaukee), Dec. No. 9845-B (WERC, 10/71); Marinette County, Dec. No. 20079-A (Roberts, 3/83).

10/ See Beaver Dam Unified School District, Ibid. at p.7.

11/ Employment Relations Department v. WERC, 122 Wis. 2d 132, 140 (1985); Village of Maple Bluff, supra.