STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant, vs. MILWAUKEE BOARD OF SCHOOL DIRECTORS, Respondent.	Case 229 No. 44019 MP-2355 Decision No. 26560-B

Appearances:

Perry, Lerner & Quindel, S.C., Attorneys at Law, by Ms. Barbara Zack Quindel and Mr. Peter Guyon Earle, 823 North Cass Street, Milwaukee, Wisconsin 53202-3908, appearing on behalf of the Complainant.

Ms. Mary M. Rukavina, Assistant City Attorney, City of Milwaukee, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Milwaukee Teachers' Education Association having, on May 15, 1990, filed a complaint with the Wisconsin Employment Relations Commission alleging that the Milwaukee Board of School Directors had committed prohibited practices within the meaning of Secs. 111.70(3)(a) 1 and 3 of the Municipal Employment Relations Act, herein MERA; and the Commission having, on July 19, 1990, appointed David E. Shaw, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided Sec. 111.07(5), Stats.; and due to the unavailability of Examiner Shaw, the Commission having, on August 10, 1990, substituted the undersigned as Examiner; and hearing on said complaint having been held on August 15, 1990 in Milwaukee, Wisconsin; and the parties having filed briefs in the matter which were exchanged on November 8, 1990; 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 Milwaukee Teachers' Education Association, hereinafter referred to as the MTEA, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and is the certified exclusive collective bargaining representative for certificated teachers and related professional personnel engaged in education of students in the Milwaukee Public Schools; that its offices are located at 5130 West Vliet Street, Milwaukee, Wisconsin 53208; and that Barry Gilbert is the MTEA's Assistant Executive Director and has acted on its behalf.

2. That Milwaukee Board of School Directors, hereinafter referred to as the Board, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., which operates a public school system in Milwaukee, Wisconsin; that its offices are located at 5225 West Vliet Street, Milwaukee, Wisconsin 53208; and that David Kwiatkowski is the Board's Manager of Labor Relations and has acted on its behalf.

3. That Frederick Carr is the principal of Franklin Pierce Elementary School, herein Pierce, a position he has held for the last ten years.

4. That Daniel Smith is a regular teacher employed by the Board for three years and has been assigned to teach fourth grade bilingual education at Pierce; that Smith was the duly elected MTEA building representative at Pierce for the 1989-90 school year and as such attended an MTEA leadership workshop for building representatives at the beginning of the school year; and that the Board had decentralized into six delivery areas, each with a community superintendent and at its workshop the MTEA emphasized the importance of building representatives communicating with it regarding any question of contract compliance so that MTEA could keep track of all six entities.

5. That on September 26, 1989, Smith met with Gilbert after school and inquired about the 25 to 1 ratio maximum for P-5 schools; that Pierce was newly designated a P-5 school which made it eligible to receive special funding from the State and as a condition of the funding the Department of Public Instruction monitors the class size ratio which is set at a maximum of 25 to 1; that on September 27, 1989, Gilbert contacted Al Cooper, the board's P-5 Coordinator about the ratio of 25 to 1 and informed him that his information on Pierce was that it was exceeding that ratio; that Cooper indicated that he

would look into it; that on the evening of September 27, 1989, Smith met with Gilbert to get his advice and informed Gilbert that Smith had heard from other teachers that Carr had been talking about having a meeting the next morning and wanted teachers to vote on whether to have "splits," that is, have students from two grades in one class; and that Gilbert advised Smith that it didn't matter whether they voted or not, the resolution of the class ratio issue was a matter of law.

6. That on September 27 or 28, 1989, Smith was attending an in-service meeting at Pierce; that Carr came to the door and asked Smith in front of the staff if he had called the MTEA in regard to class size and Smith stated that he had; that on September 28, 1989, Carr held a staff meeting and stated that he was in charge of the school and was the boss and did not want to deal with the MTEA all year and had done nothing illegal; that Carr addressed Smith and said that Smith had less than 25 students in his class and had a full-time para-professional and couldn't understand why Smith was bringing up the ratio issue; that Carr brought up the issue of either having a vote on splits or letting things stand as they were; that Smith objected to the vote and after further discussion Carr decided to have a survey done on the issue; that Smith felt that the staff blamed him for the possibility of splits and Gilbert met with the staff on October 4 or 5, 1989, and explained to them that Smith had acted properly and there were other alternatives to the ratio problem than just splits; and that the Department of Public Instruction determined that based on the history of a very high turnover rate at Pierce of around 41%, turnover would quickly bring the ratio down as well as Pierce was closed to the addition of new students, thus resolving the ratio issue.

7. That in November, 1989, Carr established committees and assigned teachers to the committees; that Smith questioned whether the committee meetings were voluntary or not and might violate the agreement; that Smith asked the MTEA whether mandatory attendance at these committee meetings complied with the contract; that Gilbert was of the belief that under the contract the committees were voluntary and attendance was voluntary and had conversations with Kwiatkowski about the committee meetings; that Kwiatkowski and Gilbert disagreed as to whether these violated the agreement and a grievance was filed; that Kwiatkowski spoke with Carr on January 9, 1990, regarding the committee meetings and told him there was a dispute about the meetings and that if Carr felt they were necessary, Kwiatkowski would support him and if they were not necessary, the issue might be resolved but the decision was Carr's.

8. That after school on January 9, 1990 Carr held a staff meeting and stated that someone had called the MTEA again and said that the committee meetings were going to take the place of staff meetings; that Smith asked if they were committee meetings or staff meetings; that Carr responded that anyone of maturity would know; and that Carr indicated they were committee meetings and attendance was required.

9. That after the staff meeting ended, Carr went to Smith's classroom and stated that he was there as Fred Carr and wanted to talk to Smith as Dan Smith; that Smith asked if he needed a Union representative present and Carr responded that he was going to just make a statement; that Carr asked Smith; "What have I done? What seems to be the problem that you and I cannot get along?"; that Smith responded that Carr had called him a white supremacist and an ignorant white ass; that Carr stated that his statement was that Smith seemed like a white supremacist; that Smith asked for a Union representative and walked to the door; that Carr blocked the door and pointed his finger at Smith's face and said that if Smith came back next year Carr would give him an unsatisfactory evaluation; that Carr told Smith that he didn't want him to call the Union anymore and tell them lies, and that if he didn't, he was going to write him up for insubordination; that because it was too late in the year to give Smith an unsatisfactory evaluation, Carr was going to give Smith a 281-T evaluation, a transfer evaluation; and that Carr then left Smith's classroom.

10. That Smith called Gilbert and reported his conversation with Carr and Gilbert told Smith to write up what had occurred and Smith did; that Smith made a request for a transfer from Pierce; and that Smith ran for building representative for the 1990-91 school year but was not elected.

11. That the January 9, 1989, meeting between Carr and Smith in Smith's classroom tended to interfere with Smith's right to be building representative and to consult with MTEA; that Carr was aware of and hostile to Smith's conduct in contacting the MTEA on the committee meetings and his threats to give an unsatisfactory evaluation, a transfer evaluation and a writeup for insubordination were motivated, in part, by Carr's hostility to Smith's activity in contacting MTEA and questioning the propriety of the class ratio and the committee meetings.

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

CONCLUSIONS OF LAW

1. That the Board, by the statements made by its agent, Frederick Carr,

on January 9, 1990, to Daniel Smith referred to in Finding of Fact 9, interfered with the exercise of Smith's rights guaranteed by Sec. 111.70(2), Stats., and therefore, the Board violated Sec. 111.70(3)(a)1, Stats.

2. That the Board, by the threats made by its agent, Frederick Carr, on January 9, 1990, to Daniel Smith, referred to in Finding of Fact 9, were motivated, in part, by Carr's hostility to Smith's lawful concerted activity on behalf of the MTEA and constitutes discrimination on the basis of Union activity, and therefore, the Board violated Sec. 111.70(3)(a)3, Stats.

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

ORDER 1/

IT IS ORDERED that the Board, its officers and agents, shall immediately

1. Cease and desist from:

   a. Interfering with Daniel Smith regarding the exercise of rights protected by Sec. 111.70(2), Stats., including his right to contact MTEA regarding matters arising out of the parties' collective bargaining agreement or interrogating him regarding his Union activity.

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

(Footnote 1/ continued on page 4)

   b. Threatening to give an unsatisfactory evaluation, a transfer evaluation or a writeup for insubordination because of his Union activities.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of MERA:

   a. Notify all employes at Pierce Elementary School by posting in conspicuous places in its offices copies of the notice attached hereto and marked "Appendix A". That notice shall be posted during the time that school is in regular session and it shall remain posted for thirty (30) days there-after. Reasonable steps shall be taken by the Board to insure that said notices are not altered, defaced or covered by other material.

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

Dated at Madison, Wisconsin this 29th day of November, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Lionel L. Crowley, Examiner

1/ (Continued)

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

As ordered by the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we notify our employes that:

1. WE WILL NOT interrogate Daniel Smith regarding his exercise of rights protected by Sec. 111.70(2), Stats., including his right to contact the Milwaukee Teachers' Education Association regarding matters arising under the collective bargaining agreement between the Milwaukee Board of School Directors and the Milwaukee Teachers' Education Association.

2. WE WILL NOT threaten or coercively propose to give an unsatisfactory evaluation, a transfer evaluation or a writeup for insubordination or in any like or similar manner discriminate against Daniel Smith because of his activity on behalf of the Milwaukee Teachers' Education Association.

Dated at Madison, Wisconsin, this _____ day of _____, 1990.

Milwaukee Board of School Directors

By _____
Name

By _____
Title

THIS NOTICE MUST REMAIN POSTED FOR 30 DAYS FROM THE DATE STATED ABOVE AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint initiating these proceedings, MTEA alleged that the Board committed prohibited practices in violation of Secs. 111.70(3)(a) 1 and 3, Stats., by Principal Carr's statements to teacher Daniel Smith on January 9, 1990, threatening Smith with an unsatisfactory evaluation, telling him to stop calling the Union and telling them lies and threatening Smith with a charge of insubordination. MTEA alleged that Carr's conduct interfered with and discriminated against Smith because of his exercise of rights guaranteed under Sec. 111.70(2), Stats. The Board answered denying any prohibited practice had been committed and sought dismissal of the complaint.

MTEA's POSITION

MTEA contends that Carr's actions interfered with Smith's rights protected under Sec. 111.70(2), Stats., constituting a violation of Sec. 111.70(3)(a) 1, Stats. It argues that proof of a violation requires a showing that Smith engaged in protected activity and Carr's hostile reactions to such activity reasonably tended to interfere with the right to engage in such activity. MTEA alleges that the evidence establishes the necessary elements of proof. It points out that Smith was indisputedly functioning as building representative on September 26, 1989 when he contacted MTEA about the class size ratio for a P-5 school, on September 27, 1989 when he had affirmatively answered Carr's question that he had contacted MTEA about this issue, when he raised the issue in a staff meeting on September 28, 1989, and when on November 21, 1989 and January 9, 1990, he raised questions about whether committee meetings were in compliance with the parties' agreement. It maintains that Smith was exercising his right to engage in lawful protected activities as building representative and the September events establish that Carr's questioning the source of the MTEA call reasonably tended to interfere with Smith's right to engage in protected activity. It argues that Carr's conduct with respect to splits was a naked effort to undermine Smith's functioning as a building representative, and his singling out Smith at the September 28, 1989 staff meeting created a coercive atmosphere which tended to interfere with his protected activity. The MTEA claims that the various acts by Carr on January 9, 1989 establish a coercive atmosphere and proves a flagrant and egregious violation of Sec. 111.70(3)(a) 1, Stats.

MTEA contends that Carr's threats of an unsatisfactory evaluation, a 281-T transfer and discipline for insubordination to Smith constituted a violation of Sec. 111.70(3)(a) 3, Stats. It claims that all the elements required to establish a violation of Sec. 111.70(3)(a) 3, Stats., have been proven. It submits that Smith had engaged in protected activities, Carr knew of Smith's activities, Carr was hostile to these activities as demonstrated by his conduct and statements and Carr's threats against Smith were motivated at least in part by hostility toward Smith's protected activities.

MTEA claims that Carr's charges that Smith is a racist are totally unsubstantiated, unjustified and irresponsible as no evidence was presented that even raised an inference that Smith's actions were motivated by racial animus. It notes that when MTEA brought its concerns about Smith's protected activity to Carr, Carr accused Gilbert of also being a racist. It alleges that these unsubstantiated accusations serve only as a pretext for Carr's anti-union conduct.

MTEA asks that Carr's conduct be found to violate Secs. 111.70(3)(a) 1 and 3, Stats., and that an appropriate cease and desist order as well as posting a notice be directed to the Board.

BOARD'S POSITION

The Board contends that no one can be sure what transpired during the January 9, 1990 conversation between Smith and Carr as they were the only ones present. It notes that the conversation was heated and words were exchanged and Smith believed Carr's statements were motivated by anti-union sentiments and Carr believed that the tone of the conversation was due to Smith's racist undertones and that their respective beliefs are based on the perception that each has of the other. The Board argues that the testimony of Gilbert, as expected, supports the perception of Smith that the words and actions of Carr were motivated by anti-union animus and Kwiatkowski, on the other hand, testified that he perceived the acrimony between Smith and Carr was due to a personality conflict and nothing more. The Board asserts that Smith's written notes authored two days after the incident should be given no corroborative weight because Smith could not accurately reflect on his thoughts. It maintains that to determine whether Smith's or Carr's perception is more meritorious is just speculation and either version is plausible. It argues that it is possible that the two simply don't like each other but this does not rise to the level of a prohibited practice. It asserts that employers have the right to speak freely provided their statements do not contain threats of reprisal or promises of benefit. It points out that Smith testified that Carr threatened him during their heated conversation and Carr testified that he never said any such thing. It submits that if Carr's anti-union sentiment was as wide spread and vitriolic as Smith claims, others would have so testified. It suggests that Smith must face the reality that Carr simply didn't like him and it had absolutely nothing to do with Smith's union activity. It requests the complaint be summarily dismissed.

DISCUSSION

Section 111.70(2), Stats., provides in part as follows:

> Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employes shall have the right to refrain from any and all such activities. . .

Section 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer to interfere with, restrain or coerce municipal employes in the exercise of rights guaranteed them under Sec. 111.70(2) Stats. A finding of anti-union animus or motivation is not necessary to establish a violation of Sec. 111.70(3)(a)1. 2/ Nor is it necessary to prove that an employer intended to interfere with employes or that there was actual inference. 3/ The statute prohibits conduct which has a reasonable tendency to interfere with the exercise of lawful concerted activities. 4/ Interference may be proved by demonstrating by a clear and satisfactory preponderance of the evidence that the employer's conduct contained either a threat of reprisal or a promise of benefit which would tend to interfere with the rights of employes guaranteed them under Sec. 111.70(2), Stats. 5/

The evidence established that Daniel Smith was the duly elected building representative for Pierce for the 1989-1990 school year. Smith contacted Gilbert of the MTEA with respect to the class size ratio and Principal Frederick Carr asked Smith if he had contacted MTEA on this issue and Smith confirmed that he had. This issue was discussed the next day at a staff meeting where Smith asserted MTEA's position. Smith also raised the committee attendance issue with Carr on January 9, 1990. The record amply demonstrates that Smith engaged in protected activities and Carr was well aware of Smith's activities. It is undisputed that Carr went to Smith's classroom after the faculty meeting on January 9, 1990 and they had a discussion. Smith testified that Carr threatened him with an unsatisfactory evaluation, a 281-T transfer evaluation, and discipline for insubordination. Carr denied any such threats. On the head to head credibility issue, the undersigned concludes that Smith is credible and Carr is not. Based on demeanor, Smith was more credible. Additionally, Smith promptly reported to Gilbert what had occurred and Gilbert confirmed Smith's testimony. At Gilbert's direction, Smith wrote down what had

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2/ City of Evansville, Dec. No. 9440-C (WERC, 3/71).

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

4/ Milwaukee Board of School Directors, Dec. No. 23232-A (McLaughlin, 4/87) aff'd by operation of law, Dec. No. 23232-B (WERC, 4/87).

5/ Western Wisconsin V.T.A.E. District, Dec. No. 17714-B (Pieroni, 6/81) aff'd by operation of law, Dec. No. 17714-C (WERC, 7/81); Drummond Jt. School District No. 1, Dec. No. 15909-A (Davis, 3/78) aff'd by operation of law, Dec. No. 15909-B (WERC, 4/78); Ashwaubenon School District, Dec. No. 14774-A (WERC, 10/77).

occurred and this writing confirms his testimony. 6/ Carr on the other hand testified that he got the impression that Smith couldn't work with him because Carr is a black male. Carr admitted that this was difficult to prove and when asked to point to prior problems with Smith, Carr was less than clear in his response. Carr confirmed parts of Smith's testimony including Carr's statement that he said Smith was acting like a white supremacist. Thus, for these reasons, the undersigned has credited Smith's version of the January 9, 1990 meeting in Smith's classroom over that of Carr. Inasmuch as Smith's testimony is credited, the Board's arguments that the evidence was insufficient to show union animus and that Smith and Carr simply disliked each other are not persuasive. The context of the statement by Carr that Smith should stop calling the Union and telling them lies and if he didn't, he would be written up for insubordination as well as the threat of a 281-T transfer is conduct which has a reasonable tendency to interfere with Smith's exercise of his protected rights. Carr clearly made a threat of reprisal for Smith's engaging in protected activity and therefore Carr's conduct violated the provisions of Sec. 111.70(3)(a) 1, Stats.

In order to prove its claim of a Sec. 111.70(3)(a) 3, Stats., violation that Carr's conduct on January 9, 1990 constituted encouragement or discouragement in regard to hiring, tenure or other terms and conditions of employment, MTEA must show all of the following elements:

1. Smith was engaged in protected activities.

2. Carr was aware of the activities.

3. Carr was hostile to the activities.

4. Carr's conduct was motivated, in whole or in part, by hostility toward the protected activity. 7/

As discussed supra, Smith was engaged in protected activity in his capacity as building representative when he contacted MTEA and questioned the class size ratio and when he questioned Carr concerning the committees and whether these complied with the parties' contract. Carr knew Smith was engaged in such activity because he had asked Smith if he had contacted the Union on the class size ratio and Smith directly questioned Carr about the committee issue. Thus, the first two elements have been established beyond doubt.

The third issue is whether Carr was hostile to Smith's activities. Carr's hostility is amply demonstrated against Smith's activities in particular as evidenced by his statement on January 9, 1990, that Smith was to stop calling the Union and telling them lies. Additionally, Carr had general hostility toward Smith's activities as evidenced by his testimony that more time could be devoted to doing something for the kids instead of meeting with Smith and Gilbert and doing things like the hearing in the instant matter. Thus, the third element has been demonstrated by the record in this matter.

The fourth requirement is discrimination motivated by hostility, in whole or in part, toward Smith's protected activity. As discussed supra, Carr stated to Smith that he was going to give him an unsatisfactory evaluation, a 281-T transfer or write him up for insubordination, all of which were directed to his concerted activities on behalf of MTEA. The threat of a transfer has been held sufficient to establish a violation of Sec. 111.70(3)(a) 3, Stats. 8/ Carr's statement that Smith was to stop contacting the Union and telling them lies or he would be written up for insubordination clearly demonstrates that Carr's actions were motivated by hostility towards Smith's protected concerted activity on behalf of MTEA, and therefore, it is concluded that Carr's actions violated Sec. 111.70(3)(a) 3, Stats.

With respect to the remedy, the Examiner has granted a cease and desist order to rectify the Board's misconduct as well as the customary posting which is standard for the type of misconduct herein.

Dated at Madison, Wisconsin this 29th day of November, 1990.

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6/ Ex-3.

7/ Milwaukee Board of School Directors, Dec. No. 23232-A (McLaughlin, 4/87) aff'd by operation of law, Dec. No. 23232-B (WERC, 4/87); Kewaunee County, Dec. No. 21624-B (WERC, 5/85); City of Shullsburg, Dec. No. 19586-B (WERC, 6/83); Fennimore Community Schools, Dec. No. 18811-B (WERC, 1/83).

8/ Milwaukee Board of School Directors (Riley Elementary School), Dec. No. 17104-A (Greco, 7/80) aff'd by operation of law, Dec. No. 17104-B (WERC, 8/80).

By _____
Lionel L. Crowley, Examiner