STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MANITOWOC COUNTY HIGHWAY DEPARTMENT EMPLOYEES, LOCAL 986, AFSCME, AFL-CIO, Complainant, vs. MANITOWOC COUNTY, Respondent.	Case 236 No. 44551 MP-2392 Decision No. 26665-A

Appearances:
Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 370, Manitowoc, Wisconsin 54221-0370, for the Complainant.
Mr. Mark Hazelbaker, Corporation Counsel, Manitowoc County, 1010 South Eighth Street, Manitowoc, Wisconsin 54220, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 17, 1990, Manitowoc County Highway Department Employees, Local 986, AFSCME, AFL-CIO, filed with the Wisconsin Employment Relations Commission a complaint alleging that the County of Manitowoc had committed prohibited practices within the meaning of Sec. 111.70(3)(a)3. and 1., Wis. Stats. On October 30, 1990, after attempts at conciliation were unsuccessful, the Commission appointed Stuart Levitan, a member of its staff, to serve as Examiner and to make Findings of Fact, Conclusions of Law and Order, as provided in Secs. 111.07(5) and 111.70(4)(a), Stats. Hearing on the complaint was held on November 14, 1990, in Manitowoc, Wisconsin, with a stenographic transcript of said hearing being provided to the parties by December 17, 1990. The parties filed briefs by January 28, 1991, and notified the Examiner on February 7, 1991, that they would not be filing reply briefs. The Examiner, having considered the evidence and the arguments of the parties, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Manitowoc County Highway Department Employees, Local 986, AFSCME, AFL-CIO, hereafter referred to as the Complainant or the Union, is a labor organization within the meaning of Sec. 111,70(1)(h), Stats., with offices at 5 Odana Court, Madison, Wisconsin. At all times relevant to this proceeding, Michael J. Wilson was the Staff Representative representing the Union.

2. Manitowoc County, hereafter referred to as the Respondent or the County, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., with offices at 1010 South Eighth Street, Manitowoc, Wisconsin. At all times relevant to this proceeding, Attorney Mark Hazelbaker was the County's Corporation Counsel and William Schramm was the County's Highway Commissioner.

3. Pursuant to a collective bargaining agreement in effect 1989-1990, the County recognized the Union as:

> the exclusive bargaining agent of all the employes of the Employer engaged in highway and bridge construction and maintenance work, shop and office employes, other employes in related activities of the Highway Department, except the employes in the positions of Engineer, State Highway Superintendent, Shop Superintendent, Assistant Road Superintendent, and Office Manager, excluding temporary, supervisory, confidential and managerial employes.

4. The agreement referred to in Finding of Fact 3 provided for a grievance procedure to address disputes over its meaning and application, culminating in final and binding arbitration.

5. On December 8, 1989, County Patrol Highway Superintendent Robert Braunel assigned Gerald Drumm and two other department employes to remove a large tree which abutted a county roadway. Drumm, believing that the tree was dangerously intertwined with power lines, challenged the assignment as unsafe, which protest he voiced over the county radio system in a manner the county felt was unacceptably loud and hostile. Drumm also requested the involvement of Union President Charles "Skip" Handl, whom Drumm mistakenly believed was a member of the safety committee. After considering, and rejecting, disciplining

Drumm for refusing a direct work order, the County issued Drumm a verbal reprimand for misuse of the radio.

6. On January 18, 1990, Drumm filed a grievance over what he considered "undue and unjust discipline," which he described as "two verbal disciplinarys (sic) received relating to refusing a direct work order and being too verbal on the county radio." As adjustment, he sought the removal from his personnel file of all references to said discipline.

7. On January 29, 1990, Highway Commissioner William H. Schramm responded to Drumm's grievance as follows:

> January 29, 1990
>
> Gerald Drumm
> 4305 Custer Street
> Manitowoc, WI 54220
>
> Re: Grievance 1-18-90
>
> Dear Gerald:
>
> Your grievance of undue and unjust discipline is being denied because we are not in violation of the following items cited.
>
> 1. Article 3 Managements Rights Reserved Paragraph 4. There isn't anything in that paragraph that pertains to this situation.
>
> 2. Article 5 Disciplinary procedures Sec A. You don't put verbal warnings in writing other than documenting in the personnel file that a verbal warning was given and for what reason.
>
> 3. Article 8 Grievance Procedure Sec C Step 1 Line 7. No one's life was at stake. All you had to do if there was a question of an assignment was to call for a review of the situation. Example: (Could you come out here? There is something were (sic) not sure about before we start.)
>
> Instead you used an ultimatum letting everyone who can monitor our radio system aware that you were going to intimidate our superintendent, Fritz Emme. This was a flagrant misuse of our radio system.
>
> 4. Article 29. It is fully within managements rights to exercise progressive disciplinary action. This begins with a verbal warning.
>
> 5. Adjustment required. There was only one verbal warning issued and documented for the blatant misuse of our communication system.
>
> I should emphasize that verbal warnings are not intended to intimidate, harass or aggrivate (sic) anyone. It is a management tool for telling an employee that he has overstepped his bounds. Our hope would be that it would be accepted in the light of constructive criticism. The fact that you have grieved this warning sends a clear message that you are once again rebelling against anything that represents authority.
>
> I think this whole issue points to deeper problems which have to be raised. You have had a history of being outspoken and critical of management not based on fact. This was mentioned in two of the four yearly evaluations we have had. Both times you said you would be more careful in the future and check with management

first on issues before making negative comments in public.

Last October I checked rumors that were circulating in regard to Bob Braunel being blamed for not getting paving work in 3 of our municipalities. I was informed that the accusations were coming out of our paving crew. I personally contacted all 3 municipalities and they assured me those allegations were totally false.

On Thursday, November 2, 1989, I met with you on your property after Bob Braunel informed me that you were working while being off on a workmans comp. claim. When he questioned you on that, you told him he was too hard to work for. I pointed out to you that as an employee you had a responsibility to inform your doctor if you could work, even if on a limited basis. We could have accommodated you with a work assignment that would have fit your limitations. In that conversation, you also did not deny that you were in fact involved with afore-mentioned paving crew comments. You again said you would check with me in the future before making public comments. You returned to work the following Monday.

On December 14, 1989, your most recent altercation with management occurred with your misuse of our communic-ation system.

I have known you all my life and have always considered you a friend and since being in the department a good worker. This has also been documented in your evalu-ations. Your feelings and associated comments of management in general have been damaging to our depart-ment. Your actions have displayed a hatred that I find difficult to understand. To this end, we do have an employee assistance program that I feel you should explore. If interested, please contact me and I will help you make the necessary arrangements.

Sincerely,

William H. Schramm /s/

William H. Schramm
Highway Commissioner

cc Skip Handl
Mike Wilson
Mark Hazelbaker
Beth Huber
Personnel Committee
Highway Committee

Schramm provided copies of this response to the Union President, Union Representative Wilson, Corporation Counsel Hazelbaker, Human Services Director Beth Huber, and the members of the County Personnel and Highway Committees.

8. Notwithstanding language in the parties' collective bargaining agreement which provides that Employee Assistance Program "referrals and counseling shall be confidential and shall not be disclosed or considered except as expressly authorized by the employe in writing," it is the County's standard operating procedure to notify relevant committees of the County Board and administrative personnel of such referrals and counseling, especially when they are made as part of the response to a grievance.

9. The grievance was ultimately processed to arbitration before Sharon Gallagher Dobish. On October 12, 1990, Arbitrator Dobish, finding that the County had just cause to impose the discipline it did (which Dobish found to consist solely of a single verbal reprimand for improper radio use), denied and dismissed the grievance on Drumm's behalf.

10. There is no identity of issue between the grievance heard by Arbitrator Dobish and this complaint proceeding.

11. Those sections of the Schramm letter of January 29, 1990 which go beyond an explanation of why the grievance was being denied, specifically those paragraphs following the numbered paragraphs, had the reasonable tendency to interfere with, restrain or coerce Drumm or other employes in the exercise of

their rights to engage in protected concerted activity.

12. The record taken as a whole fails to establish by a clear preponderance of the evidence that the County's actions -- its disciplining of Drumm, or its response to Drumm's grievance over his verbal reprimand -- were motivated, in whole or in part, by hostility on its part toward the Union or any employe for engaging in protected concerted activity.

CONCLUSIONS OF LAW

1. That because there is no identity of issue, the Respondent's Motion to Dismiss this complaint on the grounds of res judicata must be denied.

2. That those sections of the Schramm letter of January 29, 1990 which go beyond an explanation of why the Drumm grievance was being denied, specifically those paragraphs following the numbered paragraphs, had the reasonable tendency to interfere with, restrain or coerce Drumm or other employes in the exercise of their rights under Sec. 111.70(2), Stats., and therefore the Respondent Manitowoc County did violate Sec. 111.70(3)(a)1, Stats., by its issuance.

3. That none of the actions by Manitowoc County or its agents were motivated by animus toward Drumm's having engaged in protected concerted activity, and therefore, Respondent did not violate Sec. 111.70(3)(a)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/

1. That the complaint alleging violations of Sec. 111.70(3)(a)3, Stats., is hereby dismissed.

2. That the Respondent Manitowoc County, its officers and agents, shall immediately:

A. Cease and desist from interfering with, restraining or coercing Drumm or other employes in the exercise of their rights under Sec. 111.70(2), Stats.

B. Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

1. Immediately delete from all files under its control those portions of the text of the Schramm letter of January 29, 1990, which follow paragraph 5.

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.

Dated at Madison, Wisconsin this 8th day of April, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Stuart Levitan, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

In support of its position, the complainant union asserts and avers as follows:

> The respondent's motion that this complaint should be dismissed because of a prior arbitration award is not well-founded. That arbitration award only addressed the issue of a contract violation; it did not address the question of law presented by a complaint of interference and discrimination. Here, there is not the concurrent jurisdiction which the respondent contends, but rather dual jurisdiction, which preserves for both arbitrator and examiner their respective responsibilities under contract and statute.
>
> It is established that interference may be found when an employer's actions might reasonably be expected to chill the exercise of protected rights; a finding of discrimination, though, requires that the employer acted out of hostility toward those rights.
>
> Here, Gerald Drumm's request for a union representative to process a safety grievance, and the filing of a grievance, were protected activities, of which the employer was clearly aware. As evidenced by the actions and comments of the patrol superintendent, who admonished Drumm for seeking union representation regarding the unsafe assignment, the employer was hostile toward the protected activity. Drumm was castigated and publicly referred to the Employe Assistance Program for filing a grievance, which the employer considered a sign of "rebelliousness." This discrimination derivatively interfered with Drumm's rights.
>
> Drumm was given a dangerous assignment, and sought union representation. The testimony establishes that it was this protected activity -- not radio transmissions or job duties -- which directly lead to the discipline, discrimination and interference. Further, the Highway Commissioner testified that Drumm's referral to the EAP -- made known to an unprecedented number of persons -- was not kept confidential simply because it was related to the grievance which Drumm filed.
>
> Even if Drumm's grievance was later found to be without merit, Drumm had every legal right to engage in protected activities free from interference and discrimination. Instead, he suffered unfairly solely because he engaged in protected activities, activities to which the employer was hostile. Accordingly, relief should be granted.

In support of its position that the complaint should be dismissed, the respondent employer asserts and avers as follows:

> The complaint must be dismissed because there is no evidence the County did anything other than impose discipline on Drumm with just cause to do so.
>
> As enunciated by the U.S. Supreme Court and followed by the WERC, there is a national policy favoring arbitration in resolving industrial disputes. Here, facts of the disputed grievance were already subjected to an arbitration award, which found the discipline to be with just cause. Therefore, although the grievance involved the collective bargaining agreement and this complaint involves the law of prohibited practices, the examiner should defer to the findings of the arbitrator and dismiss the complaint.
>
> Because the complaining union cannot show that the County did anything other than impose discipline for just cause, it cannot establish that the respondent committed prohibited practices. The arbitrator expressly found no employer hostility against Drumm; indeed, the only hostility in evidence was that of Drumm toward management.
>
> There was no evidence of employer actions showing either a tendency to interfere with, or hostility toward, Drumm's exercise of protected rights.
>
> The complaining union is in error when it contends that Drumm was issued two reprimands; the record evidence, and the arbitrator's award, clearly establishes that the County issued only one verbal reprimand, that being for misuse of the County radio system. Because no reprimand was issued for refusing a direct work order (as the Union falsely alleges), there is nothing to support the claim that the County interfered with Drumm's protected rights. As the County was found to be within its rights to impose the discipline it did, it is completely unreasonable to contend that just and progressive discipline is an

interference with protected rights. Any objective person would see that to find otherwise would allow an employe to escape the consequences of misconduct by attempting to intertwine the misconduct with some protected activity.

Also, the Union's argument that the Commissioner's reference to the Employe Assistance Program was a hostile response to Drumm's exercise of protected rights, or an interference with those rights, is a contention strained to the point of incredulity.

First, as the arbitrator noted, such references in the grievance response are routine aspects of discipline, and was made out of genuine concern on the part of the Commissioner, not in an attempt to silence an aggrieved employe. It was not just that Drumm filed a grievance that occasioned the reference to the EAP; it was that the hostile way in which he did so indicated his serious personal resentment of management, a problem which the Commissioner believed could be helped by the EAP. Further, the involvement of the persons copied on the grievance response was routine, and pursuant to standard County operational practices.

Because the complaining Union has failed to demonstrate that the County was hostile towards Drumm for the exercise of protected rights, and that the reprimand was motivated in part by that hostility, the complaint alleging a violation of Sec. 111.70(3)(a)3., Stats., must be dismissed. Neither before the Arbitrator nor before the Examiner was the Union able to offer any credible evidence pointing to hostility on the part of the County.

DISCUSSION

Respondent's Motion to Dismiss

At hearing, the Respondent County moved that the complaint be dismissed on the grounds that the Award by Arbitrator Dobish was res judicata. Based on my interpretation of the Commission's policy regarding motions to dismiss prior to an evidentiary hearing, I took the motion under advisement at that time. The Respondent thereafter renewed its motion in its brief. It also supplemented its motion by incorporating the theory of deferral to arbitration.

As applied by the WERC to arbitration awards, the doctrine of res judicata holds that such awards will be found to be conclusive of a subsequent dispute, where there is an identity of issues, parties and relief sought, and no material discrepancies of fact between the prior dispute governed by the award and the subsequent dispute. 2/ This understanding of res judicata is consistent with that of the Wisconsin Supreme Court. 3/

A related concept is that of collateral estoppel, which our Supreme Court has held "precludes relitigation of an issue of ultimate fact previously determined by a valid final judgment in an action between the same parties." 4/ Such preclusion, however, is premised on the matter raised in the second proceeding being "identical in all respects with that decided in the first proceeding and . . . the controlling facts and applicable legal rules remain(ing) unchanged." 5/

Neither of these concepts is applicable in the matter before me. At arbitration, the stipulated issue was, "(d)id the Employer have just cause to reprimand the Grievant for his conduct on December 8, 1989?" The issue before me is different, and concerns whether, by its actions, the employer interfered with Drumm's exercise of protected rights, or otherwise improperly discouraged union membership.

Granted, there is some factual overlap between the two. In particular, the Union argued at arbitration that certain employer action of which it complains -- the Schramm letter ostensibly referring Drumm to the EAP -- helped demonstrate the unjustness of the discipline which it grieved. That contention was explicitly rejected by Arbitrator Dobish, at footnote 9. However, as

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2/ Department of Administration, Dec. No. 14823-A (Yaeger, 1/77); City of Onalaska, Dec. No. 23483-A (Shaw, 6/86), aff'd by operation of law; State of Wisconsin, Dec. No. 20145-A (Burns, 5/83), aff'd by operation of law.

3/ Leimert v. McCann, 79 Wis.2d 289, 294 (1977); Barbian v. Lindner Bros. Trucking Co., Inc., 106 Wis.2d 291, 296 (1982).

4/ State ex. re. Flowers v. H&SS Department, 81 Wis.2d 376, 387 (1977), citing Ashe v. Swenson, 397 U.S. 436 (1970).

5/ C.I.R. v. Sunnen, 333 U.S. 591, 599 (1948).

respectful as I am of by colleague Arbitrator Dobish, it strikes me that the commentary in footnote 9 was dicta, which, while interesting, was not an actual holding in the case, nor a finding essential to its resolution.

Because there is thus no identity of issue, there is neither res judicata nor collateral estoppel.

The County has also raised an objection based on the concepts of deferral and selection of remedies. The County is correct, of course, that there is a well-settled "national policy favoring arbitration," 6/ which policy has been adopted in Wisconsin, both for private and public sector employment. 7/ Again, the County is correct that arbitration awards are to be set aside only in cases of arbitral misconduct, perverse misconstruction of the agreement, illegality, or violations of clear public policy. 8/

The County errs, however, in contending that the Union's complaint calls on me to consider reversing or vacating the prior arbitration award. That award, which establishes that the County had just cause to issue a verbal reprimand of Drumm for his misuse of the radio system, stands; nothing in the consideration of this complaint case can call that conclusion into question.

Instead, the question concerns the relationship between a grievance which alleged a contractual violation and a complaint of an unfair labor practice, where the grieved/complained of employer's action is related, but not completely the same. The Commission has long held that it

> has the authority to make determinations and order relief in cases involving noncontractual unfair labor practices, even despite, contrary to, or concurrently with the arbitration of the same matters. The possibility of full relief through arbitration does not preclude (the Commission) from fully adjudicating alleged noncontractual violations of the statutes which it enforces. 9/

Thus, the Commission has

> concluded that an employ can pursue grievance arbitration alleging a contractual violation by the employe while contemporaneously citing the same employer action as a basis for a finding of an unfair labor practice by the Commission. 10/

Obviously, if such dual actions are permissible where the underlying act by the employer was the same, such actions must also be allowable where, as here, the underlying actions are distinct.

This proceeding involves subchapters I and IV of Chapter 111, Wis. Stats; a recent proceeding involving subchapter II provides further clarification of this policy. In Krueger v. Wisconsin Department of Transportation, ERD Case No. 7700157 (LIRC, 1982), an employe was able to pursue a statutory discrimination claim before an administration agency after his contractual claim alleging the same set of facts had been rejected by an arbitrator -- a procedure analogous to what the grievant/complainant seeks to do here. In language which has been implicitly endorsed by the WERC, our sister agency summarized its understanding and application of Gardner-Denver as follows:

> (1) the doctrine of election of remedies is inapplicable in this context which involves statutory rights distinctly separate from the employe's contractual rights under a collective bargaining agreement, regardless of the fact that violation of both rights may have resulted from the same factual occurrence; (2) by merely resorting to the arbitral

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6/ Steelworkers v. American Manufacturing, 363 U.S. 564; Steelworkers v. Warrior & Gulf Navigation, 363 U.S. 574; Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 593 (1960).

7/ Denhart v. Waukesha Brewing Co., Inc., 17 Wis.2d 94 (1962); Joint School District No. 10 v. Jefferson Education Ass'n., 78 Wis.2d 94 (1977).

8/ Wisconsin Professional Policy Ass'n v. Dane County, 106 Wis.2d 303 (1982); Fortney v. School District of West Salem, 108 Wis.2d 167 (1982); See also, Sec. 298.XX, Wis. Stats.

9/ Milwaukee Elks, Dec. No. 7753 (WERC, 10/66).

10/ Universal Foods Corporation, Dec. No. 26197-B (WERC, 8/90).

> forum the petitioner has not waived his cause of action under the fair employment lay, because the rights conferred thereby cannot be prospectively waived and form no part of the collective bargaining process; (3) an arbitrator's authority is confined to resolution of questions of contractual rights, regardless of whether they resemble the rights conferred by the fair employment statute; (4) in instituting an equal rights action, the employe is not seeking review of the arbitrator's decision but is asserting a right independent of the arbitration process based on the fair employment law; (5) a policy of deferral by the court or agency to arbitral decision would lead to an undue emphasis on the law of the shop rather than the law of the land.

This reasoning was cited with approval by Examiner Marshall Gratz, in a decision which the Commission affirmed. 11/

In summary, then, I am persuaded that the Legislature did not intend to deprive litigants of the opportunity to pursue a statutory right before this administration agency merely because the propriety of the conduct in question has already been litigated in a contractual forum. Accordingly, because I find the concepts of res judicata, collateral estoppel and deferral no bar to my consideration of this complaint, I have denied the County's Motion to Dismiss, and proceed now to review this matter on its merits.

Complaint Alleging Violation of 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, individually or in concert with others, to interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed by Sec. 111.70(2), Stats, relating to the formation or administration of a labor or employe organization.

The complainant has the burden of proving by a clear and satisfactory preponderance of the evidence that the employer's conduct contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain or coerce its employes in the exercise of their section (2) rights. 12/ It is not necessary to demonstrate that the employer intended its conduct to have such an effect, or even that there was actual interference; instead, interference may be proven by showing that the conduct has a reasonable tendency to interfere with the exercise of protected rights. 13/

As I understand it, the specific conduct which the Union alleges was unlawful was the Step 2 grievance response by Highway Commissioner Schramm.

That communication can be viewed, in this context, as having three component parts. The first section, consisting of an introductory paragraph and five numbered paragraphs (one of them in two blocks), was a direct response to the grievance. The second section, consisting of six paragraphs, decried Drumm's overall attitude toward management, and culminated in an informal referral to the employe assistance program. The third section notes the parties who received copies of this correspondence.

There is nothing wrong with the first section. Nor is there anything wrong with the third section; in and of itself, it is standard practice, both for this employer and, I believe, in general, for information about the disposition of grievances to be provided to oversight committees and administrators. That such notice may, and here did, include reference to a matter which is supposedly confidential, namely the employe assistance program, is certainly a problem, but it is a problem which implicates the employer's personnel practices, not the law of prohibited practices.

There is something wrong, however, with the second section. Here, the Commissioner is not just explaining his denial of the grievance; instead, he is criticizing the conduct, perhaps the very character, of Drumm. In particular, he writes that, "the fact that you have grieved this warning sends a clear message that you are once again rebelling against anything that represents authority. I think this whole issue points to deeper problems which have to be raised." Later, he concludes with a reference to the employe assistance program, which he tells Drumm is something "I feel you should explore." That

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11/ Universal Foods, supra.

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

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

this is not a formal referral to the employe assistance program is not the point. Rather, the point is that the County has told an employe, in clear and unmistakable terms, that the filing of a grievance is viewed as an act of rebellion, one indicating the kind of deep personal problems which may need to be addressed through the employe assistance program. In so doing, the County cast a chill unto the grievance procedure, and thus interfered with Drumm's exercise of his protected rights.

Because the offending language is contained in the grievance response, the Employer's action is thus undeniably linked to the grievance process. However, I do not believe that separating the language in question from the grievance response would have cured its inherent defects. That is, even if the employer had divided the Schramm letter into two separate letters -- one, the formal grievance response, containing the numbered paragraphs; another, the additional portions -- the impact would have been the same, and the result as much of a violation.

The filing of a grievance is a protected activity. 14/ While there are certainly limits to the exercise of this right by an employe or labor organization, these limits must be established through lawful means (e.g., procedural standards set through collective bargaining; prohibited practice complaints where the employer alleges abuses). To condemn the conduct and character of an employe solely because the employe has filed a grievance will inevitably make that employe, and the rest of the work force, hesitate before filing and processing further grievances. In so doing, the employer interferes with the exercise of a protected activity; in so doing, that is what this employer did.

The County argues that the Highway Commissioner's response was not reflective of hostility, but that the EAP referral was in fact made out of genuine concern for Drumm. I believe that to be the case. Based on the record evidence, especially including witness demeanor at hearing, I am certain that the Highway Commissioner is deeply and genuinely anguished by this situation, and that his attitude toward Drumm is indeed one of concern, not hostility. It is because I believe that Schramm was acting in good faith that I have ordered the relief as noted below. However, inasmuch as a violation of (3)(a)1 is not premised on hostility, the absence thereof is not a defense.

Complaint Alleging Violation of Sec. 111.70(3)(a)3, Wis. Stats.

Section 111.70(3)(a) 3, Stats, provides that it is a prohibited practice for a municipal employer to "encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment. In order to prevail on this count, the Union must prove that:

> (1) The employe was engaged in lawful and concerted activities protected by MERA; 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. 15/

Here, there is no dispute that criteria one and two are met: the employer was aware that Drumm was engaged in the protected concerted activities of seeking union representation and filing a grievance.

The employer, however, took no action of any kind against Drumm for seeking union representation or for declining a work order, but instead issued the verbal reprimand solely for misuse of the radio, which by itself was not protected concerted activity. Therefore, there being no action by the employer in this regard, the inquiry is closed. As to the filing of the grievance, I have discussed above how the County's response was motivated by concern over, and possibly confusion at, Drumm's behavior, but not out of hostility. The Union having failed to establish Employer action and/or hostility, the necessary preconditions for a finding of a (3)(a)3 violation, this aspect of its complaint is being dismissed.

REMEDY

14/ Richland County (Sheriff's Department), Dec. No. 26352-A (Schiavoni, 7/90).

15/ Town of Mercer, Dec. No. 23186-B (Buffett, 5/86); Barron County, Dec. No. 23391-A (Burns, 7/87).

Where a violation of protected rights has been found, it is typical for the relief ordered to include a public posting of a Notice to that effect. I have not so ordered in this proceeding, because I believe such relief is not necessary to effectuate the purposes of the Municipal Employment Relations Act. Instead, I have concluded that the appropriate relief is an order to the County to (a), cease and desist from interference with Drumm's protected rights, and, (b), delete from the Schramm letter of January 29, 1990 all material following the paragraph numbered "5."

Dated at Madison, Wisconsin this 8th day of April, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Stuart Levitan, Examiner