STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO, Complainant, vs. JEFFERSON COUNTY, Respondent.	Case 61 No. 47292 MP-2584 Decision No. 27266-A

Appearances:

Mr. Jack Bernfeld and Mr. Laurence S. Rodenstein, Staff Representatives, 5 Odana Court, Madison, Wisconsin 53719-1169, appearing on behalf of Wisconsin Council 40, AFSCME, AFL-CIO.

Mr. Victor Moyer, Corporation Counsel, Courthouse, Room 201, 320 South Main Street, Jefferson, Wisconsin 53549-1799, appearing on behalf of Jefferson County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Wisconsin Council 40, AFSCME, AFL-CIO, filed a complaint on April 10, 1992, with the Wisconsin Employment Relations Commission alleging that Jefferson County had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3 and 4 of the Municipal Employment Relations Act, herein MERA. On May 19, 1992, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on said complaint was held in Jefferson, Wisconsin on August 27, 1992. The parties filed briefs which were exchanged on November 24, 1992. The Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization with its principal offices located at 5 Odana Court, Madison, Wisconsin 53719-1169.

2. Jefferson County, hereinafter referred to as the County, is a municipal employer with its offices located at the Jefferson County Courthouse, 320 South Main Street, Jefferson, Wisconsin 53549-1799.

3. The Union and the County are parties to a collective bargaining agreement covering all regular full-time and regular part-time employes employed in the County's Courthouse. The agreement by its terms was effective from January 1, 1991 through December 31, 1992, and contained a grievance procedure which culminates in final and binding arbitration.

4. On or about December 10, 1991, the Union filed a grievance with the Sheriff's Department alleging that the use of inmates in the kitchen caused safety concerns for the cooks and decreased the hours of work available for full-time and part-time employes. On or about December 20, 1991, the grievance was denied by the Sheriff. Before proceeding to arbitration on this grievance,

the parties agreed to participate in mediation through the Wisconsin Employment Relations Commission. On March 16, 1992, a mediation session was held but the parties were unable to reach agreement on this grievance.

5. On March 17, 1992, Sheriff Orval Quamme had a conversation with Eunice Liebel, the supervisor of the cooks in the jail kitchen. Although the record fails to establish the details of this conversation, the record indicates the Sheriff informed Liebel that the grievance had not been settled and they discussed catering in or contracting out the kitchen work and discussed catering out by providing service to the Head Start Program and Meals on Wheels.

6. After the meeting with the Sheriff, Eunice Liebel had a conversation with Luella Voight, a cook employed in the jail and a member of the bargaining unit represented by the Union. Liebel told Voight that the Sheriff was getting backed into a corner by the Union and Liebel stated that he said that if they continued pushing the part-time help, he would work them less hours and they would be out the door. Liebel further told Voight that the Sheriff said, "How would you like it if you all lost your jobs if I contract the kitchen out?"

7. Later that day, Voight reported this conversation to Helen Weisensel, the Union steward, who told Voight to write down what was stated and to give it to Peg Darnall, who was the Union president. Thereafter, Voight wrote up what she recalled from the conversation and gave it to Darnall after work on March 17, 1992.

8. On an unknown date in late March, 1992, Michael P. Sullivan, the Chief Deputy in the Sheriff's Department, was in the kitchen and Luella Voight asked about the use of inmates in the kitchen and Sullivan stated that State Statutes allowed it and a lot of jails in the state do it. Voight also asked Sullivan about the possibility of contracting out the kitchen work and he told her it had been an option that had been discussed.

9. The County has not subcontracted the kitchen work out and the grievance remained unresolved as of the date of the hearing.

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

CONCLUSIONS OF LAW

1. The County, by the statements made by its agent, Cook Supervisor Eunice Liebel, on March 17, 1992, to Luella Voight referred to in Finding of Fact 6, interfered with, threatened and coerced her in the exercise of her rights guaranteed by Sec. 111.70(2), Stats., and therefore, the County violated Sec. 111.70(3)(a)1, Stats.

2. The County, by the statements made by Chief Deputy Sullivan on an unknown date in March, 1992, to Luella Voight, referred to in Finding of Fact 8, did not interfere with, threaten or coerce her in the exercise of rights guaranteed by Sec. 111.70(2), Stats., and the County therefore did not violate Sec. 111.70(3)(a)1, Stats.

3. The Union failed to demonstrate by a clear and satisfactory preponderance of the evidence that Jefferson County discriminated against employes for the exercise of rights guaranteed by MERA, and consequently, the County did not violate Sec. 111.70(3)(a)3, Stats.

4. The Union failed to demonstrate by a clear and satisfactory

preponderance of the evidence that Jefferson County has refused to bargain with it or to circumvent bargaining with it by bargaining directly with employes in violation of Sec. 111.70(3)(a)4, Stats.

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

ORDER 1/

IT IS HEREBY ORDERED:

1. That those portions of the complaint alleging violations of Secs. 111.70(3)(a)3 and 4, Stats., are hereby dismissed.

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

a. Cease and desist from interfering with their employes' exercise of rights protected by Sec. 111.70(2), Stats.

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

1. Notify all employes in the Courthouse unit by posting in conspicuous places in its offices where notices to such employes are usually posted, copies of the notice attached hereto and marked "Appendix A." The notice shall be signed by an authorized representative of the County and shall remain posted for thirty days thereafter. Reasonable steps shall be taken by the

County to insure that said notices are not altered, defaced or covered by other material.

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

Dated at Madison, Wisconsin this 7th day of January, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Lionel L. Crowley, Examiner

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

Section 111.07(5), Stats.

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

"APPENDIX A"

NOTICE TO ALL 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 interfere with, threaten or coerce employes in the exercise of rights protected by Sec. 111.70(2), Stats.

Dated at Jefferson, Wisconsin this _____ day of _____, 1993.

JEFFERSON COUNTY

By _____

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

JEFFERSON COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint initiating these proceedings, the Union alleged that the County violated Secs. 111.70(3)(a)1, 3 and 4, Stats., by threatening, coercing and intimidating employes of the Sheriff's Department who were involved in a

grievance dispute and by attempting to bargain with individual bargaining unit members. The County answered the complaint denying that it had committed any prohibited practice.

UNION'S POSITION

The Union contends that the record raises serious questions about the credibility of the County's agents. It argues that Liebel's testimony is completely unreliable and, in all probability, is colored by a fear of her own job loss. It submits that the Sheriff's testimony is also incredible. On the other hand, the Union asserts that Union witnesses Voight and Weisensel offered precise and detailed testimony which is supported by the contemporaneous written statement of Voight. The Union submits that the County violated Sec. 111.70(3)(a)1, Stats., because Liebel's statements to Voight constituted a threat of reprisal. It notes that after talking to the Sheriff on March 17, 1992, Liebel seemed upset to Voight and Liebel stated to Voight that the Sheriff was getting backed into a corner and if the Union kept pushing the grievance for more part-time help, that such help would be limited to 600 hours per year and then be out the door and that the Sheriff said to Liebel "How would you like it if you all lost your jobs. - If I contract the kitchen out." It alleges that Voight had no reason to make up this account and that the only plausible explanation is that Liebel's recitation was to intimidate, coerce and threaten Voight and unless the grievance was dropped, the Sheriff would retaliate against employes by contracting out their work. It concludes that the statements contained a threat of reprisal which interfered with the rights of employes guaranteed by Sec. 111.70(2)(a), Stats.

The Union contends that the record establishes that the County violated Sec. 111.70(3)(a)3, Stats. It submits that a grievance dispute involving these employes was the subject of mediation on March 16, 1992, and the Sheriff and Liebel were aware of such activity. It claims that the Sheriff's and Liebel's admissions evidence hostility to the employes' grievance activity and the threat to contract out establishes that the employer's statements were based on hostility toward the grievants' protected grievance activity.

With respect to Sec. 111.70(3)(a)4, Stats., the Union maintains that the County refused to bargain collectively with the representative of the majority of the employes in the bargaining unit by attempting to pressure the grievants to get the Union to drop the grievance and the County engaged in an effort to circumvent the bargaining agent by ignoring the exclusive bargaining representative. It asks that the Union's prayer for relief as described in the complaint be granted.

COUNTY'S POSITION

The County contends that the evidence relating to two incidents of threats or coercion is far short of convincing.

With respect to the conversation between Eunice Liebel and Luella Voight on March 17, 1992, the County states that Liebel was not the most satisfactory witness but she was consistent in her testimony that she had never stated that the Union was backing the Sheriff into a corner. It points out that Liebel said that she had no knowledge of the existence of a grievance and did not say the grievance should be dropped or there would be subcontracting. It further notes that she never said that subcontracting was a definite move and no one told her it was a definite plan and she did not threaten anyone because of Union membership. The County argues that no Union member was present or privy to the conversation between the Sheriff and Liebel and each denied any statement that he was being backed into a corner. It refers to Voight's testimony that she did not hear the Sheriff say anything and what she did say about these matters was her own interpretation.

As to the second incident, the conversation between Chief Deputy Sullivan and Voight was initiated by Voight who asked Sullivan a hypothetical question and the Union now is seeking to interpret the predictable answer as a threat. It notes that Sullivan never told Voight that if the Union didn't drop their grievances, the County would contract out and people would lose their jobs. The County asserts that the record is unclear when Sue Topel, another cook, was present for any conversation with Liebel but argues that again a hypothetical question which solicited a predictable answer is asserted to be a threat by the Union. It points out that Topel was never called to testify, and the inference must be that her testimony would have damaged an already weak case. The County submits that the grievances were still being processed through the grievance resolution procedure and this is inconsistent with attempting to coerce Union members to drop grievances.

The County alleges that the Sheriff has considered various ways to make the kitchen operation more efficient but the various considerations were never communicated to the Union because no decision to change was ever made. It insists that the Union may have reacted to rumor or irrational fear because the County spent $300,000.00 for a state of the art kitchen and no change in the method of operation had been proposed to the County Administrator or the County Board and the Sheriff submitted a budget for continued operation of the kitchen so the threat of a job loss inferred by some Union members was not realistic. It asserts that the County made no threats and any threats which Union members imagined or inferred from responses they had solicited were not realistic. It submits the Union has failed to prove that the County attempted to chill the exercise of protected rights and it asks that the complaint be dismissed.

DISCUSSION

Section 111.70(3)(a)1, Stats., provides that it is a prohibited practice for a municipal employer "to interfere with, restrain, or coerce municipal employes in the exercise of their rights guaranteed in sub. 2. Sec. 111.70(2), Stats., provides as follows:

> (2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. . .

A violation of Sec. 111.70(3)(a)1, Stats., occurs when a municipal employer's conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. 2/ In order to prevail on its complaint of interference, the Union must demonstrate, by a clear and satisfactory preponderance of the evidence, that the County's conduct contained a threat of reprisal or promise of benefit which would tend to interfere with the exercise of the employes' Sec. 111.70(2) rights. 3/ It is not necessary to prove that an employer intended to interfere with the rights of employes or that there was actual interference. 4/ Interference may be proved by a showing of a threat of reprisal or a promise of benefit which would reasonably tend to interfere with employes' rights to join or assist labor organizations or bargain collectively through representatives of their choice. 5/ The statements as well as the circumstances under which they were made must be considered in order to determine the meaning which an employe would reasonably place on the statements. 6/

Application of these principles to the instant case reveals the following: The evidence failed to establish what the conversation between the Sheriff and Liebel was on March 17, 1992. Liebel could not recall what was discussed. 7/ The Sheriff denied saying he was being backed into a corner by the Union. 8/ He denied stating that if the Union did not drop its grievance, he would contract out the kitchen. 9/ There was no evidence that the Sheriff instructed Liebel to say anything to anyone else about the conversation or to talk to employes about contracting out. However, it is not necessary to determine what the Sheriff discussed with Liebel on March 17, 1992 because it is not important what the Sheriff said as he never spoke to any bargaining unit employe. What is important is what Liebel said to bargaining unit employes because she is a supervisor and an agent of the County and her statement is imputed to the County. She could be saying what the Sheriff said, mistating it or just making it up. It is her statement however which must be examined to see if it contains a threat of reprisal or promise of benefit.

What Liebel said to Voight involves a credibility determination. Liebel's testimony is less than precise. She stated that she never said the

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

3/ 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).

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

5/ City of Brookfield, Dec. No. 20283-B (WERC, 5/84).

6/ City of La Crosse, Dec. No. 17084-C (WERC, 4/82); WERC v. Evansville, 69 Wis.2d 140 (1975).

7/ TR-71.

8/ TR-88.

9/ Id.

Union was backing the Sheriff into a corner. 10/ She denied threatening anyone because of their being in the Union. 11/ On the other hand, she could not recall what she talked to the Sheriff about on March 17, 1992. 12/ Yet Liebel indicated that part-timers might be limited to 600 hours 13/ and that subcontracting was discussed. 14/ Liebel also testified that Voight was an honest and trustworthy employe. 15/

Voight's testimony was consistent. Voight wrote down her recollection of the conversation with Liebel the same day of the conversation and her testimony was consistent with her written statement. 16/ I conclude that Voight's testimony should be credited because of its consistency and the contemporaneous written statement and her reputation for honesty.

Therefore, the record establishes that one day after a grievance mediation involving the cooks in the jail, the supervisor tells a cook that the Sheriff is getting backed into a corner by the Union and that if they keep pushing the part-time help, they will work 600 hours and be out the door and how would they like it if they all lost their jobs if the Sheriff contracted out the kitchen. Although Liebel never stated that the grievance should be dropped or the Sheriff in fact would contract out the kitchen, there was an inference that contracting out may occur if the grievance was pursued. This is clearly a threat of reprisal, although a veiled one, that employes would suffer severe consequences for pushing their grievance, a clearly protected activity. Even though Liebel may not have intended to interfere with employes' rights as she testified she did not mean to make any such implication, 17/ it is unnecessary to prove that Liebel intended to interfere with employes' protected rights or that interference actually occurred. Given the Sheriff's power to run the jail, a threat of subcontracting work and putting employes out of work is not so unrealistic that the employes would not reasonably interpret it as a threat. Liebel's statement under the circumstances of this case had a reasonable tendency to interfere with the employes' protected rights and thus was a violation of Sec. 111.70(3)(a)1, Stats.

The Union's complaint alleges that Chief Deputy Sullivan's statements also constituted interference. The Union never referred to Sullivan's statements in its brief and the evidence established that Voight questioned Sullivan and he answered in general terms which answer contained no threats of reprisal or promise of benefit, thus the statements by Sullivan in the context in which they were made did not violate Sec. 111.70(3)(a)1, Stats.

The Union alleged that the County violated Sec. 111.70(3)(a)3, Stats. In

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10/ TR-55.

11/ TR-59.

12/ TR-71.

13/ TR-56.

14/ TR-73.

15/ TR-77.

16/ Ex-4, TR-40.

17/ TR-66.

order to prove a violation of Sec. 111.70(3)(a)3, the Complainant must prove by a clear and satisfactory preponderance of the evidence that:

(1) the employes were engaged in protected, concerted activity;
(2) the employer was aware of said activity;
(3) the employer was hostile to such activity;
(4) the employer's action was based, at least in part, upon said hostility. 18/

The evidence establishes that the Union had filed a grievance over the use of inmates in the kitchens as well as over the hours of work and the County was aware of this activity, so the first two elements have been met. It could be inferred that the County was hostile to this activity by the statement made by Liebel, so arguably the third element of hostility appears to be present. The fourth element requires that action by the employer be based, at least in part, on said hostility. Here, the only action shown was Liebel's statement from which interference is inferred but there was no action taken against employes by the County as the only "action" was the speech of Liebel. Liebel's statements appear to be more based on a fear of the loss of her job rather than hostility to any protected activity. In this case, the Union has failed to prove by a clear preponderance of the evidence, the four elements necessary for a violation of Sec. 111.70(3)(a)3, Stats., and consequently, this allegation has been dismissed.

18/ 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).

The complaint also contains an allegation that the County violated Sec. 111.70(3)(a)4, Stats., on the basis that the County was bargaining with individual employes and bypassing the Union. The evidence presented failed to establish that Liebel played any part in the grievance procedure and there was no grievance discussion. Voight never responded to Liebel and a reference to the grievance does not appear in Voight's statement. 19/ There was no evidence that the County tried to adjust the grievance with the individual employe or to negotiate a settlement of it or to reach an agreement, thus, no violation of Sec. 111.70(3)(a)4, Stats., has been found and this allegation has been dismissed.

With respect to the remedy, the County has been ordered to cease and desist from interfering with, coercing or restraining employes in the exercise of their protected rights as well as posting the standard notice which the undersigned deems to be the appropriate remedy in this matter.

Dated at Madison, Wisconsin this 7th day of January, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Lionel L. Crowley, Examiner

19/ Ex-4.