

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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MILWAUKEE TEACHERS' EDUCATION ASSOCIATION,	:	
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Complainant,	:	Case 264
	:	No. 48233   MP-2654
vs.	:	Decision No. 27484-A
	:	
MILWAUKEE BOARD OF SCHOOL DIRECTORS,	:	
	:	
Respondent.	:	
	:	

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Appearances:

Perry, Lerner & Quindel, S.C., Attorneys at Law, 823 North Cass Street, Milwaukee, Wisconsin 53202-3908, by Mr. Richard Perry, appearing on behalf of the Milwaukee Teachers' Education Association.

Ms. Mary Kuhnmuench, Assistant City Attorney, City of Milwaukee, Office of the City Attorney, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, appearing on behalf of the Milwaukee Board of School Directors.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 27, 1992, the Milwaukee Teachers' Education Association filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission alleging that the Milwaukee Board of School Directors had committed prohibited practices in violation of Sec. 111.70, Stats. On December 2, 1992, the Wisconsin Employment Relations Commission appointed Coleen A. Burns, a member of its staff, as Examiner to conduct a hearing on the complaint, and to make and issue Findings of Fact, Conclusions of Law and Order in the matter as provided in Secs. 111.70(4)(a) and 111.07, Stats. Hearing on the matter was held on January 15, 1993 in Milwaukee, Wisconsin. The record was closed on May 6, 1993, upon receipt of transcript and written argument.

Having considered the evidence and arguments of the parties, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Milwaukee Teachers' Education Association, hereafter MTEA or Complainant, is a labor organization and is the certified exclusive collective bargaining representative of certain professional certificated teaching employes employed by the Milwaukee Board of School Directors. MTEA has its principal offices at 5130 West Vliet Street, Milwaukee, Wisconsin 53208.
2. Milwaukee Board of School Directors, hereafter Board or Respondent, is a municipal employer with authority to control and direct the operations of the Milwaukee Public School System (MPS) and has its principal offices located at 5225 West Vliet Street, Milwaukee, Wisconsin 53208.

3. The MTEA and the Board have been parties to a series of collective bargaining agreements covering certificated teachers employed in the Milwaukee Public Schools. Part IV, Section B(6)(a) of the parties' collective bargaining agreement provides in relevant part as follows:

Teachers shall be entitled to a duty-free lunch period equal in length to a normal class period in high school, no less than fifty (50) minutes in a middle school, and no less than one (1) hour in the elementary school.

At the time of the complaint hearing, Harry Oden was the Principal of the MPS Juneau High School, hereafter Juneau, and had been in this position for the previous three years. Prior to becoming the Principal of Juneau, Oden had been an Assistant Principal at Juneau for four years. In March of 1992, one Juneau student, who was black, died of sickle cell anemia and another Juneau student, who was white, died in an accident. Following the deaths of these students, a group of black students asked Oden for permission to have a memorial service for the student who had died of sickle cell anemia and a group of white students asked Oden for permission to have a memorial service for the student who had died in the accident. Oden gave permission for the memorial services on the condition that the parents of the two dead students consented to the memorial services. The mother of the student who had died of sickle cell anemia did not consent to the memorial service. The parents of the other student did consent to the memorial service. The group of black students informed Oden that they would stage a walk-out if the memorial service did not include the student who had died of sickle cell anemia. Oden decided to allow a joint memorial service. On March 31, 1992, the joint memorial service was held at the end of the Third Hour of the school day. Two Juneau teachers conducted the memorial service over the PA system. The memorial service ran into the Fourth Hour, which is one of the lunch periods at Juneau.

4. At the end of the memorial service, Terrence Falk (a/k/a/ Terry Falk), a Juneau teacher with a Fourth Hour lunch period, checked his watch and concluded that the memorial service had extended into the Fourth Hour lunch by ten minutes. After dismissing his Third Hour class, Falk went into the hallway, met Assistant Principal Luecht, and told Luecht that the lunch hour should be extended by ten minutes or there would be a violation of the teachers' contract. Falk then went in to the office and told the secretary that Oden should be informed that the lunch hour should be extended by ten minutes because the shortened lunch hour was a violation of the contract. The lunch hour was not extended as requested by Falk. On that same day, Falk told two of the Juneau MTEA Building Representatives that he had told Luecht that the lunch hour should be extended, that the lunch hour had not been extended, and that he would be contacting MTEA about the incident. Thereafter, Falk contacted MTEA Assistant Executive Director Mark Rosenbaum, and advised Rosenbaum that the lunch period had been shortened in violation of the teachers' contract. Thereafter, Rosenbaum, who has the responsibility for enforcing the teacher contract, contacted Oden and scheduled a Step 1 grievance conference for on or about April 7, 1992. Due to the death of Falk's mother, the conference was rescheduled to April 29, 1992. Falk did not discuss his grievance with Oden prior to April 29, 1992. Nor did Falk, or the MTEA, file any written grievance prior to April 29, 1992. The written grievance was filed on May 12, 1992.

5. Prior to April 29, 1992, Oden received a petition which contained the following typewritten information:

April 2, 1992

To Whom It May Concern

We, the undersigned faculty of Juneau Business High School, purport the following sentiments regarding the grievance recently filed by Mr. Terry Falk:

1. We are in agreement that the execution of the memorial was poorly planned with reference to time, however, we do not believe it to have been an intentional act.
2. The minutes in violation should be viewed as a necessary function so that we as a school could honor the lives of Daniel and Tashanita and also as an opportunity to display an attitude of respect and selflessness.
3. In light of the nature of the issue, we suggest that all involved remember to deal humanely and sensitively to this and any other issue related to death.

Twenty-seven signatures were attached to the document. Prior to the grievance conference of April 29, 1992, other Juneau teachers indicated to Oden, orally and in writing, that they neither agreed with, nor were a part of, the grievance. Oden did not tell these teachers to get involved in the grievance or to stop the grievance, but did tell the teachers that they should discuss their concerns with Falk because he was their colleague. Prior to the conference of April 29, 1992, a member of the press contacted Oden and stated that a member of Oden's staff had contacted the press about a grievance which had been filed involving the deaths of some of Oden's students. Oden responded that he intended to deal with the matter at the school level. Oden did not initiate this contact with the press and did not instruct any member of his staff to contact the press.

6. The April 29, 1992, conference was held in Oden's office at Juneau, involved only Falk, Rosenbaum and Oden and lasted approximately forty to fifty minutes. During the conference, Oden discussed the threatened student walk-out and explained that he had consented to the memorial because he considered the memorial to be in the best interest of the school. Oden told Falk that he (Oden) understood that Falk had shouted at the secretary when Falk had gone into the office to complain about the shortened lunch hour. Oden stated that he had received a petition signed by some teachers indicating that the grievance should not have been filed. Oden indicated that someone had contacted the press, that he did not want to have the grievance go before the press and that he wanted the grievance handled within the building. Oden does not like dealing with the press because he believes that they look for the negative and are not interested in the positive. Oden acknowledged that there had been a contract violation, but that the contract violation had been unintentional. Oden explained that, at times, he had deviated from the contract for the benefit of the teachers; that he did not believe that the grievance was good for the school, good for the staff, or good for morale; and asked whether or not the grievance could be dropped. Falk told Oden that he may have acted too strongly when he went into the office and apologized for his conduct in the office. Falk explained that, at the time of the memorial, his mother had been dying of cancer and that he was emotionally distressed. Falk told Oden that, although he did not want any money, there had been a contract violation. Rosenbaum and Falk requested that Oden offer time cards to all

affected teachers and let the teachers decide whether or not they wanted to be paid for the lost lunch hour time. Falk stated that the lunch hour time was Falk's to give and not Oden's to take. Oden did not respond to the request to give time cards to the affected teachers. Oden ended the conference by indicating that he would follow the contract to the letter of the law and that, if the press called again, he would talk to the press. During the conversation, Oden maintained a physical distance between Falk and Rosenbaum; there was no joking or miscellaneous conversation; and Oden's final statements regarding following the contract and going to the press were made very forcefully. Oden did not make any statement about MTEA or the union. Rosenbaum had been employed by MTEA for approximately two and one-half years. Rosenbaum had not met Oden prior to the April 29, 1992 meeting and did not have any other face-to-face meetings with Oden between April 29, 1992 and the date of the complaint hearing. At the time of the April 29, 1992 meeting, Oden believed that the other teachers affected by the grievance had previously indicated to him that they did not want to be paid for time lost due to the memorial service. Prior to the April 29, 1992 meeting, some teachers had talked to Falk and had told Falk that they did not agree with the filing of a grievance on the issue of the memorial services encroachment on the Fourth Hour lunch period.

7. Falk has been a teacher in the Milwaukee Public Schools since 1971 and has been at Juneau since 1973. Falk is an English teacher, the Juneau debate coach, assists with the forensic festival, and is presently the secretary for the Parent Teacher Students Association. Prior to the time that Oden became Principal of Juneau, Falk had been a Forensic's coach. Falk has been an MTEA building representative. At the time of the complaint hearing, Falk was in his second six-year term as member of the MTEA Executive Board. At the time of hearing, Oden did not know if Falk held any MTEA position outside of Juneau and had not been advised that Falk had any MTEA position at Juneau. Falk is a lifetime member of the Wisconsin Communication Association, a past president of the Wisconsin Debate Coaches Association and, until recently, served on the advisory board for debate for the Wisconsin High School Forensics Association. Oden, who has evaluated Falk on one occasion, gave Falk a satisfactory evaluation. On April 13, 1992, Falk completed the MPS "Request for Professional Leave - Teacher" form requesting leave with pay to attend the "Wis Communications Assoc/Debate Coaches/Forensic Coaches" to be held on May 1 and 2 in Green Bay, Wisconsin. In response to questions on the form, Falk indicated that a substitute was required and that he had received another leave that school year, i.e., on January 10, 1992. Falk turned the form into the Juneau school office on the following day, April 14, 1992. On April 16, 1992, Oden signed and completed the Principal's portion of the form which required the principal to put a check in one of two lines, i.e., "Recommended" or "Not Recommended" by checking "Not Recommended". In the comment area, Oden wrote "Do not see educational value to total school". Oden had not previously questioned the conference's educational value to the school. Oden claims that he reached this conclusion by looking at the total numbers involved, the availability of substitutes, and deciding that, proportionally, a large number of students were not involved. Juneau has approximately 860 students. Approximately twelve to seventeen Juneau students participate in debate and approximately the same number participate in forensics. In January of 1991, Oden approved a Professional Leave Request in which Falk requested one day of paid leave to attend an Academic Decathlon. Falk acted as a Judge at the Decathlon. No Juneau students participated in the Decathlon. Oden denies that his decision to not recommend Falk's leave request was retaliatory, discriminatory, or in response to the fact that Falk had filed a grievance. The portion of the form entitled "Department of Curriculum and Instruction" contains the word "Approved", with an accompanying line to be checked, and the word "Denied", with an accompanying line to be checked. There is also a

"Comment" section, a signature line and a date line. On April 30, 1992, Dr. Cynthia Ellwood, of the MPS Department of Curriculum and Instruction, denied, without comment, Falk's request for professional leave. When Falk arrived at school on Thursday, April 30, 1992, he reminded Malou Noth, the Juneau office secretary, that he would be on professional leave on Friday, May 1, 1992. The school secretary responded by telling Falk that the leave had been denied. Concluding that the leave had been denied because he had filed a grievance, Falk immediately contacted the MTEA office and left a message for Rosenbaum informing Rosenbaum that the leave had been denied. Falk also called the MPS Central Office to determine who received professional leave request forms and was advised that such forms were sent to Ellwood. When Falk contacted Ellwood's office, a secretary told Falk that she could not find any record of the form, but that she would look into the matter. When Falk called back about an hour later, an individual in Ellwood's office told Falk that the form had been found, but that Ellwood had not signed the form. At about 1:00 p.m., Falk discussed the denial with Rosenbaum. Based upon discussions with Rosenbaum, Falk understood that Ellwood had told Rosenbaum that she could not override the recommendation of the principal. Since at least 1990, the request forms for teacher professional leave have indicated that the Principal recommends or not recommends such leave requests, while authority to approve or deny such leave requests resides with central administration.

8. Falk attended school on Friday, May 1, 1992. The Wisconsin Communication Association, in conjunction with the Wisconsin Forensics Coaches Association, Wisconsin Debate Coaches Association, and the Wisconsin High School Forensic Association, held their annual spring conference from April 30 to May 2, 1992 in Green Bay, Wisconsin. For at least twelve years prior to the 1992 annual spring conference, Falk had been granted professional leave to attend this conference. During Oden's tenure as Principal of Juneau, Oden had recommended all of Falk's requests for professional leave to attend the Wisconsin Communication Association, Wisconsin Forensics Coaches Association, Wisconsin Debate Coaches Association, and the Wisconsin High School Forensic Association annual conference, except for Falk's request to attend the 1992 conference. Falk, who had paid a registration fee of \$37.00 to attend the 1992 conference, did not attend the 1992 conference. If Falk had attended the conference, he would not have been reimbursed by MPS for the \$37.00 registration fee. Falk had wanted to attend the Friday portion of the conference so that he could attend the debate coaches business meeting on Friday morning and the forensics coaches meeting on Friday afternoon. Historically, Falk had acted as the Juneau representative at the forensics meeting. Falk wanted to attend these meetings so that he could participate in the election of officers, the discussion of rule changes, and the scheduling of the debate and forensics calendar.

9. On April 16, 1992, Oden received a request for professional leave from the Golf Coach for the purpose of attending a regional, sectional golf tournament for the latter part of April or early May. Oden told the Golf Coach that he did not need to fill out the professional leave request form because the tournament was part of his normal duties as a coach. Falk does not believe that the Wisconsin Communication Association, Wisconsin Forensics Coaches Association, Wisconsin Debate Coaches Association, and the Wisconsin High School Forensic Association conference should be a requirement of the debate or forensic coaches. Oden had recommended Falk's request for professional leave to attend the annual Wisconsin Communication Association, Wisconsin Forensics Coaches Association, Wisconsin Debate Coaches Association, and the Wisconsin High School Forensic Association convention prior to April 16, 1992, with the

proviso that the leave should not be provided if a substitute were not available. Oden made such a recommendation on November 20, 1990 and on December 4, 1990, Department of Administrative Services representative McGriff approved the leave request with the comment: "I can not guarantee a substitute". On April 16, 1992, Oden did not condition his recommendation on the availability of a substitute and did not reference availability of substitutes. The Request for Professional Leave - Teacher form submitted by Falk on April 14, 1992 had a Blue Copy for the Department of Curriculum and Instruction, a Yellow Copy for the Principal, and a Pink Copy for the Substitute Office. At Juneau, the teacher completing the request form submits the form to Oden's secretary, who gives the form to Oden; Oden determines whether or not to recommend the leave and signs the request form; the request is then sent to the Central Office via the museum mail, i.e., the MPS inter-office mail. On April 16, 1992 Oden signed Falk's request for a paid day of professional leave after the museum mail pick-up. April 17, 1992 was a school holiday, Good Friday, and school did not resume until Monday, April 27, 1992. Oden maintains that, when determining whether or not to recommend a professional leave request, he considers such factors as importance to the school, the number of leaves previously granted, staffing levels, and the availability of substitutes. Oden has not recommended all professional leave requests submitted by members of his staff. There have been instances in which central administration denied professional leave requests which were recommended by Oden and there have been instances in which central administration has approved professional leave requests which were not recommended by Oden. When the professional leave request form has been completed by the Department of Curriculum and Instruction, a copy is returned to the Principal. Oden does not provide the applicant with a copy of the professional leave request form and does not otherwise notify the applicant of either Oden's recommendation or the Central Offices disposition of the leave request. While Oden has always routed the professional leave request form to the Central Office, the form has not always been routed to the same individual at the Central Office. At one time the form went to Willy Little in the Human Relations area, then it went to Deputy Superintendent McGriff, then it went to the Community Superintendent, and since the 1991-92 school year it has gone to Ellwood. Prior to the submission of the professional leave request for the May, 1992 conference, a photo copy of the professional leave form showing Oden's recommendation had been placed in Falk's mail box and Falk would receive a copy with the Central Office recommendation approximately one week later. The "Request for Professional Leave - Teacher" form contains "Guidelines for Professional Leave - Teacher". Item 3 of these guidelines states that: "Requests for professional leave to attend conventions and/or conferences may be approved for those sponsored by recognized organizations and institutions." Item 6 of these guidelines states that: "Approval of requests for professional leave will be made within the limits of available funds, the concentration of applications at a particular school or the district, the priority of services needed in the school or district, and upon the applicant's inability to obtain the desired information or training by other means."

10. MPS principals have authority to recommend or to not recommend the professional leave requests of teachers, but authority to approve or to deny the professional leave requests of teachers resides with MPS central administration. On or about June 10, 1992, Juneau teacher Accomando, presented Falk with a one page document which was dated June 10, 1992 and which stated the following: "While I acknowledge the MTEA's winning of the grievance regarding the intrusion of the student memorial service held on March 31, 1992, by six (6) minutes into the contractual faculty lunch or preparation period, I wish to waive my right to payment for said infringement." Following this statement, there were twenty-four typed signature lines, with accompanying typed faculty names. Falk signed this document, as did all of the other

twenty-three faculty members listed on the document. At the time that Falk signed this document, he did not believe that the grievance had been resolved.

On November 6, 1992, MPS Superintendent Howard Fuller granted the grievance initiated by Falk on March 31, 1992 by authorizing the payment for lunch hour time which was lost as a result of the memorial service. While all of the affected teachers were offered the payment, all of the teachers, including the Grievant, declined the offer.

11. Authority to grant or deny Falk's request for professional leave to attend the May, 1992 Wisconsin Communication Association, Wisconsin Forensics Coaches Association, Wisconsin Debate Coaches Association, and the Wisconsin High School Forensic Association convention resided with Ellwood, and not with Oden. Ellwood had discretion to approve or to deny teacher professional leave requests. The record does not demonstrate that Ellwood automatically approved all professional leave requests recommended by MPS Principals or that Ellwood automatically denied all professional leave requests not recommended by MPS Principals. The record does not demonstrate that Ellwood was hostile towards Falk, or any other employe, for engaging in rights protected by Sec. 111.70(2), Stats. The record does not demonstrate that Ellwood did not have a valid business reason for denying Falk's request for professional leave to attend the May, 1992 Wisconsin Communication Association, Wisconsin Forensics Coaches Association, Wisconsin Debate Coaches Association, and the Wisconsin High School Forensic Association convention. Oden did not have a valid business reason for not recommending Falk's request for professional leave to attend the May, 1992 Wisconsin Communication Association, Wisconsin Forensics Coaches Association, Wisconsin Debate Coaches Association, and the Wisconsin High School Forensic Association convention.

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

#### CONCLUSIONS OF LAW

1. Complainant Milwaukee Teachers' Education Association is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

2. Respondent Milwaukee Board of School Directors is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats, and Principal Harry Oden is an agent of Respondent Milwaukee Board of School Directors.

3. Dr. Cynthia Ellwood's decision to deny Terry Falk professional leave to attend the May, 1992 Wisconsin Communication Association, Wisconsin Forensics Coaches Association, Wisconsin Debate Coaches Association, and the Wisconsin High School Forensic Association convention did not have a reasonable tendency to interfere with, restrain or coerce employes in the exercise of Sec. 111.70(2) rights and, thus, did not violate Sec. 111.70(3)(a)1, Stats.

4. Principal Harry Oden's April 16, 1992 decision to not recommend Terry Falk's request for professional leave to attend the May, 1992 Wisconsin Communication Association, Wisconsin Forensics Coaches Association, Wisconsin Debate Coaches Association, and the Wisconsin High School Forensic Association convention did have a reasonable tendency to interfere with, restrain or coerce employes in the exercise of Sec. 111.70(2) rights and, thus, Respondent, by its agent Principal Harry Oden, has violated Sec. 111.70(3)(a)1, 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. Respondent Milwaukee Board of School Directors, its officers and agents,
  - a. Cease and desist from interfering with, restraining or coercing employes in the 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. Post the Notice attached hereto as Appendix "A" in conspicuous places at Juneau High School where notices to such employes are usually posted. The notice shall be signed by an authorized representative of the Respondent Milwaukee Board of School Directors and shall remain posted for thirty days thereafter. Reasonable steps shall be taken by the Respondent Milwaukee Board of School Directors 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 2nd day of July, 1993.

COMMISSION

WISCONSIN            EMPLOYMENT            RELATIONS

By     Coleen A. Burns    /s/    

Coleen A. Burns, Examiner

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

Continued



1/ Continued

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.

**This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).**

"APPENDIX A"

NOTICE TO ALL EMPLOYEES

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:

WE WILL NOT in any manner interfere with, restrain, or coerce our employes in the exercise of rights protected by Sec. 111.70(2), Stats.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 1993.

MILWAUKEE BOARD OF SCHOOL DIRECTORS

By \_\_\_\_\_

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

MILWAUKEE PUBLIC SCHOOLS

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

On October 27, 1992, the MTEA filed a complaint with the Wisconsin Employment Relations Commission alleging that the Milwaukee Board of School Directors, by its agent, Harry Oden, violated Sec. 111.70 (3)(a)1, Stats., by interfering with, restraining, and coercing Terrence Falk in the exercise of rights guaranteed under Sec. 111.70(2), Stats. Respondent denies that it has violated any section of the Municipal Employment Relations Act.

POSITIONS OF THE PARTIES:

Complainant

At the April 29, 1992, Step 1 grievance conference, Principal Harry Oden indicated that he did not want the grievance pursued and attempted to persuade Terry Falk not to process the grievance. When Falk insisted on pursuing the matter, Oden engaged in retaliatory action by denying Falk's request for professional leave.

Oden's demeanor during the grievance conference indicated that he was angry. During the grievance conference, Oden mentioned that he had received a petition from members of the faculty who opposed the grievance. While Oden denied instigating the petition, when questioned about the petition at the complaint hearing, Oden tacitly admitted that he supported the petition and that he had not wanted the grievance processed.

During the grievance conference, Oden mentioned that the media had contacted him about the grievance, but that he had declined to comment on the situation because he wanted to handle the matter within the School. At the end of the conference, however, Oden threatened to go to the media with the issue if it could not be resolved. This threat was clearly intended to pressure Falk to drop the grievance and further evidences Oden's displeasure over the fact that Falk was pursuing the grievance.

To establish a violation of Sec. 111.70(3)(a)1, Wis. Stats., Complainant must demonstrate by clear and satisfactory preponderance of the evidence that Oden's conduct had a reasonable tendency to interfere with an employes' exercise of rights guaranteed under Sec. 111.70(2). It is not necessary for the Complainant to prove that there was actual interference or that the employe felt coerced or was deterred from exercising Sec. 111.70(2) rights.

Falk has attended the Wisconsin Communication Association Convention on an annual basis for at least the past 12 years. On April 14, 1992, in the midst of the controversy over the shortened lunch period, Falk submitted a request to Oden's office for professional leave to attend the 1992 Wisconsin Communication Association Convention to be held on May 1st and 2nd, 1992, in Green Bay, Wisconsin. Falk's request of April 14, 1992, was not processed in the same manner as his previous request. He did not receive a copy of the request form as he had in the past and only learned of the denial on Thursday, April 30, 1992, the day before his scheduled departure.

Ostensibly, Oden denied the April 13, 1992, request because he did not see the educational value of the convention to the entire school. However, the facts and testimony elicited from Oden belie this assertion. Oden never

articulated why he believed the conference was not of value to the school. Neither Oden, nor any other principal, previously questioned the validity of the conference. Prior to April 13, 1992, the only condition placed on the professional leave request was that a substitute teacher be available to replace Falk.

Between 24 to 34 students participate in forensics and debate at Juneau. As a representative of Juneau at the Wisconsin Communication Convention, Falk represents the students' and school's interest. Falk's testimony demonstrates that his participation in the Wisconsin Communication Association was of value to Juneau High School and the entire school system. Oden's assertion that the conference did not provide educational value to the entire school is without merit.

In January of 1991, Falk had been granted professional leave to judge an academic decathlon at the University of Wisconsin at Milwaukee. While that program did not involve any Juneau High School students, apparently it was of benefit to the entire school system.

In April of 1992, the only element that had changed was Falk's decision to lawfully pursue a grievance. By denying Falk's legitimate request for professional leave because he engaged in protected Union activities, Oden interfered with and restrained Falk and other employes in the exercise of rights guaranteed under Sec. 111.70(2), Stats.

Since Falk was not permitted to attend the conference on Friday, May 1, 1992, he was not able to participate in any of the rule changes or scheduling of the calendar. Because of the discriminatory denial of his leave request, Falk was denied the professional advantage of attending the conference. Accordingly, Falk lost the benefit of the \$37 registration fee.

The Examiner should find that Principal Harry Oden interfered with, restrained and coerced Terry Falk in retaliation for his protected concerted activities and order Principal Harry Oden to cease and desist from violating the provisions of Sec. 111.70, Stats., as set forth in the complaint. Additionally, Respondent should be ordered to compensate Terry Falk for the expenses he incurred because of the discriminatory actions of its agent, Principal Harry Oden.

#### Respondent

The Complainant has alleged an independent violation of interference only. In such cases, the conduct complained of must contain a threat of reprisal or a promise of a benefit that would "reasonably tend to interfere with the employes exercise of rights under Sec. 111.70(2), Wis. Stats." However, the scope of the prohibition against employer interference, is not so broad as to vest the WERC with unlimited authority to oversee employer decision making. Provided there is no independent violation of MERA, employer action for a valid business reason, or unilateral action within the scope of an employer right is not prohibited by Sec. 111.70(3)(a)1, Stats.

Falk submitted his written request to attend the May forensics convention on or about April 14, 1992. Oden, who signed the form on April 16, 1992, did not recommend the request for leave and provided the following reason: "Do not see the educational value to total school." The act of recommending or not recommending leave requests is a management right. Cynthia Ellwood, the Administrator at central office responsible for approving or denying the leave request, denied the leave request on April 30, 1992.

Without checking with Oden as to the reasons why the leave had been denied, Falk concluded that he had been denied the leave because of his filing of the grievance. MTEA has failed to prove by clear and satisfactory preponderance of the evidence that Oden's exercise of a legitimate management right rose to the level of interference of a protected union activity.

Contrary to the assertion of the Complainant, the record does not demonstrate that Oden was angry and upset about the filing of the grievance. Oden received Falk's request for leave on April 14, 1992, and signed it on April 16, 1992, 13 days before the first step grievance conference. As Falk testified at hearing, he had not had any discussions with Oden concerning the grievance prior to the first step grievance conference. Upon learning that Falk was planning to file a grievance involving the shortening of the lunch hour, a group of fellow faculty members drafted a petition criticizing Falk's action and complained of Falk's actions to the school principal. In this regard, Falk acknowledged that it was his own colleagues, and not Principal Oden, who showed "hostility" towards him.

Complainant has not offered one scintilla of evidence to substantiate the claim that Oden harbored resentment toward Falk on April 16, 1992, the day that he signed Falk's request for leave form. Rosenbaum, who had not met Oden prior to April 29, 1992, testified that it was during the April 29, 1992, grievance conference that Rosenbaum made his judgment that Oden was angry about the filing of the grievance. Rosenbaum, who has been an MTEA employe for two years, acknowledged that he has been wrong in his judgments about people. As Rosenbaum's testimony demonstrates, at times both Union Representatives and Administrators get hot under the collar when discussing grievances. Rosenbaum admitted that he did not know one way or the other about Oden's view about his obligations under the contract.

While Falk was justifiably upset and emotional about his mother's illness and death, it must be concluded that his judgments in this matter are colored by his personal distress. The complaint should be dismissed in its entirety.

## DISCUSSION

At the start of the hearing on the Complaint and in response to questioning by the Examiner, Complainant's Attorney confirmed that the Complainant was alleging only one statutory violation, i.e., that Respondent has violated Sec. 111.70(3)(a)1, Stats. Specifically, the Complainant argues that Respondent, by its agent Principal Harry Oden, interfered with, restrained and coerced Terry Falk in retaliation for engaging in protected concerted activities, i.e., contacting MTEA and filing a grievance over the denial of a duty free lunch period on March 31, 1992.

### Standards and Burdens

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)." Section 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.

In order to prevail upon the allegation that an employer has violated Sec. 111.70(3)(a)1, Stats., the complaining party must demonstrate, by a clear and satisfactory preponderance of the evidence, that an employer has engaged in conduct which has a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Sec. 111.70(2) rights. 2/ A violation may be found where the employer did not intend to interfere and an employee did not feel coerced or was not, in fact, deterred from exercising Sec. 111.70(2) rights. 3/ A finding of anti-union animus or motivation is not necessary to establish a violation of Sec. 111.70(3)(a)1. 4/

Just as employees have a protected right to express their opinions to their employers, so also do public sector employers enjoy a protected right of free speech. 5/ Recognizing that labor relations policy is best served by an uninhibited, robust and wide-open debate, the Commission has found that neither inaccurate employer statements, nor employer statements critical of the employees' bargaining representative are violative of Sec. 111.70(3)(a)1, per se. 6/ The test is whether such statements, construed in light of surrounding circumstances, express or imply threats of reprisal or promises of benefits which would reasonably tend to interfere with, restrain, or coerce municipal employees in the exercise of rights guaranteed by Sec. 111.70(2), Stats. 7/ Thus, the same statement made in two different circumstances might be coercive in one circumstance, but not in the other. Employer conduct which may well have a reasonable tendency to interfere with employee exercise of Sec. 111.70(2) rights will generally not be found to be violative of Sec. 111.70(3)(a)1 if the employer had valid business reasons for its actions. 8/

#### Merits

At hearing, Complainant introduced examples of Requests For Professional

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- 2/ WERC v. Evansville, 69 Wis.2d 140 (1975).
  - 3/ Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84); City of Brookfield, Dec. No. 20691-A (WERC, 2/84); Juneau County, Dec. No. 12593-B (WERC, 1/77).
  - 4/ City of Evansville, Dec. No. 9440-C (WERC, 3/71).
  - 5/ Ashwaubenon Jt. School District No. 1, Dec. No. 14774-A (WERC, 10/77).
  - 6/ See generally: Lisbon-Pewaukee Jt. School District No. 2, Dec. No. 14691-A (Malamud, 6/76); Drummond Joint School District No. 1, Dec. No. 15909-A (Davis, 3/78); and Brown County (Sheriff-Traffic Department), Dec. No. 17258-A (Houlihan, 8/80).
  - 7/ Id.
  - 8/ City of Milwaukee, Dec. No. 26728-A (Levitan, 11/91).

Leave which Terry Falk had submitted while employed at Juneau. These requests, the earliest of which dates back to 1990, indicate that the Principal recommends or not recommends such leave requests, while authority to approve or deny such leave requests resides with central administration. 9/ At hearing, Principal Oden confirmed that central administration has not always accepted his recommendation with respect to professional leave requests. According to Oden, there have been instances in which central administration has approved requests that Oden had not recommended and there have been instances in which central administration has denied requests that Oden had recommended.

At hearing, Falk stated that he had reason to doubt the accuracy of Oden's testimony because Falk had a conversation with Mark Rosenbaum in which Rosenbaum related a conversation which Rosenbaum had with Cynthia Ellwood, of the MPS Department of Curriculum and Instruction, in which Rosenbaum understood Ellwood to say that she knew of no example of where central administration had overridden the recommendation of a principal to deny professional leave and, therefore, she would not override Oden's recommendation to deny Falk's request. Ellwood did not testify at hearing. While Rosenbaum did testify at hearing, he did not offer any testimony with respect to such a conversation with Ellwood.

The Examiner does not consider the hearsay testimony of Falk to be persuasive evidence that Ellwood made such statements to Rosenbaum. Nor does the Examiner find any other reasonable basis to discredit Oden's testimony concerning the authority of central administration to approve or deny professional leave requests. Indeed, Oden's testimony, to the effect that central administration does not rubber stamp the principal's recommendation with respect to professional leave, is supported by information contained on Falk's prior leave requests. For example, on November 20, 1990, Oden indicated that he recommended the leave request of Falk "Only if a substitute is available. If no substitute leave is not recommended". On December 4, 1990, central administration representative McGriff approved the leave request, with the comment that "I can not guarantee a substitute".

The Examiner is persuaded that authority to approve or deny Falk's request for professional leave to attend the Wisconsin Communication Association, Wisconsin Forensics Coaches Association, Wisconsin Debate Coaches Association, and the Wisconsin High School Forensic Association convention of May, 1992 resided with Ellwood and not with Oden. Ellwood denied Falk's professional leave request on April 30, 1992, the day after Oden, Rosenbaum and Falk held the Step 1 grievance conference. Ellwood did not attend this grievance conference and the record does not demonstrate that Ellwood was privy to the grievance or the discussions which occurred during the Step 1 grievance conference at the time that Ellwood denied Falk's request for professional leave. While the Complainant argues that Oden's recommendation was colored by Oden's hostility towards the grievance which had been filed by Falk, Complainant has not argued, and the record does not demonstrate, that Ellwood was hostile toward Falk, or any other employe, for engaging in rights guaranteed by Sec. 111.70(2). Stats.

As Falk stated at hearing, the "Request for Professional Leave - Teacher" form contains guidelines for approving or disapproving professional leave requests. Item 3 of these guidelines states that: "Requests for professional leave to attend conventions and/or conferences may be approved for those

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9/ The earlier forms provide for approval or denial by the Department of School Administrative Services, in the later forms this function is assigned to the Department of Curriculum and Instruction.

sponsored by recognized organizations and institutions." (Emphasis supplied). Item 6 of these guidelines states that: "Approval of requests for professional leave will be made within the limits of available funds, the concentration of applications at a particular school or the district, the priority of services needed in the school or district, and upon the applicant's inability to obtain the desired information or training by other means." The existence of these guidelines, as well as the testimony of Oden, persuades the undersigned that Ellwood had discretion to approve or deny Falk's professional leave request.

As stated above, the Examiner does not find Falk's hearsay evidence concerning the alleged conversation between Ellwood and Rosenbaum to be persuasive evidence that such a conversation occurred. Neither Falk's testimony, nor any other record evidence, demonstrates that Ellwood "rubber stamped" Oden's recommendation to deny Falk's professional leave request.

The Examiner is not persuaded that Ellwood's conduct in denying Falk's professional leave request, construed in light of surrounding circumstances, would reasonably tend to interfere with, restrain, or coerce municipal employees in the exercise of rights guaranteed by Sec. 111.70(2), Stats. The Examiner has concluded, therefore, that Ellwood's denial of Falk's professional leave request does not give rise to a violation of Sec. 111.70(3)(a)1. Having concluded that the denial of Falk's professional leave request did not violate Sec. 111.70(3)(a)1, Stats., it is not appropriate to order Respondent to reimburse Falk for the expenses he incurred in registering for the Wisconsin Communication Association, Wisconsin Forensics Coaches Association, Wisconsin Debate Coaches Association, and the Wisconsin High School Forensic Association convention held in May of 1992.

Having concluded that the denial of Falk's request for professional leave to attend the Wisconsin Communication Association, Wisconsin Forensics Coaches Association, Wisconsin Debate Coaches Association, and the Wisconsin High School Forensic Association convention in May of 1992 did not violate Sec. 111.70(3)(a)1, Stats., the Examiner turns to the issue of whether or not Oden's conduct, in not recommending Falk's professional leave request, violated Sec. 111.70(3)(a)1, Stats.

As the Respondent argues, the Step 1 grievance conference between Falk, Rosenbaum and Oden occurred on April 29, 1992, nearly two weeks after April 16, 1992, the date on which Oden had signed and not recommended Falk's professional leave request. On April 16, 1992, however, Oden was aware that Falk had initiated a grievance over the fact that the memorial service of March 31, 1992 had encroached upon the Fourth Hour lunch period. While Oden had not yet had any conversations with Falk regarding the grievance, on April 16, 1992, Oden was aware of the nature of Falk's grievance and was further aware of the fact that some teachers at Juneau did not agree with the grievance initiated by Falk. 10/ The Examiner is satisfied that Oden's conduct during the Step 1 grievance conference is a surrounding circumstance which may be considered when determining whether Oden's conduct in not recommending Falk's professional leave request violated Sec. 111.70(3)(a)1, Stats.

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10/ The teacher petition was dated June 2, 1992. While it seems likely that Oden had discussed Falk's complaint with Assistant Principal Luecht and the office secretary prior to the time that he made the recommendation on Falk's professional leave request, the record is not clear on these points. Nor is it clear that Oden had been contacted by the press prior to the time that he made the recommendation on Falk's professional leave request.



## Step 1 Grievance Conference

Falk, who gave the most detailed testimony concerning statements made during the Step One grievance conference, recalls that he explained that he had told Assistant Principal Luecht that there was a need to extend the lunch hour; that the lunch hour had not been extended; and that there had been an infringement on the rights of both students and teachers. Falk recalls that Oden responded by stating that the contract violation had not been intentional and that Falk had shouted at the secretary when he went into the office. According to Falk, he acknowledged that he may have reacted a bit strongly, but that he had been distressed by his mother's illness. Falk recalls that he apologized for his conduct in the office and indicated that, while he was not interested in the money, *per se*, there had been a contract violation. According to Falk, Oden indicated that the grievance should be dropped and that Falk then reiterated that, although he had no personal interest in the money, the affected teachers should be offered a time card so that each teacher could decide whether or not to accept payment for the lost lunch time. Falk recalls telling Oden that Falk's lunch time was his to give and not Oden's to take. Falk further recalls that Oden stated that he (Oden) had received a petition which had been signed by teachers; that the petition indicated that teachers were upset by the grievance and teachers did not believe that the grievance should have been filed; that someone had contacted the press; and that Oden did not want to have the press involved, but rather, wanted the matter handled within the building. According to Falk, he and Rosenbaum reiterated the position that affected teachers should be offered time cards. Falk recalls that Oden ended the conference by indicating that he (Oden) would follow the contract to the letter of the law and by indicating that it was possible that he (Oden) would go to the press.

Oden recalls that he told Falk and Rosenbaum that a member of the media had contacted Oden and had informed Oden that a member of Oden's staff had contacted the media about the grievance. Oden further recalls that he stated that he did not want to get involved with the media and that the matter should be handled within the school; that he acknowledged that there had been a contract violation; that he stated that the contract violation was not intentional; that he stated that he would consider talking to the media if he was again contacted by the media; that he explained to Falk and Rosenbaum that, in the past, he may have violated the contract by giving an early dismissal or extending a lunch period, but that now he would follow the contract to the letter.

Rosenbaum confirmed that Oden indicated that Oden did not want the grievance processed. While Oden did not remember telling Falk and Rosenbaum that he (Oden) wanted them to drop the grievance, Oden did acknowledge that, at the time of the grievance conference, he had agreed with the sentiments contained in the petition dated April 2, 1992 and that he did not think that the grievance should have been processed. Given this acknowledgement, as well as the nature of the grievance, it is likely that Oden would have made a statement which indicated that the grievance should be dropped. The Examiner credits Falk's assertion that, during the conference of April 29, 1992, Oden indicated that the grievance should be dropped.

Oden denies that Rosenbaum and Falk asked about timecards and maintains that he did not know how Rosenbaum and Falk intended to remedy the grievance. The Examiner, however, considers it unlikely, as Oden maintains, that Falk and Rosenbaum would not have discussed the remedy being sought by the Union. Moreover, Falk's testimony concerning the time cards was confirmed by Rosenbaum. The Examiner is persuaded that Oden is mistaken when he claims that

Falk and

Rosenbaum did not ask about the teacher timecards and did not ask that the grievance be remedied by offering time cards to the affected teachers.

Rosenbaum and Oden agree that Oden explained the circumstances which lead to the memorial service on March 31, 1992, including the threatened student walk-out. Rosenbaum and Oden also agree that Oden referred to instances in which he had deviated from the contract in a manner which benefitted the teachers.

For the most part, the testimony of Oden, Falk and Rosenbaum concerning statements made during the Step 1 grievance conference are consistent and, thus, are not in controversy. The major inconsistencies in the testimony, which are described above, have been resolved in favor of Falk.

Falk, unlike Rosenbaum, had known and worked with Oden for several years. According to Falk, he felt that Oden was angered by the grievance because Oden maintained a physical distance between Falk and Rosenbaum; there was no joking or miscellaneous conversation; and, at the end of the conference, when Oden made the statements that he would follow the contract to the letter and would consider speaking with the press, Oden's manner of speech became quite forceful. Falk's testimony concerning the lack of miscellaneous conversation, the maintenance of a physical distance, and the forceful manner of Oden's speech is credible. 11/

For at least twelve years prior to April of 1992, Falk had attended the Wisconsin Communication Association, Wisconsin Forensics Coaches Association, Wisconsin Debate Coaches Association, and the Wisconsin High School Forensic Association convention. Oden had previously recommended Falk's professional leave requests for this convention, subject only to the proviso that a substitute be provided.

On April 16, 1992, for the first time, Oden did not recommend Falk's professional leave request to attend the Wisconsin Communication Association, Wisconsin Forensics Coaches Association, Wisconsin Debate Coaches Association, and the Wisconsin High School Forensic Association convention. According to the comments written by Oden on the request form, as well as Oden's testimony at hearing, he did not recommend the leave because he did not see the educational value to the whole school.

At hearing, Oden explained that availability of substitutes was a factor which he considered in denying Falk's leave request. However, unlike previous years, Oden did not make the availability of a substitute a condition of his recommendation, nor did Oden make any reference to the availability of substitutes. Oden also explained that his conclusion on educational value involved the consideration that the number of Juneau students participating in

forensics and debates was not large in proportion to the total student population. It is not evident that there had been a significant decrease in student participation in forensics and debate at Juneau since the last time that Oden had approved Falk's professional leave request to attend the Wisconsin Communication Association, Wisconsin Forensics Coaches Association,

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11/ Rosenbaum, who had not met Oden prior to the Step One grievance conference, stated that Oden's demeanor during the conference evidenced a resentment toward the filing and the processing of the grievance and that, towards the end of the conference, Oden became terse.

Wisconsin Debate Coaches Association, and the Wisconsin High School Forensic Association convention. In a prior year, Oden approved Falk's request for professional leave to be a judge at an Academic Decathlon in which no Juneau students participated.

Oden did not claim, and the record does not demonstrate, that Oden previously considered the Wisconsin Communication Association, Wisconsin Forensics Coaches Association, Wisconsin Debate Coaches Association, and the Wisconsin High School Forensic Association convention to be without educational value to the school. It is not evident that either the nature of the convention, or the nature of Falk's debate and forensic activities at Juneau, had changed from the time that Oden last recommended Falk's request for professional leave to attend the convention. The Examiner is not persuaded that Oden has articulated a valid business reason for not recommending Falk's professional leave request on April 16, 1992.

Oden denies that Falk's decision to pursue the grievance was a factor in his decision not to recommend Falk's personal leave request. As discussed above, it is not necessary to demonstrate that Oden's conduct in not recommending Falk's leave request was motivated by hostility towards Falk's exercise of rights guaranteed by Sec. 111.70(2), Stats.

At the time of the memorial service on March 31, 1992, Principal Oden was not only confronted with the tragic death of two of his students, but he was also confronted with the unenviable task of having to consent to a memorial service for one of these students, when he knew that the mother of the student did not want such a memorial service, in order to avoid an organized student walk-out which, regardless of motivation, had the possibility of escalating into a racial incident. Given the sensitive nature of the Falk grievance, the division that the grievance caused among the teachers at Juneau, Oden's demeanor and conversation at the Step 1 grievance conference, and the nature of the "justification" for Oden's decision to not recommend Falk's professional leave request, Falk could reasonably infer (1) that Oden was not happy that Falk had initiated the grievance and (2) that Oden's unhappiness over the grievance was a factor in Oden's decision not to recommend Falk's request for professional leave.

By not recommending Falk's request for professional leave to attend the May, 1992 Wisconsin Communication Association, Wisconsin Forensics Coaches Association, Wisconsin Debate Coaches Association, and the Wisconsin High School Forensic Association conference, Oden engaged in conduct, which expressed or implied a reprisal which would reasonably tend to interfere with, restrain, or coerce municipal employes in the exercise of rights guaranteed by Sec. 111.70(2), Stats. Accordingly, the Examiner has concluded that Respondent, by its agent Principal Harry Oden, has violated Sec. 111.70(3)(a)1, Stats.

In remedy of Respondent's Sec. 111.70(3)(a)1 violation, the Examiner has issued a cease and desist order. Additionally, the Examiner has ordered the Respondent to post the appropriate notice.

Dated at Madison, Wisconsin this 2nd day of July, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/  
Coleen A. Burns, Examiner