

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARK J. BENZING,

Complainant,

vs.

BLACKHAWK TECHNICAL COLLEGE,

Respondent.

Case 61

No. 54276 MP-3190

Decision No. 28846-A

Appearances:

Mr. Mark J. Benzing, 2022 Dewey Avenue, Beloit, Wisconsin 53511, appearing pro se.  
Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Peter L. Albrecht, 131 West Wilson  
Street, P. O. Box 1110, Madison, Wisconsin 53701-1110, appearing on behalf of  
Blackhawk Technical College.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Mark J. Benzing filed a complaint with the Wisconsin Employment Relations Commission on July 5, 1996, alleging that Blackhawk Technical College had committed prohibited practices in violation of Secs. 111.70(3)(a)1 and 5, Stats., by the College's giving him a discriminatory, retaliatory work performance evaluation. On September 4, 1996, 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 was held on December 5, 1996, in Janesville, Wisconsin. At the hearing and after the hearing, Complainant amended the complaint to allege a violation of Secs. 111.70(3)(a)1 and 3, Stats., and not Sec. 111.70(3)(a)5, Stats. 1/ The parties filed briefs and reserved the right to file reply briefs.

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1/ Generally, the Commission will not exercise its jurisdiction to determine the merits of breach of contract allegations in violation of Sec. 111.70(3)(a)5, Stats., where the parties'

Neither party filed a reply brief and the record was closed on April 1, 1997.

### FINDINGS OF FACT

1. Mark J. Benzing, hereinafter referred to as the Complainant, is an individual whose address is 2022 Dewey Avenue, Beloit, Wisconsin 53511.

2. Blackhawk Technical College, hereinafter referred to as the College, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its offices are located at 6004 Prairie Road, Janesville, Wisconsin 53547.

3. Paraprofessional Technical Council, Wisconsin Education Association Council, hereinafter referred to as the Union, is the exclusive collective bargaining representative of all regular full-time employes in maintenance, custodial and clerical positions at the College. At all times material herein, the Complainant was employed by the College as a custodian and was a member of the bargaining unit represented by the Union.

4. The College and Union have been parties to a series of collective bargaining agreements, the last of which is effective from July 1, 1995 to June 30, 1998, which contains final and binding arbitration and the following provision:

#### ARTICLE 13 - EVALUATION

The primary purpose of evaluation is to improve the quality of service and to make known to the employee his/her strengths and areas where improvements can be made.

1. The District will orient all new employees regarding evaluation procedures and instruments at the time of hire. If the instrument is changed, all employees will be reoriented.

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1/ (Footnote continued from Page 1)

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collective bargaining agreement provides a grievance procedure with final and binding arbitration. The rationale for this is to give full effect to the parties' agreed-upon (Footnote continued on Page 2)

procedures for resolving disputes arising under their contract. A grievance arbitration procedure is presumed to constitute a grievant's exclusive remedy unless the parties to the agreement have express language which provides it is not. Here, the parties' collective bargaining agreement provides for final and binding arbitration and contains no express language that it is not the exclusive remedy. A grievance was filed but was not taken to final and binding arbitration. The Complainant cannot later assert a violation of Sec. 111.70(3)(a)5, Stats., when the contractual grievance procedure is the exclusive remedy and that exclusive remedy was not exercised and no valid excuses were offered for not exercising it.

2. Employees shall be given a copy of an evaluation report prepared by their supervisors and shall have the right to discuss the report with their supervisors.
3. The employee has the right to answer any evaluation report and have his/her answer attached to the file copy.
4. No bargaining unit employee may be assigned to prepare an evaluation report concerning any other bargaining unit employee for purposes of promotion, demotion, discipline and/or continued employment.

5. On July 6, 1995, the Complainant was given a written evaluation of his performance by his supervisor Jeff Amundson, the College's Facilities Manager. It was stipulated that the Complainant received the lowest evaluation of all the custodial staff. Among other assertions, the Complainant's evaluation stated that he continued to perform only the minimum work required, continued to have a problem with punctuality and did not seem to fit into the group easily.

6. The grievant objected to his evaluation and submitted an answer which was attached to the evaluation pursuant to Article 13, Section 3. In addition, the Complainant filed a grievance over the evaluation alleging a violation of Article 13. The grievance was processed through the grievance procedure and denied at each step. By a letter dated February 7, 1996, the Union's president informed the College as well as Complainant that the Union would not pursue the grievance to arbitration.

7. Prior to the instant grievance noted above, the grievant had filed several other grievances, a number of which were resolved in his favor. Amundson made no statement or otherwise referred to the Complainant's filing grievances in his evaluation and the record fails to show that Amundson ever discussed Complainant's filing grievances or mentioned same at any other time. There is nothing in the record taken as a whole that establishes that the Complainant's evaluation was based on anything other than the grievant's performance and was not, even in part, based on hostility toward his filing any grievances in the past.

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

#### CONCLUSIONS OF LAW

1. The College, by the Complainant's evaluation by Jeff Amundson, was not motivated in whole or in part by hostility toward the exercise of Complainant's protected rights, and therefore, the College has not committed any prohibited practice within the meaning of Sec. 111.70(3)(a)3, or

derivatively of (3)(a)1, Stats.

2. The College has not interfered with, restrained or coerced the Complainant in the exercise of his rights under Sec. 111.70(2), Stats., and therefore, has not committed an independent prohibited practice under 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 2/

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2/ 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

IT IS ORDERED that the complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 2nd day of May, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/  
Lionel L. Crowley, Examiner

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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

(Footnote continued on Page 5)

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2/ (Footnote continued from Page 4)

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).**

BLACKHAWK TECHNICAL COLLEGE

MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In his complaint initiating these proceedings, the Complainant alleged that the College violated Secs. 111.70(3)(a)1 and 5, Stats., by an evaluation of his work performance which he alleged was incorrect and retaliatory. The College denied that the work evaluation was incorrect and/or retaliatory and denied that it committed any prohibited practices. At hearing, the Complainant amended the complaint dropping the allegation of a violation of Sec. 111.70(3)(a)5, Stats., and alleged a violation of Sec. 111.70(3)(a)3, Stats.

Complainant's Position

The Complainant contends that at every step of the grievance procedure, he complained and offered evidence to support his complaint and the Union in a letter to the top administrators pointed out specific irregularities and other factors that did not warrant the Complainant's low employee evaluation. He asserts that the College never investigated or replied to the Union. The Complainant alleges that the lead custodian testified that he was well aware of preferential treatment practiced by Amundson requiring high quality and high standards from Complainant as compared to other custodians. Complainant points out that the Union's letter noted that every custodian was working to full capacity and because all the manpower recommended by a work study was not implemented, no custodian could complete all tasks in the time allotted.

The Complainant observes that under the collective bargaining agreement, all grievances must be presented to the employee's immediate supervisor. Thus, the Complainant argues, Amundson had knowledge of the number of grievances filed by him. The Complainant states that the record establishes that only he and another custodial filed grievances from 1992 - May, 1995, and that they received the lowest evaluations and only they filed grievances over the evaluations.

The Complainant claims that the evidence establishes that the College's agents took no action to the possible false and/or inaccurate information compiled on which his evaluation was based as well as other factors, all of which were retaliatory.

College's Position

The College contends that the Complainant has the burden of proof by a preponderance of the evidence that his evaluation was discriminatory. It states that he must show that: 1) He was engaged in protected activities; 2) The College was aware of said activities; 3) The College was

hostile to such activity; 4) The College's work performance evaluation was based at least in part on said hostility. It insists that the grievant failed to meet his burden of proof. It admits that the first two elements are not disputed. It maintains that the grievant provided no evidence that the College was hostile to his filing grievances in the past. It points out that there were no statements by Amundson or any other College representative to show hostility. The College notes that it offered proof that it was not hostile in that a number of grievances were resolved in his favor and one of the Complainant's witnesses admitted that he had filed prior grievances and these had no effect on his performance evaluation. It submits that the Complainant failed to prove any hostility as a result of his prior grievances.

The College further alleges that there was no nexus between the grievances and the Complainant's performance evaluation. It observes that his grievances were too remote in time with the most recent grievance filed in November, 1994. It also asserts that Amundson was not connected to any of the recent grievances. It argues that the Complainant had to prove Amundson had some reason to retaliate but Complainant failed to do so. The College observes that it offered a legitimate, non-discriminatory reason why the Complainant received a poor evaluation and that quite simply was because the Complainant was doing a poor job. It submits that the Complainant offered self-serving testimony but no objective proof, only his personal belief. It points out that Amundson observes all the custodians and can evaluate the work performance in relation to each other, and based on his observation, the Complainant needs the most improvement. It contends the performance evaluation reflected this fact which was unrefuted and credible.

In conclusion, the College states that sometimes things are as they appear and this is such a case as the Complainant received a poor evaluation because his work was poor. It insists that while the Complainant may not believe that was the case, he did not prove discrimination and the complaint must be dismissed.

## DISCUSSION

Section 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to "encourage or discourage a membership in any labor organization by discrimination in regard to . . . tenure or other terms or conditions of employment." To prove a violation of this section the Complainant must, by a clear and satisfactory preponderance of the evidence, establish that:

1. Complainant was engaged in protected activities; and
2. The College and Amundson were aware of those activities;  
and
3. The College and Amundson were hostile to those activities;

and

4. The College's and Amundson's conduct was motivated, in whole or in part, by hostility toward the protected activities. 3/

It is undisputed that the Complainant engaged in protected activities and that the College as well as Amundson were aware of those activities. The evidence fails to establish that the College and particularly Amundson were hostile to the Complainant's protected activities. The Complainant had the burden of proving by a clear and satisfactory preponderance of the evidence that there was such hostility. The evidence failed to show that Amundson ever said anything to the Complainant about his grievance filing or any other protected activity. There is no evidence of any animosity on the part of Amundson toward the Complainant's protected activity. It must be concluded that there is simply no evidence to support a finding of hostility toward the Complainant's grievance filing.

Even if there were hostility, the evaluation would have to be motivated by said hostility. Motive is difficult to determine as usually there is no direct evidence so it must be determined from the total circumstances proved. Here, there is a disagreement over the Complainant's job performance evaluation. The Complainant obviously disagrees with Amundson's evaluation but his proof of motive boils down to self-serving testimony. For example, Amundson stated in the evaluation that the Complainant has a problem with punctuality in that he has been tardy and absent from work on numerous times. Complainant made no assertion that this was incorrect or that others were more tardy. Amundson has stated that the grievant merely performs the minimum work required. The Complainant asserts he does more than the minimum and does more than others. This is merely a difference of opinion and any testimony is just self-serving. Complainant in his brief alleged that Charles Stokes had testified that he was aware of preferential treatment by Amundson. A review of Stokes' testimony 4/ indicates that he was asked a question in general terms but it was not answered. 5/ Stokes testified that if people started complaining about an area not being kept up in a good housekeeping manner, Amundson took care of it. 6/ This is not evidence of any preferential treatment. The parties recognized that there can be a difference of opinion with respect to performance evaluations and provided in Article 13, Section 3, the right of

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3/ The "in-part" test was applied by the Wisconsin Supreme Court to MERA cases in Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis.2d 540 (1967) and is discussed at length in Employment Relations Dept. v. WERC, 122 Wis.2d 132 (1985).

4/ Tr. 97-109.

5/ Tr. 103.

6/ Tr. 104.

an employe to answer the evaluation which is attached to the file copy. Based on the totality of circumstances, the evidence simply fails to show that the

Complainant's job performance evaluation which was lower than any other custodian was motivated in whole or in part by his grievance filing. Thus, the allegation of a Sec. 111.70(3)(a)3, Stats., violation has been dismissed.

The Complainant has alleged a violation of Sec. 111.70(3)(a)1, Stats. Inasmuch as there is no Sec. 111.70(3)(a)3, Stats., violation, there is no derivative Sec. 111.70(3)(a)1, Stats., violation.

As far as an independent violation, Sec. 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer:

1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).

Section 111.70(2), Stats., describes the rights protected by Sec. 111.70(3)(a)1, Stats., as being:

- (2) RIGHTS OF MUNICIPAL EMPLOYEES. 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 . . .

Violations of Sec. 111.70(3)(a)1, Stats., occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. 7/ If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employe(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights. 8/ However, in recognition of the employer's free speech rights and of the general benefits of "uninhibited" and "robust" debate in labor disputes, employer remarks which inaccurately or critically portray the employe's labor organization and thus may well have a reasonable tendency to "restrain" employes from exercising the Sec. 111.70(2) right to supporting their labor organization generally are not

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

8/ 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).

violative of Sec. 111.70(3)(a)1, Stats., unless the remarks contain implicit or express threats or promises of benefits. 9/ Similarly, employer conduct which may well have a reasonable tendency to interfere with employe exercise of Sec. 111.70(2) rights will not be found violative of sec. 111.70(3)(a)1, Stats., if the employer had valid business reasons for its actions. 10/

No evidence was presented that the evaluation had a reasonable tendency to interfere with, restrain or coerce the Complainant in the exercise of his protected rights. There were no hostile statements by Amundson or any other College official regarding Complainant's grievance filing. There were no implicit or express threats or promises made to Complainant. In short, the evidence failed to prove any violation of Sec. 111.70(3)(a)1, Stats., and that charge has also been dismissed. The evidence failed to prove any prohibited practices and the complaint has therefore been dismissed in its entirety.

Dated at Madison, Wisconsin, this 2nd day of May, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/  
Lionel L. Crowley, Examiner

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9/ Milwaukee Board of School Directors, Dec. No. 27867-B (WERC, 5/95); Ashwaubenon Joint School District No. 1, Dec. No. 14474-A (WERC, 10/77); Janesville Board of Education, Dec. No. 8791 (WERC, 3/69).

10/ City of Brookfield, *supra*, footnote 4.