STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GREEN BAY EDUCATION ASSOCIATION, and its bargaining unit member, CONNIE PESERIK, Complainants,

vs.

GREEN BAY AREA PUBLIC SCHOOL DISTRICT AND THE BOARD OF EDUCATION OF THE GREEN BAY AREA PUBLIC SCHOOL DISTRICT, and PRINCIPAL NANCY CROY, Respondents.

Case 191
No. 54373
MP-3206

Decision No. 28871-B

Appearances:

Kelly & Kobelt, by **Attorney Robert C. Kelly,** 122 East Olin Avenue, Suite 195, Madison Wisconsin 53713, appearing on behalf of the Green Bay Education Association and its bargaining unit member, Connie Peserik.

Melli, Walker, Pease & Ruhly, S.C., by **Attorney Jack D. Walker,** 119 Martin Luther King Jr., Blvd., Suite 600l, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of Green Bay Area Public School District and the Board of Education of the Green Bay Area School District and Principal Nancy Croy.

ORDER AFFIRMING AND MODIFYING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

On March 26, 1997, Examiner Richard B. McLaughlin issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondents had not committed prohibited practices within the meaning of Secs. 111.70 (3)(a) 1 or 3, Stats. He therefore dismissed the complaint.

Complainants timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received June 18, 1997.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER

Examiner Findings of Fact 1-16 are affirmed. 1/

1/ The Examiner's decision includes two Findings of Fact numbered 15. We hereby renumber and affirm the second Finding of Fact 15 as Finding of Fact 16 and renumber existing Finding of Fact 16 to Finding of Fact 17.

B. Examiner Finding of Fact 17 is affirmed as modified to read as follows:

> Respondent Croy's April, 1996 decision to terminate Complainant Peserik's House Leader assignment effective with the end of the 1995-1996 school year was not based in whole or in part on hostility toward Peserik's absence from the September 1995 Open House at Lombardi Middle School.

Examiner Conclusions of Law 1-3 are affirmed.

Examiner Conclusion of Law 4 is affirmed as modified to read as follows:

> Respondents did not violate Secs. 111.70(3)(a) 1 or 3, Stats., by terminating Complainant Peserik's House Leader assignment effective with the end of the 1995-1996 school year.

The Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 28th day of April, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

Green Bay Area School District

MEMORANDUM ACCOMPANYING ORDER AFFIRMING AND MODIFYING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

THE PLEADINGS

In their complaint, Complainants assert the Respondents committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 3, Stats., by terminating Complainant Peserik's assignment as a House Leader. Complainants ask that Peserik be reinstated to that assignment and made whole and that Respondents be ordered to cease and desist from committing such prohibited practices and to post appropriate notices.

In their answer, Respondents deny committing any prohibited practices and ask that the complaint be dismissed.

THE EXAMINER'S DECISION

The Examiner found no violations of Sec. 111.70(3)(a) 1 or 3, Stats., had been committed by Respondents and dismissed the complaint.

As to the alleged violation of Sec. 111.70 (3)(a) 1, Stats., he reasoned in pertinent part as follows:

> While the force of the Association's arguments must be acknowledged, the evidence will not support a conclusion that Croy's refusal to select Peserik as House Leader has a reasonable tendency to interfere with protected activity. The arguable equivalence of the general interests sketched above breaks down when those interests are evaluated against the evidence.
>
> The interference allegation seeks to link Peserik's loss of House Leader status to her refusal to attend the Open House. The allegation focuses on employe perception of the effect of Croy's actions rather than her intent, and requires concluding that the replacement of a House Leader who did not attend the Open House with a House member who did has sufficiently coercive overtones to trigger Sec. 111.70(3)(a)1, Stats.
>
> While the coercive appearance of Croy's actions regarding Peserik cannot be ignored, it is insufficient to establish an independent violation of Sec. 11.70(3)(a)1, Stats. As preface, it should be noted that the appearance of Croy's actions support more than the inference of coercion. A Principal's preference of a teacher who undertakes a non-required activity over a teacher who

does not can reasonably be viewed as a routine exercise of administrative discretion. An evaluation of the evidence supports the latter inference over the former.

The House Leader position is a quasi-supervisory position, linked to the implementation of building policy. That Principals have broad discretion over the selection of a House Leader is mutually recognized by the Employer and the Association and a known feature of the work place. Against this background, the loss of House Leader status based on a refusal to attend a voluntary event is, standing alone, unremarkable.

Peserik's loss of House Leader status is coercive to the extent it can be viewed as retaliation for her non-attendance at the Open House. On the current facts, this begs the issue of intent, which is not relevant to this allegation. Even ignoring potential difficulties in linking her loss of House Leader status to the Open House, the appearance of coercion is more easily understated than overstated on this record. A considerable period of time passed between the non-attendance and the asserted retribution for it. This is not insignificant. The purported retribution has no immediately apparent purpose. It did not serve to secure attendance at the Open House. If the attendance sought to be secured concerned future open houses, it is not apparent why Zibell and Allen suffered no adverse consequences. Nor can it be assumed that the retaliation was restricted to Peserik as House Leader. Brittelli openly engaged in Phase 2 job actions, yet remained a House Leader. The evidence affords no persuasive basis to discern why Croy would seek to punish Peserik's individual non-attendance at the Open House rather than Association supported Phase 2 actions. The coercive overtones are, then, attenuated.

The evidence also establishes the Employer's institutional interest in Croy's right to assign outweighs Peserik's individual interest in the assignment. The Association's assertion of coercion is magnified to the degree Peserik's non-attendance can be viewed as a generally recognized stand of conscience. The asserted coercion is undercut to the degree her non-attendance can be viewed as an individual expression of convenience. The evidence establishes that Peserik discussed the non-attendance with Allen, but did not coordinate her refusal to attend with any other teacher. Although her refusal to attend the Open House manifests concerted activity, she acted as an individual. Beyond this, Peserik was not playing a high-profile role in the then ongoing negotiations. In marked contrast to this, Zibell, who served as Building Representative and as a Reading Chair, suffered no adverse consequence for her refusal to attend the Open House or for her earlier support of Phase 2 job actions. This should not be read to imply the law must be enforced to afford greater protection to high-profile Association members than to a rank and file member. It underscores, however, that any chilling effect flowing from Croy's action toward Peserik is limited.

The Employer's interest in exercising discretion in the assignment of positions closely linked to the implementation of building policy is apparent. But for the then-ongoing negotiations, Peserik's loss of House Leader status would not have been challenged. The parties' mutual recognition of the Employer's discretion over this type of assignment underscores the depth of the Employer's institutional interest in it.

In sum, the Union's statement of the coercive appearance of Croy's conduct is forceful, but the evidence will not support a conclusion that those overtones establish interference with employe exercise of protected rights. The evidence fails to establish that employes at Lombardi could reasonably be expected to see Croy's action as more than the exercise of managerial discretion.

The Association also contends that Croy lacked a "valid business reason" under Cedar Grove for its conduct. The conclusion reached above moots this argument, but it is appropriate to touch on it to complete the record for review. The Association accurately notes that Meyers' and Croy's reasons for preferring McCarthy over Peserik are general and subjective. This is not, however, determinative given the nature of the House Leader assignment. That general or subjective thinking may influence a supervisor in selecting a lead worker is, for better or worse, not unusual. Beyond this, the subjectivity cannot obscure that Peserik refused to attend the Open House, reluctantly participated in Croy's attempt to smooth over parental concern over the Open House and failed to provide meaningful assistance for the spelling conference. A House Leader must function in a quasi-supervisory role in cooperation with building administration. Croy's citation of this conduct to ground her preference of McCarthy over Peserik cannot be considered less than a "valid business reason" under CEDAR GROVE given the nature of the House Leader position.

The record fails to establish an independent violation of Sec. 111.70(3)(a)1, Stats.

As to the alleged violation of Sec. 111.70(3)(a)3, Stats., he reasoned in pertinent part as follows:

The final two elements turn on "hostility," and the evidence will not support a conclusion that Croy bore such hostility toward Peserik or the Association. This determination does not turn on witness credibility. There is no reason to doubt the sincerity or truthfulness of Peserik or Croy. Rather, the evidence indicates Peserik sincerely believed the changes Croy made could not be rooted in her conduct as a teacher or as a House Leader. From this she concluded the changes were traceable to Croy's hostility toward her refusal to attend the Open House. That she would reach this conclusion is neither unjustifiable nor surprising. However, even though the evidence affords no persuasive basis to impugn the sincerity her belief, it will not support the validity of her conclusion.

The inference of hostility cannot satisfactorily account for the events following Peserik's submission of the Open House RSVP. Croy's account of those

events can. Under the Association's view, Peserik's refusal to attend the Open House was sufficiently egregious to warrant retribution the following April. The record would not indicate open houses carry this level of significance. Past non-attendance by Department Chairs or House Leaders has not been punished. The most telling evidence of the significance of the Open House is that Croy rescheduled it to fall within the Moratorium. This change cannot, however, be accounted for by anti-Association hostility. The change had no established impact on the Association's bargaining position. At most, the change may have secured the attendance of more teachers and may have made the parent-teacher interaction more likely to revolve on educational rather than labor-relations issues. Croy's desire to facilitate meaningful parent-teacher involvement can account for this change. The inference of hostility cannot.

Nor does the inference of proscribed hostility persuasively account for Croy's conduct after her receipt of Peserik's RSVP. If Croy was angered by Peserik's stated refusal to attend the Open House, it is inexplicable why she took no meaningful action to secure the attendance of Peserik or any other House 6-2 member between her receipt of the RSVP and the date of the Open House. Rather, she called a meeting to attempt to address what she anticipated would be adverse parental reaction to the non-attendance of three of four House 6-2 members. This reaction presumes the non-attendance the Association argues caused Croy's anger. Croy avowedly called the meeting to address adverse parental reaction to finding three darkened classrooms in a four classroom House. That she could accept non-attendance at the Open House, but would attempt to address adverse parental response to it can be accounted for by her avowed interest in enhancing parent-teacher contact. It cannot be accounted for by inferring proscribed hostility.

Nor can the inference of proscribed hostility persuasively account for the September 5, 1995 meeting and its aftermath. The Association urges that Croy issued a directive, which reflected her anger at the non-attendance. That anger, sown in September, presumably flowered the following April, when Croy rewarded McCarthy for his attendance at the Open House. By Peserik's account, however, McCarthy questioned Croy, during the September 5 meeting, on why teachers would have to "make up" a voluntary event. How this squares with the inference that Peserik was punished as a dissenter while McCarthy was rewarded as a "yes man" is not apparent.

More significantly, the first substantial indication of hostility from the meeting is rooted not in Croy's conduct, but in Peserik's September 6, 1995 memo. That memo refers to Croy as "Nancy Croy" and "Mrs. Croy," and contains a blank line for a "Verification signature." None of these references are inaccurate, but each compose a strikingly formal response to be communicated from a lead worker to a supervisor. There is no apparent provocation for this.

Croy acknowledged the memo angered her. Her anger should have been expected. Her behavior toward Peserik is, however, the most notable fact here. In the September 6 meeting, she expressed her personal frustration, but would not accede

to Peserik's characterization of the suggestion as a "directive." Nor did she attempt to make her "strong suggestion" stick in the face of House 6-2 reluctance. It is difficult to account for Croy's willingness to abandon her "directive" or "strong suggestion" to her lead worker if it is presumed she bore significant anger for the then prospective non-attendance at the Open House. No such difficulty exists if it is inferred that Croy hoped to smooth over adverse parental reaction and knew she could not do so without the cooperation of her teachers.

Croy's subsequent conduct further undercuts the persuasive force of the assertion of proscribed hostility. When the House 6-2 members, on their own, modified the parent visitation format and the modification yielded favorable parental response, Croy openly communicated her pleasure with them. Why she would do so if she continued to bear hostility toward the non-attendance at Open House is not apparent.

In sum, the inference of hostility rests on a weak factual basis concerning the events of September of 1995.

Nor will a broader view of the evidence lend greater support for the inference. On the most general level, the inference of hostility does not clarify what Croy or the Employer gained, in a labor relations sense, by denying Peserik House Leader status. As noted above, the alleged retaliation could not secure the attendance of the teachers at the Open House and sent, if anything, a weak coercive message concerning attendance at future open houses. Why Croy would overlook Phase 2 actions in the 1994-95 school year, then be angered by the same type of actions during the Moratorium is not apparent. Neither Zibell nor Allen suffered any adverse consequence for their non-attendance. Zibell, unlike Peserik, was known to Croy and Lombardi teachers as an Association activist. Brittelli continued as a House Leader, in spite of undertaking Phase 2 actions. Croy's actions had, then, no clear impact on stifling Association-based dissent within Lombardi. Nor do her actions have any apparent impact on the broader Association/Employer conflict. Roughly one thousand teachers met to approve and suspend job actions. How Croy's actions could be perceived to address dissent outside of Lombardi is not apparent.

The Association argues that the reasons given for not continuing Peserik as House Leader are vague and thus unreliable. The force of this assertion must be acknowledged. Meyers' testimony concerning his own reasons for wishing to replace Peserik as House Leader is unspecific. Croy's testimony is general, but not unspecific. The generality of her testimony is not solely traceable to her. The April 18, 1996 meeting was unpleasant for both participants, and affords little insight beyond their conflicting and deeply held views. More to the point here, it

is apparent Croy saw no purpose in an extended dialogue with Peserik at that meeting and did not elaborate her position. This makes the generality of her testimony less than determinative.

More significantly, her reasons for replacing Peserik stand, in effect,

unrebutted. It is undisputed that Peserik was less than forthcoming in helping Croy redress the potential difficulties regarding the Open House and the spelling conference. As noted above, House Leader is a quasi-supervisory assignment and the significance of Croy's relationship to Peserik is, for better or worse, a significant feature of the assignment. That Croy and Peserik communicated with some difficulty is apparent. The tone the September 6, 1995 memo drafted by Peserik speaks for itself concerning the quality of their communication. There was no demonstrated provocation for the tone of that memo. The assertion of pretext presumes Croy gained something, in a labor relations sense, for preferring McCarthy. The evidence would indicate she gained no more than a House Leader with whom she could comfortably communicate.

It is worthy of some note that Meyers initiated the dialogue which led to Peserik's loss of House Leader status, and that Croy has prior union ties. The significance of neither fact should be overemphasized. As noted above, Meyers' testimony is unspecific. Croy's past association ties establish no more than that she has no history of anti-union animosity. The facts do, however, underscore that the inference of hostility lacks persuasive support in the evidence.

POSITIONS OF THE PARTIES ON REVIEW

The Complainants

Complainants contend the Examiner erred when he failed to find that the Respondents committed prohibited practices within the meaning of Secs. 111.70(3)(a) 1 and 3, Stats. Complainants ask that the Examiner be reversed.

Complainants argue that the Examiner failed to apply the appropriate legal standard to the alleged violation of Sec. 111.70(3)(a)1, Stats. Once the appropriate standard is applied to the evidence in the record, Complainants assert that it is clear that Respondent Croy's removal of Complainant Peserik from the House Leader position had a reasonable tendency to interfere with, restrain and coerce Peserik and other employes in the exercise of rights under Sec. 111.70(2), Stats.

As to the alleged violation of Sec. 111.70(3)(a)3, Stats., Complainants allege the record amply supports a determination that Respondent Croy was: (1) aware of Complainant Peserik's lawful concerted activity of refusing to attend an Open House at which attendance was voluntary; (2) hostile toward that activity; and (3) removed Peserik from her House Leader position at least in part because of her hostility toward that activity. Thus, Complainants contend the Examiner erred when he failed to find a violation of Sec. 111.70(3)(a)3, Stats.

The Respondents

Respondents assert the Examiner properly concluded that they did not commit any prohibited practices by removing Peserik from her House Leader position. Respondents request that the Examiner's dismissal of the complaint be affirmed.

Looking first at the alleged violation of Sec. 111.70 (3)(a)1, Stats., Respondents argue the

Examiner correctly looked at all relevant facts and circumstances and determined that Peserik's removal did not have a reasonable tendency to interfere with, restrain or coerce Peserik or any other employe in the exercise of rights protected by the Municipal Employment Relations Act.

As to the asserted violation of Sec. 111.70(3)(a)3, Stats., Respondents contend that Peserik's refusal to attend the Open House was neither concerted nor lawful and thus argue that Complainants have failed to establish the first element of proof of a Sec. 111.70(3)(a) 3, Stats., violation. Assuming that Peserik's conduct was concerted and lawful activity, Respondents next assert that the Respondents have failed to prove that Respondent Croy was aware of such activity. Lastly, Respondents allege the Complainants failed to establish Croy's hostility toward any such activity or that Croy acted upon any such hostility when she removed Peserik from the House Leader position.

DISCUSSION

We look first at the alleged violation of Sec. 111.70(3)(a)3, Stats.

In MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 WIS.2D 540 (1967) and again in EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985), the Wisconsin Supreme Court affirmed that a violation of Sec. 111.70(3)(a)3, Stats., is to be found where the complaining party establishes by a clear and satisfactory preponderance of the evidence: (1) that a municipal employe engaged in lawful concerted activity; (2) that the municipal employer, by its officers or agents, was aware of said activity and hostile thereto; and (3) that the municipal employer took action against the municipal employe based at least in part upon said hostility.

Here, the parties dispute whether Peserik engaged in lawful concerted activity when she did not attend an Open House and, if she was so engaged, whether Respondent Croy was aware that Peserik's non-attendance was lawful concerted activity. We make no findings or conclusions as to these disputed matters. We need not resolve these questions because even assuming arguendo that both questions are answered in the affirmative, we are satisfied that Croy did not act in whole or in part out of hostility toward Peserik's failure to attend the Open House in September 1995.

As the Court noted in EMPLOYMENT RELATIONS DEPT. V. WERC, SUPRA AT 143:

> As the key element of proof involves the motivation of [the employer] and as, absent an admission, motive cannot be definitively demonstrated given the impossibility of placing oneself inside the mind of the decisionmaker, [the

> employee] must of necessity rely in part upon the inferences which can reasonably be drawn from facts or testimony. On the other hand, it is worth noting that [the employer] need not demonstrate 'just cause' for its action. However, to the extent that [the employer] can establish reasons for its action which do not relate to hostility toward an employe's protected concerted activity, it weakens the strength of the inferences which [the employee] asks the [WERC] to draw.

Earlier in our decision, we extensively quoted from the Examiner's efforts to sift and winnow the inferences which can reasonably be drawn from the record. The Examiner's lengthy discussion of whether Respondent Croy was hostile toward Peserik's failure to attend the Open House underscores the reality that there is support in the record for the competing inferences which both sides ask us to draw. The parties' extensive briefs ably debate these conflicting inferences. On balance, however, we are persuaded that the Examiner correctly concluded that Croy was not hostile to Peserik's failure to attend the Open House.

We note that, unlike the Examiner, we do not find the House Leader assignment to be "quasi-supervisory". We also conclude that the Examiner placed too much emphasis on the tone of the September 6, 1995 memo to Croy. This differing view of the record makes the issue of hostility a closer question than the Examiner found it to be. Nonetheless, with these exceptions, we generally find the Examiner's discussion of the record to be persuasive and conclude, as he did, that Respondent Croy was not hostile to Peserik's failure to attend the Open House. 2/ Particularly important to us when reaching this conclusion are: (1) the presence of valid alternative explanations for the removal decision; (2) the absence of any alleged retaliation by Croy toward other employes who did not attend Open House and who were much more active within the Association than Peserik; (3) the absence of any alleged retaliation by Croy against any employes for pre-September 1995 activities supportive of the Complainant Association's bargaining efforts; (4) Croy's choice of McCarthy(who admittedly attended the Open House but openly challenged Croy as to why there was any reason to have alternatives for parents) as the replacement House Leader; (5) the absence of any facts external to the Open House dispute which establish any hostility by Croy toward unions generally, the Association specifically, or toward lawful concerted activity generally, and the presence of facts which support an inference that she is supportive of such activity; (6) Meyers' triggering role in the process which led Croy to decide to remove Peserik; (7) Croy's compliment to Peserik and the other teachers in the House regarding the success of the alternative they devised in at least partial response to absences from Open House; and (8) Croy's reaction to the decision by Peserik and others to be absent during the Open House was not to seek to persuade them to attend (i.e. she respected their choice) but rather to encourage them to find alternatives which would produce additional parent/teacher contact opportunities.

2/ The Examiner graciously attempted to avoid the need to determine whether Peserik or Croy had the more accurate recollection of their April 18, 1996 conversation regarding the end of the House Leader assignment. On appeal, Complainants reject the Examiner's gracious effort and insist that a determination be made. Complainants are correct that if Peserik's version of the conversation is fully credited, the inference of hostility is much stronger. However, we do not credit Peserik's version of the

2/ (Continued)
conversation. Particularly when viewed in the context of her notes, her testimony is somewhat inconsistent as to the content of the conversation. Croy's testimony was more internally consistent. In addition, the facts external to the conversation have led us to conclude that Croy was not hostile to Peserik's failure to attend the Open House. Croy's testimony is consistent with that external reality. Peserik's is not.

Given the foregoing, no violation of Sec. 111.70(3)(a)3, Stats., is found. Thus, we have affirmed dismissal of this allegation..

We turn to the alleged violation of Sec. 111.70(3)(a)1, Stats.

Section 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer:

> To interfere with, restrain or coerce municipal employes in the exercise of 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:

> 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. . . .

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. WERC V. EVANSVILLE, 69 WIS.2D 140 (1975). 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. 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).

As reflected in his extensive discussion of this alleged violation, the Examiner concluded that Croy's April, 1996 decision did not have a reasonable tendency to interfere with, restrain or coerce Peserik or any other employes in the exercise of their rights under Sec. 111.70(2), Stats. The same circumstances discussed above in the context of our "hostility" determination are relevant to determining the reasonableness of any tendency of the Peserik removal to interfere

with, restrain or coerce Peserik or other employes in the exercise of their rights under Sec. 111.70(2), Stats. These same circumstances persuade us that there was no such reasonable tendency. In reaching this conclusion, we do not doubt the sincerity of Peserik's belief that she has been restrained or coerced. However, we do not find her belief to be a reasonable one.

We have noted in prior decisions that even where an employer action may have a reasonable tendency to interfere with employes' exercise of rights under Sec. 111.70(2), Stats., a finding of a violation is not appropriate if the employer action was in fact based on valid business reasons. GREEN LAKE COUNTY, DEC. NO. 28792-B (WERC, 12/97); MILWAUKEE COUNTY, DEC. NO. 28063-C (WERC, 3/97); BROWN COUNTY, DEC. NOS. 28158-F, 28159-F (WERC, 12/96); CEDAR GROVE-BELGIUM SCHOOLS, DEC. NO. 25849-B (WERC, 5/91); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84). For instance, if a union activist is disciplined, co-workers may be less

likely to exercise their rights under Sec. 111.70(2), Stats. However, if the discipline was based solely on actual misconduct which warranted the level of discipline imposed, no violation of Sec. 111.70(3)(a)1, Stats. should be or will be found. Here, even assuming arguendo that the removal of Peserik as House Leader had a reasonable tendency to interfere with the exercise of rights under Sec. 111.70(2), Stats., no violation would be found because Croy's decision was in fact based on her judgment that McCarthy would be a better House Leader than Peserik. Her judgment qualifies as a valid business reason.

Given all of the foregoing, we affirm the Examiner's dismissal of the complaint.

Dated at the City of Madison, Wisconsin this 28th day of April, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

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