STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION, Complainant

vs.

RACINE UNIFIED SCHOOL DISTRICT, Respondent.

Case 148
No. 54551
MP-3235

Decision No. 29074-B

(limitations on employe use of school fax and telephone)

Appearances:

Weber & Cafferty SC, by **Attorney Mr. Robert K. Weber**, 2932 Northwestern Avenue, Racine, WI 53404, appearing on behalf of the Complainant.

Mr. Frank L. Johnson, Attorney at Law and Director of Employee Relations, Racine Unified School District, 2220 Northwestern Avenue, Racine, WI 53404, appearing on behalf of the Respondent.

EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complainant Association named above filed and subsequently amended a complaint, with the Wisconsin Employment Relations Commission (WERC), alleging that the Respondent District named above had committed and was committing prohibited practices within the meaning of the Municipal Employment Relations Act, Sec. 111.70, et seq. On May 17, 1997, the WERC issued an order substituting the undersigned Marshall L. Gratz as Examiner.

Pursuant to notice, the Examiner conducted hearings concerning the complaint on May 21, 1997 and concerning certain complaint amendments on September 4, 1997, both at the District's offices in Racine, Wisconsin. Briefing was completed on November 5, 1997, marking the close of the record.

The Examiner has considered the record evidence and arguments submitted by the parties. On the basis of the record, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant Racine Education Association (Association), is a labor organization with offices at 1201 West Boulevard, Racine, Wisconsin. At all material times, James Ennis has been the Association's Executive Director.

2. Respondent Racine Unified School District (District) is a municipal employer with offices at 2220 Northwestern Avenue, Racine, Wisconsin. The District is governed by a nine-member School Board (Board). At all material times, Dennis Kornwolf has been a member of the Board. Frank Johnson is the District's Director of Employee Relations, and Keri Paulson is the District's Associate Director of Employee Relations.

3. At all material times, the Association has been the exclusive collective bargaining representative of bargaining unit of certified teaching personnel employed by the District.

4. At all material times, the most recent collective bargaining agreement between the District and Association had expired by its terms on June 30, 1993. In 1994, the District changed its then long-standing policy concerning Association use of the District's internal mail system, first by banning all Association use of District internal mail system (following the Association's distribution of political materials via that system) and thereafter by notifying the Association "that its use of school mail must be limited to communications that would relate only to school district/union business. This would exclude the use of school mail for union or third party business." Later, in 1995, the District temporarily blocked access of Association officials to school buildings, after which such access privileges were restored consistent with the terms of a grievance settlement reached between the parties on that subject. The working relationship between the District and Association has variously deteriorated from July 1, 1993, through all times material to this case.

5. The 1992-93 Teacher Labor Agreement between the Association and the District contains a general managements rights clause which by its terms is subject to the specific and express terms of that Agreement. In several rounds of bargaining between the parties for agreements preceding the 1992-93 agreement, the Association proposed language that would have required the District to, e.g., make "telephone facilities available to teachers for their reasonable use" (1976) and to make "a telephone for private calls [available] in each faculty lounge for the use of teachers" (1982). However, the parties' resultant agreements have never contained such language.

6. In March of 1996, the Board's Business and Facilities Management Committee had occasion to review the contents of the prototype of the annual District directory of personnel for

1996-97. During the course of that review, Board and Committee Member Dennis Kornwolf told the District's Director of Information Systems, Michael Dingman, that stronger language prohibiting the personal use of the District telephones should be added to the directory.

7. In June of 1996, a teacher phoned Kornwolf via a District telephone during working hours to express concerns about a proposed elimination or relocation of an existing District program. During the course of that call, Kornwolf expressed concern that the teacher involved was placing the call during work time. Kornwolf thereafter caused a District administrator to order the teacher involved to submit a written apology or be disciplined for making that telephone call. A grievance was later filed regarding that incident.

8. Except for that incident in June of 1996, no teacher has ever been threatened with discipline or disciplined for alleged inappropriate use of District telephone or fax equipment or of District telephone lines.

9. In October of 1996, the District published its annual personnel/employee directory 1996-97. In it was contained the following language concerning use of District telephone and fax equipment:

> Use of RUSD Telephone Equipment
>
> The telephone system is to be used for Racine Unified School District business only. Personal calls, local or long distance, are not permitted except in an emergency. If an emergency warrants a personal call, employees must notify their supervisor. If a personal long distance [sic] is involved, the employee is required to reimburse the District for the cost of the call plus any associated service fee.
>
> Use of RUSD FAX Equipment
>
> Facsimile equipment is to be used for Racine Unified School District business only. Sending personal facsimiles is not permitted. If an emergency situation requires sending a personal FAX, employees must notify their supervisor. If a long distance call is involved, the employee is required to reimburse the District for the cost of the call plus any associated service fee.

By way of comparison, the previously published District directories since at least 1993-94, contained the following language on that subject:

> Use of RUSD Telephone Equipment
>
> The telephone system is to be used for Racine Unified School District business only. Personal calls should only be made in an emergency. If a personal long distance call must be made, be sure to log it as "personal" on the Long Distance

Call Summary Sheet. Personal long distance fees can be determined from the monthly Long Distance Charges Report. It is the responsibility of the employee to reimburse the District for any personal long distance calls made, which may include a service fee.

Long Distance Summary sheets may be ordered using a stock requisition: stock number: SN 8452.01

Use of RUSD FAX Equipment

The FAX equipment is to be used for Racine Unified School District business only. A personal FAX should only be made in an emergency. If a personal FAX must be made, it should be noted on the FAX log as "personal." It is the responsibility of the employee to reimburse the District for any personal long distance FAX messages sent, which may include a service fee.

10. The Association initially filed its complaint in this case on October 24, 1996, alleging that the District had committed independent violations of both Secs. 111.70(3)(a)1 and 3, Stats., by including the above revised language in its published 1996-97 directory of personnel. By way of remedy, the Association complaint requested declaratory, cease and desist and litigation cost/fees reimbursement relief.

11. Sometime prior to December 9, 1996, the Board directed the administration to draft a policy related to the appropriate use of the District telephone system. On December 9, 1996, the Board's Legislative and Policy Committee voted to recommend that the Board adopt a formal policy on the subject of the use of District telephone and fax equipment and telephone lines. Thereafter, on January 13, 1997, the Board enacted the recommended policy statement, known as Croft Policy 3316, which reads as follows:

6. Use of District Telecommunications Resources (3316)

a. The District telephone systems are to be used for Racine Unified School District business only. Personal calls, local or long distance, are not permitted except in an emergency. If an emergency warrants a long distance call, employees must notify their supervisor and reimburse the District for the cost of the call plus any associated service fee.

b. Facsimile equipment is to be used for Racine Unified School District business only. Sending personal facsimiles is not permitted. If an emergency situation requires sending a personal FAX, employees must notify their supervisor. If a long distance call is involved, the employe is required to reimburse the District for the cost of the call plus any associated service fee.

c. Employee and student access to the Internet via the District Internet service provider is restricted to instructional and District business use only. If staff or students need electronic mail or other Internet services, they should arrange for access directly with a service provider.

12. Croft Policy 3316 constituted the first formal Board policy on the subjects with which it dealt.

13. The instant complaint hearing was initially conducted and completed on May 21, 1997, subject to the filing of post-hearing written arguments.

14. On May 22, 1997, the following directive was issued by Pat Limburg, the Principal at Roosevelt School, to all personnel at that school:

> To: Staff
> From: Pat Limburg
> Date: May 22, 1997
> Subject: Phone Calls...Billing
>
> Several calls have been made during the school year. Most calls that have gone out of the building have been Racine calls; however, several calls of a personal nature have gone out of the building to Racine and outside of Racine.
>
> All calls leaving the building are charged. Local calls are 9 cents each. Milwaukee calls are 5 cents a minute as well as Kenosha and Burlington; and of course, calls further than the Milwaukee line are charged per their area (long distance).
>
> An enormous amount of personal phone calls are being made from Roosevelt School. The budget Department of central office has contacted Roosevelt regarding their concern for the use of our Milwaukee line (that also covers the other areas mentioned), as well as long distance.
>
> Attached is a list of those calls made this year. Several of the numbers have been designated for those making them. Several other numbers have not been reported to the office as to who the caller was.
>
> Please contact Chris to pay for the calls designated as being yours as well as those calls listed that you recognize as being calls you made.
>
> Thanks for your cooperation in this endeavor. [Emphasis in original.]

Limburg issued that directive at the suggestion of a secretary at her school and without knowledge of the Association complaint that was heard on May 21, 1997.

15. The District has sought reimbursement from employes for personal calls made on District telephones for many years. The methods by which the District has done so have not been shown to have materially changed at any time pertinent to this case.

16. The District adopted the 1996-97 directory language and Croft Policy 3316, described respectively in Findings of Fact 9 and 11, above, for the valid business reasons of keeping its limited telephone and fax resources available for calls involving district business and emergencies and of minimizing the amount of work time spent by employes on calls unrelated to District business.

17. The record does not establish by a clear and satisfactory preponderance of the evidence that the District's conduct described in Findings of Fact 9, 11 or 14, above, was motivated, in whole or in part, either by District hostility toward employe exercise of MERA protected rights or by an intention to discourage employes from exercising MERA protected rights.

18. The record does not establish by a clear and satisfactory preponderance of the evidence that the District's conduct described in Findings of Fact 11 or 14 was motivated, in whole or in part, by an intention to retaliate against employes on account of the Association's filing or processing of the instant complaint.

CONCLUSIONS OF LAW

1. The District did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats., by any of the conduct set forth in Findings of Fact 9, 11 or 14, above.

2. The District did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)3, Stats., by any of the conduct set forth in Findings of Fact 9, 11 or 14, above.

ORDER

The amended complaint filed in the above matter is dismissed.

Dated at Shorewood, Wisconsin this 30th day of April, 1998.

Marshall L. Gratz /s/

Marshall L. Gratz, Examiner

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

Procedural Background

The Association initially filed its complaint in this case on October 24, 1996, alleging that the District had committed independent violations of both Secs. 111.70(3)(a)1 and 3, Stats., by including in its annual published directory of personnel what the Association described as "an express prohibition against the use of District telephone equipment except for emergency or previously noticed calls which then have to be reimbursed. Similarly fax equipment cannot be utilized except for official school district business." The Association requested relief in the forms of declaratory, cease and desist and litigation cost/fees reimbursement.

The Association amended its complaint on February 27, 1997, to further allege that on or about January 13, 1997, the District had committed additional such violations by enacting an official Board of Education policy on those subjects.

The WERC issued an order substituting the undersigned as examiner in this matter on May 17, 1997, in advance of a previously- scheduled May 21, 1997 hearing in the matter.

The District answered the amended complaint by denying that its actions violated Secs. 111.70(3)(a)1 or 3, Stats., and by requesting dismissal of the amended complaint.

The matter was fully heard on May 21, 1997, subject to the right of both parties to submit post-hearing written arguments.

Prior to any further developments, on June 6, 1997, the Association filed a motion to reopen the record pursuant to CH. 20.19, WIS. ADM. CODE, for the purpose of receiving evidence to the effect that on May 22, 1997, the day after the above hearing, the District allegedly "issued the first blanket reimbursement directive to teachers that affiant [James Ennis] is aware of in his twenty-four year tenure . . . [and that] said directive is retaliatory and a further violation of Secs. 111.70(3)(a)1. and 3., Stats."

On July 8, 1997, as requested by the Association, the Examiner scheduled further hearing in the matter. That hearing was conducted on September 4, 1997. At that time, the District denied the Association's June 6, 1997 allegations noted above, and asserted that the District's May 22, 1997 communication was not the first of its kind and was not retaliatory or otherwise violative of Secs. 111.70(3)(a)1 or 3, Stats.

Briefing was ultimately concluded on November 5, 1997, following submission of the parties' initial briefs and of the Association's reply brief.

POSITIONS OF THE PARTIES

Association Position

WERC case law establishes that a violation of Sec. 111.70(3)(a)1, Stats., occurs when a municipal employer's conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights to join or assist labor organizations or bargain collectively through representatives of their choice. The complainant must show that the employer's conduct contained a threat of reprisal or promise of benefit which would tend to interfere with the exercise of those rights, but need not prove that the employer intended to interfere or actually interfered with the exercise of those rights. The conduct as well as all the circumstances under which it was engaged in must be considered in order to determine the meaning which an employe would reasonably place on the conduct. CITING, JEFFERSON COUNTY, DEC. NO. 27266-A (CROWLEY, 1/93) and cases cited therein.

Here, the evidence shows that prior to the enactment of Croft Policy 3316, Association building representatives could contact the Association offices at any time by use of District telephones. Statements on the subject in earlier published directories did not rise to the level of work rules, were not shown ever to have been issued to teachers, and were not made a part of Board policy until Croft Policy 3316 was issued.

Whether that policy is reasonable as regards personal phone calls in a wide variety of situations is the subject for a grievance arbitration. However, as enacted and interpreted by the District, Croft Policy 3316 interferes with the ability of teachers to contact Association representatives who are located outside their school buildings.

The policy prohibits all personal calls except for District business. The District's Association Director of Employee Relations, Keri Paulson, testified that, while a building representative calling the Association office for disciplinary or grievance processing advice is making a call related to District business, calls to the Association office about Association "studies" and certain other "activities" would not. Because Croft Policy 3316 subjects every teacher including Association building representatives to potential discipline for calls that are not on District business, employe calls in a wide variety of gray areas will need to be cleared with the building administrator as "emergency calls" or made at the risk of potential disciplinary consequences. Communications that may or may not pertain directly or even indirectly to District business still pertain to employe protected activities. For example, while Paulson testified that the District would characterize a call by a building representative to the Association office to schedule or talk about an Association committee meeting as a personal call, such a call constitutes an activity for the mutual assistance of Association members that is therefore protected by MERA. CITING, GREEN COUNTY, DEC. NO. 26798-B (WERC 7/92) and MILWAUKEE COUNTY MEDICAL COMPLEX, DEC. NO. 27279-A

(GALLAGHER 12/92). Thus, the tendency of the new Croft Policy 3316, as written, is to interfere with the long-standing free line of communication that the Association has enjoyed with its members including building representatives.

In any event, the District has been shown to have implemented the Croft Policy 3316 as part of a pattern of District hostility toward communications between the Association and its building representatives and members and in retaliation for the Association's opposition to new District restrictions on those communications.

Under WERC case law it is necessary to prove the following elements regarding a violation of Section 111.70(3)(a)3, Stats.: the employes were engaged in protected, concerted activity; the employer was aware of that activity; the employer was hostile to that activity; and the employer's action was based, at least in part, on that hostility. CITING, E.G., KEWAUNEE COUNTY, DEC. NO. 21624-B (WERC, 5/85). Those elements have all been proven in this case.

In those regards, the record establishes that the parties' relationship has been deteriorating since their last collective bargaining agreement expired on June 30, 1993. The District changed its school mail policy in 1994, limiting the ability of the Association to communicate with its members directly, and in 1995 the District temporarily blocked the access of Association officials to school buildings.

In March of 1996, District School Board Member Dennis Kornwolf instructed the District's Director of Information Systems to curtail personal phone calls by strengthening the language on the subject in the District's personnel directory. In June of that year, Kornwolf also caused a District administrator to order a teacher to submit a written apology or be disciplined for making a telephone call on a District phone. When the District strengthened the language in its 1996-97 directory, the Association filed the instant prohibited practice complaint in October of 1996. The District Board then wasted little time in thereafter enacting an official policy prohibiting all personal phone calls. Specifically, in December of 1996, the Board's Legislative and Policy Committee formulated what was thereafter enacted in January of 1997 by the Board as Croft Policy 3316.

The District's decision to enact a formal policy which subjects teachers including Association building representatives to discipline for using District telephones or fax machines to contact the Association office was motivated, at least in part, by its ongoing hostility toward such protected activity. CITING, CITY OF MONROE, DEC. NO. 27015-B (WERC 4/93). Teachers in most elementary schools have no alternative means of communicating with the Association office: most elementary buildings have no pay phone; secondary school students are given priority access to District phones in those buildings; and there is no pay alternative to the use of the District's fax machine.

Therefore, unless and until the District has viable alternatives which would permit the building representatives to contact the Association offices, the new policy both tends to and

actually does interfere with the rights of teachers to engage in protected activity and should therefore be prohibited.

In its reply brief, the Association emphasizes that the policies published in the 1996-97

directory and in Croft Policy 3316 constituted changes from the previous freedom of Association building representatives and members to contact the Association by use of District telephone at any time without fear of discipline. While directory language was not an official Board policy enforceable by means of discipline, the Croft Policy 3316 was so enforceable.

Moreover, Croft Policy 3316, for the first time, prohibited local, non-emergency calls. As interpreted by the District and its witnesses at the hearing and in its brief, the District policy treats any calls made for the purpose of discussing "union business" as that term has been defined by the District as prohibited, regardless of whether it is related to group action and is in the interests of the bargaining unit. The District's claim that none of its discussions leading up to Croft Policy 3316 ever considered the effect of the policy on the Association is highly suspect given that the policy was promulgated during the pendency of a prohibited practice complaint on the very same subject matter.

The fact, that a Board member directed a District administrator to order a teacher to submit a written apology or be disciplined for making a telephone call on a District phone, constitutes a threat of reprisal for the exercise of protected activities, i.e., making calls to the Association office regarding "Union business." Even if the District did not intentionally interfere with the teachers' rights to engage in such activities, its policy has the reasonable tendency to do so.

The District's new policy also constitutes interference within the meaning of MERA because it results in a disparity between elementary and secondary teachers in terms of their ability to exercise their MERA rights, given the presence of pay phones only in secondary schools. CITING, MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 20811-A (CROWLEY 1/84).

The District's concern that teacher calls for private purposes should not be paid for by tax money intended for education could have been obviated simply by requiring the caller to provide an eight cent per call reimbursement to the District.

Finally, because the District's distinction between calls on District business and calls that are personal does not parallel the legal distinction between activities that are protected and not protected under MERA, the policy necessarily has a tendency to interfere with the exercise of protected activities.

Accordingly, the Examiner should order the District to cease and desist and to post notices near the District telephones in all District buildings.

District Position

The District Board's January 13, 1997, policy formalized a long-standing informal policy that -- as in other school districts and governmental units -- the employer's phone and fax equipment are ordinarily to be used only for the employer's business. The phone companies charge the District eight cents per local call and per minute charges for calls outside the local calling area.

The policy discourages personal calls in order keep the limited phone lines to school buildings reasonably available for District business. The record establishes that none of the Board discussions leading to the issuance of Croft Policy 3316 made any reference to the effect the policy would have on employe communications with the Association. The District has never challenged an employe regarding whether or not a call was personal, or, if so, whether it was an emergency. For the most part, use of the school phones and reimbursement for emergency personal calls has been on the honor system.

The record also contains District testimony acknowledging that telephone calls regarding Association business often involve District business so as to be authorized under the District policy; for example a call from an employe to the Association office to arrange for an Association representative to be present at a meeting with a District representative. However, calls to the Association office concerning, for example, Association social or political activities would not be authorized under the policy.

While the District's prohibition of the latter calls may cause the Association inconvenience, that is not a sufficient basis on the instant record to conclude that the District's policy is unlawfully interfering with employe rights protected by MERA. The Association has made numerous proposals to establish a contractual right for employes to use District phones, but the District has never been willing to include such language in the parties' agreements, and the parties' latest agreement contains no such language.

The Association's claim that Croft Policy 3316 was enacted in retaliation for the Association's filing of the instant complaint is also without merit. The evidence shows that the Board action amounted essentially to formalization of what had been the District's long-standing informal policy on the same subjects.

With regard to the Association's additional retaliation claim, the evidence shows that the District has requested and collected reimbursements of for personal calls made on District telephones for many years and that the District's methods of doing so have not materially changed at any time pertinent to this case. For that reason and others it is clear that Roosevelt School Principal Limburg's memorandum to her staff, which was coincidentally issued the day after the initial hearing in this case, did not constitute unlawful retaliation on account of the Association's filing or processing of the instant complaint.

Accordingly, the amended complaint should be dismissed.

DISCUSSION

The questions in this case are whether the District has exercised its rights to allocate use of its telephone and fax resources in ways that either discriminate in whole or in part on account of employes' exercise of rights protected by MERA or that otherwise unlawfully interfere with employes' exercise of those rights.

Alleged discrimination violation of Section 111.70(3)(a)3, Stats.

Section 111.70(3)(a)3, Stats., provides that it is a prohibited practice for a municipal employer individually or in concert with others "[t]o encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or any other terms or conditions of employment." To establish that the District has engaged in discrimination in violation of Sec. 111.70(3)(a)3, the Association must prove each of the following factors: (1) that employes have engaged in protected, concerted activity; (2) that the employer was aware of such activity; (3) that the employer was hostile to such activity; and (4) that the employer's complained of conduct was motivated at least in part by such hostility. MUSKEGO-NORWAY V. WERB, 35 Wis. 2d 540 (1967); and E.G., CEDAR GROVE-BELGIUM SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91). The Association bears the burden of proving each of those elements by a clear and satisfactory preponderance of the evidence. Sec. 111.07(3), Stats. elements.

The Examiner has concluded that the Association has not met that burden.

The evidence establishes that beginning in March of 1996 the District has attempted in various ways to limit use of its telephone and fax equipment and phone lines to calls that are related to District business broadly defined. The evidence further establishes that the District has done so to keep its limited telephone lines available for District business calls and to reduce the amount of work time spent by employes on calls unrelated to District business. While the District's efforts in those respects have been undertaken in the context of a lengthy deterioration of its relationship with the Association, the evidence does not establish by the requisite clear and satisfactory preponderance standard that the District's actions were motivated, in whole or in part, by hostility toward employes' engaging in activities protected by MERA.

The District's efforts in those respects appear to have begun when the Board's Business and Facilities Management Committee reviewed the contents of a prototype for the next annual District directory. According to the meeting minutes, Board and Committee member Dennis Kornwolf suggested "that stronger language prohibiting the personal use of the District telephones should be added to the directory." (ex. 7). The record establishes that the concerns prompting that suggestion and the Committee and Board's ultimate adoption of Croft Policy 3316 were to keep its limited telephone lines available for District business calls and emergencies and to avoid wasting time or abuse of the telephone system through personal conversations. (tr. 67-68).

The June, 1996 telephone call that prompted the Board Member Kornwolf to cause a District Administrator to require the teacher involved to apologize for it or be disciplined involved a call from the teacher during work hours to the Kornwolf to express concerns about a proposed elimination or relocation of an existing District program in which that teacher was involved. (ex. 15). The call was neither to nor about the Association. During the course of that call, Kornwolf expressed concern that the teacher involved was placing the call during work time. (ex. 15).

The District's enactment Croft Policy 3316, then, has not been shown to have been

motivated in whole or in part by a purpose of discouraging employes from communicating with the Association or by District hostility toward the Association or toward employe activities on the Association's behalf.

With regard to the Association's claim that Croft Policy 3316 was enacted in retaliation for the Association's October 24, 1996 filing of the instant complaint, the Examiner has concluded that the Association has not proven that claim by the requisite clear and satisfactory preponderance of the evidence. While the Board's Legislative and Policy Committee's decision to recommend Board adoption of what became Croft Policy 3316 occurred on December 9, 1996, the minutes of that meeting indicate that the Board had previously directed the administration to draft a policy on that subject (ex. 4, attachment F); however, the record does not establish whether that initial direction occurred before or after the Association filed the instant complaint. In any event, the District's interest and actions in tightening its telephone and fax policies predated (and led to) the Association's filing of the instant complaint. The creation of a formal Board Policy on the subject where none had previously existed is consistent with that pre-complaint District interest and those pre-complaint District actions.

Finally, because the District's efforts to seek reimbursement for personal long distance calls made by employes is consistent with the District's long-standing practice in that regard, there is no basis on which to conclude that the District engaged in those efforts in retaliation for the filing or processing of the instant complaint.

Therefore, upon consideration of the record as a whole, no Sec. 111.70(3)(a)3, Stats. discrimination has been proven.

Alleged independent interference violation of Section 111.70(3)(a)1, Stats.

Section 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer "[t]o interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2)." Under Section 111.70(2), Stats., the rights protected by Sec. 111. 70(3)(a)1, Stats., include, among others, "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 . . . ."

The Association correctly asserts that 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). However, exceptions to that general rule have been recognized by the Commission in prior cases. For example, 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 of supporting their labor organization generally are not violative of Sec. 111.70(3)(a)1, Stats., unless the remarks contain implicit or express threats or promises of benefit. ASHWAUBENON JOINT SCHOOL DISTRICT NO. 1, DEC. NO. 14474-A (WERC, 10/77); JANESVILLE BOARD OF EDUCATION, DEC. NO. 8791 (WERC, 3/69). SEE GENERALLY, MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 27867-B (WERC 5/95) AND CEDAR GROVE-BELGIUM SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91).

In addition, and of particular significance to this case, it is also well established that employer conduct which may well have a reasonable tendency to interfere with employe exercise of Sec. 111.70(2) rights will generally not be found violative of Sec. 111.70(3)(a)1, Stats., if the employer had a valid business reason for its actions. E.G., BROWN COUNTY, DEC. NO. 28158-F (WERC, 12/96); CITY OF OCONTO, DEC. NO. 28650-A (CROWLEY, 10/96), AFF'D BY OPERATION OF LAW, -B (11/96); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 27867-B (WERC, 5/95); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 27484-A (BURNS, 7/93), AFF'D BY OPERATION OF LAW, -B (WERC, 7/93); CITY OF MILWAUKEE, DEC. NO. 26728-A (LEVITAN, 11/91), AFF'D ON REHEARING, -D (WERC, 9/92); CEDAR GROVE-BELGIUM SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC 2/84); SEE GENERALLY, WAUKESHA COUNTY, DEC. NO. 14662-A (GRATZ, 1/78) at 22-23, AFF'D -B (WERC, 3/78)(". . . some municipal employer actions that, in the broadest and most literal senses of the terms, "interfere with" or "restrain" municipal employes' exercise of Sec. 111.70(2) rights have been held not to violate Sec. 111.70(3)(a)1. [citations omitted] Rather, the traditional mode of analyzing whether a violation of those quoted terms as used in the applicable statute has occurred has involved a balancing of the interests at stake of the affected municipal employes and of the municipal employer to determine whether, under the circumstances, application of the protections of the interference and restraint prohibitions would serve the underlying purposes of the act. [citations omitted]. Id. at 22-23."); and KENOSHA BOARD OF EDUCATION, DEC. NO. 6986-C (WERC, 2/66) (In relation to a claim of interference, "[r]ules established by a municipal employer in effectuation of its public function, which regulate, on a non-discriminatory basis, the activities of its employes and their representatives on the employer's time and premises, and which may arguably limit the rights and protected activities of

employes, as established in Section 111.70, Wisconsin Statutes, shall be presumed valid. Whether said rules constitute . . . prohibited practices, will depend on the facts in each case. The rights of the employes and their representatives must be balanced with the obligation and duties of the municipal employer. Those challenging such rules must establish that they were adopted for the purpose of . . . interfering with the lawful organizational activity of the employes involved . . . ". Id. at 22-23)

Applying the foregoing decisional standards to the facts of the instant case, the Examiner has concluded that the Association has not met its burden of proof by a clear and satisfactory preponderance of the evidence as regards an independent interference violation of Sec. 111.70(3)(a)1, Stats., either.

For the reasons advanced by the Association, the District policies at issue in this case appear reasonably likely to cause some teachers not to engage in some communications with the Association office which would constitute protected activities within the meaning of Sec. 111.70(2), Stats. However, as noted above, the analysis of whether the District has therefore unlawfully interfered with employes' exercise of those rights in violation of Sec. 111.70(3)(a)1, Stats., does not end there.

The District asserts that its policies in the 1996-97 directory and in Croft Policy 3316 were implemented to keep the District's limited telephone and fax equipment and telephone lines available for calls involving District business and emergencies, and to reduce the amount of work time spent by employes on calls unrelated to District business. While there are gray areas between calls involving District business and those that are personal, it is nonetheless clear that the policies, both on their face and as interpreted and applied to date, directly relate to the business reasons that the District claims the policies were developed to serve. The policies are also facially nondiscriminatory in that, as written, they apply to all represented and non-represented personnel. While the District's policies as written and as interpreted to date would prohibit employe use of District telephone resources for those MERA-protected activities that do not involve District business, the District and its witness Keri Paulson have acknowledged that the policies permit the use of those District telephone resources for the wide range of MERA-protected activities that do involve District business. (tr. 59-60, 79-81).

Limiting the use of the District's telephone and fax resources to District business and emergencies and minimizing the amount of work time spent by employes on calls unrelated to District business are valid business reasons for the District's policies at issue in this case. Especially so, in light of the evidence that it has been difficult at times to get through to the telephones involved on District business calls (tr. 47, 48 and 63) and for teachers to find a phone with which to make calls on District business (tr. 39-41, 47 and 48). The fact that the enactment of Croft Policy 3316 has made the District's policy enforceable through the same disciplinary consequences as would follow from the violation of other District policies does not detract from the validity of the District's business reasons for adopting the instant policies.

The facts, that most secondary school teachers have pay phones available to them at their buildings whereas most elementary teachers do not, also do not constitute a persuasive basis on which to conclude that the instant District's policies constitute unlawful interference within the meaning of MERA. The only authority cited by the Association on that point was MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 20811-A (CROWLEY 1/84). In that case the union complained that the employer was refusing to provide bargaining unit employes with a complaint procedure with as broad a scope as that available to non-bargaining unit employes. In the instant case, the District's policies appear to be applicable to non-represented and represented employes alike, making the instant situation materially distinguishable from that involved in the case cited by the Association. The uneven availability of a pay phone alternative for contacting the Association without using the District's equipment and phone lines is merely an incidental consequence of the District's lawful establishment and implementation of the instant policies.

For reasons noted in the earlier discussion of the Association's discrimination claim, the Examiner has found that the Association has not shown by the requisite clear and satisfactory preponderance of the evidence that the District has implemented the instant policies (or sought call reimbursements) in order to discourage employes from engaging in MERA-protected activities.

On the foregoing bases, the Examiner has concluded that no independent interference prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats., has been proven in this case.

CONCLUSION

Accordingly, the Examiner has dismissed the amended complaint in all respects.

Dated at Shorewood, Wisconsin this 30th day of April, 1998.

Marshall L. Gratz /s/

Marshall L. Gratz, Examiner

gmf
g4222.doc