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-C

Appearances:

Weber & Cafferty, S.C., by **Attorney Robert K. Weber**, 2932 Northwestern Avenue, Racine, Wisconsin 53404, appearing on behalf of the Racine Education Association.

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

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

On April 30, 1998, Examiner Marshall L. Gratz issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondent Racine Unified School District had not committed prohibited practices within the meaning of Secs. 111.70(3)(a) 1 or 3, Stats. He therefore dismissed the complaint.

Complainant Racine Education Association timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and opposition to the petition, the last of which was received June 24, 1998.

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

ORDER

The Examiner's Findings of Fact, Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 23rd day of July, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

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

Racine Unified School District

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

THE PLEADINGS

In its complaint, as amended, Complainant asserts Respondent violated Secs. 111.70(3)(a) 1 and 3, Stats., by limiting employe access to Respondent's telephone and fax machines. Respondent denies that its conduct violated the Municipal Employment Relations Act.

THE EXAMINER'S DECISION

The Examiner found no violation of Secs. 111.70(3)(a)1 or 3, Stats. He reasoned:

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 employe's 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 Section 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 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' **(**sic) engaged 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 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 (sic) 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 (sic) 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 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.

POSITIONS OF THE PARTIES ON REVIEW

Complainant

Complainant argues that the Examiner erred when he concluded that Respondent's conduct did not violate Secs. 111.70(3)(a)1 or 3, Stats. Complainant asserts the Examiner correctly cited applicable law but failed to correctly apply that law to the facts of the case.

When Respondent's conduct is viewed in the context of the parties' poor collective bargaining relationship, Complainant contends it should be inferred that Respondent acted, at least in part, out of hostility toward the Complainant's efforts to represent employe interests. Even without evidence of animus, Complainant asserts a violation of Sec. 111.70(3)(a)3, Stats., is warranted because Respondent's conduct was inherently destructive of employe rights to engage in activity protected by the Municipal Employment Relations Act.

Complainant argues that Respondent's restrictions on phone and fax usage clearly have a reasonable tendency to make employes less likely to engage in activity protected by Sec. 111.70(2), Stats. and thus violate Sec. 111.70(3)(a)1, Stats. Complainant contends Respondent's business justification for the restriction is pretextual.

Given all of the foregoing, Complainant asks that the Examiner be reversed.

Respondent

Respondent urges affirmance of the Examiner's decision.

Respondent contends that the Complainant had failed to prove that Respondent's conduct was anything other than a continuation of Respondent's long standing practice of restricting employes' personal use of telephones and fax. Given Complainant's failure, dismissal of the complaint was mandated.

DISCUSSION

We have carefully reviewed the record and conclude that it fully supports the Examiner's decision. The Examiner correctly applied the law to the facts and we find his decision to be well reasoned. Because we have extensively quoted from his decision earlier herein, we deem no further comment to be warranted. We affirm.

Dated at Madison, Wisconsin this 23rd day of July, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

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

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