STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THORP EDUCATION ASSOCIATION and THORP EDUCATION ASSOCIATION EDUCATIONAL SUPPORT PERSONNEL, Complainants,

vs.

SCHOOL DISTRICT OF THORP, Respondent.

Case 15
No. 55093
MP-3292

Decision No. 29146-A

Appearances:

Ms. Laura Amundson, Associate Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P. O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Complainants.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Stephen L. Weld**, 4330 Golf Terrace, Suite 105, P. O. Box 1030, Eau Claire, Wisconsin 54702-1030, and **Mr. Michael D. McCarthy**, Membership Consultant, Wisconsin Association of School Boards, 2600 Stewart Avenue, Suite 162, Wausau, Wisconsin 54403, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Thorp Education Association and Thorp Education Association Educational Support Personnel filed a complaint with the Wisconsin Employment Relations Commission on April 9, 1997, alleging that the School District of Thorp had committed prohibited practices in violation of Secs. 111.70(3)(a)1, 3 and 4, Stats. On July 15, 1997, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held on November 12, 1997, in Thorp, Wisconsin. The parties filed post-hearing briefs and reply briefs, the last of which was received on March 5, 1998. The Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Thorp Education Association and Thorp Education Association Educational Support Personnel, hereinafter referred to collectively as the Association, are labor organizations within the meaning of Sec. 111.70(1)(h), Stats., and have their offices c/o Mary Virginia Quarles, Director, Central Wisconsin UniServ Council, P. O. Box 158, Mosinee, Wisconsin 54455-0158.

2. The School District of Thorp, hereinafter referred to as the District, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its principal office is located at 605 South Clark Street, Thorp, Wisconsin 54711. Michael McCarthy was the District's Chief Spokesman in negotiations for the 1995-1997 collective bargaining agreement and Gerald Eichman is the District's Superintendent, and they have acted on behalf of the District.

3. The Association is the exclusive bargaining representative for all employes the District has classified as "teacher" including the librarian and guidance counselor, who are employed on a regular basis. The Association and the District were parties to a series of collective bargaining agreements including one which expired on June 30, 1995.

4. The Association is the exclusive bargaining representative for all regular full-time and regular part-time secretarial and clerical employes and teaching assistants, excluding supervisory, confidential, managerial, temporary, casual and all other instructional and non-instructional employes of the District. The Association and the District were parties to an agreement which expired on June 30, 1996.

5. In approximately March of 1995, the Association and the District commenced negotiations for a successor for the teacher's contract which expired by its terms on June 30, 1995. On or about September 18, 1995, the parties reached a tentative agreement for a 1995-1997 agreement. By a letter dated October 4, 1995, from the Association to the District, the letter stated, in part, as follows:

> The Thorp Education Association voted unanimously on September 29th to reject the tentative agreement concerning this grievance and our contract.

After Christmas vacation, a second ratification vote was taken and the Association membership did not ratify the tentative agreement. In July, 1996, a third ratification vote was taken which also failed. The Association agreed to three of six items in the tentative agreement and when this was conveyed to Superintendent Eichman, he informed the Association that it was a total package and they had to take it or leave it.

6. On August 21, 1996, Investigator Herman Torosian sent the following letter to representatives of the District and the Association:

First let me state for the record that the parties are deadlocked in the negotiations of a successor agreement to their contract that expired July 1, 1995.

It is my understanding from my conversations with Mr. McCarthy and Ms. Quarles that the parties may be interested in agreeing to the economic issues and proceeding to arbitration over the language issues. Given same, I think the best way to proceed is for the District to provide the Association the following: (1) The District's signed economic offer (QEO or better) for the Association's signature; (2) a list of tentative agreements, if any, and (3) a list of language issues to be arbitrated.

Once the above has been completed, please submit same to the undersigned. Also, please indicate your position with regard to the inclusion of out-of-state arbitrators on the panel that will be submitted in this case. As you know, under Sec. 111.70, Wis. Stats., out-of-state arbitrators will only be included if both parties agree to their inclusion.

7. On March 14, 1997, Mr. McCarthy sent a letter to Mary Virginia Quarles, the Association's Chief Spokesperson, which stated, in part, as follows:

Dear Ms. Quarles:

I am contacting you to inform you that the Thorp School District Board of Education has modified its Final Offer to the Thorp Education Association (TEA). The Board submits to you the following Final Offer:

FINAL OFFER

. . .

The Board strongly believes that the Tentative Agreement reached between the parties on September 18, 1995 was more favorable to both parties. The teachers, undoubtedly, would have benefitted more greatly financially with the Tentative Agreement. The difference between the Tentative Agreement and the Minimum Qualified Economic Offer(s) for contract years, 1995-96 and 1996-97 is approximately $15,000 which is lost from the salary schedule. The Board had been informed that the primary obstacle to Association ratification was the modified Board Functions clause. The Board knows that its existing contract language contains the powers granted to it through the tentatively agreed to enumerated rights. Its objective in the last round of negotiations was to better communicate its authority in certain areas. Consequently, the Board believes that pursuing interest arbitration is unnecessary for two (2) primary reasons:

1. The Board already has the enumerated rights it seeks with more detailed and clearly stated language which was included in the tentative agreement.

2. The Board does not want to waste precious time, money, and energy on litigating contract language which was already agreed to by the Association.

The Association can expect to receive a Minimum Qualified Economic Offer (QEO) for future contract years until it voluntarily accepts the language contained in the Tentative Agreement of September 18, 1995. The Board has weighed its two (2) major priorities with respect to this issue: 1) litigating the Tentative Agreement to retrieve what was mutually agreed upon; or 2) expecting the school district's staff to exhibit integrity by honoring the authority of its bargaining team and agreeing to the Tentative Agreement. The resolution of this issue lies on the staff's shoulders.

Consequently, the Association is presented with a choice. One, it can agree to the original Tentative Agreement and commence negotiations for 1997-99. Second, it can receive the Minimum QEO for 1995-96 and 1996-97 and expect to see the same Board-proposed items in the upcoming round of negotiations.

8. The parties met on April 15, 1997, but no agreement was reached and the District imposed a minimum QEO for the 1995-96 and 1996-97 years.

9. On April 29, 1996, the Association sent the following letter to the District:

The Thorp Education Association does not wish to open bargaining for a replacement contract for the educational support personnel, but rather wishes the current contractual terms to continue for 1996-1998. This is not a waiver of future bargaining rights.

On May 14, 1996, the District's Superintendent responded as follows:

I apologize for my late response to your letter. The Board wishes to open bargaining for a replacement contract for the educational support personnel.

In discussion with Judy Smriga, the Board would like to try a little more personal approach to this bargaining process. I recently attended a Win/Win workshop. I would like to sit down with local representatives only (both the Board and the Association leave their advisors at home). Hopefully, this would allow us to enter into better dialog.

> If you would be willing to try this approach, we will need to get together to pick a date or dates to begin this process.

10. Edna German is employed by the District as a teacher's aide and is in the Educational Support Personnel unit but holds no office in the Association and is not on the bargaining team. German works in the High School office during the noon hour in relief of the regular office employes. The Superintendent's office is in that area and she and the Superintendent engaged in banter. On January 8, 1997, the District and the Association engaged in negotiations over the successor to the support staff contract. On January 9, 1997, the Superintendent approached German and asked why she wasn't at the negotiations. She replied that it wasn't necessary for her to be there and she had confidence in her representatives and this was the past practice. The superintendent said he would like to see all seven support personnel at the negotiations. The Superintendent went to his office and after a period of time German went into his office and asked her if he would give her an honest answer to a question to which he responded "yes." She told him a number of employes thought he was trying to break the Union. He told her "no" and went on to say they would be better off if they were represented by the Teamsters Union.

11. Jeff Geissler is a middle school teacher with the District and during 1996 was a football coach. On or about October 7, 1996, Geissler went to Superintendent Eichman's office to talk about reimbursement for a coaching clinic. At the end of this conversation, Eichman stated that he wanted to talk about some things that some football officials had reported to him. Geissler stated he felt uncomfortable and would like to leave. Eichman said he would like to ask some questions but Geissler did not want to talk about it, so Eichman told him to come back at 3:15 p.m. that day. Geissler returned at 3:15 p.m. with his Union Steward. Eichman told Geissler that he didn't want to talk to him then and he should go to football practice, which he did.

12. Superintendent Eichman testified that when Geissler would not talk to him about it, Eichman didn't need to talk to him anymore. He admitted that had Geissler talked to him, whether he admitted or denied making the comments, it would have been all over and he would have simply told him, "just don't make those comments."

13. On October 8, 1996, Superintendent Eichman gave Geissler the following letter:

> It was brought to my attention that you may have made several false or misleading comments about me to parents, students, and/or other faculty members.
>
> On Tuesday, September 24, 1996, I attempted to investigate these allegations. I offered you an opportunity to explain yourself. Your response was that you felt uncomfortable and would not discuss them with me without union representation.

> I can only assume from your refusal to talk to me, that there is sufficient evidence that you did in fact make false or misleading statements that were derogatory towards this administration. This is an intolerable act and as such will be considered an act of insubordination.
>
> On Thursday, October 3, 1996 the football officials had commented to you that it was difficult to see the hash marks on the field and suggested that the field be repainted. Your comments back were irresponsible, brazen and less than professional. You insinuated that the District Administrator was responsible for an unpainted field.
>
> A head coach and two assistants with over 35 years of football coaching experience and a long established "past practice" for maintaining the fields makes your comments totally out of line, especially since the district administrator has never been part of this practice, a fact that you are fully aware of. Equally concerning, you never followed up with the official's suggestion and communicated their concern with the athletic director, head custodian, or myself.
>
> This letter will be placed in your file and serve as a written reprimand and a warning to cease from making false and misleading statements regarding this administration or school system.

The letter was grieved and the letter was not placed in grievant Geissler's file.

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

CONCLUSIONS OF LAW

1. The District, by its letter of March 14, 1997, informing the Association that it could expect to see a minimum QEO in future contracts until it agreed to language offered by the District, did not refuse to bargain in good faith with the Association nor retaliated against members for exercising their right to vote on the contract and thus did not commit any prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 4, Stats.

2. The District, by Superintendent Eichman's statements to Edna German on January 9, 1997, did not interfere with the Association's representation of employes and did not commit a prohibited practice in violation of Sec. 111.70(3)(a)1, Stats.

3. The District, by the discipline meted out to Geissler when he sought Union representation in an investigative interview, interfered with, restrained and coerced Geissler in the exercise of his rights and thus committed a prohibited practice in violation of Secs. 111.70(3)(a)1 and 3, Stats.

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

ORDER

IT IS ORDERED that

1. The alleged violation of Secs. 111.70(3)(a)1 and 4, Stats., related to the District's retaliatory conduct and refusal to bargain as well as the alleged violation of Sec. 111.70(3)(a)1, Stats., related to Eichman's conversation with German, are dismissed in their entirety.

2. The School District of Thorp, its officers and agents, shall immediately:

a) Cease and desist from interfering with employes' exercise of their WEINGARTEN rights and discriminating against employes who request to have Association representatives at disciplinary interviews.

b) Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

(1) Post the Notice attached hereto as Appendix "A" in conspicuous places in District buildings where notices to employes are posted. The Notice shall be signed by the Superintendent and remain posted for a period of thirty (30) days. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

(2) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this Order as to the action the District has taken to comply with this Order.

Dated at Madison, Wisconsin, this 20th day of April, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

APPENDIX "A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employes that:

WE WILL NOT interfere with the rights of any of our employes who request to have an Association representative present during investigative interviews which may reasonably lead to employe discipline.

WE WILL NOT discriminate against employes who seek to have an Association representative present during investigative interviews which may reasonably lead to employe discipline.

Dated at Thorp, Wisconsin, this _____ day of _____, 1998.

By _____
District Superintendent

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

THORP SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint, the Association alleged that the District violated Secs. 111.70(3)(a)1, 3 and 4, Stats., by coercive and retaliatory behavior regarding the 1995-97 professional staff bargain, interference with the representation of the Educational Support Personnel in negotiations for its contract and the imposition of more severe discipline because an employe declined to discuss a matter in the absence of Union representation. The District answered the complaint denying that it had committed any prohibited practices.

ASSOCIATION'S POSITION

The Association contends that the District violated Secs. 111.70(3)(a)1 and 4, Stats., by failing to provide information to the Association in a timely manner, by conditioning future bargains on the Association acceding to a District proposal and by retaliating against the Association for voting against ratification of a tentative agreement. The Association points out that it had three ratification votes, all of which resulted in rejection of the tentative agreement. According to the Association, prior to the third ratification vote, it had told Eichman and McCarthy that the hang up was the "board functions" language in the District's proposal and the Association suggested that if the vote was against ratification, the Association would then go through each item and if any were acceptable these could be taken off the table. It asserts that McCarthy agreed with this but when the Association informed Eichman it would accept three of the six outstanding items, Eichman told it that the District's proposal was a "total package" and it had to take it or leave it.

The Association states that the District received a letter from Investigator Torosian in August, 1996, directing the District to convey information to the Association; however, this information was not provided to the Association until February, 1997. It notes that it responded immediately in February, 1997, and the District responded with the letter of March 14, 1997, telling it that it could expect a minimum QEO in future bargains until it accepted the District's language contained in the tentative agreement.

The Association argues that the District was obligated to bargain in good faith and its failure to respond or provide information to the Association in bargaining violated the duty to bargain, where the delay in responding is unreasonable in the totality of circumstances. It asserts that the delay for six months was part of a pattern of the District's failure to bargain in good faith for the 1995-97 negotiations. It asserts that the District's refusal in July, 1996, to consider the Association's proposal demonstrates that the District was not interested in reaching an agreement and the "take it or leave it" attitude is contrary to good faith bargaining. The Association claims that the District made its refusal to bargain in good faith explicit in the March 14, 1997 letter as its threat with regard to future bargains was clearly impermissible. It

asserts that the refusal of the District to bargain with the Association in this and future bargains until the Association agreed to the "board functions" language constituted bad faith bargaining in violation of Secs. 111.70(3)(a)1 and 4, Stats. It states that it appears from the March 14, 1997 letter that the District compounded its violation by retaliating against the Association for exercising its right to vote against ratification of the tentative agreement.

The Association contends the District violated Sec. 111.70(3)(a)1, Stats., when Eichman approached German and encouraged her to deal directly with him rather than through her collective bargaining representatives. The Association asserts that Eichman suggested that employes negotiate directly with him rather than through their bargaining representatives. It maintains that the statement made the day after the first negotiating session implied a promise of reward if there was direct bargaining. It claims the statement was an attempt to undercut the Association and interfered with the Association's representation of employes.

The Association takes the position that the District violated Secs. 111.70(3)(a)1 and 3, Stats., when it disciplined Geissler and/or increased the level of discipline it would have imposed because he desired Union representation in a disciplinary interview. It states that an employe has the right to Union representation in a disciplinary interview. It argues that increasing the severity of the discipline because an employe insists on Union representation during an investigative interview constitutes retaliation for exercising the right to engage in concerted Union activity. It points out that on October 8, 1996, Geissler received a written reprimand but at the hearing Eichman stated that he would not have issued a written reprimand if Geissler had spoken to him "one on one" initially rather than returning with his representative. It observes that removing the letter from Geissler's file is immaterial. It suggests that the real reason Geissler was disciplined was for refusing to meet Eichman "one on one." It concludes that Eichman committed a prohibited practice in violation of Secs. 111.70(3)(a)1 and 3, Stats.

DISTRICT'S POSITION

The District contends that the Association committed a prohibited practice when it rejected the tentative agreement by a unanimous vote. It submits that the Association's President, a master's degree holder, sent the District a letter stating that the Association "voted unanimously" to reject the tentative agreement. It observes that the bargaining team has an obligation to support the tentative agreement and a unanimous vote against it is a per se prohibited practice. It states that the letter was never clarified and it questions the testimony that the bargaining team members had, in fact, voted for ratification.

The District insists that despite the unanimous rejection of the tentative agreement, it continued to bargain in good faith even when the Association instructed its membership to "work to contract," initiated a letter writing campaign and submitted Association propaganda to a local newspaper. It points out that even after deadlock was declared, it still attempted to reach a voluntary agreement and when the Association asked to meet in April, 1997, the District met on April 15, 1997.

The District argues that the March 14, 1997 letter was an attempt to reach a voluntary settlement and avoid unilateral implementation of a minimum QEO. It notes that McCarthy pointed out the members would receive less money if a minimum QEO was imposed and predicted the District would continue to propose language similar to that in the tentative agreement. It suggests this is analogous to the CITY OF BELOIT, DEC. NO. 27779-B (WERC, 9/94) in that the District was attempting to persuade the Association to change its position. It insists the letter was not coercive and did not contain any threats of reprisal or promises of benefit and although the proposal might have represented a step backward, it did not constitute bad faith bargaining. It submits that the Association has cherry-picked one sentence and at worst, this is merely robust, free speech which can be expected in the bargaining environs. It concludes that there was no violation of Sec. 111.70(3)(a), Stats.

The District contends that Eichman's comments to German did not constitute a prohibited practice. It observes that they have engaged in work place "banter." It notes that German did not initiate this complaint but the Association's negotiator did, who neither witnessed it nor knew its tone or context. In the totality of circumstances, the District states that it is significant that the Association did not rush to bargain a new contract for 1996-1998; rather, the Superintendent made the request in writing. It claims that the comments to German were nothing more than the Superintendent's desire to try win-win bargaining and have all the affected staff involved. It asserts that this charge should not be considered at all.

The District contends that the investigation of Geissler's alleged comments did not constitute a prohibited practice. It points out that Geissler initiated the conversation and was under no compulsion to appear and when Eichman asked about his comments, he did not insist that Geissler stay and answer the questions. It states that when Geissler returned with a Union steward, Eichman, at that time, had to meet with the School Board President so he couldn't meet with Geissler. Geissler, according to the District, was never asked any questions.

It observes that Geissler alleged that Eichman took the action because he was a member of the Association's bargaining team; however, he changed his testimony as to when he became a member of said team and his assertion that the letter was based on his bargaining team membership is not sustainable.

It submits that following Geissler's request for a Union representative, Eichman was not required to interview him as part of the investigation, a risk Geissler took. Eichman concluded that Geissler made the alleged comments and according to the District, he viewed Geissler's failure to deny them as an implicit admission. It observes that the letter was not placed in Geissler's file and this allegation would not have been filed had bargaining gone better. The District claims the allegations in this complaint are frivolous, in bad faith and capriciously joined and requests dismissal with prejudice and seeks costs and attorneys' fees.

ASSOCIATION'S REPLY

The Association denies that it committed any prohibited practice in the 1995-97 bargain and states that if it did, it would not be a defense to the District's violation. It asserts that the District could have filed a complaint, but knowing it to be unsubstantiated, it declined to do so. It submits that the testimony established that the bargaining team voted in support of the tentative agreement. The Association observes that "two wrongs do not make a right," so if it had committed a prohibited practice, it would be no defense to the District's separate violation. The Association argues that the self-serving testimony related to the District's disappointment following the membership's exercising its legitimate right to vote down the tentative agreement is not a defense to the alleged prohibited practice.

The Association claims that the District's attempt to characterize its March 14, 1997 letter as an attempt to achieve a voluntary settlement is unpersuasive and was an attempt to coerce the Association into accepting its offer by refusing to bargain in good faith. It maintains that the District was infuriated by the membership's legitimate right to vote against ratification. The District resorted to threatening a present and future refusal to bargain in good faith unless the Association agreed to a specific proposal. It argues that the District made a threat, not a mere prediction and as such, the District's coercive conduct, unlawful threat and refusal to bargain in good faith violated Secs. 111.70(3)(a)1 and 4, Stats.

The Association alleges that Eichman's comments to German constituted interference. It states that Eichman encouraged German to negotiate with him directly rather than through her bargaining representative and this constituted unlawful interference with the Union's representation of employes in violation of Sec. 111.70(3)(a)1, Stats.

The Association insists that Eichman's discipline of Geissler was for attempting to exercise his right to have representation at an investigative interview. It submits that the letter of reprimand states that Eichman concluded that Geissler made the statements but this conclusion was not based on any investigation but on Geissler's having requested that a Union representative be present at the investigative interview. It further observes that Eichman testified that he would not have given Geissler a written reprimand if Geissler had spoken to him initially without a Union representative. It asserts that Eichman retaliated against Geissler for attempting to exercise his WEINGARTEN rights and such violated Secs. 111.70(3)(a)1 and 3, Stats. The Association asks for appropriate relief including ordering the District to pay all fees and costs.

DISTRICT'S REPLY

The District maintains that it bargained in good faith. The District notes that the Association raises the claim of a failure to provide information for the first time in its brief and it should not now be forced to defend this charge. It observes the basis for this assertion is Investigator Torosian's August, 1996 letter which it points out was sent to the Association and the Association never followed up on Investigator Torosian's suggestion because it had the

information already. The District contends that the Association is befuddled by or attempting to obfuscate the facts, confusing the September, 1995 tentative settlement with 1996 and the ratification process. It denies that the District took a "take it or leave it" attitude after the tentative agreement was rejected. It submits the March 14, 1997 letter was after eighteen months of bargaining after the tentative settlement during which time relations were "acrimonious" and seven months after the declaration of deadlock. It asserts that after deadlock is declared, the District has a statutory right to cut off arbitration on economic issues by making a minimum QEO. It asserts the March 14, 1997 letter presented the Association with a choice of money for language and was an attempt to bargain both economic and non-economic issues. It observes that the duty to bargain does not require a party to concede its position and the March 14 letter was an attempt to inform and persuade the Association and the District insists it was not bargaining in bad faith.

The District insists that Eichman's discussion with German did not constitute a prohibited practice. Contrary to the Association's contention that Eichman suggested to German to deal with him directly, the District states there is not a hint of a suggestion of direct dealing in the contemporaneous written statement of German. It notes there was no suggestion of bypassing the Association and it recalls that the District rejected the Association's request to waive a salary and benefits increase for 1996-97 and 1997-98. It submits there are no facts to support the Association's charge. It observes that there was no bargaining between Eichman and German, no threats issued or promises offered, just an encouragement that German participate in the regular bargaining process.

The District submits that Eichman's investigation of Geissler did not constitute a prohibited practice. The District points out that Geissler contended he became a member of the bargaining team in January, 1996, but the record reveals he attended no sessions until April, 1997, so there could be no retaliation on the basis of bargaining team membership in October, 1996. It observes that Eichman did not have to meet with Geissler and if his investigation was inadequate, the grievance procedure was available to address that issue and that was a risk Eichman could legally take.

As to increasing the penalty, the District asserts the Association's reliance on ILGWU V. QUALITY MANUFACTURING CO., 410 U.S. 276, 88 LRRM 2698 (1975) is misplaced as it involved a discharge for insisting on a Union representative at an investigative interview. The District claims it could find no case including QUALITY which supported the Association's proposition. It asserts that the Association's contention that Eichman would not have issued the letter of reprimand had Geissler met with him "one on one" is pure speculation. It requests that the complaint be dismissed in its entirety.

DISCUSSION

The first count alleged by the Association involves a failure to provide information, retaliation for failure to ratify the tentative agreement and interference by the March 14, 1997

letter. The alleged refusal to provide information charge does not appear in the complaint or the amended complaint and its dismissal could be based on the fact that it was not pled. It is dismissed on the merits on the basis that the Association never made a request for this information.

The duty to bargain in good faith requires that, where appropriate, municipal employers provide the collective bargaining representative of their employes with information which is relevant and reasonably necessary to bargaining a successor contract or administering the terms of an existing agreement. MORAINE PARK VTAE, DEC. NO. 26859-B (WERC, 8/93); MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 24729-B (WERC, 9/88). The obligation to provide such information is triggered by a request for the information by the bargaining representative. In the instant case, there is no evidence that the Association ever asked for the information. The Association relies on the Investigator's letter to the parties dated August 21, 1996, wherein he states:

> Given same, I think the best way to proceed is for the District to provide the Association the following: (1) the District's signed economic offer (QEO or better) for the Association's signature; (2) a list of tentative agreements, if any, and (3) a list of language issues to be arbitrated.

A suggestion by the Investigator does not translate into a request for information by the Association. Additionally, this "information" was subsequent to a declaration of a "deadlock" and is the documentation for the imposition of a QEO and any non-economic items the District wishes to arbitrate. There was no time table for providing such documentation and the District could decide what the amount of the QEO would be as long as it was at or above the minimum as well as any items it wished to arbitrate. There is no evidence the Association sought this data from the District or the Investigator any time prior to the District's providing it. Thus, the charge lacks merit and is dismissed.

The Association contends that the District refused to bargain in good faith by retaliating against the Association because the members exercised their right to vote against the tentative agreement. This allegation is not supported in the record. The Association voted down the tentative agreement in September, 1995, and this was over a year before the March 14, 1997 letter. The Association voted the tentative agreement down twice more with the last vote in July, 1996. The Association offered to accept some items but not others and the District Administrator told the Association's representative that it was a package deal and it had to "take it or leave it." This does not constitute bad faith bargaining. Just because the District would not accept a ratification of a part of a total package does not establish that it was bargaining in bad faith. It did not have to make any concessions, particularly where the concessions would involve part of a tentative agreement at the culmination of bargaining. Additionally, this was over six or seven months before the March 14, 1997 letter. The evidence failed to prove any retaliation and this charge is dismissed.

As to the March 14, 1997 letter, when read in the context of the total circumstances, it did not interfere with, restrain or coerce bargaining unit members in the exercise of their rights and did not constitute bargaining in bad faith. After the Investigator declared "deadlock." The District could have imposed a minimum QEO and arbitrated the language items it sought. In its letter of March 14, 1997, (Ex. 4), the District indicated it would not arbitrate its language items and would impose the minimum QEO. It informed the Association representative that the Association lost about $15,000 from the salary schedule by not accepting the tentative agreement and the Association could expect a minimum QEO in future contract years until the language items in the tentative agreement were accepted. The Commission stated in CITY OF BELOIT, DEC. NO. 27779-B (WERC, 9/94) the following:

> . . . In our view, it is generally appropriate for one party to advise the other during the collective bargaining process of the potential negative consequences if a proposal or position ultimately is included in the collective bargaining agreement. Thus, for instance, if an employer advises a union that acceptance of the union's wage demands might or would require the layoff of employes and the totality of the circumstances surrounding the employer's statement establish that the employer is not motivated by a desire to threaten employes for the exercise of their right to collectively bargain, that employer is acting in a legal manner consistent with the collective bargaining process. The employer in such circumstances is not seeking to deter employes from exercising rights but rather seeking to persuade employes to change the position they are taking at the collective bargaining table when exercising their rights. Simply put, parties are generally free to take whatever positions they wish at the collective bargaining table, but cannot expect to be insulated from any consequences if they are successful in having those proposals become part of the collective bargaining agreement.

In the letter of March 14, 1997, the District was pointing out the negative consequences of the Association's position. Like BELOIT, the District was not seeking to deter the Association from exercising whatever rights they desired to exercise but was attempting to persuade them to change their position. The last paragraph of the March 14, 1997 letter states:

> Consequently, the Association is presented with a choice. One, it can agree to the original Tentative Agreement and commence negotiations for 1997-99. Second, it can receive the Minimum QEO for 1995-96 and 1996-97 and expect to see the same Board-proposed items in the upcoming round of negotiations.

This clearly is an attempt to persuade the Association to change its position. Additionally, this letter came some 3 1/2 months before expiration of the contract, a time when

negotiations for the next contract are usually in the process of starting. Thus, under the circumstances, the District's conduct did not violate Secs. 111.70(3)(a)1 or 4, Stats. See also CITY OF MARSHFIELD, DEC. NO. 28926-A (GALLAGHER, 9/97), AFF'D BY OPERATION OF LAW, DEC. NO. 28926-B (WERC, 11/97).

The Association's second count alleges a violation of Sec. 111.70(3)(a)1, Stats., in Eichman's conversation with German on January 9, 1997, in that Eichman allegedly sought to individually bargain with German. A review of German's statement (Ex. 15) leads to the conclusion that there is nothing stated to her by Eichman that constitutes bargaining with her. Employer's have exercised First Amendment rights to communicate directly with members of the bargaining unit. An employer can tell employes what has been offered in negotiations. To prove individual bargaining, the evidence should show an attempt to deal directly about something bargainable. In the conversation there were no discussions about bargaining proposals nor was there any statement that employes should bargain directly with Eichman rather than through their representatives. Eichman never made any statement about wages, hours or working conditions. Eichman made disparaging comments about the Association but an employer can make disparaging comments about a union without violating Sec. 111.70(3)(a)1, Stats. MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 27867-B (WERC, 5/95).

None of the statements made to German can be viewed as an express or implied threat to her exercise of her protected rights or a promise of benefits. It is concluded that none of Eichman's statements to German constituted individual bargaining and this count has been dismissed.

The third count involves the discipline of Jeff Geissler and his investigatory interview. The law with respect to an employe's rights in investigative interviews is set out in NLRB V. WEINGARTEN, INC., 88 LRRM 2689 (1975) and has been adopted by the Commission in CITY OF MILWAUKEE, DEC. NOS. 14873-B, 14875-B AND 14899-B (WERC, 8/80). WEINGARTEN provides that an employe may refuse to participate in an investigative interview without Union representation where the employe reasonably believes that the interview may result in discipline. The right only arises where the employe requests representation and he can participate in an interview without a representative if he forgoes his right to request one. The employe must reasonably believe the interview will result in discipline and "reasonable" is measured by objective standards. The Employer has no obligation to continue with an investigative interview once Union representation is requested. It does not have to justify its refusal and can continue on its investigation without questioning the employe and the employe then forgoes any benefits that may be derived from participating in an interview.

In this case, Geissler sought Union representation when Eichman asked about the comments he allegedly made to football officials. At that point, Eichman was free to not interview Geissler and to draw his conclusions from whatever sources he deemed appropriate and to take whatever action he felt was appropriate. The action taken as far as discipline is concerned would be subject to the grievance procedure and if Eichman made an error, it would be resolved in the grievance procedure.

The Association initially claimed that the discipline was based on Geissler's membership on the Association's bargaining team; however, I credit the testimony of Eichman that he did not know of Geissler's team membership until April, 1997, several months after the letter of reprimand. The Association has also asserted that Geissler was disciplined because he sought representation. The evidence fails to support this allegation. As noted above, once Geissler sought representation, Eichman had no obligation to continue the interview and Geissler lost any benefit he might derive from participation in the interview. While not stated as artfully or precisely as WEINGARTEN, the third paragraph of the letter of reprimand is simply stating that by foregoing participation in the interview, Geissler has credited the statements of football officials which was his right to do. Whether he could prove it in arbitration is a different matter but it is concluded that under WEINGARTEN rules, he could make this conclusion. Thus, the evidence fails to establish that Eichman disciplined Geissler because he sought representation.

The Association has also alleged that Eichman increased the amount of discipline because Geissler chose to exercise his WEINGARTEN rights. It is undisputed that Eichman gave Geissler a written reprimand after he requested representation. (Ex. 2) In his testimony, when asked why he didn't feel obligated to continue Geissler's interview, Eichman made the following admission:

> I just don't. I feel that's -- when he walked out of the office, I figured it was a done deal right there; that he wouldn't talk to me about it, I didn't need to talk to him anymore, that I was going to follow through with the fact that he had made some statements that I felt were uncalled for.
>
> And if he'd just come in and said yes, he did, or no, he didn't, or if we talked about it, it would all have been done, Jeff, just don't make those comments. That was basically the gist of the conversation, but it didn't happen that way. (Tr. 222)

Eichman is admitting that whether Geissler admitted or denied making the statements, if they had talked about it without Union representation, all that he would have received is a verbal warning. Therefore, Geissler's request for Union representation resulted in greater discipline than had he made no request. This has a chilling effect on the exercise of representation rights and is a violation of Sec. 111.70(3)(a)1, Stats., as it interferes with, restrains and coerces the exercise of employes' WEINGARTEN rights.

Additionally, Eichman's conduct violated Sec. 111.70(3)(a)3, Stats., in that he discriminated against Geissler by giving him a written reprimand rather than a verbal reprimand based on the exercise of his WEINGARTEN rights.

As far as the remedy is concerned, the letter of reprimand was not placed in Geissler's file, so the standard cease and desist and posting requirement should resolve the matter.

Each side requested costs and attorneys' fees. The Examiner does not deem the complaint or the District's response to be so frivolous, in bad faith or devoid of merit as to warrant the imposition of attorneys' fees and costs and they are denied. WISCONSIN DELLS SCHOOL DISTRICT, DEC. NO. 25997-C (WERC, 8/90) citing MADISON METROPOLITAN SCHOOL, DEC. NO. 16471-B (WERC, 5/81).

Dated at Madison, Wisconsin, this 20th day of April, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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