STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CENTRAL HIGH OF WESTOSHA ESP,
and TERESA D. WATSON, Complainants,

vs.

CENTRAL HIGH SCHOOL DISTRICT OF WESTOSHA,
and GERALD SORENSEN, District Administrator, Respondents.

Case 29
No. 57583
MP-3523

Decision No. 29671-B

Appearances:

Mr. Stephen Pieroni, Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, WI 53708-8003, on behalf of the Complainants.

Mr. Daniel G. Vliet, Davis & Kuelthau, S.C., Attorneys at Law, Suite 1400, 111 East Kilbourn Avenue, Milwaukee, WI 53202-6613, on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Central High of Westosha ESP and Teresa D. Watson, herein referred to as the Complainants, filed a complaint on May 26, 1999 with the Wisconsin Employment Relations Commission alleging that the Central High School District of Westosha and Gerald Sorensen, District Administrator, had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 3 of the Municipal Employment Relations Act by various conduct affecting Ms. Watson. On June 28, 1999, the Complainants amended their complaint, alleging that that the Respondents engaged in further conduct affecting Ms. Watson that violates Sec. 111.70(3)(a)1 and 3, Stats. On July 27, 1999, the Commission appointed Karen J. Mawhinney 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. On July 27, 1999, the Respondents filed a

Motion to Dismiss and/or Defer to Arbitration. The Complainants responded to the Motion on August 4, 1999, and the Respondents filed a further reply in support of the Motion on August 20, 1999. The Examiner denied the Motion on August 25, 1999. On August 28, 1999, the Complainants further amended the complaint to allege that the District had constructively discharged Ms. Watson by changing her starting time. A hearing was held on October 14, 1999 in Paddock Lake, Wisconsin. The parties completed filing briefs by March 27, 2000. The Examiner, having considered the evidence and arguments, makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant Central High of Westosha ESP, herein called the Association or the Union, is a labor organization with its offices at 32100 Droster Avenue, Burlington, WI 53104. Complainant Teresa D. Watson was a member of the bargaining unit represented by the Association. The unit includes custodial, health service workers, food service, and secretarial/clerical employes in the District.

2. Respondent Central High School District of Westosha, herein called the District, is a municipal employer with its offices at P.O. Box 38, Salem, WI 53168. Respondent Gerald Sorensen was employed as the District Administrator during the relevant times in this case.

3. The Complainants alleged that the District committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 3, Stats., when the District changed Watson's part-time position to full-time after she became active in union activities, when it denied her request for 30 minutes of pay after attending a meeting after work, when it changed its practice of providing paid leave to Watson for days the office was closed over vacation breaks, and when it required Watson to get Sorensen's permission before reporting to work on snow days. The Complainants amended the complaint to further allege that the District committed prohibited practices by reducing summer hours for Watson, by eliminating a paid lunch, and by constructively discharging Watson when it changed her starting time from 8:30 a.m. to 7:15 a.m. The Respondents denied committing any prohibited practices. During the hearing, the Complainants withdrew the allegation regarding 30 minutes of pay for attending a meeting after work.

4. Watson was employed by the District as a cheerleading coach and a guidance clerk. She was a cheerleading coach from the summer of 1994 to the winter of 1998, and she voluntarily resigned that position. She started as a guidance clerk in February of 1996 and worked until August 24, 1999. Her supervisors were the Guidance Director, Keith Olson, and the Principal, Doug Potter. There were four guidance counselors in the District. Potter became District Administrator on July 1, 1999, replacing Sorensen. Watson received favorable comments on her job performance from Olson, Potter and Sorensen. Watson had a good working relationship with Olson and Potter, except her relationship with Potter became strained when her hours were changed. When Watson was hired as guidance clerk, Sorensen

changed the position from full-time to part-time. Watson told Sorensen that her children got on the bus at 8:05 a.m. and she could be on the job by 8:30 a.m., and that she wanted part-time work. They agreed that she would work from 8:30 a.m. to 3:00 p.m. and then she would start her cheerleading coaching duties at 3:00 p.m. Watson's children attended a different school, and she had another person take over supervising the cheerleaders at 3:30 p.m. when she picked up her children and brought them back to the cheerleading practice, which lasted until 4:30 or 5:00 p.m. about three or four days a week. After Watson resigned the cheerleading position, she worked in the office until 3:30 p.m.

When Watson started, she worked in the Principal's office with his secretary, Dolly Driza, and a receptionist, Gerry Curavo. Watson and Curavo both answered telephones and took care of the counter as people came in. Driza typed things for the Principal and helped out with the phones and the counter. Driza and Curavo both started at 7:15 a.m., although Watson came in at 8:30 a.m. For three years, Watson came in earlier for the first few days of the school year, when a lot of new students and freshmen do not know where they are going. Watson worked the first school days from 7:15 to 7:40 a.m. while a neighbor watched her children. Watson returned home to see that her children were on the bus at 8:05 a.m., then she returned to work. At the time of the hearing, her children were 9 and 11 years old. Watson's husband teaches at another school and starts too early in the morning to put the children on the bus.

Watson worked a 40-hour week in the summer, starting at 7:15 a.m. and working until 3:15 p.m. Her husband took care of their children during the summer. In other breaks in the school year, such as the Easter Break, Watson usually worked part-time hours. In the summer, Watson got paid for eight hours, which included a paid lunch hour.

The District remodeled and added a new security door around the end of April in 1999. Watson and Curavo moved to the new office that was about 100 feet from the Principal's office.

5. Watson became President of the Association around the end September or the beginning of October of 1998. She had not held any prior office in the Association. Driza was the former President. Watson volunteered to be the President when no one else wanted the position. There was no election of officers and she signed up on a sheet for the position. Neither Watson nor the Union sent the District any notice that Watson was the President. Watson overheard Driza tell Sorensen in December of 1998 that Watson was the President. Sorensen turned to Watson and asked her if the Association was planning on having Rick Moore, Executive Director of Southern Lakes United Educators, attend contract negotiations. Watson said that Moore would attend, Sorensen said they would have to wait until April or May to start, Watson said ok, and Sorensen walked away.

6. Watson kept notes on conversations that she had with Sorensen and Potter on several occasions. According to her notes and her testimony, Sorensen told Watson about the new office area and security door on December 14, 1998. Visitors would have to be admitted

with a buzzer only after Curavo or Watson had a chance to check them out. Sorensen told Watson that the new office would be completed around Easter break of 1999. Potter was involved in deciding which employes would staff the new security office. He believed two people were needed there, especially if one were gone.

7. On December 18, 1999, Potter sent Watson and Curavo a memorandum which stated in part:

> I am not sure if we discussed working hours in the new office area when it is completed or not, but I feel it is necessary that both of you have the same hours. The hours of work will be from 7:15 a.m. until 3:45 p.m. This will take affect when the move is made.

After getting the memo, Watson told Potter that she could not work between 7:15 a.m. and 3:45 p.m. because of her children's school schedule. Watson told Potter that she and her husband had just built a house and she needed to keep this job. The new house put her further away from the District, and she drove her children to school after they moved into their new house. Potter asked her if there were any options she could explore, but she said there were no options. Potter said that one person could not handle the morning traffic in the office alone. Watson told Potter that when either Driza or Curavo were ill, there is only one person in the office or someone comes to the office to help out until the traffic dies down. The Superintendent's secretary, Lynn Maher, also came to the office to help sometimes. Most of the traffic with students in the morning was between 7:15 and 7:30 a.m. Potter said he would talk to Sorensen about the matter. Potter was aware of Watson's move to Burlington and had helped her and her husband pick out a lot to build on.

8. On December 15, 1998, Moore sent a letter to Sorensen regarding the status of a confidential employe and asking for information about procedures for bomb threats. Moore listed Watson as being copied on the letter, but did not identify her as President of the Union. Watson testified that the letter questioned Sorensen's policies, and she assumed that this letter caused Sorensen to change her schedule.

9. On December 21, 1998, Watson met with Potter. Watson testified that Potter said that Sorensen said he had been accommodating her long enough and that it was going to stop. Potter did not recall such a statement and testified that it was not likely that he made such a statement. Potter told Watson again that the need to change her hours to 7:15 a.m. to 3:45 p.m. was due to the fact that one person could not handle all the early morning traffic alone. Watson agreed with him but said she could not work full-time during the school year. Potter again asked her if there were any other options and she said there were none.

10. On December 28, 1998, Potter again told Watson that she had to come in at 7:15 a.m. and leave at 3:45 p.m. when the new office was opened. Watson told Potter that she would not quit but that she also would not be able to come in at 7:15 a.m. She also informed Potter that the Union was going to file a grievance over the matter. Watson did not know if Potter was aware that she was the Union President.

11. During the winter holiday break in 1997, Watson was paid for two days of the break even though the office was closed and she did not work on those days. She was not paid any additional days over the holidays in 1996. Watson testified that there was a new computer system in the fall of 1997 that required people to have additional training. After the holiday break in 1998, Watson asked Potter to see if she would be paid for two days that the office was closed and she did not work. Potter told her that Sorensen said she was not getting paid for those days. Watson testified that no one else got the holiday pay and she did not believe she had been singled out.

12. On January 5, 1999, although school was closed due to problems with buses, Watson worked in the office. Neither Sorensen nor Potter asked Watson to come in. Sorensen gave Watson a memo regarding school closings and told her that he had the right to close the office when he wanted and did not have to pay her. The memo had a page of the labor contract attached for clarification. At the end of the day, Watson, Potter, Maher and Sorensen had a meeting. Sorensen started the meeting and said that he had the right to shut down the office and not pay Watson. According to Watson's testimony and notes, Sorensen then said that Watson lost the paid holiday days and other days – which he called "perks" - because she asked to get paid for a 30 minute discussion after school last fall. Sorensen said he was happy to give his staff "perks" because they worked hard and deserved them, and Watson asked him if he thought she had not been working hard. He replied that was not what he meant. Sorensen told Watson that when she asked to be paid for the extra 30 minutes last fall, he took away the holiday "perks." He also said that when she demanded to get paid for that 30 minutes, she took a "union philosophy" and that he did not like "union philosophy," so there would be no more "perks" anymore. Sorensen asked Watson if she had read her bargaining contract and how she felt about it. She replied that she personally felt that she should get paid because she was not voluntarily choosing not to come in to work, despite what the contract said.

13. The incident regarding the extra 30 minutes referred above occurred in the fall of 1998, probably in September, when Sorensen asked Curavo and Watson to meet with him at 3:30 p.m. A new copier had been delivered to the administrative office. Curavo and Watson were supposed to get the old copier, and the Athletic Director, Kris Allison, was to get another old copier. Sorensen saw Allison in the hall and told her she had taken the wrong copier. Watson testified that Sorensen yelled at Watson and told her that she did not make the rules around there. Watson tried to defend herself but Sorensen walked away. In the meeting after regular hours, Sorensen apologized to Watson. The following day, Watson and Curavo decided to put the meeting time on their time cards. Sorensen refused to pay for that time and Watson did not grieve the issue.

14. Sorensen sent Watson a letter dated January 12, 1999 that states the following:

> I sent you a letter in regard to the new office which is being built to increase the security of the school and in that letter I stated that you and Mrs. Curavo would be moved to that office and that your hours would be changed to 7:15 a.m. until

> 3:45 p.m. I am sorry that this change of working hours has caused you inconvenience. However, we have had several discussions and there doesn't seem to be a viable alternative. Therefore, your working hours when you move to the new office will be 7:15 a.m. to 3:45 p.m.
>
> I have heard through the grape vine that when the time comes to move to the new office, you will refuse to work your assigned hours from 7:15 a.m. to 3:45 p.m. You do not, however, have a choice. Please refer to your contract under Article IV – Hours of Work on page 4. Therefore, I need to know no later than February 15, 1999 whether or not your intention is to work your assigned hours. If I do not receive a response from you by February 15, 1999, I will assume you will refuse to work your assigned hours and are voluntarily terminating your employment as of the 15th.

Watson gave Sorensen notice in writing by February 15, 1999 that she would work the hours as required. Watson filed a grievance on the change in her schedule. The grievance went up through the third step of the grievance procedure where Watson appeared before the Board. The Board denied the grievance and the Union did not appeal it to arbitration.

15. Moore wrote Sorensen on January 26, 1999, with a detailed plan of five different suggestions to work around Watson's problems with the change in hours. Watson helped Moore develop the proposals. The suggestions involved where to place security cameras, where to place personnel, where to place buzzers to open doors, and who could substitute regularly for Watson. Sorensen notified Moore the following day that a committee of the Board read his proposals but did not feel any of them were workable.

16. When the new office was completed at the end of April of 1999, Watson drove her children to a relative's home and came to work at 7:15 a.m. Her niece, who was in eighth grade, got her children on the bus. In the fall of 1999, the niece was a freshman and had to leave the house at 7:00 a.m., so Watson could not leave her children with the niece after the end of the school year. Watson had her mother pick her children up from school during May of 1999. Watson was not willing to consider any option of day care that would cost her money.

17. Once school starts at 7:30 a.m., all doors are locked and students who are late have to come through the security door. All visitors have to come through the security door. On days when Curavo was absent, Watson worked alone and was able to manage her job and Curavo's job for a full day on more than one occasion. Curavo has ongoing health problems and was absent more than Watson. Curavo was absent for two weeks in one stretch. The new security office moved Watson closer to guidance counselors and made part of her job simpler.

18. On June 3, 1999, Potter asked Watson to come into his office. He gave her a memo to read about her summer hours. The hours in June were from 8:00 a.m. to noon and 1:00 p.m. to 3:00 p.m., with the exception of three dates when Watson wanted vacation.

From June 28 through July 30, the hours were to be from 8:00 a.m. to noon. On August 2, 1999, Watson was expected to resume her work schedule of 7:15 a.m. to 3:30 p.m. Watson and Potter had no discussion about the summer hours. Watson testified that she did not realize that the hours in June would result in a loss of a paid lunch hour as she had received in the past during the summer. She did not get a paid lunch period during the school year. Watson put 8:00 a.m. to 3:00 p.m. on her first time sheet in the summer, and Potter brought her lunch hour to her attention. In the summer of 1999, she worked six hours a day and was not paid for a lunch hour. Potter changed her hours because of the workload in the summer. When students are gone, the work tapers off in July but picks up again in August. He talked about the schedule with the other secretaries but not with Watson before giving her the schedule for the summer of 1999. Potter knew that Watson wanted more hours in the summer but did not know what time she wanted to work. He decided that there was no need for more hours in the summer.

19. Potter decided that Watson should continue to start work at 7:15 a.m. during the following school year. Watson gave Potter a letter of resignation on August 10, 1999, notifying him that her last day would be August 25, 1999. In the letter, she stated that the reason she was resigning was due to the hours of work and the District's insistence that she start at 7:15 a.m. instead of 8:30 a.m. Watson's replacement starts at 7:00 a.m. Potter testified that he thought if people came to work by 7:00 a.m., they would be prepared to deal with students at 7:15 a.m. The starting time for Curavo also became 7:00 a.m.

20. The collective bargaining agreement provides in Article II, Management Rights, that the District has the right to establish schedules of work. In Article IV, Hours of Work, the District Administrator has the right to determine hours of work for all employes. Also in that Article, employes are entitled to an unpaid, duty free lunch period. School closings are addressed in Article IV, Section 2, wherein the District Administrator has the sole discretion to determine which employes are required to work. Paid holidays are named in Article XI of the contract.

21. The Respondents' decisions to change the hours of Watson during the school year and the summer were based on legitimate business reasons. The decisions to not pay Watson for time not worked during the winter holiday break, snow days or lunch periods were within the discretion and contractual rights of the District.

22. The Respondents did not make working conditions so onerous that Watson was forced to quit her job.

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

CONCLUSIONS OF LAW

The Respondents did not violate Sec. 111.70(3)(a)1 or 3, Stats., by changing the hours of work for Teresa D. Watson, during the school year and the summer, by not paying her for days not worked over the winter holiday break, by requiring her to get permission to work on snow days, by reducing her summer hours, or by not giving her a paid lunch period in the summer.

ORDER

The Complaint is hereby dismissed in its entirety.

Dated at Elkhorn, Wisconsin this 12th day of May, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Karen J. Mawhinney /s/
Karen J. Mawhinney, Examiner

CENTRAL HIGH SCHOOL DISTRICT OF WESTOSHA

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

The Association

The Association alleges that the Respondent violated Sec. 111.70(3)(a)1 and 3, Stats., by its conduct toward Watson, and that management was quite forthcoming in explaining why it wanted to get rid of Watson. On January 5, 1999, District Administrator Sorensen told Watson that he revoked her "perks" as a consequence of her "union philosophy" and after that engaged in a pattern of discriminatory conduct against her. He prohibited her from coming in to work on snow days, denying her additional compensation for working those days. He changed her hours to a schedule he knew she could not work, thus constructively discharging her. He denied her holiday pay that she had been allowed the year before. Finally, Potter shortened her summer hours by more than 25 percent. The Respondent knew that its actions would force Watson to resign her employment and relinquish her position as Association President. Watson's testimony and contemporaneous notes demonstrate the union animus and its connection to the actions against her, and this is unrebutted by the Respondent. The evidence supports the assertion that the Respondent imposed difficult and burdensome working conditions upon her because of her position as President, and those burdens were so onerous that it forced her to resign.

The Association states that prior to unilateral changes in her working conditions, Watson had engaged in protected activity and demonstrated that she would be an articulate and effective advocate for herself and the Association. In September of 1998, Watson requested, in concert with Curavo, compensation for the additional half-hour to meet with Sorensen after normal hors. She became President of the Association in October of 1998. Her involvement in Association activities was reinforced when she was copied on correspondence from the Association to Sorensen questioning the District's bomb threat policy and the exclusion of an employe from the bargaining unit.

The Association argues that the totality of the evidence shows that the Respondent's hostility to Watson becoming the President of the Association motivated its changes in her working conditions and its intransigence on her new hours. The decision to revoke her holiday pay and to require her to get permission to work on snow days were due to her efforts to get paid for attending a meeting outside of normal working hours. At the meeting on January 5, 1999, Sorensen told Watson he took away the "perks" because she had put in for 30 minutes she spent meeting with him in September. He made it clear that his motive was anti-union animus when he said, "When you demanded to get paid for that 30 minutes, you took a union

philosophy, and I don't like union philosophy." It was clear that he resented Watson becoming the Association President. His statements provide a rare example of express retaliation, punishing her for engaging in protected activity.

Watson's testimony is compelling, the Association asserts, because neither Sorensen nor Maher testified and Potter was unable to rebut her testimony. While he was evasive on cross-examination, he admitted that Watson was honest and forthright. Also, Sorensen did not retaliate against Curavo even though she submitted a timecard for the 30 minutes of time for the September 1998 meeting. The only logical explanation is that Sorensen treated Watson more harshly than Curavo because Watson was President of the Association and in a position to be an effective advocate on behalf of bargaining unit employes. Sorensen's harsh treatment showed that he could mete it out to the President, thereby intimidating not only her but also all of the bargaining unit employes.

The Association asserts that the timing of Sorensen's retaliation against Watson demonstrates the Respondent's illicit motive. Sorensen learned in December of 1998 that Watson had become Association President. He also received Moore's inquiry into the confidential employe's status and the bomb threat policy that indicated Watson being copied on the correspondence. Shortly thereafter, Sorensen announced the change in Watson's hours. Then on January 5, 1999, he told her she would no longer receive "perks" from him because of her "union philosophy."

The most significant aspect of this case involves the Respondent's decision to knowingly change Watson's hours so as to interfere with her childcare responsibilities, the Association states. The importance that she put on her childcare responsibilities was well known to both Sorensen and Potter. The administration knew that the one issue that would most discourage her from continuing her job was to schedule her hours so that they interfered with her childcare responsibilities. Sorensen sent a memo to Watson which threatened to fire her if she did not confirm her willingness to work the additional hours. Threatening to terminate Watson two months in advance of the completion of the new office makes Sorensen's agenda transparent. When Watson and the Association tried to accommodate the proposed change in hours, the Respondent refused to explore alternatives. Sorensen told Potter that he had accommodated her in the past and it was going to stop. Watson made a good faith effort to accommodate the new hours in the spring of 1999, but could not in the fall of 1999.

The Association takes issue with the Respondent's alleged reason for changing Watson's hours. There was no pressing need to have two people in the new office at 7:15 a.m., at least not the type of need that would compel the employer to cause a valuable employe such as Watson to quit her job. The record shows that one person could cover the job. Watson had no trouble covering the office when Curavo was sick for a two-week stretch, and Curavo had no trouble covering for Watson when Watson was sick. If Watson came in at 8:30 a.m. and Curavo had attendance difficulties, the District would have required only one person to cover the office for the first hour and fifteen minutes, and that would not have been burdensome on the District. Absent the Respondent's illegal motive, it would have been relatively easy for the District to accommodate Watson.

The Association submits that the decision to cut Watson's summer hours was a continuation of the pattern of conduct that started on January 5, 1999. The facts and testimony support the inference that the Respondent decided to cut her summer hours in order to punish her for her protected activity. Potter knew that Watson had recently purchased a new house and that she needed the money to meet the additional financial burden of a new mortgage. Yet he reduced her hours in a heavy-handed manner, consulting with other office staff about summer hours but not conferring with her. Watson was the only summer hourly employe, and the only one whose hours were reduced in the summer.

Moreover, the Association infers that Sorensen influenced the decision to reduce Watson's summer hours. The Association finds it incredible to believe that Potter recalled conferring with other clerical employes but could not recall whether he conferred with Sorensen. Sorensen was still District Administrator, this prohibited practice complaint had been filed, and Potter would not have made that decision on his own. Potter asserted that there was less need for office work in the summer, but he did not state why the summer of 1999 was different from previous summers. There was no explanation for converting Watson's paid lunches into unpaid time. The logical inference is that this decision was designed to remove one more of the "perks" as announced by Sorensen on January 5, 2000. The Respondent's stated reasons for reducing summer hours were pretextual.

Finally, the Association argues that the relevant case law supports Watson's claim that she was constructively discharged in violation of MERA. There is no extensive Commission case law on constructive discharge in the context of an employer's prohibited practices, and it is relevant to consider NLRB case law, as the Commission has done in the past where NLRB law does not conflict with the underlying policies of MERA. In CRYSTAL PRINCETON REFINING COMPANY, 91 LRRM 1302 (1976), the Board states that there are two elements which must be proven to establish a constructive discharge. The burdens imposed on the employe must cause and be intended to cause a change in working conditions so difficult or unpleasant as to force him or her to resign, and it must also be shown that those burdens were imposed because of the employe's union activities.

The Association argues that both elements were met here. Watson was unable to work the additional hours because of her childcare responsibilities. The District knew this and it imposed the additional hours because of her union activities. Sorensen's statement regarding "union philosophy" came on the heels of his memo that advised her she would have to work more hours. Additionally, wage reductions of 25 percent for an indefinite period create an inference of an onerous change and is a *per se* constructive discharge under NLRC. See CONSEC SECURITY, 158 LRRM at 1102 (1998).

The Association also asserts that the Respondent's open hostility towards Watson's "union philosophy" and its threat to take away her "perks" violated Sec. 111.70(3)(a)1, Stats. The evidence shows that the Respondent's conduct had a reasonable tendency to interfere with Watson's and other employes' exercise of their Sec. 111.70(2) rights. The Respondent sent an unmistakable message to members of the Association that it was not hesitant to inflict serous hardship in order to prevent effective representation.

The Respondents

The Respondents believe that there are three issues in this proceeding. One – was the Respondents' decision to change Watson's hours a prohibited practice or was it based on their rights under the collective bargaining agreement to determine staffing needs? Two – was their decision to determine pay for holidays, snow days and lunches a prohibited practice or was it within their discretion under the collective bargaining agreement? Three – did Sorensen engage in prohibited practices or were his decisions based upon his authority under the collective bargaining agreement?

The Respondents assert that the decision to change Watson's hours was not a prohibited practice because the decision was based solely upon the legitimate staffing and security needs of the District. The change in hours was clearly permitted under the collective bargaining agreement. The Complainants failed to demonstrate union animus as the motive behind the decision, since the schedule change was based on legitimate needs of the District.

In order to establish an independent violation of Sec. 111.70(3)(a)1, the Complaints must demonstrate by a clear and satisfactory preponderance of the evidence that the Respondents' conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights. Even then, a finding of a violation is not appropriate if the employer's action was in fact based on valid business reasons.

The Respondents argue that the Complainants have not met the first element of their burden – that Watson was engaged in lawful, concerted activity. Although she claimed to be the President of the Union, her only proof was that she testified that she signed up for it. She was not aware of the procedures for becoming Union President. She was not engaged in any other protected concerted activity. Respondents were not even aware of her alleged position with the Union. Thus, it was impossible for the District to interfere with rights which she did not even have since she cannot prove she was President of the Union. She did not sent a letter to the District informing them that she was the Union President. She was not involved in any meetings or negotiations or grievances where she acted as Union President. Watson's allegation that Driza informed Sorensen of her Union status is hearsay at best. Even if Sorensen was aware of her status in the Union, his knowledge of her involvement does not indicate union animus. Further, Potter made the decision to change her hours before Sorensen became aware of her status, so how could Potter's decision be affected by an alleged incident that occurred with another individual two months later?

The Respondents argue that it is unlikely if not impossible that the decision to change Watson's hours interfered with her Sec. 111.70(2) rights. The decision to install a new security office and require two full-time employes to staff it is based on legitimate staffing and security interests. The Respondents ask – how can a schedule change interfere with Watson's rights to be a member of the Union or to hold an office in that Union? Watson chose to work part-time hours, and she chose to resign because she wanted to be home in the mornings. The Complainants cannot argue that the District built the security office in order to make Watson's job untenable.

The Respondents can also prevail against a claim of interference if they demonstrate that they had a valid business reason for changing the schedule which outweighed her decision to work part-time. The security system was established to avoid situations like Columbine High School. The District decided in November of 1998 to have two full-time employes present in the office, and even Watson agreed that one person could not handle all the early morning traffic in the office. While Moore suggested other alternatives, all those suggestions shifted work to others so Watson could keep her part-time schedule. The District had the right to change work hours under Article IV of the collective bargaining agreement. The Association is now trying to take back what it agreed to in negotiations. The Respondents conclude that neither Sorensen nor Potter nor the Board knew of Watson's position as Union President until after the decision was made to create the security office and move her into it. Complainants have failed to prove that Watson was engaged in protected activity or that Respondents were aware of such activities.

The Respondents also assert that there is no violation under Sec. 111.70(3)(a)3, Stats. They have already addressed the first two elements. The Complainants must further demonstrate that the Respondents were hostile to the lawful and concerted activities protected by MERA and that the conduct complained of was motivated in whole or in part by hostility toward the protected activities. The Complainants have alleged that a letter from Moore which he sent on December 15, 1998, caused the District to change Watson's schedule. This is unlikely, the Respondents state, since the letter was sent after the change in hours. Moreover, Watson testified that the Respondents never said or indicated that her Union position affected her schedule. Sorensen never said anything about her position as Union President. The timing of the letter and the action also is insufficient to infer union animus.

Even if Sorensen did say something negative about the Union, the Respondents claim that the decision to change Watson's hours occurred before Moore's letter. While Watson claimed that Potter told her that Sorensen said he had been accommodating her long enough, Potter testified that this statement was unlike something he would say. Also, that remark does not demonstrate any union animus. Watson alleged that Sorensen said he did not like union philosophy and there would not be any more perks. However, that was the only time Watson heard him use that phrase and he never said anything negative before or after that about unions. One stray remark, supported only by Watson's testimony, is insufficient to demonstrate union animus.

Also, the Respondents note, Potter made the decision to change Watson's hours and he did not say anything negative about the Union. His decision was based upon the needs of the District. Watson admitted that when her work schedule changed, she did not inquire into day care services. She chose to move and stay home with her children in the morning. The District has many employes with childcare issues, but it has to assign work schedules to meet its legitimate business needs. Watson's status as Union President was irrelevant to the District's determination.

The Respondents submit they did not commit a prohibited practice against Watson by denying her pay for holidays, snow days or lunches because it is within their discretion to determine under the collective bargaining agreement. The Respondents chose to offer holiday pay as a gratuity in 1995 but not the following year, which was clearly within their discretion under the contract. When school was closed on January 5, 1999, neither Sorensen nor Potter told Watson to come to work. The District Administrator has the sole discretion to determine which employes are required to report to work on snow days under Article IV, Section 2 of the contract. Finally, Respondents have the right under the contract to allow employes to take an unpaid lunch period of not less than 30 minutes. No one in the District told Watson she was entitled to get a paid lunch.

The Complainants have alleged that Sorensen is individually liable due to his position as District Administrator. He did not make the decision to change Watson's schedule. His decisions regarding snow days and holidays were proper under the contract.

Respondents asked that the Examiner dismiss the complaint with prejudice and award reasonable attorneys' fees and costs.

DISCUSSION

Section 111.70(3)(a), Stats., states:

> It is a prohibited practice for a municipal employer individually or in concert with others:
> 1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).

Section 111.70(2), Stats., referred to above, states:

> Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

To establish a claim of interference, a complainant must establish by a clear and satisfactory preponderance of the evidence that the respondent's conduct contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain or coerce employes in the exercise of their section (2) rights. BEAVER DAM UNIFIED SCHOOL DISTRICT, Dec. No. 20283-B (WERC, 5/84). It is not necessary to demonstrate that the employer intended its conduct to have such effect, or even that there was actual interference; instead,

interference may be proven by showing that the conduct has a reasonable tendency to interfere with the exercise of protected rights. CITY OF BROOKFIELD, Dec. No. 20691-A (WERC, 2/84). However, employer conduct which may well have a reasonable tendency to interfere with an employe's exercise of Sec. 111.70(2) rights will generally not be found to violate Sec. 111.70(3)(a)1 if the employer had valid business reasons for its actions. CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, Dec. No. 25849-B (WERC, 5/91).

Section 111.70(3)(a)3, Stats., provides that it is a prohibited practice for a municipal employer to encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment. In order to prevail on this count, a complainant must prove that:

1. The employe was engaged in lawful and concerted activities protected by MERA; and

2. The employer had knowledge of those activities; and

3. The employer was hostile towards those activities; and

4. The employer's action was based, at least in part, on hostility towards those activities. MILWAUKEE BOARD OF SCHOOL DIRECTORS, Dec. No. 23232-A (MCLAUGHLIN, 4/87), *aff'd* by operation of law, Dec. No. 23232-B (WERC, 4/87).

Evidence of hostility and illegal motive (factors three and four above) may be direct (such as with overt statements of hostility) or, as is usually the case, inferred from the circumstances. TOWN OF MERCER, Dec. No. 14783-A (GRECO, 3/77). If direct evidence of hostility or illegal motive is found lacking, then one must look at the total circumstances surrounding the case. In order to uphold an allegation of a violation, these circumstances must be such as to give rise to an inference of pretext which is reasonably based upon established facts that can logically support such an inference. COOPERATIVE EDUCATION SERVICE AGENCY #4, ET AL., Dec. No. 13100-E (YAFFE, 12/77), *aff'd*, Dec. No. 13100-G (WERC, 5/79).

Regarding the fourth element, it is irrelevant that an employer has legitimate grounds for its action if one of the motivating factors was hostility toward the employe's protected concerted activity. LACROSSE COUNTY (HILLVIEW NURSING HOME), Dec. No. 14704-B (WERC, 7/78). In setting forth the "in-part" test, the State Supreme Court noted that an employer may not subject an employe to adverse consequences when one of the motivating factors is his or her union activities, no matter how many other valid reasons exist for the employer's action. MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 Wis.2d 540, 562 (1967). Although the legitimate bases for an employer's actions may properly be considered in fashioning an appropriate remedy, discrimination against an employe due to concerted activity will not be encouraged or tolerated. EMPLOYMENT RELATIONS DEPT V. WERC, 122 Wis.2d 132, 141 (1985).

In CITY OF LACROSSE, Dec. No. 17084-D (WERC, 10/83), the Commission elaborated on concerted and protected activity as follows:

> The MERA does not refer to "protected" activities. Sec. 111.70(2) of the MERA identifies certain rights of municipal employes which, broadly stated, are "to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection..." The rights thus identified are enforced by Secs. 111.70(3) and 111.70(4) of MERA. Protected activity is, then, a shorthand reference to those lawful and concerted acts identified and enforced by MERA. Thus, acts which are not lawful or not concerted within the meaning of Sec. 111.70(2) of MERA are not protected.
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> . . .
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> It is impossible to define "concerted" acts in the abstract. Analysis of what a concerted act is demands an examination of the facts of each case to determine whether employe behavior involved should be afforded the protection of Sec. 111.70(2) of MERA. At root, this determination demands an evaluation of whether the behavior involved manifests and furthers purely individual or collective concerns.

In applying the above analysis to the instant case, it appears that Watson's concerns were purely individual and not collective. She was attempting to secure several benefits for herself, not others, and benefits that fell outside of the collective bargaining agreement. For example, she wanted to be paid for days not worked over the holidays and lunch periods and snow days, none of which was contractually based. She wanted to secure a schedule that met perfectly with her own personal life and childcare concerns, and she remained adamant about getting a schedule to meet her own needs. Nothing in the record shows that Watson was advancing collective concerns at any time. While the Association claims that the District Administrators must have seen that Watson was an effective advocate, she was being an advocate only for herself, not on behalf of others.

It is undisputed that there were no contract negotiations or grievances going on during the 1998-1999 school year. While Watson testified that she was the Union President or became the President by signing up for it in late September or October of 1998, the District had no knowledge of this until December of 1998. At best, the record shows that Sorensen asked Watson in December of 1998 if Moore was going to be present for contract negotiations, and Watson replied that he was to be present. Sorensen said that negotiations would have to be put off for awhile, Watson agreed, and that was the end of the matter. The first correspondence to the District from Moore that copied Watson did not list her as Union President, and the correspondence did not concern Watson's hours or any other issues dealing with her.

This case is threadbare to demonstrate that Watson was even engaged in concerted or protected activity. However, assuming *arguendo* that Watson's status as Union President is sufficient to muster the first and second prongs of a discrimination test, the complaint still has other defects.

The Complainants must show that the District and Sorensen were hostile toward Watson's involvement with the Union as Union President. To do this, the Complainants rely entirely on Sorensen's statement on January 5, 1999, during a meeting with Watson in which he said that she took a "union philosophy," that he did not like "union philosophy," and that he was not going to give her any more "perks." The particular "perks" that Sorensen was referring to, according to Watson's own notes, were the days over the winter holiday break. In 1997, Watson had been paid for two days over the holiday break when she did not work. The staff had been getting used to a new computer that year and had been required to do some additional training. Watson wanted the same benefit applied to the 1998 winter holiday break. However, the one-time gratuity had no contractual basis and no established practice and cannot be considered a condition of employment.

Again, this case is threadbare in trying to show that the element of hostility toward concerted and protected activity is present. The Association would have the Examiner believe that Sorensen had been harboring this anti-union animus since September of 1998 when Watson asked for 30 minutes of pay for a meeting after regular hours. That meeting did not involve any concerted and protected activity and had nothing to do with the Union. The meeting only dealt with a misunderstanding about a copier machine and Sorensen's treatment of Watson, for which he apologized. The meeting occurred before Watson became Union President and long before the District had any knowledge of Watson becoming Union President. Watson's attempt to get paid for the meeting had nothing to do with concerted and protected activity – she sought only to be paid for the time she spent after her regular schedule ended.

Even if Sorensen's remark in January of 1999 about "union philosophy" showed anti-union animus, the decision to change Watson's hours was made by Potter, not Sorensen. While the Association claims that Sorensen made all the important decisions and Potter would not have made the decision to make Watson work full-time on his own without Sorensen's approval, there is no proof of that. Sorensen was present at the hearing but neither party called him to testify. Potter testified that he decided which hours Watson should work. It was Potter who felt strongly that the new security office should be staffed by two people. Even Watson agreed with the logic of that decision – she just did not want to be one of the people to staff it by 7:15 a.m. because of her own personal problems.

The Complainants have asked the Examiner to draw inferences of anti-union animus and hostility toward Watson for role as Union President based on Sorensen's one remark in a meeting regarding holidays. However, it is a leap to conclude that everything to which Watson is objecting – primarily the change in hours – was motivated in whole or in part by hostility toward her concerted and protected activity as being Union President.

In EMPLOYMENT RELATIONS DEPT. v. WERC, 122 Wis.2d 132, 361 N.W.2d 660 (1985), the Wisconsin Supreme Court stated:

> As the key element of proof involves the motivation of the employer and as, absent an admission, motive cannot be definitively demonstrated given the impossibility of placing oneself inside the mind of the decision maker, the employe must of necessity rely in part upon the inferences which can reasonably be drawn from facts or testimony. On the other hand, it is worth noting that the employer need not demonstrate just cause for its action. However, to the extent that the employer can establish reasons for its actions which do not relate to hostility toward an employe's protected concerted activity, it weakens the strength of the inferences which the employe asks the WERC to draw.

There is no debate that the District's actions in creating a security door and office that admits people to the building is a valid and legitimate business need. There is also no debate that the new security office needed to be staffed by two people, especially between 7:15 and 7:30 a.m. The District's decision to change Watson's hours was directly in line with the need to staff the new security office. The Principal's secretary was to stay with the Principal, while the other two secretaries or clerical personnel were to move to the security office. Curavo was already working at 7:15 a.m. The District's decision to have Watson work at 7:15 a.m. was based on the need to staff the office. There was nothing pretextual about the District's decision to change Watson's hours to meet changed circumstances and building security concerns.

The Association wanted the District to accommodate Watson's personal preferences by having other personnel fill in on a daily basis so that Watson could stay home with her children and report at 8:30 a.m. That is an unreasonable position – obviously, other employes have duties to be filled or they would not be there. The Association also argued that one person could occasionally staff the security office and in fact did so when either Watson or Curavo was absent. But that misses the point – if one of them were absent, there would be no one in the security office if only one person were assigned between 7:15 and 8:30 a.m. Further, Watson admitted that two people were necessary. Potter made the determination early on that two people would have to be there.

The Association argued that Sorensen's threat to terminate Watson two months in advance of the completion of the new office made his agenda transparent – that he wanted Watson out as President of the Union and he knew he could do that by forcing her to quit. However, it was Watson that told Potter that she would not work the new hours and she would not quit. Therefore, the District was put in a position of having to ask her whether or not she was going to comply with the change in hours or not. Under those facts, it was reasonable for the District to determine two months before the new office was completed whether in fact Watson was going to show up for work in the new office at 7:15 a.m.

The Association also argued that Watson was constructively discharged by the District's imposition of extra hours on her because of her union activities. First of all, the change in hours was not such an onerous or difficult condition of employment that one would be forced

to resign. Watson could have paid for day care for her children but refused to do so. She continued to try to force the District to accommodate her, instead of finding ways to meet the needs of her employer. The hours for the school year were not impossible to meet. Other employes met them. Watson also met them for a short period of time at the end of the 1998-1999 school year.

The Association has further argued that the wage reduction of 25 percent for an indefinite period creates an inference of such an onerous change as to force an employe to leave. However, the wage reduction was for the summer months only, not an indefinite period of time. Watson cannot have it both ways – on one hand, she wants part-time work for nine months of the year because of her childcare problems, and on the other hand, she wants full-time work during the summer because her husband can watch the children and she has no childcare problems. However, the District has less need for clerical services in the summer than during the school year, and the District was doing nothing more than changing Watson's schedule to meet its needs, not hers. It needed Watson to be in the office full-time during the school year and to start at 7:15 a.m. when students started coming in. It did not have a need to have Watson work full-time in the summer. Moreover, the summer hours in 1999, which included an unpaid lunch, were in line with the collective bargaining agreement. If Watson had indeed been getting a paid lunch hour in the previous summers, it was not approved by an administrator and not in accordance with the bargaining agreement.

The Respondents did not interfere with Watson's Sec. 111.70(2) rights or commit a prohibited practice under Sec. 111.70(3)(a)1, Stats. The Association has argued that the Respondents sent an unmistakable message to members of the Association that it was not hesitant to inflict serious hardship in order to prevent effective representation. However, Watson was not engaged in representing bargaining unit members but rather was engaged in securing additional benefits outside of the contract for herself in her dealings with the District. The conduct complained of did not have a reasonable tendency to interfere with rights protected by MERA. Moreover, the District had valid business reasons for its conduct that would outweigh the employe interests being asserted here.

Accordingly, the complaint has been dismissed.

The Respondents' request for attorneys' fees and costs is denied.

Dated at Elkhorn, Wisconsin this 12th day of May, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Karen J. Mawhinney /s/
Karen J. Mawhinney, Examiner

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