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-C

Appearances:

Attorney Stephen Pieroni, Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, on behalf of Central High of Westosha ESP, and Teresa D. Watson.

Davis & Kuelthau, S.C., by **Attorney Daniel G. Vliet**, Suite 1400, 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202-6613, on behalf of Central High School District of Westosha, and Gerald Sorensen, District Administrator.

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

On May 12, 2000, Examiner Karen J. Mawhinney issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein she concluded that Respondents had not committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 or 3, Stats., by taking certain actions affecting Complainant Teresa D. Watson. Therefore, she dismissed the complaint.

Complainants timely filed a petition with the Wisconsin Employment Relations Commission seeking review of that portion of the Examiner decision which dismissed an alleged violation of Sec. 111.70(3)(a)1, Stats.

The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received July 13, 2000.

Having reviewed the record and being fully advised in the premises, we make and issue the following

ORDER

A. Examiner Findings of Fact 1-6 are affirmed.

B. Examiner Finding of Fact 7 is modified as follows:

7. On December 18, 1999, ~~Potter~~ Sorensen 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 effect when the move is made.

C. Examiner Findings of Fact 8-22 are affirmed.

D. Examiner Conclusions of Law are affirmed in part and reversed in part as follows:

1. Respondent Central High School District of Westosha did not violate Secs. 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.

2. Sorensen's remark to Complainant Watson that there would be no more "perks" because of her "union philosophy" had a reasonable tendency to interfere with employes' exercise of rights guaranteed by Sec. 111.70(2), Stats. Therefore, Respondent Central High School District of Westosha thereby violated Sec. 111.70(3)(a)1, Stats.

E. Examiner's Order is affirmed in part and reversed in part as follows:

The complaint is dismissed except as to the violation of Sec. 111.70(3)(a)1, Stats., found in Conclusion of Law 2.

To remedy the violation of law found in Conclusion of Law 2, Respondent Central High School District of Westosha, its officers and

agents, shall immediately take the following action which the Commission finds will effectuate the purposes of the Municipal Employment Relations Act:

1. Cease and desist from interfering with, restraining and coercing employes in the exercise of rights guaranteed by Sec. 111.70(2), Stats.

2. Take the following affirmative action:

A. Notify all of its employes represented for the purposes of collective bargaining by Central High of Westosha ESP by posting, in conspicuous places on its premises where said employes work, copies of the Notice attached hereto and marked Appendix "A". The Notice shall be signed by an official of the District and shall remain posted for 30 days. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

B. Notify the Wisconsin Employment Relations Commission in writing within 20 days of the date of this Order as to what steps have been taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 22nd day of August, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

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

APPENDIX "A"

NOTICE TO ALL EMPLOYES

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

1. WE WILL NOT interfere with, restrain or coerce employes in the exercise of rights guaranteed by Sec. 111.70(2), Stats., by making threats or promising benefits.

Central High School District of Westosha Date

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

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

BACKGROUND

The Pleadings

In their complaint, Complainants allege that Respondents committed violations of Sec. 111.70 (3)(a)1 and 3, Stats., by taking certain actions toward Complainant Watson and by advising Watson that "perks" were ending because of her "union philosophy."

Respondents filed an answer denying that any violations had been committed.

The Examiner's Decision

The Examiner concluded that no violations of Secs. 111.70(3)(a)1 or 3, Stats., had been committed and dismissed the complaint.

As to the alleged violations of Sec. 111.70(3)(a)3, Stats., the Examiner determined that Respondents' conduct toward Watson was not based in whole or in part on hostility toward Watson's protected concerted activity.

As to the alleged violation of Sec. 111.70(3)(a)1, Stats., regarding "perks," the Examiner reasoned as follows:

> 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.

POSITIONS OF THE PARTIES ON REVIEW

Complainants

Complainants' petition for review is limited to the Examiner's allegedly erroneous dismissal of the Sec. 111.70(3)(a)1, Stats., allegation regarding the end of "perks" and to the Examiner's allegedly erroneous factual determination that Potter made the decision to change Watson's regular school year hours.

As to the end of "perks" allegation, Complainants assert that Watson and another employe (Cuervo) engaged in protected concerted activity when they sought pay for a 30 minute meeting with District Administrator Sorensen in September 1998. Complainants contend that when Sorensen cited the September 1998 pay request as exhibiting Watson's "union philosophy" and advised Watson that his distaste for the "union philosophy" meant he was ending "perks" such as pay for holiday time not worked, it must be concluded that Sorensen's remarks had a reasonable tendency to chill and thus interfere with employes' exercise of statutorily protected rights.

Complainants argue that it is irrelevant whether or not Watson had any contractual right to the "perks" in question. Even assuming she had no such right, Complainants contend that by articulating an illegal reason for the end of the "perks," Respondents violated Sec. 111.70(3)(a)1, Stats. Given the foregoing, Complainants allege that the Respondents' "valid business reasons" defense is irrelevant to these proceedings because Respondent Sorensen justified his action with an illegal rather than a legitimate rationale.

Turning to the factual question as to whether Potter or Sorensen was the decision-maker when altering Watson's hours, Complainants argue that although Potter played a role in communicating the decision to Watson, the record establishes that Sorensen was the decision-maker.

To remedy the violation of Sec. 111.70(3)(a)1, Stats., Complainants ask that Respondents be ordered to cease and desist from such conduct and to post a notice.

Respondents

Respondents argue that they did not violate Sec. 111.70(3)(a)1, Stats. When Respondent Sorensen advised Complainant Watson that the "perks" were ending due to her "union philosophy." Thus, Respondents contend the Examiner's dismissal of this allegation should be affirmed. Respondents further assert that the Examiner correctly concluded that it was Potter who decided to change Watson's regular work hours.

Respondents allege that no violation of Sec. 111.70(3)(a)1, Stats., can be found because Watson did not engage in concerted activity when seeking pay for the September 1998 meeting. Although Respondents acknowledge that Watson and another unit employe both turned in a request for payment, Respondents contend the activity is nonetheless not concerted because the pay requests were on separate time cards. Respondents further argue that Sorensen's remark did not have a reasonable tendency to interfere with the exercise of protected rights because there was no entitlement to payment under the terms of the existing contract.

If the Commission concludes that Sorensen's remark to Watson did have a reasonable tendency to interfere with Watson's exercise of her statutory rights, Respondents assert that no violation of Sec. 111.70(3)(a)1, Stats., should be found because they had a valid business reason for denial of the pay request.

Given all of the foregoing, Respondents ask that the Examiner be affirmed in all respects.

DISCUSSION

Overview of Issues on Review and Our Decision

When a petition for review is filed, the entire Examiner decision is before us for affirmance, modification or reversal. See Secs. 111.07(5) and 111.70(4)(a), Stats.; GREEN COUNTY, DEC. NO. 26798-B (WERC, 7/92). Thus, although the Complainants only seek review of the Examiner's dismissal of a Sec. 111.70(3)(a)1, Stats., allegation and of a specific factual determination, we are obligated to and have considered all aspects of the Examiner's decision during our review. Having done so, we affirm her dismissal of the Sec. 111.70(3)(a)3, Stats., allegations -- although we find that issue to be a closer question than she did.

As to the Sec. 111.70(3)(a)1, Stats., issue specifically presented in the petition for review, we reverse the Examiner because, as more fully discussed below, we think it clear that Sorensen's remark to Watson had a reasonable tendency to chill Watson's future support of her union.

As to the question presented on review regarding which management employe decided to change Watson's regular hours of work, we conclude, as more fully discussed below, that both Principal Potter and District Administrator Sorensen played a role in this decision.

Analysis of Alleged Violation of Sec. 111.70(3)(a)1, Stats.

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

> 1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).

Section 111.70(2), Stats., describes the rights protected by Sec. 111.70(3)(a)1, Stats., as being:

> (2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Violations of Sec. 111.70(3)(a)1, Stats., occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. WERC v. EVANSVILLE, 69 WIS.2D 140 (1975); BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B, (WERC, 5/84); CITY OF BROOKFIELD, DEC. NO. 20691-A, (WERC, 2/84); JUNEAU COUNTY, DEC. NO. 12593-B, (WERC, 1/77).

As the text of Sec. 111.70(2), Stats., reflects, the employe rights established include ". . . the right to form, join or assist labor organizations. . . ." As also reflected by the language of Sec. 111.70(2), Stats., this right includes the decision to "join" the Union as a member and/or to generally support or "assist" the Union.

Employer conduct which may 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, Stats., if the employer has valid business reasons for its conduct. CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91).

Here, the alleged violation of Sec. 111.70(3)(a)1, Stats., consists of Sorensen's remark to Watson that she would not receive any more "perks" because of the "union philosophy" she exhibited when asking to be paid for a 30 minute meeting in September 1998. We find this comment ill-considered, at best. As argued by Complainants, we think it apparent that said remark would have a reasonable tendency to make an employe less likely to support Complainant Union – a right guaranteed and protected by Sec. 111.70(2), Stats. Like the remark found violative of Sec. 111.70(3)(a)1, Stats., in BEAVER DAM UNIFIED SCHOOL DISTRICT, SUPRA, Sorensen's comment made a direct link between how Watson had been and would be treated and her support or lack thereof of a "union philosophy"/Complainant Union. Thus, we think it clear that the Sorensen remark violated Sec. 111.70(3)(a)1, Stats.

In reaching this conclusion, we reject the assumption made by the Examiner and the parties that an individual employe must have personally exercised rights guaranteed by Sec. 111.70(2), Stats., before a violation of Sec. 111.70(3)(a)1, Stats., can occur. As evidenced by WERC V. EVANSVILLE, SUPRA, the Wisconsin Supreme Court established no such prerequisite. In EVANSVILLE, the issue was whether pre-representation election conduct of the employer violated Sec. 111.70(3)(a)1, Stats., because it made employes less likely to vote for the union. The employer was not reacting to past employe exercise of Sec. 111.70(2) rights but rather attempting to influence future employe decisions as to whether to exercise such rights by voting for the union. The Court held that:

> The WERC properly concluded, on the basis of sufficient evidence, that the letter threatened employees with the loss of benefits **if** they engaged in union activity. As a consequence, this conduct constituted a prohibited practice in violation of Sec. 111.70(3)(a)1, Stats., 1969. (emphasis added)

Given the foregoing, the outcome of the debate between the parties as to whether Watson was or was not engaged in protected concerted activity when she asked for pay for the 30 minute meeting in September, 1998 is not determinative as to whether a Sec. 111.70(3)(a)1, Stats., violation occurred. Assuming *arguendo* that Watson was not thereby engaged in protected concerted activity, a violation of Sec. 111.70(3)(a)1, Stats., nonetheless occurred because Sorensen's remark had a reasonable tendency to make an employe less likely to exercise protected concerted rights in the future.

By finding a violation of Sec. 111.70(3)(a)1, Stats., we also reject the Respondents' argument and the Examiner's view that because Complainant Watson may have had no contractual right to the "perks" in question, Respondents had a "valid business reason" for their conduct. As persuasively argued by Complainants, the "valid business reasons" defense has no application to the remarks of Sorensen. The question before us is not whether the end of the "perks" itself violated Sec. 111.70(3)(a)1, Stats., but rather whether Sorensen's linkage of the end of "perks" to "union philosophy" violated Sec. 111.70(3)(a)1, Stats. There cannot be a "valid business reason" for making veiled threats which have a reasonable tendency to chill an employe's exercise of statutory rights.

To remedy the violation of Sec. 111.70(3)(a)1, Stats., Complainants ask that Respondents be ordered to cease and desist from such conduct and to post an appropriate notice to employes. We find this remedy to be an appropriate one and have so ordered Respondents to comply therewith.

Analysis of Factual Issue

Complainants ask that we correct the Examiner's determination that Principal Potter -- not District Administrator Sorensen -- altered Watson's regular school year work schedule. As argued by Complainants, Sorensen was the author of the December, 1998 memo announcing the new hours and we have corrected the Examiner's Finding of Fact 7 to reflect that fact. Complainants' view that Sorensen was the decision-maker is supported by his authorship of the memo and the memo sentence ". . . but I feel it is necessary that both of you have the same hours." Sorensen did not testify at the hearing. Potter did testify and indicated that he was part of the discussion process that led to the new hours. Based on the forgoing, we conclude that both Sorensen and Potter played significant roles in the District's decision.

Dated at Madison, Wisconsin this 22nd day of August, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

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

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