STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NEW BERLIN EDUCATION ASSOCIATION, Complainant,

vs.

SCHOOL DISTRICT OF NEW BERLIN, Respondent.

Case 30
No. 64067
MP-4093

Decision No. 31243-B

Appearances:

Rebecca Ferber Osborn, Legal Counsel, Wisconsin Education Association Council, 13805 West Burleigh Road, Brookfield, Wisconsin 53005-3058, appearing on behalf of the New Berlin Education Association.

Michael Aldana, Quarles & Brady, LLP, Attorneys at Law, 411 East Wisconsin Avenue, Suite 2040, Milwaukee, Wisconsin 53202-4497, appearing on behalf of the School District of New Berlin.

ORDER ON REVIEW OF EXAMINER'S DECISION

On November 23, 2005, Examiner Daniel J. Nielsen issued Findings of Fact, Conclusions of Law, and Order in the above-captioned matter, holding that the School District of New Berlin (District) unilaterally changed the status quo regarding the manner in which parent-teacher conferences would be scheduled, in violation of Secs. 111.70(3)(a)4 and 1, Stats. To remedy the violations, the Examiner ordered the District to cease and desist from such conduct, but declined to require the posting of a notice. He dismissed the allegations of the New Berlin Education Association (Association) that the District had committed prohibited practices by its conduct toward certain Association officials or by certain comments by a District official regarding an Association official.

On December 12, 2005, the Association filed a timely petition pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats., seeking review of certain Findings of Fact and Conclusions of Law in the Examiner's decision. Both parties filed written argument in support of or in opposition to the petition for review, the last of which was received on February 15, 2006. For reasons set forth in the Memorandum that accompanies this Order, the Commission affirms the Examiner's conclusions in some respects and reverses the Examiner in others. Contrary to the Examiner, the Commission holds that the District violated Sec. 111.70(3)(a)1, Stats., by interrogating the Association president about his lawful concerted activity under

threat of discipline, under the circumstances present here. The Commission also holds that the comments by a District official interfered with the Association's internal organization and selection of its representatives. The Commission also orders the District to post a notice regarding its violations of the law.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. The Examiner's Findings of Fact 1 through 50 are affirmed.

B. The Examiner's Findings of Fact 51 and 52 are reversed and the following Findings of Fact 51 and 52 are made:

> 51. Randy Hawley's e-mail to Joe Hanser advising him that he had the right to be accompanied by a Union representative to a meeting with Hawley, as discipline might result from the meeting, had a reasonable tendency to interfere with, coerce or restrain Hanser in the exercise of his protected rights.
>
> 52. Randy Hawley's comment to Diane Lazewski that the Association had the right to use someone other than Cupery to represent it, that labor relations would improve if it did so, and his offer to assist the Association in changing representatives, had a reasonable tendency to interfere with the internal operations of the Association.

C. The Examiner's Finding of Fact 53 is affirmed.

D. The Examiner's Conclusions of Law 1 through 5 are affirmed.

E. The Examiner's Conclusion of Law 6 is affirmed in part and reversed in part and is replaced by the following Conclusions of Law 6 through 8:

> 6. By interrogating the Association grievance chair under threat of discipline about his lawful concerted activity, the District has interfered with, restrained, and coerced municipal employees in the exercise of rights guaranteed in Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

7. By stating to an Association official that the District could resolve more disputes if the Association obtained a different representative, and by offering to assist the Association in obtaining a different representative, the District has interfered with the internal administration of the Association and the employees' right to select their representatives, in violation of Secs. 111.70(3)(a)2 and 1, Stats.

8. By stating that the District would not negotiate while an interest arbitration proceeding over the predecessor agreement was still pending, the District did not commit prohibited practices in violation of Secs. 111.70(3)(a), Stats.

F. The Examiner's Order is set aside and the following Order is made:

1. The Respondent, School District of New Berlin, its officers and agents, shall immediately:

a. Cease and desist from unilaterally changing the status quo ante with respect to the scheduling of parent-teacher conferences and the prerequisites for the implementation of contract waivers.

b. Cease and desist from interrogating the Association grievance chair under threat of discipline about his lawful concerted activity.

c. Cease and desist from stating to an Association official that the District could resolve more disputes if the Association obtained a different representative, and offering to assist the Association in obtaining a different representative, thereby interfering with the internal administration of the Association and the employees' right to select their representatives

d. Take the following affirmative action which will effectuate the purposes of the Municipal Employment Relations Act:

(1) Pay 1.25 hours of pay at the then-existing per diem rate to all teachers who participated in the Spring parent-teacher conferences in 2004.

(2) Post the notice attached hereto as "Appendix A" in conspicuous places in the District's buildings where notices to District employees represented by the Association are posted. The Notice shall be signed by a representative of the District and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

(3) Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

2. The Association's allegations that Respondent engaged in individual bargaining, discriminated against Zarske based on her lawful concerted activity, and illegally refused to bargain until an interest arbitration process was completed are all dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 21st day of April, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

Commissioner Paul Gordon did not participate

APPENDIX "A"

NOTICE TO ALL EMPLOYEES REPRESNTED BY THE NEW BERLIN EDUCATION ASSOCIATION

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 employees represented by the New Berlin Education Association that:

WE WILL NOT violate Section 111.70(3)(a)1 of the Municipal Employment Relations Act by interrogating the Association grievance chair under threat of discipline about his protected concerted activity or otherwise interfere with, restrain, or coerce municipal employees in the exercise of rights guaranteed in Sec. 111.70(2), Stats.

WE WILL NOT violate Sections 111.70(3)(a)2 or 1 of the Municipal Employment Relations Act by stating to an Association official that the District could resolve more disputes if the Association obtained a different representative and by offering to assist the Association in obtaining a different representative, or by otherwise interfering with the internal administration of the Association or the employees' choice of representatives.

WE WILL NOT violate Section 111.70(3)(a)4 of the Municipal Employment Relations Act by changing the status quo regarding the hours and working conditions of teachers or otherwise refuse to bargain in good faith with the Association.

Dated this _____ day of _____, 2006.

By: _____
SCHOOL DISTRICT OF NEW BERLIN

THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES FOR A PERIOD OF THIRTY (30) DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED OR OBSCURED IN ANY WAY.

New Berlin School District

MEMORANDUM ACCOMPANYING ORDER ON REVIEW OF EXAMINER'S DECISION

Summary of the Facts

As indicated in the Commission's Order, the Commission has affirmed the Examiner's Findings of Fact, except for his ultimate Findings 51 and 52. Many of the Examiner's Findings relate to conclusions that the parties have not challenged in connection with the instant petition for review, and which the Commission has affirmed. Hence, the following factual summary is limited to those facts that pertain to the issues that have been presented on review.

The record reflects some tensions between the Association and the District during the 2003-04 school year. The parties had not reached voluntary agreement on their successor contract and the matter was pending before an interest arbitrator. Over the course of that school year, they had also skirmished about the scheduling of parent-teacher conferences at the Prospect Hill Elementary School.

On Tuesday April 27, 2004, Association official Diane Lazewski met with District Human Relations Director Randy Hawley to discuss Association concerns about teacher assignments for the coming year. They were able to work out a resolution, and Ms. Lazewski thanked Mr. Hawley for doing so. Hawley responded with words to the effect that the parties could work things out more often if it were not for the Association's professional representative, UniServ Director Steve Cupery, who (Hawley said) had a tendency to file worthless grievances and had alienated the School Board. Hawley also stated words to the effect that negotiations over a new contract were being held up by the pending arbitration, attributing this delay to Cupery as well.[1] A few days later, by e-mail addressed to Cupery on

[1] The Association has challenged the Examiner's Finding that Hawley's reference to arbitration as delaying the onset of successor negotiations pertained to the pending interest arbitration over the predecessor contract, rather than to grievances and/or grievance arbitration in general. The Commission concurs in the Examiner's Finding in this respect. The Association points to Lazewski's testimony at page 131 of the transcript, where, in relating the conversation with Hawley, she testifies that Hawley attributed the Board's reluctance to bargain a successor to the "trivial grievances." However, on cross examination, Lazewski acknowledged that, when Hawley referred to arbitration in that conversation, "I wasn't sure what he was referring to, to be honest." (TR. 135). The Association also points out that the Examiner had credited Lazewski's version of the conversation over Hawley's in another aspect of his Findings, i.e., the Examiner found that Hawley had suggested that the Association jettison Cupery as a representative. In crediting Hawley over Lazewski on the successor negotiations issue, the Association argues that the Examiner was inconsistent. However, as we see it, in reaching both conclusions, the Examiner primarily relied upon the more or less contemporaneous recording of the conversation contained in Lazewski's April 30 e-mail. The reference to arbitration in that e-mail, in context, much more plausibly refers to interest arbitration (e.g., Lazewski refers to "the process") than to any particular grievance arbitration. While we agree with the Association that Hawley discussed the effect of frivolous grievances, we find, as did the Examiner, that the frivolous grievances were connected in Hawley's mind to his suggestion that the Association replace Cupery, not to his comments about the delay in successor bargaining. We, like the Examiner, rely less upon the recollection stated at the hearing, many months after the events, than on the contents of and inferences from the contemporaneous recording and the inherent plausibility of the competing versions of the conversation.

April 30, 2004, Lazewski reduced to writing her recollection of the conversation, as follows:

> At approximately 12:50 P.M. on Tuesday, May 27th [sic], I stopped by Randy Hawley's office to show him that one of the teachers being shifted into another position wasn't fully certified for that position and showed him an alternative that would please all parties involved. After I thanked him for trying to retain as many teachers as possible, Randy launched into a discussion in which he maintained that if it wasn't for Steve Cupery, we could work things out without going to grievance constantly. He indicated that Cupery enjoyed making him (Hawley) look bad by filing grievance after worthless grievance. I indicated that I felt that Cupery files grievances because he was asked to do so by members. He stated that he felt that some of the stuff being grieved were items that he was asked to do so by members. He stated that he felt that some of the stuff being grieved were items that Cupery wanted to grieve, not necessarily the union leadership? (didn't understand what he meant – he alluded to the arbitration clause) He also stated that "the board members hate Cupery, even those members considered union friendly" and indicated that "you (union) have a choice you know. You can get rid of Cupery – get him replaced. Other districts have done it". He even offered to find districts in which this had occurred. I told him I thought he didn't get along with Steve because of his ego. He (Hawley) indicated that maybe part of the problem was that they were both (Cupery and Hawley) big egomaniacs. He reminded me that we could get the contract for the teachers done quickly, however because "Cupery has us tied up in litigation", the board won't bargain while the arbitration is still in progress. He said that if "Cupery drops the arbitration, then we can begin to bargain" and I indicated that bargaining could still occur while the process was ongoing. I then excused myself, reminding him to check the certification of the teacher with Virginia Wolters, so placement was accurate.

During the same 2003-04 school year, Rose Zarske, a first grade teacher and first-year Association building representative at the Prospect Hill Elementary School, where the parent-teacher conference conflict had occurred, came to believe that she was being subjected to excessive criticism by Principal Susan Bechard. These occurrences are recounted in the Examiner's decision in connection with a prohibited practice allegation that the Examiner ultimately dismissed. One of them, however, towards the end of the school year, eventuated in an allegation that the District, through Mr. Hawley, had interfered with the protected activity of Association grievance chair Joe Hanser.

This situation began on April 30, 2004, when Ms. Bechard noticed that Ms. Zarske had scheduled three hours of time the following week for her first graders to work in the computer lab. Bechard e-mailed a concern to Zarske about the amount of time and Zarske responded that it was a one-time project, not a regularly scheduled part of the curriculum. Bechard then suggested a meeting about the time Zarske was spending on "extras" (such as computer work)

as opposed to reading instruction for first graders. Zarske and Bechard agreed to meet on May 4. Bechard advised Zarske that she would be available until 4 p.m. that day. Since Zarske perceived this exchange as a continuation of the ongoing criticism she had incurred from Bechard over the year, Zarske feared the meeting might result in discipline and asked Hanser to accompany her to the meeting on May 4. Neither Zarske nor Hanser informed Bechard that Hanser would be present.

At the end of the school day on May 4, Zarske had "bus duty" and was unable to return to the building until after 3:45. Bechard had volunteered to participate at 4 p.m. in preparations for a parent appreciation event the following day and became concerned about a delay in her scheduled meeting with Zarske. Bechard had Zarske paged once when Zarske was still outside the building and then had her paged a second time, at which point Zarske contacted the office secretary and said she was finishing something in her classroom and would be "right up." Hanser arrived at Bechard's office before Zarske did, surprising Bechard who had not been notified that Hanser would be attending. Hanser indicated to Bechard that Zarske was concerned about discipline and Bechard assured Hanser that was not the purpose of the meeting. Hanser then encountered Zarske on her way into the office and accompanied her back to the office. It was about 4:05 p.m. and Bechard had already left to work on the preparations. Hanser then left a note for Bechard as follows:

> As we discussed upon my arrival since you assured me that your meeting with Rose was to discuss the use of PowerPoint and in no way would lead to disciplinary action against Rose Zarske, I, as we agreed had a short meeting with Rose. At 4:05 Rose went to meet with you and informed me that she had been informed by Maggie that the meeting with Rose is now cancelled for today, so I advised Rose to go home.

The next day, Bechard sent the following e-mail to Zarske:

> I was disappointed that you left me waiting for you for 15 minutes yesterday when we were to meet right after school. (3:45) Maggie called over the intercom and into your room several times. You finally then called Maggie back at around 3:55 saying that you had to "do a few things," while I was still waiting for you to show up. I was also quite surprised when Joe Hanser came at 4 PM, and he told me he was here for the meeting with you and me, since you never informed me that he was coming to our meeting about PowerPoint. I told Joe, then, that we wouldn't be meeting Tuesday since I had no district staff with me. I then went upstairs to the PH staff activity which I had told you about when we set up our 3:45 PM meeting. Maggie informed you of that, I believe, when you finally came to the office after 4 PM. Your behavior was rude, to say

> the least, and wasteful of time for me and for Joe. It reminded me of your rude behavior at last week's staff meeting. You and I still need to meet before you proceed with having first graders doing PowerPoint. We also need a follow-up conference to the classroom observations. In addition, I have some visitations, as you and I had discussed earlier in the year. If you feel you need representation for these meetings, then please let me know ahead of time so I can do the same. That is always your option.

Zarske shared the foregoing communication with Hanser, who then (later the same day) sent the following e-mail to Bechard and Zarske, as well as District Human Resources Director Randy Hawley. In his e-mail, Hanser offered a different version than Bechard's of the previous day's conversations, in that Hanser believed he had told Bechard that he would meet briefly with Zarske and then Zarske would appear for the meeting. His e-mail concluded:

> Reading the last paragraph of this e-mail from Susan, I can only conclude that the tone is harsh, the resurrection of the undefined "rude behavior" referred to would seem to indicate that further discipline could result from the staff meeting issue. In conclusion, it would seem to me that my presence in the cancelled meeting has caused Susan a certain amount of discomfort. If the meeting were intended to be as Susan characterized in our short meeting in her office, this discomfort seems out of proportion. Perhaps something else is at work here. Let's all remember Weingarten. Among other things, an employee cannot be disciplined for insisting upon their rights. So I would suggest that Susan be careful so as not to act in a way which could be construed to be punitive towards Rose for my presence at Prospect Hill yesterday. Finally, Randy, perhaps we need to sit down, you, me, Susan, and talk about conducting business in a businesslike manner, so that these misunderstandings do not occur in the future.

The next day, May 6, Bechard replied to Hanser's e-mail, taking issue with Hanser's recollection of what occurred and denying that she had indicated she would still meet with Zarske that afternoon. Bechard's e-mail concluded with the statement, "Life need not be this complicated." Hanser responded that same day by e-mail as follows:

> I agree. I can't believe that life need be this complicated either. I'm not going to argue about the contents of our conversation. I know what we agreed to (that I would have a conversation with Rose and that she would then be down shortly to have the meeting with you). I'm standing behind my earlier statement. Frankly, I'm somewhat miffed that what you tell me in private you now deny in public. I'm the type of person who is willing to stand behind statements I make, even without corroborating witnesses. Sometimes I forget that I'm dealing with people who have less integrity.
>
> This is the last time I intend to discuss this via E-mail. Future discussions will need to be face-to-face. I really don't have the time to spend on this issue, but when my integrity is impugned I tend to take it rather personally.

Bechard replied by e-mail that perhaps Hanser had not heard her correctly on the afternoon of May 4 and added, "You certainly have nerve to speak of my integrity."

By memorandum e-mailed to Hanser on May 7, District Human Resources Director Hawley directed Hanser as follows:

> I agree with your comment that we should meet to "talk about conducting business in a businesslike manner". Therefore I am asking you to provide me with times and dates you are available to meet with Mrs. Bechard and me during the week of May 10, 2004. I am available Tuesday, Wednesday or Friday after 3:30 p.m. I am also advising you that you have the right to be accompanied by an association representative, as this meeting could result in disciplinary action.
>
> Please send dates and times to me no later than noon on Monday, May 10, 2004.

Hanser responded by telling Hawley that he (Hanser) would be represented at the meeting by UniServ Director Steve Cupery and asking Hawley to communicate with Cupery about the matter. At the end of the same day, Cupery e-mailed Hawley indicating that the Association people would be available on May 14 and asking Hawley for information about what it was that might lead to discipline for Hanser. Hawley responded that Bechard was not available on the 14th and, after some more scheduling e-mail, communicated the following to Cupery:

> Joe is to work directly through me on this.
>
> It is his right to have a union rep present, but he does not have the right to abdicate his responsibility for his behavior and responsibility, which includes communicating with administration.
>
> Joe also knows that this is about. He can tell you as well as I can.

Cupery replied that he was Hanser's representative, that they were available on Friday May 21, and reiterated that he wanted to know from Hawley what the potential discipline might concern. Hawley replied:

> I'm not trying to make a big deal out of all this. Joe's refusal to communicate with me has only served to complicate the issue. Joe has been given specific instructions to notify me before 4:00 p.m. today as to his availability for Monday or Tuesday. His refusal to do so would be considered insubordinate.

When Cupery replied again insisting that Hawley advise him about the possible discipline, Hawley responded that the issue was "related to the unprofessional manner in which he has treated Susan."

Thereafter Hawley, Bechard, Cupery and Hanser met at a scheduled time to discuss the e-mail exchange between Hanser and Bechard. No disciplinary action resulted from the meeting.

The Examiner's Decision and the Petition for Review

The Examiner rendered a decision on five discrete prohibited practice allegations in the Association's Complaint. First, he held that Principal Bechard did not engage in unlawful individual bargaining, in derogation of the Association's status as exclusive bargaining representative, by her conduct in pursuing a waiver of a contract provision regarding parent-teacher conference scheduling in the spring of 2004. The Association has not sought review of this determination and we affirm.

Second, the Examiner held that the District, through Ms. Bechard, had unilaterally changed the hours required for parent-teacher conferences in the spring of 2004, by increasing them from 7.0 to 8.25 hours without authorization from the Association, in violation of the District's duty to bargain in good faith. Without conceding that this conclusion is correct, the District has not challenged it in connection with the instant petition for review, and we affirm.

Third, the Examiner concluded that Ms. Bechard had not discriminated against Association building representative Rose Zarske, in violation of Sec. 111.70(3)(a)3 or 1, during the spring of 2004 and the fall of 2005, in retaliation for her protected activity in connection with the spring 2004 parent-teacher conferences, by a series of unrelated incidents – none disciplinary – in which Bechard criticized Zarske on a number of occasions. The Association has not sought review of this conclusion and we affirm.

Fourth, the Examiner decided that the District had not violated the law when Hawley directed Association grievance chair Joe Hanser to attend a meeting to discuss whether Hanser should be disciplined in connection with comments he made to Bechard following the cancellation of a meeting Bechard had scheduled with Zarske. The Examiner concluded that the District had a legitimate managerial interest in protecting Bechard from "abuse and insubordination" which overrode the relatively minor interference with Hanser's protected activity that was involved in calling him to account for, as the Examiner saw it, "thrice [going] out of his way to call a principal a liar." (Examiner's Decision at 20).[2] The Association seeks review of this determination and we reverse, for the reasons explained below.

[2] As discussed more fully below, the Examiner's characterization is inaccurate. The record reflects that Hanser questioned Bechard's integrity only once prior to Hawley sending the memo directing Hanser to a meeting with possible disciplinary consequences. Hence the lawfulness of the directive must be evaluated in light of that one prior communication. In response to that directive, Hanser again explained his version of the May 4 events and why he saw it as an integrity issue. Neither the Examiner's Findings of Fact nor the record reflects any third instance.

Fifth, the Examiner concluded that District Human Resources Director Randy Hawley did not violate the law when he encouraged Association representative Lazewski to change professional representatives and suggested that labor relations would improve with a different representative. Further he concluded that Hawley had not violated the law when he stated that the District would not engage in negotiations over a successor agreement until the arbitration over the predecessor was complete. The Association seeks review of these conclusions. We agree with the Examiner that the District had no obligation to engage in bargaining over a successor until a predecessor contract was settled and lawfully could so state to Lazewski. However, while the issue is extremely close, we reverse the Examiner's holding on the comments regarding Cupery and conclude that the District thereby interfered with the employees' right to be represented by representatives of their own choosing, in violation of Sec. 111.70(3)(a)1, Stats., and with the Association's internal operations in violation of Sec. 111.70(3)(a)2, Stats.

As a remedy for the unilateral change violation, the Examiner issued a cease-and-desist order and a make-whole remedy for the additional hours worked. However, he did not order the District to post a notice – a traditional part of the remedy for a prohibited practice – stating, "Given the limited nature of the violation – amounting to a contract violation – I do not find that the posting of a public notice is necessary to effectuate the purposes of the Act." The Association seeks review of this portion of the Examiner's remedy. We have ordered the District to post the traditional notice, encompassing the unilateral change violation that the Examiner found, as well as the additional two violations that are reflected in our Conclusions of Law, above.

Discussion

1. Hawley's Directive that Hanser Attend a Meeting with Potential Disciplinary Consequences

The Commission has long adhered to the following standards for assessing whether employer conduct has violated Sec. 111.70(3)(a)1, Stats.:

> Violations of Sec. 111.70(3)(a)1, Stats., occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Sec. 111.70(2) rights. If, after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employee(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights.

JEFFERSON COUNTY, DEC. NO. 26845-B (WERC, 7/92), AFF'D 187 WIS. 2D 647 (CT. APP. 1994), at 12-13, CITING WERC V. EVANSVILLE, 69 WIS. 2D 140 (1975) and BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84). On the other hand, the

Commission has recognized that an employer's legitimate business interests can sometimes justify rules that may have a limiting effect on protected activity. For example, in RACINE UNIFIED SCHOOL DISTRICT, DEC. 29074-B (GRATZ, 4/98), AFF'D DEC. NO. 29074-C (WERC, 7/98), an employer's need to ensure the availability of its telephones for business purposes was held sufficient to warrant a general rule prohibiting personal use of the telephone during work hours, even though that rule somewhat limited employees' ability to communicate with each other and the union about union business. The Commission has recently characterized this balancing test as "permitting an employer to 'interfere with its employees' lawful concerted activity to the extent justified by the [employer's] operational needs.'" STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, DEC. NO. 30340-B (WERC, 7/04), at 13.

The first step in the analysis is to determine whether the employee's activity is within the protection of Section 2 of MERA, i.e., "lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection ...." Clearly, as the Examiner found and the District does not dispute, Mr. Hanser's electronic communications with Ms. Bechard were part and parcel of his role in representing Ms. Zarske in connection with her concern that Bechard might discipline her.

The District, however, contends that Hanser's communications lost the protection of the law when, in response to Bechard's denying she had said on May 4 what Hanser thought she had said, Hanser questioned her "integrity." The Commission has observed that:

> [C]oncerted activity can go beyond the pale of statutory protection in some circumstances. Violent or threatening behavior are examples of concerted activity that will likely lose statutory protection. However, the rights established by Section 2 of MERA are often exercised in tense, chilly, or hostile atmospheres, because by its very nature such activity involves challenging the employer's authority.

CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03) at 12. In CLARK COUNTY, the employee had aggressively challenged the manner in which the County was applying a recent wage settlement. The employee had offended management officials by the manner in which she had pressed her message, at one point rising slightly out of her chair and placing her hands on the table to emphasize her words. She had also implied that management officials might be misrepresenting the facts and that, as a public entity, they should be held to a higher standard of conduct. The Commission stated that, while the employee's "conduct was vocal (perhaps even "condescending" and "disrespectful" as County officials saw it) it remained within the law's protection."

Similarly, in VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03), the Commission considered whether an employee had gone beyond the law's protection in storing on a village computer a memo, later discovered by the fire chief, in which he harshly criticized

the chief, using vitriolic and salty language, about a variety of equipment and personnel issues. As in CLARK COUNTY, the employer in STURTEVANT claimed that its negative reaction to the employee's conduct was not directed at the employee's protected activity, but rather at the "disloyal" or "disturbed" tone of the activity. The Commission set forth an extensive statement of the controlling principles:

> In general, the law gives wide berth to employees expressing mutual concerns about working conditions. Concerted activity by its nature often occurs in tense, confrontational, or chilly atmospheres, and some intemperance is to be expected in those situations. A mild-mannered complaint is likely to aggravate an employer less than a harshly-worded one, and sometimes it is the vehemence itself that renders concerted activity effective; certainly Section 2 cannot be read to protect only ineffective concerted activity. SEE CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03). Thus, unless concerted activity is marked by flagrant misconduct, it does not lose its protection. In addition, what constitutes "flagrant misconduct," will depend upon the nature of the work place and the effect on the employer's authority. For example, in CKS TOOL & ENGINEERING, 332 NLRB NO. 162, 168 LRRM 1047 (2000), the NLRB deemed protected an employee's obscenity-laden speech during a management presentation at a staff meeting, because the employee was deemed to be implicitly acting on behalf of his co-workers and because his language was commonly tolerated by management at such meetings. Some measure of "disloyalty" and "disparagement" are tolerated, even if the employer arguably has suffered some harm to its business. SEE, E.G., ALLSTATE INSURANCE CO., 332 NLRB NO. 66, 165 LRRM 1293 (2000) (insurance agent's activity was protected, where gave interview to a magazine, in which she complained about the company's working conditions); ARLINGTON ELECTRIC, INC., 332 NLRB NO. 74, 166 LRRM 1049 (2000) (it was protected for an employee to distribute literature to the public urging them not to use a hospital that subcontracted with a company that did not provide family health insurance). Hence, unless the form of expression exceeds the law's liberal parameters, the law does not distinguish between hostility towards the subject matter and hostility towards the attitude or manner of expression.

ID. at 25.

The context in which heated or intemperate statements occur during the course of concerted activity is often influential in determining whether they remain within the law's protection. For example, the District cites the Commission's decision in CITY OF KENOSHA, DEC. NO. 25226-B (WERC, 2/89) for the proposition that "statements which are made as a personal attack and not in good faith are not protected." (District's Response Brief at 2). In that case, a firefighter filed a grievance claiming an entitlement to overtime pay for an off-duty meeting that the acting chief had required him to attend. In the statement of the grievance, the

firefighter wrote, "[The chief] called me at home to ask me if this was a joke. I said no. He said this was "Unreasonable & absurd and would not pay it [sic]. It's funny I had the same thoughts when they made him Assistant chief but they still made him chief so I think I should receive the overtime." The acting chief then disciplined the firefighter for that comment and the firefighter filed a prohibited practice charge with the Commission. The examiner concluded that the statement was protected because it was a prelude to the grievance and had been to some extent provoked by the fire chief. The Commission examined in detail the situation in which the statement was made and concluded that, while the examiner's view was reasonable, the overall context showed that the statement was not a good faith element of the grievance, but an unrelated personal attack on the chief that was not protected. Among the factors contributing to the Commission's conclusion were 1) the firefighter had held a lingering personal resentment against the acting chief because he had received a promotion that the firefighter's father had sought and been denied; 2) the insult was not an impromptu ill-considered remark, but rather calculated and intentional, as demonstrated by the fact that the firefighter had gone ahead and included the insult even though he had submitted a draft of the statement beforehand to both his supervisor and the union's grievance officer, both of whom urged him to remove it. In that context, the Commission decided that the remark was not a good faith effort at grievance advocacy, but simply an opportunity for a personal insult for reasons unrelated to the grievance.

Applying these principles to Hanser's communications leaves us convinced that his conduct, albeit vehement and offensive to Bechard, was a good faith extension of his advocacy on behalf of the Association. First, it is apparent on the record as a whole that Hanser sincerely believed that Zarske was at some risk in her relationship with Bechard and that he was concerned about whether his intervention would exacerbate Zarske's situation. His version of what occurred on May 4 (that he told Bechard that he would meet briefly with Zarske and then send her on to meet with Bechard) is consistent with his conduct when, after returning to the office, he and Zarske discovered that Bechard had left for her other activity. Before releasing Zarske to go home, Hanser went to find Bechard to make sure she was not still planning to meet with Zarske. He then took time to hand write a note to Bechard explaining what had occurred. This conduct would make little sense if Hanser did not in good faith believe that Bechard had indicated she would wait for Zarske.

Second, Hanser's vehemence is understandable and related to his role as union representative, when the overall context is taken into account. Hanser knew that he had surprised Bechard by his appearance after school on May 4 and she had made it clear that in her view it was a purely curricular, non-disciplinary meeting. As an experienced grievance officer, he realized that Association intervention can sometimes increase friction and raise tensions, and he naturally would be cautious not to do anything that would increase Zarske's vulnerability. When Zarske arrived at the office and found Bechard gone, Hanser left a fairly detailed explanatory note on Bechard's desk. That note and his subsequent e-mails reflect his anxiety that Zarske might perceive him as having caused her to miss a meeting and/or that

Bechard might perceive Zarske as having been uncooperative by leaving school without meeting with her. His anxieties were somewhat confirmed when Bechard stridently chided Zarske the next day for her "rudeness" in failing to attend the meeting. Hanser's response to Bechard, in which he recounted what he believed had occurred, seems (and we infer it was) designed in part to deflect criticism away from Zarske – a legitimate response by a union representative to the situation. In addition, the response reflects Hanser's concern that he may have made Zarske's situation worse, since Hanser suggests in that e-mail that Bechard's anger may have been triggered by Hanser's presence at the school ("Perhaps something else is at work here. Let's all remember Weingarten.")[3]

When Bechard then responded, with a copy to Zarske and Hawley, disputing Hanser's account ("I did not say I would meet with Rose afterward that day, as you indicate in your letter"), Hanser's subsequent comments show (and we infer) that he felt his own credibility with Zarske was at stake. He responded with the now-pivotal statement that he was "miffed that what you tell me in private you now deny in public … Sometimes I forget that I'm dealing with people who have less integrity." At the end of that e-mail, however, he explains that he is "miffed" because, under Bechard's version of the facts – a version now transmitted to Zarske as well – Hanser had not performed his job well as a union representative. Under Bechard's version of the facts, Hanser should have told Zarske either to get to the office immediately or informed her that Bechard could not wait any longer. One way or the other, under Bechard's version, it would be reasonable to conclude that Zarske should have been alerted to the fact that she had (wittingly or not) further annoyed Bechard. Instead, under the scenario that Bechard conveyed to Zarske and Hawley as well as Hanser, Hanser had made things worse for Zarske – confirming his apparent concerns in that regard. Hanser's last comment in that e-mail reflects that he felt it necessary to defend his sense of responsibility and competence: "I really don't have the time to spend on this issue, but when my integrity is impugned I tend to take it rather personally."

Bechard responded with an e-mail reiterating her version of events and ending "You certainly have nerve to speak of my integrity." As indicated, Hawley had been copied on the full exchange. At this point, Hawley rose to Bechard's defense and sent the directive that the Association claims interfered with Hanser's right to engage in protected activity. Hawley ordered Hanser to a meeting to discuss this communication with Bechard, stating that the meeting "could result in disciplinary action." As indicated in footnote 2, above, the lawfulness of this directive must be measured in terms of what preceded it – the single (not triple) e-mailed comment, "I forget that sometimes I'm dealing with people who have less integrity."

[3] The reference to "Weingarten" stems from a United States Supreme Court decision affirming an individual employee's right to seek union representation at a meeting called by an employer to investigate possible wrongdoing that may result in discipline. NLRB v. WEINGARTEN, 420 U.S. 251 (1975).

We have related our views and inferences about the context in which Hanser's remark was made in such great detail because that context and those inferences are crucial in our determination that Hanser's comment was fully protected. In context, what might otherwise seem to be a quasi-insubordinate overreaction to a minor event is understandable as a good faith defense of Hanser's own credibility as a union representative and an effort to fulfill that role by insulating Zarske from being unfairly blamed for what had occurred. He was dealing with a delicate situation involving an employee/building representative's deteriorating relationship with her supervisor, and he feared his own actions could be construed to have exacerbated that situation. He felt his own credibility at stake. Whether these perceptions were objectively valid or not, they were legitimately related to his union activity and render his reaction/response well within the purview of Section 2 of MERA. His comment stands in stark contrast to the personally-motivated ad hominem insult that the Commission founded unprotected in CITY OF KENOSHA, SUPRA. We also note that Hanser's choice of language remained within a professional realm. Contrary to the Examiner's paraphrasing, Hanser did not use the inflammatory term "liar," nor any other name-calling or profanity.[4]

We turn then to whether the District impermissibly interfered with Hanser's protected activity when Hawley directed Hanser to attend a meeting with the explicit possibility of disciplinary consequences. In responding to this issue, the Examiner properly referenced the Commission's decision in STATE OF WISCONSIN/DEPARTMENT OF CORRECTIONS, DEC. NO. 30340-B (WERC, 7/04). The pertinent issue in STATE OF WISCONSIN arose when a female bargaining unit member filed a sexual harassment charge against a male bargaining unit member. The union president met with the alleged victim to discuss her concerns and at the conclusion of the meeting drafted a statement for her to edit and sign, in which she stated that she wanted the male employee's behavior to stop, but she did not want to have him disciplined. The female employee thereafter made statements to a co-worker that led the co-worker to conclude that the female had felt intimidated into signing the written statement. The co-worker approached the employer with this information and the employer called the union president into a meeting, in order to question and potentially discipline him about what had occurred during his meeting with the female employee. As the Examiner in the instant case observed, the Commission in STATE OF WISCONSIN viewed the situation as a "direct clash between statutory rights and an employer's bona fide interests, and set forth the balancing test to apply:

> [W]hat are the nature and weight of [the union representative's] statutory interests, does the State have genuine countervailing operational needs, and are those needs being met in a manner that interferes as little as practical with [the union representative's] protected activity?

ID. a 17. Applying the foregoing test, the Examiner in the instant case properly concluded that Hanser was engaging in protected activity and that the District also had a legitimate competing interest, i.e., in protecting its principal from insubordination or denigration. He then balanced the two interests and decided that the interference with Hanser's rights (being called into a potentially disciplinary meeting) was relatively slight and hence his rights were not impaired.

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[4] We do not intend to indicate that such terminology would necessarily go beyond the pale. There are circumstances where salty language and/or ill-considered outbursts could remain within the law's protection, as discussed in CLARK COUNTY, SUPRA, and STURTEVANT, SUPRA.

In fact, however, the Examiner glided past some additional guidance in STATE OF WISCONSIN about how the balancing test should be applied in the specific situation at issue here. The Commission in that case, after stating the foregoing general balancing test, noted that the employer had a legitimate interest in protecting alleged sexual harassment victims from union coercion. However, the Commission went on to note that "the mere existence" of that employer interest could not be sufficient to outweigh the union representative's protected activity, or else the employer could justify questioning the union representative about every conversation he has with bargaining unit members who have alleged sexual harassment, "a degree of intrusion that the State does not seek and could not justify." Instead, the Commission set forth a requirement that, before compelling the union representative to face questioning and potential discipline, the employer must have "a sufficient concrete and reliable basis ... to evoke a reasonable suspicion" that misconduct had occurred. In that case, the Commission concluded that the co-worker, by reporting to the employer the alleged victim's comments about feeling coerced by the union representative, had given the employer a reason to inquire further into the specifics of that conversation.

The Commission's approach in STATE OF WISCONSIN aligns with the settled principle, discussed earlier in that decision, that an employer may discipline an employee for misconduct that occurs in the course of protected activity only if the employer has correctly concluded that the misconduct actually occurred. ID. at 14-15; CLARK COUNTY, SUPRA, at 16. n.7; NLRB V. BURNUP AND SIMS, INC., 379 U. S. 21 (1964). A good faith but erroneous belief that misconduct has occurred is insufficient, because, as the United States Supreme Court stated in BURNUP AND SIMS, "A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith." 379 U.S. at 23.

Just as an employer may not discipline an employee for misconduct in the course of protected activity unless the misconduct actually occurred, the Commission held in STATE OF WISCONSIN that an employer may not question a union representative, under threat of discipline, about potential misconduct that may have occurred during the course of that activity, unless the employer has a substantial and reliable basis for its suspicion. The mere questioning under threat of discipline is an unlawful interference, absent that well-grounded suspicion. Contrary to the Examiner, we think an employer's compulsory directive to attend a meeting that could result in discipline is not "relatively little interference," nor was it taken lightly by Hanser, even though he was a seasoned union veteran. He testified that the directive engendered anxiety as we believe it would in any "reasonable employee" under the objective standard that applies in cases arising under Section (3)(a)1 of MERA. JEFFERSON COUNTY, SUPRA. Hawley heightened the seriousness of the situation by requiring Hanser to arrange the meeting directly with Hawley, rather than through Cupery, or be viewed as insubordinate.

The instant case is a notch away from STATE OF WISCONSIN but readily guided by the same principles. Here we may presume that the District believed in good faith that Hanser had engaged in misconduct in the course of his protected activity – i.e., that, in questioning

Bechard's integrity in an e-mail, Hanser had committed misconduct. As discussed above, we have concluded that Hanser's comments were not misconduct and that the activity remained protected. Hence, the District clearly would have violated the law if it had disciplined Hanser. But the District did not discipline Hanser; it merely required him to discuss his conduct under threat of potential discipline. If the District had a substantial and reliable suspicion that misconduct had occurred during the protected activity, STATE OF WISCONSIN would permit the District to do what it did. What is missing, however, is an implicit but unstated underpinning of STATE OF WISCONSIN: the questioning itself carries enough coercion to amount to interference and hence must be authentically aimed at seeking information that the employer does not already possess. Otherwise, the interrogation becomes merely punitive and the meeting merely a vehicle for threatening discipline.

Thus, in STATE OF WISCONSIN, the employer did not know what actually had occurred during the conversation between the union president and the alleged harassment victim; therefore, once the employer had a reasonable suspicion, it had a bona fide need to further inquire. Here, in significant and crucial contrast, the District was fully aware of exactly what had occurred that it incorrectly viewed as misconduct: Hawley had been privy to the full e-mail exchange and was already aware that Hanser had questioned Bechard's integrity. That comment in itself is what the District found objectionable and "unprofessional." It was not necessary to question Hanser about whether or not he impugned Bechard's integrity. Moreover, Hawley knew from the detailed e-mail exchange exactly what each party believed had occurred on May 4. In a typical Weingarten investigatory meeting in this situation, the only relevant facts that the District might elicit would be facts that might exonerate Hanser, e.g., facts that would justify Hanser impugning Bechard's integrity. While this is a perfectly appropriate purpose in a normal Weingarten situation, it is not a legitimate purpose where the conduct in question is protected activity. To call a union representative into a meeting simply to justify his protected activity, under threat of discipline, is itself a form of punishing him for engaging in the vigorous but protected activity. As we said in CLARK COUNTY, SUPRA, at 14, "An aggressive grievance officer is likely to incur employer antipathy more readily than a steward who is passive; if the employer terminates the assertive grievance officer for his assertiveness, the employer cannot prevail by demonstrating that he bore no animus towards union stewards in general or towards passive stewards." Thus the District acted unlawfully, whether or not it had a good faith belief that the activity was marked by actual misconduct.[5]

[5] It is important to point out that the District would have acted lawfully if, observing the growing rancor between the Union and Principal Bechard, the District had invited both parties to a meeting to clear the air or discuss improving their relationship. Such a meeting would respect the Union's co-equal role in District labor relations. However, by ordering Hanser to a meeting under threat of discipline, the District utilized its disciplinary authority as an employer over a subordinate employee to chill that employee's exercise of lawful concerted activity, a distinction that makes a significant statutory difference. Hawley's ancillary conduct in refusing to set up the meeting with Hanser's representative (Cupery) and insisting that Hanser deal directly with Hawley under threat of insubordination, further evidences the coercive element in the District's handling of the situation.

Contrary to what the District argues, the principle we apply in this case will not "effectively immunize all conduct or speech made within the context of otherwise protected activity." To the contrary, if the conduct or speech is truly beyond the bounds of Section 2 of MERA and/or otherwise constitutes misconduct, an employer may respond with appropriate discipline. Moreover, as held in STATE OF WISCONSIN, an employer may interrogate employees if the employer has a substantial basis for believing that misconduct may have occurred in the course of protected activity. We add in this case what is logically implied in STATE OF WISCONSIN and BURNUP AND SIMS, i.e., that the employer's questioning must be designed to learn whether the misconduct actually occurred. In this case Hanser did not exceed permissible bounds, nor did the District have any need to question him in order to learn whether he had questioned Bechard's integrity. That is why, consonant with BURNUP AND SIMS and STATE OF WISCONSIN, we conclude that requiring Hanser to answer for his statements, under threat of discipline, would tend to discourage future vigorous advocacy on his part and therefore interfered with his right to engage in Association activity.

For the foregoing reasons, we conclude that the District violated Sec. 111.70(3)(a)1, Stats., when it called Hanser into a meeting, under threat of discipline, to discuss his e-mail exchange with Bechard, which was lawful concerted activity within the protection of Sec. 111.70(2), Stats.

2. Hawley's Comments Regarding Cupery

The Examiner viewed the interaction between Hawley and Association representative Lazewski as "Complaining about the other side's representative and suggesting that he or she is the problem in a labor-management relationship," which, as the Examiner said, "is a commonplace occurrence." Examiner's Decision at 20. The Association argues on review that "Hawley's comments went beyond merely criticizing Cupery and that Hawley actively offered to assist the Association in replacing Cupery." Association Reply Brief at 5. It was this offer of assistance that, the Association argues, created the "reasonable tendency to interfere with the right of the Association to select its own representatives without intrusion from the employer." Id.

The Examiner is a seasoned and shrewd observer of labor relations realities and we cannot quarrel with his above-quoted statement about the mutual mud-slinging that often characterizes the relationship between union and management, especially, as here, in the context of prolonged contract negotiations. Like the Examiner, we are reluctant to police the verbal sparring that accompanies labor relations unless it rises to the level of interference or coercion. Here, had Hawley's remarks gone no further than accusing Cupery of filing frivolous grievances and of alienating the School Board, the discussion would have remained within lawful bounds. Where the District went awry was when its agent stated that things would improve if the Association chose a different professional representative, coupled with an explicit offer of assistance in making that happen. This unsolicited offer of assistance in

selecting a different representative pushed the conversation beyond what the parties might take with a grain of salt and into an area where a reasonable union representative would feel unease and coercion. As the Commission stated in WAUKESHA COUNTY, DEC. NO. 30799-B (WERC, 2/05):

> It is well established that the purpose of subsection (3)(a)2 (and of its analogs in the private sector) is to curtail employer favoritism toward a particular union or toward a particular leadership cadre within the union, so as to undermine bargaining unit employees' free choice of representatives. ... In cases of "interference," the employer has not totally subjugated the union to the employer's will, but has "exercised some lesser form of influence in the determination of union policy." [citing GORMAN AND FINKIN, BASIC TEXT ON LABOR LAW, 2D ED. (WEST 2004), at 265].

WAUKESHA COUNTY at 9-10. While the question is very close, we conclude that Hawley's remarks were actually intended to persuade the Association to select a different representative, one with whom he and other management officials would feel more comfortable, and that the persuasion included an implicit promise of benefit (a District willingness to resolve more issues). As such, it violated Sec. 111.70(3)(a)2, Stats., and Sec. 111.70(3)(a)1, Stats.

In this connection, we acknowledge that employee and union rights to be free from certain kinds of coercion and interference, as embodied in Section (2) and Section (3)(a)2 of MERA, do not precisely parallel those of public employers. As the Examiner noted, the labor relations arsenal available to public employees includes access to information about fees an employer's representative may be charging. Public employees, as citizens, may also utilize School Board meetings and other public forums to point out or criticize such expenditures. Unlike the District, the Association generally is not subject to such public scrutiny. We also note that MERA itself contains no analogous union prohibited practice under Sec. 111.70(3)(b) to the employer prohibited practice set forth in Sec. 111.70(3)(a)2.[6]

The Association also contends that Hawley further violated the law by linking the District's willingness to engage in successor contract negotiations to the Association's relinquishing certain grievance arbitration activity. As noted earlier in our discussion of the Examiner's Findings (footnote 1, supra), we concur in the Examiner's construction of Hawley's words in this respect, i.e., that Hawley was linking the Board's willingness to negotiate a successor contract to the completion of the pending interest arbitration over the predecessor contract. We also agree with the Examiner that the statement, as so construed, did not violate the law.

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[6] Without citation or specific argument, Complainants have also asserted that Hawley's conversation with Lazewski constitutes a refusal to bargain in violation of Sec. 111.70(3)(a)4, Stats. Based on the facts and argument presented, we conclude that no violation of Sec. 111.70 (3)(a) 4, Stats., has occurred.

Remedy and Posting

Both of the foregoing violations are subject to the Commission's standard remedy in cases involving unlawful actions that have not resulted in monetary or other tangible losses which might implicate make-whole relief, i.e., a cease and desist order and the posting of a notice for thirty days.

We have also affirmed the additional violation found by the Examiner, i.e., that the District unilaterally required certain teachers to work additional hours during parent-teacher conferences in spring, 2004. The Examiner provided make-whole relief for that violation, which we have affirmed. However, the Examiner declined to order the District to post a notice regarding that violation, on the ground that it was a "limited" violation, "amounting to a contract violation." Examiner's Decision at 17-18. The Association seeks review of that portion of the Examiner's remedy and we agree that it is not in line with traditional Commission remedies.

First, the Commission does not withhold the standard posting in cases merely because the violation in question arises under Sec. 111.70(3)(a)5, Stats. (a breach of collective bargaining agreement). Second, while the violation shares some elements of a contract violation, it is actually not a contract violation but rather a refusal to bargain violation pursuant to Sec. 111.70(3)(a)4, Stats. Third, while none of the violations involved in the instant case would necessarily be labeled egregious, neither does this record reflect special mitigating circumstances that might warrant eliminating a standard portion of the remedy. Accordingly, we have ordered that the traditional notice be posted.

Dated at Madison, Wisconsin, this 21st day of April, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

Commissioner Paul Gordon did not participate

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