STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS,
CLEAR LAKE SCHOOL DISTRICT TEACHERS, Complainant,

vs.

SCHOOL DISTRICT OF CLEAR LAKE, Respondent.

Case 25
No. 65573
MP-4228

Decision No. 31627-B

Appearances:

Jesse L. Reschke, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, appearing on behalf of the Complainant.

Andrea M. Voelker, Weld, Riley, Prenn & Ricci, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Northwest United Educators, Clear Lake School District Teachers (Complainant) filed a complaint with the Wisconsin Employment Relations Commission on February 6, 2006, alleging that the Clear Lake School District (Respondent) had committed prohibited practices in violation of Sec. 111.70(3), Stats. On February 23, 2006, Respondent filed a Motion to Make the Complaint More Definite and Certain. On March 1, 2006, the Commission appointed Coleen A. Burns, as Examiner, to conduct a hearing on the complaint and issue Findings of Fact, Conclusions of Law and Order in the matter as provided in Secs. 111.70(4)(a) and 111.07, Stats. On March 10, 2006, a hearing was scheduled for April 14, 2006. On March 13, 2006, Complainant responded to the Motion to Make the Complaint More Definite and Certain by filing an amended Complaint. On March 27, 2006, Respondent filed a second Motion to Make the Complaint More Definite and Certain and a Motion to Dismiss. Complainant was provided with an opportunity to respond to these two Motions by April 5, 2006 and, on April 7, 2006, the Examiner issued an Order Denying Respondent's Pre-Hearing Motion to Dismiss the Complaint and Granting, in Part, Respondent's Second Motion to Make the Complaint More Definite and Certain. A

transcribed hearing was held in Clear Lake, Wisconsin on April 14 and May 17, 2006. The record was closed on August 2, 2006, following notification that the parties did not wish to file reply briefs.

Having considered the evidence and arguments of the parties, the Examiner now makes and issues the following Findings of Facts, Conclusions of Law and Order.

FINDINGS OF FACT

1. Northwest United Educators, hereafter Complainant or NUE, is the exclusive collective bargaining representative of certain teachers employed by the School District of Clear Lake. At all times material hereto, NUE Executive Director Jesse L. Reschke and NUE Unit Director Susan Jungerberg, an employee of the School District of Clear Lake, have acted on behalf of NUE for the purposes of collective bargaining. NUE has principal offices at 16 West John Street, Rice Lake, Wisconsin 54868.

2. School District of Clear Lake, hereafter Respondent or District, has principal offices at 1101 3rd Street SW, Clear Lake, Wisconsin 54005. At all times material hereto, District Administrator Mark Heyerdahl and District Principals Brad Ayer and Wayne Whitwam have acted on behalf of the District.

3. Master contracts covering the Clear Lake School District teachers must be submitted to the NUE Board for ratification. In 2002, the NUE Board tabled a ratification vote on master contracts that had been negotiated by the District and the local NUE negotiations team. On July 29, 2002, Heyerdahl issued the following:

> To: Teaching Staff
> From: Mark
> Re: Contract Status
> Date: July 29, 2002
>
> I am very disappointed to inform everyone that the status of the contracts for the 2001-2002 and 2002-2003 school years have changed significantly in the last week. The Board and the Clear Lake Education Association bargained in good faith and crafted a contract that was not perfect, but did offer positive aspects to each side of the negotiations. Each side agreed to the tentative contract settlement. After the contract was tabled by the NUE at the June meeting of the NUE Board of Directors, the Board of Education informed the Clear Lake Education Association, the Negotiating Team, and the NUE that if the NUE did not approve the contracts at the July meeting, the tentative settlement was withdrawn and the process for implementing the QEO would begin.
>
> I think it is important for everyone to understand that the NUE is the only Uniserve in the state that expects veto rights over bargaining agreements made and approved by its locals. The Board of Education does not go to the

trying to make a point (to who is extremely debatable) and in doing so is depriving Clear Lake teachers of raises and, in fact, forcing paybacks to the District.

The process that is set into motion is that District lawyers are applying for mediation right now. A mediation hearing will be set for some time in late October, November, or December. After deadlock is determined, the District will be allowed to implement a QEO which is a total package of 3.8% each year rather than the 4.34% and 5.43% total packages agreed to in the tentative agreement. Since negotiations have already been completed and both sides have already approved a tentative contract, deadlock is assured. Implementing a QEO requires that all benefits be maintained before placing any money on the salary schedule. After benefits are paid for, steps are paid for teachers not on the top of the salary schedule, and, if there is any money left, a percentage is added to the entire salary schedule. Modifications in the structure of the salary schedule or in the benefits are not allowed. Unfortunately, since health insurance costs have gone up so much over the last two years, the salary schedule must be reduced in each of the two years of the contract.

The first year of the contract, top of the scale teachers (11 teachers at the very top, 18.81 at the top of all lanes) only lose and have to repay $356 plus repay $64 of retirement and FICA. The second year of the contract will require significantly more payback, the amount of which cannot be determined until we know when the official implementation date will be.

The Board is very upset and disappointed that the negotiations have come to this point. However, since an agreement has been reached and approved by both sides, and then turned down by an outside party, there is no reason for further negotiations to occur. The Board negotiated in good faith and the Board believes that the Clear Lake Education Association Negotiating Team bargained in good faith. It is very unfortunate that 12-14 Board members out of 40 Board members for the NUE can decide that Clear Lake teachers do not deserve raises. This is particularly true when the Clear Lake Board of Education, the Clear Lake Education Association Negotiating Team, and the Clear Lake Education Association all have already agree to a contract.

If you have any questions, please feel free to contact me at any time.

Thereafter, the NUE Board ratified the master contracts that had been negotiated with the District. Jungerberg, who was not a member of the NUE team that bargained the 2001-2003 contracts, received a copy of this letter during the summer of 2002. Stephen Hagen retired from District employment in 2005. Prior to his retirement, he had approximately 25 years experience as NUE "Local Unit" negotiator; with ten or eleven years as chief negotiator. During Hagen's tenure as negotiator, most of the collective bargaining agreements were settled locally; all such agreements

were required to be submitted to "Rice Lake" for approval; and, although the initial proposals followed district office NUE guidelines, district office NUE was primarily used as a

resource for language clarification. As a High School teacher, Hagen worked in the same building as the District Administrator. Hagen and the District Administrator had frequent informal contacts in which concerns were addressed and information exchanged directly, rather than through fax or e-mails. Under the previous District Administrator, Hagen would prepare a proposed calendar; present it to the District Administrator; the District Administrator would verify with Hagen that the calendar met certain parameters, such as starting in the third week of August; and, if the calendar met those parameters, then the calendar would be accepted by the District Administrator. Under Heyerdahl's administration, either Hagen or Heyerdahl would draft a calendar in February or March; Hagen and Heyerdahl would discuss this draft; and Hagen and Heyerdahl would submit the agreed upon calendar to "their people." Hagen submitted the agreed upon calendar for a vote by the "Local Unit," but not the NUE Board. Jungerberg became NUE Unit Director in 2003 and was Unit Director during the negotiation of the successor 2003-2005 master contract; which was executed by the parties on March 8, 2004. Prior to the 2003-2005 bargain, Heyerdahl told Jungerberg that if the local unit brought the NUE representative to the bargaining table, the district will make sure their lawyer is there and the cost of having the lawyer there will come right off the top of the settlement. Prior to the NUE Board meeting at which the settlement on the 2003-2005 master contract was submitted to the NUE Board for approval, Heyerdahl had a telephone conversation with Jungerberg in which he stated that he expected the settlement to be brought up at that NUE meeting. After the NUE Board tabled this settlement, Heyerdahl had a telephone conversation with Jungerberg in which he stated that I expect you to get it passed.

4. Reschke began his employment with NUE in October of 2005. Thereafter, Sue Jungerberg sent the following e-mail:

> **From:** Sue Jungerberg
> **Sent:** Tuesday, November 15, 2005 9:31 AM
> **To:** Mark Heyerdahl
> **Subject:** Thursday post school
>
> Mark,
>
> Would you be available to meet Jesse Reschke, our new NUE representative on Thursday, November 17, at about 3:30 p.m.? He is coming for a meeting with our membership at 4:03 and I would like to make sure he gets a chance to meet you.
>
> Please let me know if this would work for you.
>
> Sue J.

Heyerdahl responded as follows:

From: Mark Heyerdahl
Sent: Thursday, November 17, 2005 1:18 PM
To: Sue Jungerberg
Subject: RE: Thursday post school

Sue –

That will be fine, although I may have to meet with staff briefly before I meet with Jesse. There is just one issue that Wayne or I may have to talk about briefly. Feel free to bring him over when he gets to Clear Lake.

Mark

The District scheduled an elementary staff meeting and a junior/senior high school staff meeting on November 17, 2005 for the purpose of discussing the health status of a District employee. Prior to these meetings, Heyerdahl met with Elementary Principal Ayer and Junior/Senior High School Principal Whitwam to discuss a District proposal to change an in-service day in the school calendar. The purpose of this change was to allow the District to participate in a joint in-service with other school districts that was to be held on January 11, 2006. At this meeting, Heyerdahl requested each Principal to describe the District's proposal at their November 17, 2005 staff meeting. Heyerdahl considered the calendar change proposal to be time sensitive because he needed to follow District procedures for notifying parents of a schedule change and his staff needed to know whether or not they had to plan for this joint in-service. When Heyerdahl met with Jungerberg and Reschke on November 17, 2005, he and Jungerberg discussed the District's calendar proposal. Heyerdahl described the proposal as changing the date of the in-service from January 16th to January 11th, in exchange for which the teachers would have an extra ½ day at Christmas and asked Jungerberg to discuss it at the NUE meeting that had been scheduled for that evening. On November 17, 2005, prior to the elementary staff meeting, Jungerberg had a discussion with her building principal, Ayer. At that time, Ayer described the District's calendar proposal by stating that the District wanted to change an in-service day in January to January 11th in exchange for ½ day off on December 23rd; told Jungerberg that Heyerdahl wanted the proposal brought up at the union meeting that night; and asked if he could discuss the proposal at the elementary school staff meeting. Jungerberg responded no and stated that the union had published an agenda; that the agenda had been distributed; and that the union could not add to the agenda at this point. Ayer replied ok, then I won't bring it up. Ayer did not discuss the District's calendar proposal at the elementary staff meeting on November 17, 2005. At the November 17, 2005 junior/senior high staff meeting, Whitwam communicated the District's calendar proposal to District employees represented by NUE for the purposes of collective bargaining; responded to staff questions regarding the calendar; indicated that the calendar proposal would probably require union approval prior to implementation; asked that the proposal be brought up at the union meeting scheduled for later that day; stated that he would like to have the proposal acted upon so that he could proceed with his planning should the proposal be approved; asked if anyone was going to the union meeting that night; and encouraged the staff to attend that union meeting

because a decision on the calendar proposal would be made at that meeting. High school teacher Steve Fredrickson polled the staff for the purpose of determining who favored the calendar change proposed by the District. Jungerberg discussed the District's

calendar proposal with the NUE "Local Unit" negotiating team and, thereafter, sent the following e-mail:

> **From:** Sue Jungerberg
> **Sent:** Monday, November 21, 2005 10:35 AM
> **To:** Mark Heyerdahl
> **Subject:** Change of Inservice Day
>
> Mark,
> The negotiation team (Tim Wyss, Josh Gange, Ann Miner, Todd Jilek and I) are requesting a copy of the itinerary for the January 11 inservice day and a written description of the changes in the calendar that we are being asked to approve.
>
> Thanks for your help!
> Sue Jungerberg

Jungerberg requested the above information so that she could discuss the District's proposal with the elementary staff. Jungerberg requested a written description of the District's proposed calendar changes so that everyone would be clear on what was being proposed and agreed to. At the time of her request, Jungerberg knew that the junior/senior high staff had indicated their approval of the District's calendar change proposal. Heyerdahl responded to Jungerberg by an e-mail that includes the following:

> Sent: Monday, November 21, 2005 11:20 AM
> Subject: RE: Change of Inservice Day
>
> Sue –
> We can't plan the inservice until we know we can attend. If you don't want a half day off, it's fine with the District. We just thought it might be nice given the short vacation this year.
> The change would be the inservice day moving form (sic) Monday, January 16 to Wednesday, January, 11.
> If this change is going to be made, we have to know by early next week so that the inservice can be planned.
>
> Mark

Heyerdahl cc'd Wyss, Gange, Miner and Jilek. Jilek then e-mailed Heyerdahl as follows:

> **From:** Todd Jilek
> **Sent:** Monday, November 21, 2005 12:12 PM
> **To:** Mark Heyerdahl

Subject: RE: Change of Inservice Day

Mark,

Our biggest question is, Will we still have a half a day to work on grades on the 11th? Also, will the end of the quarter move to the 10th?

Thanks,

Todd

Heyerdahl then e-mailed Jilek as follows:

From: Mark Heyerdahl
Sent: Monday, November 21, 2005 12:20 PM
To: Todd Jilek
Subject: RE: Change of Inservice Day

Todd –

As I told Sue, Wayne told the 7-12 staff, and Brad was supposed to tell the Elementary staff, you will still have a half day for grades and the quarter can end whenever you want it to end – probably the 10th. It doesn't matter.

Mark

Jilek then replied with the following e-mail:

From: Todd Jilek
Sent: Monday, November 21, 2005 12:24 PM
To: Mark Heyerdahl
Subject: RE: Change of Inservice Day

Ok, this was not told to the Elementary staff. Thanks.

Heyerdahl then replied with the following e-mail:

From: Mark Heyerdahl
Sent: Monday, November 21, 2005 12:26 PM
To: Todd Jilek
Subject: RE: Change of Inservice Day

Todd –

Even if Brad forgot, I told it to Sue. She knew.

Mark

Jilek responded with the following e-mail:

From: Todd Jilek
Sent: Monday, November 21, 2005 12:28 PM
To: Mark Heyerdahl
Subject: RE: Change of Inservice Day

Ok. Thanks.

On November 29, 2005, Heyerdahl sent the following e-mail to Jungerberg:

Subject: Half Day Off

Sue –

I signed the sheet you sent to me and I put it in the school mail back to you.

I find it interesting and disappointing that you felt the need to formalize such a simple issue that involved a free gift. A simple "Yes" would have been fine since the only substantive change was the half day off. I verified all of the points of your sheet when I talked to you about the change of dates for the inservice day.

I hope this does not signal a departure from the amicable, productive, and positive negotiation sessions that we have had for the ten years that I have been in Clear Lake and for many years before that with Ray Smith.

Let me know when you are ready to begin negotiations. The Board is ready at any time.

Mark

Heyerdahl cc'd Wyss, Gange, Miner and Jilek. Thereafter, members of the NUE Clear Lake Negotiations Team and Heyerdahl signed a written document that states as follows:

We agree to the following calendar changes:

1. One half day of school on Friday, December 23 for students and staff.
2. Change the January 16th In-service Day to January 11th with ½ of that day used to work on grades.
3. The school district will provide transportation to employees to another district if it is needed on the 11th.

4. The end of 2nd quarter will be changed from January 13th to January 10th.

Nue Clear Lake Negotiations Team:

Sue Jungerberg /s/ Sue Jungerberg
Todd Jilek /s/ Todd Jilek
Josh Ganje /s/ Josh Ganje
Ann Miner /s/ Ann Miner
Tim Wyss /s/ Tim Wyss

Clear Lake School District Administrator:
Mark Heyerdahl /s/ Mark Heyerdahl

The above agreement was drafted by the NUE Clear Lake Negotiations Team and was not presented to the NUE Board for approval prior to its execution.

5. Following their meeting on November 17, 2005, Reschke had two telephone conversations with Heyerdahl. The first telephone conversation was for the purpose of scheduling bargaining sessions on the successor agreement. As a follow-up to this conversation, Reschke and Heyerdahl exchanged the following e-mails:

From: Reschke, Jesse [mailto: ReschkeJ@weac.org]
Sent: Thursday, January 26, 2006 2:28 PM
To: Mark Heyerdahl
Subject: RE: Bargaining dates

Mark,

Some of my bargaining team members have come to me stating that the date we have selected for bargaining does not work. They are only available on Wednesdays. The Wednesdays that I have open are:

February 8th and probably the 22nd. Let me know if we can make these changes.

Thanks,

Jesse L. Reschke

Heyerdahl responded:

From: Mark Heyerdahl [MHeyerdahl@ClearLake.K12.WI.US]

Sent: Thu Jan 26 18:13:04 2006
To: Reschke, Jesse
Subject: RE: Bargaining dates

Jesse –

I'm sorry, but one of the Board team is a minister and has confirmation and a service on Wednesdays so they don't work at all. Mondays are the best.

Both of my people can make 4:00 or 4:30 on February 6 so that your bargaining team does not have to come back at night. We would like to get started.

Mark

Reschke responded:

From: Reschke, Jesse [mailto: ReschkeJ@weac.org]
Sent: Friday, January 27, 2006 4:07 PM
To: Mark Heyerdahl
Subject: RE: Bargaining dates

Mark,

I think we discussed the minister during our phone conversation. I understand why he would want Mondays and pass the info on to my team. However I would like to offer Wednesdays at the table as an alternative for some future bargains. If your team does not go for it we will at least be able to discuss it.

Thanks for the qyick (sic) reply. See you at the table.

Jesse

Heyerdahl responded:

From: Mark Heyerdahl [MHeyerdahl@ClearLake.K12.WI.US]
Sent: Wednesday, February 01, 2006 9:37 AM
To: Reschke, Jesse
Subject: RE: Bargaining dates

Jesse –

My Board Member, Randy Dean, has been on the negotiating team for

the Board for at least 11 years. Wednesdays are absolutely not a possibility. Randy has Confirmation classes followed by a church service. I don't understand why my teachers cannot meet right after school on a Monday (best) or a Tuesday.

I want to remind you that if you plan to attend the negotiations sessions, we will hire a negotiator for the Board, too. That may add additional complications to setting meeting times. The cost of the negotiator will be taken from the amount of money we have set aside for the settlement.

Neither side has had an outside negotiator at the table for the 11 years that I have been at Clear Lake and for at least a few years before that. I hope this positive, interactive relationship can continue.

Are we still on for February 6? 4:00 or 4:30 are best, but 7:00 is a possibility as well.

Mark

In the second telephone conversation, Reschke advised Heyerdahl that he was filing the instant complaint. At the time of hearing, the parties had met to negotiate the agreement to succeed their 2003-2005 agreement.

6. The District does not have a legitimate operational basis or valid business reason for Heyerdahl's February 1, 2006 e-mail statement to Reschke that "the cost of the negotiator will be taken from the amount of money we have set aside for the settlement." In his e-mail of February 1, 2006, Heyerdahl made statements to Reschke that reasonably indicate that a decision by Complainant to have Reschke attend contract negotiation sessions between the Respondent and Complainant will have an adverse impact upon these contract negotiations; including a lower monetary settlement for Complainant. Neither Heyerdahl, nor any other Respondent representative, refused to reduce the District's proposed calendar change to writing or threatened to repeal the proposed calendar change if NUE reduced the proposal to writing.

Based upon the foregoing Findings of Fact, the undersigned makes and issues the following

CONCLUSIONS OF LAW

1. Complainant Northwest United Educators, Clear Lake District Teachers, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

2. Respondent School District of Clear Lake is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

3. Complainant's decision to have, or to not have, NUE Executive Director Reschke, or any other NUE representative, attend Complainant's contract negotiation sessions with the Respondent involves the exercise of municipal employees' Sec. 111.70(2), Stats., right to bargain collectively through representatives of their own choosing.

4. Respondent's proposed calendar change primarily relates to wages, hours and conditions of employment and, thus, is a mandatory subject of bargaining.

5. Complainant has not established, by a clear and satisfactory preponderance of the evidence, that Respondent has engaged in unlawful individual bargaining, as alleged by Complainant.

6. Complainant has established, by a clear and satisfactory preponderance of the evidence, that Respondent Representative District Administrator Heyerdahl, by his February 1, 2006 e-mail statements, threatened a reprisal if NUE Executive Director Reschke attends contract negotiation sessions between Complainant and Respondent which would tend to interfere with, restrain or coerce employees in the exercise of their Sec. 111.70(2), Stats., rights and, therefore, Respondent has violated Sec. 111.70(3)(a)1, Stats.

7. Complainant has not established, by a clear and satisfactory preponderance of the evidence, that Respondent has otherwise violated Sec. 111.70(3)(a)1, Stats., or Sec. 111.70(3)(a)2 and 3, Stats., as alleged by Complainant.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

1. All of Complainant's claims that Respondent has violated Sec. 111.70(3)(a)1, Stats., with the exception of the claim giving rise to the violation found in Conclusion of Law Six, *supra*, are hereby dismissed.

2. All of Complainant's claims that Respondent has violated Sec. 111.70(3)(a)2 or 3, Stats., are hereby dismissed.

3. To remedy Respondent's violation of Sec. 111.70(3)(a)1, Stats., found in Conclusion of Law Six, *supra*, Respondent, its officers and agents, shall:

a) immediately cease and desist from threatening a reprisal toward Complainant if NUE Representative Reschke, or any other NUE Representative, attends contract negotiation sessions between Complainant and Respondent.

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

1) immediately notify the Clear Lake School District teachers represented by NUE for the purposes of collective bargaining by

posting, in conspicuous places on its premises where these employees work, copies of the Notice attached hereto and marked "Appendix A." This Notice shall be signed by the District Administrator or a Clear Lake School District School Board member and shall remain posted for a period of thirty (30) days. Reasonable steps shall be taken to ensure that said Notices are not altered, defaced or covered by other material.

2) notify the Wisconsin Employment Relations Commission, in writing and within twenty (20) days of the date of this Order, of the action taken to comply with this Order.

Dated at Madison, Wisconsin, this 31st day of October, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/
Coleen A. Burns, Examiner

"APPENDIX A"

NOTICE TO CLEAR LAKE SCHOOL DISTRICT TEACHERS REPRESENTED BY NORTHWEST UNITED EDUCATORS (NUE)

As ordered by the Wisconsin Employment Relations Commission and in order to remedy a violation of the Municipal Employment Relations Act, the School District of Clear Lake notifies you of the following:

> We will not threaten a reprisal if NUE Executive Director Jesse L. Reschke, or any other NUE Representative, attends contract negotiation sessions between NUE and the School District of Clear Lake.

SCHOOL DISTRICT OF CLEAR LAKE

By_____
Name

_____
Title

_____
Date

THIS NOTICE IS TO REMAIN POSTED FOR 30 DAYS AND IS NOT TO BE COVERED OR OTHERWISE OBSTRUCTED OR DEFACED.

NORTHWEST UNITED EDUCATORS

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Northwest United Educators, Clear Lake School District Teachers (Complainant) filed a complaint with the Wisconsin Employment Relations Commission on February 6, 2006, alleging that the Clear Lake School District (Respondent) had committed prohibited practices in violation of Sec. 111.70(3), Stats. Respondent denies that it has committed prohibited practices as alleged by the Complainant.

POSITIONS OF THE PARTIES

Complainant

Respondent violated Secs. 111.70)(3)(a)1, 2, and 3, Stats., by:

1) threatening to settle for less money if NUE used its Executive Director as its bargaining spokesperson;

2) bargaining directly with members of the bargaining unit regarding a mandatory subject of bargaining;

3) dominating or interfering with the administration of NUE by refusing to reduce a proposed change to writing and by threatening to repeal the proposed change if NUE reduced the proposal to writing.

NUE has the statutory right to bargain collectively through a representative of its own choosing. District Superintendent Heyerdahl has stated that if the NUE local did not bring Jesse Reschke to the table to be its lead bargainer, the District would be willing to offer more money in a settlement. Heyerdahl has the power to make this threat a reality. Under the rationale of JEFFERSON COUNTY, DEC. NO. 27266-A (Crowley, 1/93), it would be unrealistic to assume anything other than that such a statement would reasonably tend to interfere with employees rights to bargain collectively through representatives of their own choice.

The coercive nature of Heyerdahl's statement is illustrated by the fact that, prior to the 2005-07 bargain, the unit has not brought its Executive Director to the table even though it had desired to do so. In an era of declining enrollments, a repeated statement that there will be more money for represented employees if they do not assert their statutory rights is both a threat of reprisal and a promise of benefit.

The District's decision to hire or, to not hire, an outside negotiator has a budgetary impact which is of legitimate concern to the District. However, nothing requires the District to use an outside negotiator even if NUE uses its NUE Director as its bargaining representative. NUE is not responsible for any District decision to use, or to not use, an outside negotiator.

The school calendar is a mandatory subject of bargaining. Heyerdahl ordered the Principals of each building to raise the issue of calendar at a staff meeting. These meetings were held prior to the issue being discussed with NUE leadership.

In the past, calendar issues were settled via communication with the Unit Director. If time were of the essence, then NUE's leadership is as easily approached as the staff as a whole.

Shortly after the grades 7-12 staff meeting, Heyerdahl met with the NUE Director and NUE local representatives at a pre-scheduled meeting. There is no legitimate explanation for raising the calendar issue with staff.

It is not unreasonable for a bargaining team to request that a proposed change to the calendar, a mandatory subject of bargaining, be put in writing. It is unreasonable to chastise the bargaining unit for making such a request. To threaten to revoke such an agreement if the union requests to have the agreement formalized in writing contravenes the very essence of collective bargaining laws. The District was seeking to secure the calendar change being sought by the District by making every effort to pressure NUE into making this change.

Testimony indicates that, previously, Heyerdahl and Hagen negotiated issues without the involvement of other NUE members. As Unit Director of the NUE local, Sue Jungerberg has chosen to operate in a more formal manner. The District's disapproval of this change in operations has resulted in an intense effort to undermine the new operational manner of NUE.

The District has bargained with individuals, rather than with NUE. When matters do not proceed as the District would like, the District attacks the union in writing. When NUE asserts its right to choose its own bargaining representative, the District responds that it will offer less money for settlement. This conduct of the District establishes a pattern of anti-union behavior that cannot go unchecked.

The District's conduct violates Sec. 111.70(3)(a), Stats., and cannot be allowed to continue. In remedy of these violations, the Respondent should be ordered to cease and desist from the actions listed above; to post the decision regarding this complaint in local newspapers and in public places and keep it posted for a reasonable period of time; or to take any other action determined by the Examiner.

Respondent

At the staff meeting, which was called for other purposes, Principal Whitwam mentioned the possibility of joint in-service and encouraged teachers to attend the upcoming NUE meeting. Whitwam did not poll the teachers and there was no exchange of information. Rather, fellow teacher Steve Fredrickson asked the teachers what they thought about the proposal.

Negotiations involves more than relaying information. Principal Whitwam did not

circumvent the Union's authority in any way.

The law does not prohibit an employer from communicating information to individual employees so long as it communicates the same information to the NUE. Unit Director Jungerberg's principal mentioned the District's proposal when he met with Jungerberg earlier in the day. After school, Heyerdahl met with Jungerberg and NUE Executive Director Reschke to discuss the proposal in more detail.

The District negotiated the calendar change directly with the local bargaining unit, led by Jungerberg, due to the parties' long-standing practice of negotiating calendar solely at the local level. The Union successfully negotiated a modification to the 2005-2006 work calendar in November of 2005; which agreement was memorialized by a written agreement signed by both parties.

Heyerdahl's e-mail does not threaten any negative consequence or reasonably imply that he would refuse to sign a written agreement. That Heyerdahl did not refuse to reduce the 05-06 calendar change to writing is evidenced by the signed document detailing the changes.

Assuming that Jungerberg reasonably interpreted Heyerdahl's e-mail as meaning that he did not want to put the negotiated change in writing, so what? By questioning the need for a written agreement, when for at least eleven years previously such changes had not been reduced to writing, Heyerdahl has not violated Sec. 111.70(3)(a), Stats.

Heyerdahl never threatened to repeal the calendar agreement. It was reasonable for the District to emphasis the urgency of the situation by emphasizing that if the parties did not reach agreement by the following week, the in-service proposal would be dropped by the District. The Union has not established that conduct surrounding the negotiation of the calendar modifications constitute any violation of Sec. 111.70(3)(a), Stats.

In his e-mail of February 1, 2006, Heyerdahl provided information which he deemed to be relevant to the negotiations process. Several Commission decisions have held that it is not a violation of Sec. 111.70(3)(a), Stats., to provide information regarding financial impact if there is no hostility toward the exercise of protected rights. At no time did a District representative refuse to meet with the Union's chosen bargaining representative or threaten the Union in any way for bringing an attorney to the table. Throughout the e-mail, as well as other correspondence, Heyerdahl expressed that he was anxious to get going with negotiations and hoped that the relationship between the parties would be amicable and positive.

Heyerdahl's February 1, 2006 e-mail statements cannot be viewed in a vacuum. The totality of the circumstances establishes that there has been no violation of Sec. 111.70(3)(a), Stats.

The Union has the burden of proof to establish its prohibited practice claims. The Union has not met this burden. The complaint was processed in bad faith; for the sole purpose of harassing the District and Heyerdahl. The complaint should be dismissed in its entirety.

DISCUSSION

Applicable Legal Standards

Complainant asserts that Respondent has engaged in conduct that violates Sec. 111.70(3)(a)1, 2, and 3, Stats., by:

1) threatening to settle for less money if NUE used Executive Director Reschke as its bargaining spokesperson;

2) bargaining directly with members of the bargaining unit regarding a change in calendar that is a mandatory subject of bargaining;

3) dominating or interfering with the administration of NUE by refusing to reduce a proposed change in calendar to writing and by threatening to repeal this proposal if NUE reduced the proposal to writing.

Sec. 111.70(3)(a),Stats., provides that it is a prohibited practice for a municipal employer individually or in concert with others:

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

2. To initiate, create, dominate, or interfere with the formation or administration of any labor organization or contribute financial support to it, but the municipal employer is not prohibited from reimbursing its employees at their prevailing wage rate for the time spent conferring with the employees, officers or agents.

3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms of conditions of employment; but the prohibition shall not apply to a fair-share agreement.

. . .

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

> RIGHTS OF MUNICIPAL EMPLOYEES: Municipal employees 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. . .

An employer who violates Sec. 111.70(3)(a)2 and 3, Stats., derivatively violates Sec. 111.70(3)(a)1, Stats. Sec. 111.07(3), Stats., made applicable to these proceedings by Sec. 111.70(4)(a), Stats., provides that "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence."

As Examiner Marshall Gratz states in SCHOOL DISTRICT OF MARINETTE, DEC. NO. 31330-A (12/05); AFF'D BY OPERATION OF LAW, DEC. NO. 31330-B (WERC, 1/06):

> The Commission has recently held that allegations of independent violations of Sec. 111.70(3)(a)1, Stats., are to be analyzed by use of the four-part test outlined below regarding violations of Sec. 111.70(3)(a)3, Stats., "in cases . . . where the essence of the violation lies in the employer's motive for taking adverse action against one or more employees, such as claims of retaliation. In such cases, if lawfully motivated, adverse actions will not be found violative of (3)(a)1 "simply because it could be perceived as retaliatory." CLARK COUNTY, DEC. NO. 0361-B (WERC, 11/03) AT 15.
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> For other claimed violations of Sec. 111.70(3)(a)1, Stats., a prohibited practice occurs when employer conduct has a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Sec. 111.70(2) rights. WERC V. EVANSVILLE, 69 WIS.2D 140 (1975). If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employee(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights. BEAVER DAM SCHOOLS, DEC NO. 20283-B (WERC, 5/84); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84); JUNEAU COUNTY, DEC NO. 12593-B (WERC, 1/77). However, exceptions to that general rule have been recognized by the Commission in prior cases. For example, in recognition of the employer's free speech rights and of the general benefits of "uninhibited" and "robust" debate in labor disputes, employer remarks which inaccurately or critically portray the employee's labor organization and thus may well have a reasonable tendency to "restrain" employees from exercising the Sec. 111.70(2) right of supporting their labor organization generally are not violative of Sec. 111.70(3)(a)1, Stats., unless the remarks contain implicit or express threats or promises of benefit. ASHWAUBENON SCHOOLS, DEC NO. 14474-A (WERC, 10/77); JANESVILLE SCHOOLS, DEC NO. 8791 (WERC, 3/69). SEE GENERALLY, MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC NO. 27867-B (WERC 5/95) AND CEDAR GROVE-BELGIUM SCHOOLS, DEC. NO. 25849-B (WERC, 5/91).
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> It is also well established that employer conduct which may well have a reasonable tendency to interfere with employee exercise of Sec. 111.70(2) rights will generally not be found violative of Sec. 111.70(3)(a)1, Stats., if the

employer had a valid business reason for its actions. E.G., BROWN COUNTY, DEC NO. 28158-F (WERC, 12/96); CEDAR GROVE-BELGIUM SCHOOLS, DEC. NO. 25849-B (WERC, 5/91); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84); SEE GENERALLY, WAUKESHA COUNTY, DEC. NO. 14662-A (Gratz, 1/78) AT 22-23, AFF'D -B (WERC, 3/78) AND KENOSHA SCHOOLS, DEC. NO. 6986-C (WERC, 2/66) . . .

> . . . To establish a violation of Sec. 111.70(3)(a)3, Stats., it must be proved by a clear and satisfactory preponderance of the evidence that the municipal employee was engaged in protected, concerted activity; that the municipal employer's agents were aware of that activity; that the municipal employer, or its agents, were hostile towards that activity; and that the municipal employer's actions toward the municipal employee were motivated, at least in part, by its hostility toward the municipal employee's protected, concerted activity. E.G., CLARK COUNTY, SUPRA, AT 12, CITING MUSKEGO-NORWAY SCHOOLS V. WERB, 35 WIS.2D 540 (1967 AND EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122 WIS.2D 132 (1985).

As Examiner David Shaw states in MILWAUKEE COUNTY (SHERIFF'S DEPT), DEC. NO. 31428-A(7/06); AFF'D DEC. NO. 31428-B (WERC, 10/06):

> Evidence of hostility and illegal motive may be direct, such as with overt statements of hostility, or as is usually the case, inferred from the circumstances. See 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. See COOPERATIVE EDUCATION SERVICE AGENCY #4, ET AL., DEC. NO. 13100-E (Yaffe, 12/77)), AFF'D, DEC. NO. 13100-G (WERC, 5/79).
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> It is irrelevant that an employer has legitimate grounds for its action, if one of the motivating factors was hostility toward the employee's lawful, concerted activity. See LA CROSSE COUNTY (HILLVIEW NURSING HOME), DEC. NO. 14704-B (WERC, 7/78). In setting forth the "in-part" test, the Wisconsin Supreme Court noted that an employer may not subject an employee 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 actions. See MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. W.E.R.B., 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 employee due to lawful, concerted activity will not be encouraged or tolerated. See EMPLOYMENT RELATIONS DEPT. V. WERC, 122 Wis. 2D 132, 141 (1985).

The Sec. 111.70(3)(a)2 statutory proscription contemplates a municipal employer's active involvement in creating or supporting a labor organization. MENOMONIE JT. SCHOOL DISTRICT NO. 1, DEC. NO. 14811-C (McGilligan, 3/78). Sec. 111.70(3)(a)2 "interference" is of a magnitude which threatens the independence of a labor organization as the representative of employee interests." COLUMBIA COUNTY, DEC. NO. 22683-B (WERC, 1/87) "Domination"

involves the actual subjugation of the labor organization to the employer's will. A dominated labor organization is so controlled by the employer that it is presumably incapable of effectively representing employee interests. BARRON COUNTY, DEC. NO. 26706-A (Jones, 8/91); AFF'D BY OPERATION OF LAW, DEC. NO. 26706-B (WERC, 9/91).

In WAUKESHA COUNTY, DEC. NO. 30799-B (2/05), the Commission states:

> It is well established that the purpose of subsection (3)(a)2 (and 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. Thus, in cases finding "domination," the employer has essentially obliterated a union's ability to act independently of the employer's interests. RACINE UNIFIED S. D., DEC. NO. 15915-B (Hoornstra, 11/77). SEE GENERALLY, GORMAN AND FINKIN, BASIC TEXT ON LABOR LAW, 2D ED. (WEST, 2004) at 263-65. 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." ID. at 265. Examples of interference within the proscription of (3)(a)2 would be negotiating with one of the rival unions during the pendency of an election petition, DANE COUNTY, DEC. NO. 5915-B (WERC, 10/73), selecting the individuals to serve on a committee dealing with working conditions, or having a supervisor serve in a significant Union position, PROFESSIONAL POLICEMEN'S PROTECTIVE ASSOCIATION OF MILWAUKEE, DEC. NO. 12448-A (WERC, 10/74).

Allegation that the District Individually Bargained Calendar

Complainant argues that, on November 17, 2005, Respondent engaged in individual bargaining when it communicated a District calendar proposal to employees represented by NUE. Respondent denies that, on November 17, 2005, Respondent individually bargained calendar and argues that, under Commission law, an employer does not engage in individual bargaining when it tells their employees what they have offered to their union in the course of collective bargaining.

Individually bargaining with employees has been construed as a refusal to bargain under Sec. 111.70(3)(a)4, Stats. MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 16231-E (McGilligan, 10/81); AFF'D BY OPERATION OF LAW, DEC. NO. 16231-F (WERC,10/81). Although Complainant has not alleged a violation of Sec. 111.70(3)(a)4, Stats., to violate Sec. 111.70(3)(a)4, Stats., is to derivatively violate Sec. 111.70(3)(a)1, Stats.

Individual bargaining is defined as "negotiations which take place between the employe and the employer" and a municipal employer individually bargains in violation of its statutory duty

to bargain where it bypasses the collective bargaining representative of its employees and seeks to obtain a contract directly with employees. ST. CROIX COUNTY, DEC. NO. 28791-A (Crowley, 5/97); AFF'D BY OPERATION OF LAW, DEC. NO. 28791-B (WERC, 7/97). Under the law, direct dealing with individuals violates an employer's statutory the duty to bargain; without

any additional subjective showing of bad faith. NORTHCENTRAL TECHNICAL COLLEGE, DEC. NO. 31117-C (WERC, 2/06).

In ASHWAUBENON SCHOOL DISTRICT, DEC. NO. 14774-A (10/77), the Commission states:

> Just as employes have a protected right to express their opinions to their employers, 7/ so also do employers enjoy a protected right of free speech in public sector collective bargaining. 9/ Accordingly, employers have long enjoyed the right to tell their employes what they have offered to their union in the course of collective bargaining. 10/ However, notwithstanding labor relations policies modeled on the NLRA favor "uninhibited, robust, and wide-open debate in labor disputes," 11/ employers' statements must stop short of coercion, threats or interference with employe rights, 12/ and the employer statements must not constitute bargaining with the employes rather than their majority collective bargaining representative. 13/ (footnotes omitted)

In ST. CROIX COUNTY, *supra,* Examiner Crowley recognized that a municipal employer's free speech rights include the right to directly communicate to its employee's truthful comments as to its bargaining proposals that had been submitted to the bargaining representative. In RANDOM LAKE SCHOOL DISTRICT, DEC. NO. 29998-C (8/02), the Commission states:

> First, the April 1999 offer was individual bargaining with employees. Such bargaining is prohibited activity under the Municipal Employment Relations Act. CITY OF MARSHFIELD, DEC. NO. 28973-B (WERC, 3/98). If Respondent wants to seek to modify the wages, hours and conditions of employment of the employees Complainant represents for the purposes of collective bargaining over these matters, Respondent is obligated to make the offer only to Complainant. It is then up to Complainant to decide how to respond to the offer. While Respondent does have free speech rights and may elect to **subsequently** advise employees that it made the offer to Complainant, ASHWAUBENON SCHOOL DISTRICT, DEC. NO. 14774-A (WERC, 10/77), Complainant is the employees' collective bargaining representative. When Respondent bargained directly with the employees, it violated Sec. 111.70(3)(a)4, Stats.
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> Contrary to Respondent, when the employer ignores the collective bargaining representative and makes an offer directly to the employees, Complainant's authority and standing as the collective bargaining representative is clearly undermined and an employer thereby unquestionably has interfered with employees' Sec. 111.70(2), Stats., right "to bargain collectively through representatives of their own choosing . . ." . . . Thus, we reject Respondent's argument that the Examiner erred when she concluded Respondent's conduct also

violated Sec. 111.70(3)(a)1, Stats.

In NORTHCENTRAL TECHNICAL COLLEGE, *SUPRA*, the Commission clarified:

> . . . First, while it is true that, absent other indicia of bad faith, an employer does not engage in unlawful individual bargaining simply by telling "their employees what they have offered to their union in the course of collective bargaining," ASHWAUBENON SCHOOL DISTRICT, DEC. NO. 14774-A (WERC, 10/77), this presupposes that the employer's communication with the union preceded the employer's communication with the individuals, so as not to interfere with the union's ability to provide a considered response to the employer's proposal. Here the communication was at best simultaneous. . .

On November 17, 2005, the only District representative to have direct communication with employees regarding the District's calendar proposal is Junior/Senior High School Principal Wayne Whitwam. Whitwam recalls that he held a staff meeting on November 17, 2005 for the purpose of discussing the health status of a staff member; that, at this, staff meeting, he discussed the District's calendar proposal; that he encouraged the staff to go to the union meeting because there was going to be a decision on the calendar; that he received feedback that, basically, his staff was not going to the union meeting; that he asked if anyone was going; and that two people responded that they were going. Whitwam states that teacher Steve Fredrickson polled the teachers to determine who thought that the proposed calendar change was a good idea.

District teacher Steve Fredrickson recalls that, at the November 17, 2005 junior/senior high staff meeting, the calendar proposal was to switch or trade a day for a day and receive a ½ day off in the process and that he (Fredrickson) polled the teachers to determine who would be in favor of the proposed change. Fredrickson recalls that someone asked who was going to the union meeting, but is not sure if that someone was Whitwam.

District teacher Richard Granger recalls that the November 17, 2005 staff meeting was called by Whitwam; that the "bulk" of the discussion was to discuss the health status of a fellow staff member; and that "roughly" a dozen teachers attended this meeting. Granger further recalls that Whitwam discussed a plan to alter the calendar; mentioned that the plan would probably require union action or approval prior to implementation; mentioned that there was a union meeting scheduled for 4:00 p.m. that day; asked that the plan be brought up at the union meeting; and indicated that he would like the calendar proposal acted upon so that he could proceed with the planning that would be required if the plan were to be approved. Granger states that Whitwam asked if anyone was going to the union meeting; that a couple of people raised their hands; and that Whitwam acknowledged those that raised their hands, but that Granger could not recall what was said at that time.

In summary, at the junior/senior high staff meeting of November 17, 2005, Whitwam communicated the District's calendar proposal to employees who were represented by NUE for the purposes of collective bargaining. At that time, Whitwam recognized that the proposal was

subject to union action; did not take any position with respect to the merits of the proposal; and did not ask the staff to provide any response to the proposal.

Respondent asserts that, on November 17, 2005, Elementary Principal Ayer and District Administrator Heyerdahl discussed the District's calendar proposal with NUE Unit Director Jungerberg. Jungerberg's testimony regarding her discussion with Ayer is not in dispute.

Jungerberg recalls that, on November 17, 2005, prior to the elementary staff meeting, she was approached by her building principal, Ayer. Jungerberg further recalls that, at that time, Ayer "somewhat" described the District's calendar proposal by explaining that the District wanted to change an in-service day in January to January 11th and, in exchange, the teachers would receive a half-day off on December 23rd. According to Jungerberg, she was also told that Heyerdahl wanted the proposal brought up at the union meeting that night. Jungerberg recalls that, when Ayer asked if he could discuss the proposal at the elementary school staff meeting, she responded no and stated that the union had published an agenda; that the agenda had been distributed; and that the union could not add to the agenda at this point. Jungerberg states that Ayer replied ok, then I won't bring it up. Ayer did not discuss the District's calendar proposal at the elementary staff meeting on November 17, 2005.

Heyerdahl and Jungerberg do not have the same recollection regarding the events of November 17, 2005. According to Heyerdahl, on or about November 17th, 2005, the District decided to propose a calendar change that would allow the District to participate in a joint in-service with other districts. As Complainant argues, the District's proposed calendar change primarily relates to wages, hours and conditions of employment and, thus, is a mandatory subject of bargaining.

Heyerdahl recalls that, on or about November 17, 2005, he was aware that a union meeting had been scheduled for that evening. Heyerdahl further recalls that he decided that he would outline the District's calendar proposal to Jungerberg so that she could take it to the union meeting for discussion and that he would have each of his Principals describe the proposal at their November 17, 2005 staff meetings so that the staff could make a decision on the proposal at the union meeting to be held later that day. According to Heyerdahl, the District's proposal was time sensitive because time was needed to follow District procedures for notifying parents of a schedule change and his staff needed to know whether or not they had to plan for the joint in-service; which was to be held on the following January 11th.

According to Heyerdahl, on November 17, 2005, he met with Jungerberg and NUE Executive Director Reschke. This is consistent with Jungerberg's e-mail of November 15, 2005; which requests a meeting "at about 3:30 p.m."

Heyerdahl recalls that, at this meeting, he described to Jungerberg the outlines of moving the in-service day; that Jungerberg had a couple of quick questions on how it would be handled; that Heyerdahl described the proposal as changing the date of the in-service from January 16th to January 11th, in exchange for which the teachers would have an extra ½ day at Christmas. Heyerdahl further recalls that he asked Jungerberg to discuss it at the union meeting that evening. In his e-mail of November 29, 2005, Heyerdahl states "I verified all of

the points of your sheet when I talked to you about the change of dates for the inservice day."

Reschke recalls meeting with Heyerdahl in November of 2005, but does not identify the date. Reschke neither confirms, nor denies, the calendar change discussions recalled by Heyerdahl.

At hearing, Jungerberg testified as follows:

Q: . . . how did you know that the superintendent wanted any type of change having to do with in-service?

A: Well, Mr. Ayer, my principal, the day of the meeting on November 17th began to explain it to me and I must have had a phone conversation with Mr. Heyerdahl about it. (T. at 20)

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Q: . . . Did you meet with District Administrator Heyerdahl on November 17th?

A: No.

Q: You did not?

A: I don't recall meeting with him.

Q: Okay. So to the best of your recollection, there was no communication between you and the district administrator in person regarding this issue?

A: No. (T. II at 22)

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Q: . . . did you have discussions with Mr. Heyerdahl regarding this calendar change: You testified it was on November 17th you had discussions with him?

A: I don't recall a discussion with him, but at some point we must have had some interaction about it. I know there was interaction over E-mail. (T. II at 22-23)

Jungerberg's testimony reasonably indicates that she recalls having contact with Heyerdahl on November 17, 2005 regarding the calendar proposal, but that she does not recall the specific nature of that contact. Neither Jungerberg's testimony, nor any other record evidence, provides a reasonable basis to discredit Heyerdahl's testimony regarding his discussions with Jungerberg on November 17, 2005.

Prior to his retirement, Stephen Hagen had been an NUE "Local Unit" representative for at least twenty-five years. According to Hagen, under the previous District Administrator, Hagen would prepare a proposed calendar; present it to the District Administrator; the District Administrator would verify with Hagen that the calendar met certain parameters, such as starting in the third week of August; and that, if the calendar met those parameters, then the calendar would be accepted by the District Administrator.

Hagen recalls that, under Heyerdahl's administration, either he or Heyerdahl would draft a calendar in February or March; he and Heyerdahl would discuss this draft; and that he and Heyerdahl would submit the agreed upon calendar to "their people." Hagen further recalls submitting the agreed upon calendar for a vote by the "Local Unit," but does not recall any involvement by the NUE Board. Nor does Hagen recall ever bringing the calendar to the bargaining table.

Heyerdahl's testimony regarding the negotiation of the calendar is consistent with that of Hagen. Heyerdahl states that there was not a signed agreement reflecting the calendar. However, as reflected in the executed 2003-2005 collective bargaining agreement, the calendar was part of the collective bargaining agreement that was submitted to the NUE Board for its approval and, thereafter, signed by the parties.

Although the "practice" of resolving calendar issues that was followed by Hagen and Heyerdahl is not binding upon either party, it does provide context for the negotiations with Jungerberg. Under the "practice," the District Administrator presented and discussed calendar issues with the "Local Unit" spokesperson, *i.e.*, Hagen, and the "Local Unit" members were not involved until the "Local Unit" spokesperson and the District Administrator had reached a tentative agreement.

The District's argument that time constraints compelled quick action do not explain why the District Administrator could not have met with Jungerberg on, or before, November 17, 2005; explained the calendar proposal to Jungerberg; and then made his request to have the proposal discussed at the staff meeting to be held on November 17th; without referring the issue to either Principal for discussion at their staff meeting. Heyerdahl's departure from the "practice" previously followed by Hagen and Heyerdahl reasonably gives rise to an inference that, in presenting the calendar proposal at the junior/senior high staff meeting, Respondent was individually bargaining.

Such inference, however, is countered by the evidence of Whitwam's conduct during the November 17th junior/senior high staff meeting. It is also countered by Jungerberg's recollection that Ayer told her that Heyerdahl wanted the proposal brought up at the union meeting; Heyerdahl's testimony that he discussed the District's calendar proposal with Jungerberg and asked Jungerberg to discuss it at the union meeting; and the evidence that Heyerdahl, thereafter, responded to questions from the NUE "Local Unit" negotiation team and signed a written agreement to change the calendar that had been drafted by the "Local Unit" negotiation team.

Summary

On November 17, 2005, two of the District's representatives, Ayers and Heyerdahl, communicated the District's calendar proposal, which was a mandatory subject of bargaining, to NUE representative Jungerberg. It is not evident that these communications occurred after the time that Whitwam communicated the District's calendar proposal to NUE bargaining unit employees at the junior/senior high staff meeting held on November 17, 2005. The evidence of Whitwam's conduct during the November 17, 2005 junior/senior high staff meeting does not indicate that Whitwam was seeking to bypass NUE as the collective bargaining representative

of District employees and seeking to obtain a contract directly with employees. Complainant has not established, by a clear and satisfactory preponderance of the evidence, that Whitwam, or any other District representative, has bargained directly with individual employees on the District's calendar change proposal.

Allegation that Respondent Threatened to Settle for Less Money if NUE Executive Director Reschke is NUE's Bargaining Spokesperson

Reschke commenced employment as NUE Executive Director in October of 2005. He first met Heyerdahl in November of 2005. Reschke recalls that this meeting occurred in Heyerdahl's office; that Jungerberg was present during this meeting; and that there was five or ten minutes of conversation.

Reschke recalls that, after his November meeting with Heyerdahl, he and Heyerdahl then had two telephone conversations. Reschke states that, in the first conversation, he informed Heyerdahl that he would be representing the local unit in contract negotiations and sought to schedule a date for these negotiations. Reschke does not relate what, if anything, that Heyerdahl may have said during these telephone conversations.

Following the first telephone conversation, Reschke and Heyerdahl exchanged e-mails regarding the scheduling of bargaining sessions. During these exchanges, Reschke stated that his bargaining team was only available on Wednesdays and Heyerdahl explained why the District was not available to meet on Wednesdays. On February 1, 2006, Heyerdahl sent an e-mail to Reschke that includes the following:

> I want to remind you that if you plan to attend the negotiations sessions, we will hire a negotiator for the Board, too. That may add additional complications to setting meeting times. The cost of the negotiator will be taken from the amount of money we have set aside for the settlement.
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> Neither side has had an outside negotiator at the table for the 11 years that I have been at Clear Lake and for at least a few years before that. I hope this positive, interactive relationship can continue.

As Examiner David Shaw states in CITY OF OSHKOSH, DEC. NO. 29791-A (11/00); AFF'D BY OPERATION OF LAW, DEC. NO. 29791-B (1/01):

The Commission has previously explained that

> . . .it is important to acknowledge certain realities of the collective bargaining process which the facts of this case demonstrate. In our view, it is generally appropriate for one party to advise the other during the collective bargaining process of the potential negative consequences if a proposal or position ultimately is included in the collective bargaining agreement. Thus, for instance, if an employer advises a union that acceptance

> of the union's wage demands might or would require the layoff of employes and the totality of the circumstances surrounding the employer's statement establish that the employer is not motivated by a desire to threaten employes for the exercise of their right to collectively bargain, that employer is acting in a legal manner consistent with the collective bargaining process. The employer in such circumstances is not seeking to deter employes from exercising their rights but rather seeking to persuade employes to change the position they are taking at the collective bargaining table when exercising their rights. Simply put, parties are free to take whatever positions they wish at the collective bargaining table, but cannot expect to be insulated from any consequences if they are successful in having those proposals become part of the collective bargaining agreement. CITY OF BELOIT, DEC. NO. 27779-B (WERC, 9/94).

More recently, the Commission reiterated that view in GREEN LAKE COUNTY, DEC. NO. 28792-B (WERC, 12/97). In Footnote 1/ of its decision in that case, the Commission again explained its rationale:

> For instance, in CITY OF BELOIT, Dec. No. 27779-B (WERC, 9/94), we concluded that the municipal employer did not violate MERA by advising employes of the potential negative consequences which would be produced if the union successfully bargained a contract including the proposal then being sought by the union. Such a comment does not reflect hostility toward the exercise of the right to bargain a contract but rather states the response to a result. So long as the response is based on the employer's understanding of the impact of a result on its operation, and not on hostility toward the exercise of the right to seek the result, no violation of law is present.

Complainant's decision to have, or to not have, NUE Executive Director Reschke, or any other NUE representative, attend Complainant's contract negotiation sessions with the Respondent involves the exercise of municipal employees' Sec. 111.70(2), Stats., right to bargain collectively through representatives of their own choosing. Statements contained in Heyerdahl's February 1, 2006 e-mail indicate that Complainant's decision to have Reschke attend the contract negotiations will have an adverse impact upon contract negotiations, *i.e.*, a lower monetary settlement due to the fact that the District will hire a negotiator and deduct the cost of the District's negotiator from the amount of money set aside for Complainant's contract settlement.

It not being evident that the District has set aside all of its resources for the contract settlement with NUE, the District has no legitimate operational basis or valid business reason for Heyerdahl's statement that the cost of the District's negotiator will be taken from the amount of money that the District has set aside for this contract settlement. This statement of Heyerdahl's is not a response to the result of the exercise of a protected right, but rather, is a response toward the exercise of a protected right and reflects hostility toward the exercise of this protected right. As Complainant argues, Heyerdahl's e-mail of February 1, 2006 contains statements that threaten a reprisal for the exercise of rights guaranteed by Sec. 111.70(2), Stats.

Allegation that the District Dominated or Interfered With the Administration of NUE by Refusing to Reduce Proposed Calendar Changes to Writing and Threatening to Repeal the Proposed Change if NUE Reduced the Proposal to Writing

During the November 21, 2005 exchange of e-mails, Jungerberg, in her capacity as a member of the "Local Unit" negotiations team, reasonably requested that Heyerdahl provide "a written description of the changes in the calendar that we are being asked to approve." Jungerberg reasonably concluded that Heyerdahl's responses indicated that he did not want to put the proposal in writing. However, contrary to the argument of Complainant, Heyerdahl never refused to put the proposal in writing.

Rather, during the ensuing e-mail exchange, Heyerdahl crabbed about having to provide the requested information in written form when he had already provided the information orally to Jungerberg, Ayer and Whitwam and about having to "formalize" the subsequent agreement. Heyerdahl provided information on the District's calendar proposal; albeit in a piecemeal fashion. That information provided by Heyerdahl was sufficient for the purposes of collective bargaining is established by the fact that the NUE "Local Unit" negotiations team drafted an agreement on the calendar change proposal that was signed by Heyerdahl and the "Local Unit" negotiations team.

During this exchange of e-mails, Heyerdahl also made the gratuitous comment that "If you don't want a half day off, it's fine with the District. We just thought it might be nice given the short vacation this year."

Jungerberg interpreted this gratuitous comment to be a threat, *i.e.*, don't push too hard or you won't get the proposed change. Complainant argues that this was a threat to repeal the

proposed change if NUE reduced the proposal to writing.

Heyerdahl expressly conditions the calendar proposal on only one factor, *i.e.*, "we have to know by early next week so that the inservice can be planned." A subsequent and nearly immediate e-mail message from Heyerdahl to Jilek confirms that the proposal is still on the table and does not attach any conditions.

Heyerdahl's gratuitous comment indicates exasperation with the fact that the union has not yet made a decision on the District's calendar proposal. Heyerdahl's November 21, 2005 e-mail to Jungerberg cannot be reasonably construed to contain a threat to repeal the proposed change if NUE reduces the proposal to writing.

Alleged Hostility

Under Sec. 111.07(14), Stats., the right of any person to proceed on a complaint of prohibited practices "shall not extend beyond one year from the date of the specific act or unfair labor practice alleged." As Examiner Millot states in TEAMSTERS UNION LOCAL 563, DEC. NO. 30637-A (12/03); AFF'D BY OPERATION OF LAW, DEC. NO. 30637-B (WERC, 1/04):

> . . . When addressing events that fall outside the statutory period, the Commission has adopted the principles enunciated by the United States Supreme Court in LOCAL LODGE NO. 1424 V. NATIONAL LABOR RELATIONS BOARD (BRYAN MFG. CO.), 362 US 411 (1960) at 418. MILWAUKEE AREA TECHNICAL COLLEGE, ET AL., DEC. NO. 28562-B, (Crowley, 12/95). The Court articulated that there are two situations wherein further consideration is warranted. Those situations include:
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> > The first is one where occurrences within the . . . limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose (the statute of limitations) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

Under the above stated principals, Heyerdahl's letter of July 29, 2002, as well as Heyerdahl's statements to Jungerberg that were made prior to the 2003-2005 bargain, may not be examined for the purpose of determining whether or not Respondent has violated MERA. They may, however, be examined for evidence of union animus.

In this letter, Heyerdahl refers to NUE, which is the exclusive bargaining representative, as "an outside party." Such denigration of NUE's legal status provides a reasonable basis to infer hostility toward NUE. Hostility toward NUE may also be inferred by Heyerdahl's statements to Jungerberg and Reschke that contain a threat of reprisal if an NUE representative attends contract negotiation sessions and Heyerdahl's statement to Reschke implying that Reschke is an "outside negotiator" and that not having an "outside negotiator" at the bargaining table creates a positive, interactive relationship.

In summary, there is evidence that reasonably gives rise to an inference that Heyerdahl is hostile toward the exercise of protected, concerted activity. Complainant, however, has not established, by a clear and satisfactory preponderance of the evidence, that, in the conduct complained of, Respondent has taken any action that is motivated, in any part, by hostility toward protected, concerted activity.

Conclusion

Complainant asserts that Respondent has engaged in conduct that violates Sec. 111.70(3)(a)1, 2, and 3, Stats., by:

1) threatening to settle for less money if NUE used Executive Director Reschke as its bargaining spokesperson;

2) bargaining directly with members of the bargaining unit regarding a change in calendar that is a mandatory subject of bargaining;

3) dominating or interfering with the administration of NUE by refusing to reduce a proposed change in calendar to writing and by threatening to repeal this proposal if NUE reduced the proposal to writing.

Complainant has not established, by a clear and satisfactory preponderance of the evidence, that Respondent has bargained directly with members of NUE's bargaining unit on a change in calendar in violation of Respondent's statutory duty to bargain. Respondent has not refused to reduce a proposed change in calendar to writing and did not threaten to repeal the proposed calendar change if NUE reduced the proposal to writing, as claimed by Complainant.

The clear and satisfactory preponderance of the evidence establishes that, in his e-mail of February 1, 2006, Respondent representative Heyerdahl made statements indicating that a Complainant decision to have NUE Executive Director Reschke attend the contract negotiation sessions between Complainant and Respondent would have an adverse impact upon contract negotiations, *i.e.*, a lower monetary settlement. Such statements contain a threat of reprisal which would tend to interfere with, restrain or coerce employees in the exercise of their Section (2) rights. By this conduct of its representative Heyerdahl, Respondent has violated Sec. 111.70(3)(a)1, Stats.

Complainant has not established, by a clear and satisfactory preponderance of the evidence, that Respondent has committed any other violation of Sec. 111.70(3)(a)1, Stats., as

claimed by Complainant. Nor has Complainant established, by a clear and satisfactory preponderance of the evidence, that Respondent has violated Sec. 111.70(3)(a)2 or 3, Stats., as claimed by Complainant. The appropriate remedy for the established violation of Sec. 111.70(3)(a)1, Stats., is to order the Respondent to cease and desist from such violation and to post a notice.

Dated at Madison, Wisconsin, this 31st day of October, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/
Coleen A. Burns, Examiner

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