STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JUDY MICHAELS, Complainant,

vs.

RHINELANDER SCHOOL DISTRICT, Respondent.

Case 60
No. 65408
MP-4212

Decision No. 31748-A

Appearances:

Mr. Ted Lewis, Northern Tier UniServ, 1901 West River Street, P.O. Box 1400, Rhinelander, Wisconsin 54501-1400, appearing on behalf of the Complainant, Judy Michaels.

Attorney Daniel J. Mallin, Staff Counsel, Wisconsin Association of School Boards, Inc., 122 West Washington Avenue, Madison, Wisconsin 53703, appearing on behalf of the Rhinelander School District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On December 16, 2005, Judy Michaels filed a complaint of prohibited practices alleging that the Rhinelander School District had violated Secs.111.70(3)(a)1 and 3, Stats., by suspending her following an interaction involving union business during work time with her Association Vice-President. Informal attempts to resolve the matter failed and the Commission, on July 31, 2006, appointed a member of its staff, Steve Morrison, to act as Examiner.

Respondent's answer was filed on July 7, 2006 and, pursuant to notice, a hearing on the matter was held on September 14, 2006. At hearing the parties stipulated on the record that the sole legal issue to be determined in this matter is "whether the Rhinelander School District unlawfully interfered with the lawful and/or protected concerted activity (of the Complainant) by disciplining Judy Michaels for her conduct on October 20, 2005." The stipulation further states, in effect, that the fact that the Complainant abandoned a prior

grievance relating to the same set of operative facts which form the basis for this Complaint shall not act as a bar to this action and any issue relating to "just cause" is moot. Briefing was completed on December 7, 2006 marking the close of the record.

The Examiner has considered the record evidence and arguments submitted by the parties. On the basis of the record, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Complainant, Judy Michaels, hereinafter referred to as Complainant or Ms. Michaels, is an individual residing in Rhinelander, Wisconsin.

2. The Rhinelander School District, hereinafter referred to as the Employer or the District, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., with its principal offices located at 315 South Oneida Avenue, Rhinelander, Wisconsin 54501. The Rhinelander School Board, hereinafter Board, is the elected governing body of the District.

3. Rhinelander Educational Support Personnel, hereinafter referred to as the Association, is a labor organization with offices located at 1901 West River Street, P.O. Box 1400, Rhinelander, Wisconsin 54501-1400. The Association is not a party to this proceeding. The Association and the Employer have been, at all times material herein, parties to a collective bargaining agreement covering Library Media Paraprofessionals. Article 3, Sec. A of the contract provides as follows:

> Article 3
>
> Association Rights and Activities
>
> A. Association Business: Except as otherwise herein expressly permitted or agreed to by the Board, Association business shall be transacted outside of the normal working hours. Grievances may not be processed by an employee during working hours unless mutually agreed upon otherwise.
>
> . . .

4. The Complainant is a Library Media Paraprofessional employed by the District and at all times material to this Complaint was normally assigned to the Pelican Elementary School library. At all times material hereto she was a member of the Association. At the time of the incident which forms the basis of this Complaint she had been temporarily assigned to work at the high school media center. Her temporary assignment was occasioned by a prior discipline resulting from verbal confrontations with her supervisor and other staff members at the Pelican School in August, 2005. The District temporarily moved Ms. Michaels to the high

school as a "cooling off" measure and to develop an "improvement plan" to aid her in dealing with her issues as well as a plan for her eventual return to the Pelican School.

5. On October 19, 2005, a meeting was held for the purpose of issuing Ms. Michaels a letter of reprimand resulting from the events outlined in Finding of Fact 4 and to discuss the circumstances under which she would return to her duties at Pelican School. In addition to Ms. Michaels, the meeting was attended by District Human Services Director Chuck Radtke, Association President Terri Angell, and Association Vice-President Mary Weisshahn. (Ms. Weisshahn is also employed as a Library Paraprofessional and is a co-worker of Ms. Michaels at the high school library.) During this meeting Mr. Radtke made a joke or two and Ms. Angell and Ms. Weisshahn laughed along with him. This made Ms. Michaels feel uncomfortable and caused her to feel that she was not being treated in an appropriate manner by her Association representatives. During this meeting Mr. Radtke advised Ms. Michaels that another meeting had been scheduled for October 21, 2005, two days hence. This meeting was to include other individuals concerning Ms. Michaels' return to Pelican School and was intended to review Ms. Michaels' "improvement plan" prior to her return. Mr. Radtke also suggested that Ms. Michaels include Ms. Weisshahn in the meeting on the 21st as her representative.

6. On October 20, 2005, the day after the meeting referenced in Finding of Fact 5, Ms. Michaels and Ms. Weisshahn were working in the high school library. At roughly 10:30 a.m. as Ms. Weisshahn approached her computer to begin working, Ms. Michaels called to her and motioned with her index finger for her to come to talk with her. This encounter was not planned or scheduled in advance. Ms. Weisshahn complied and was informed by Ms. Michaels that she, Weisshahn, was not to attend the meeting with Ms. Michaels the following day. Ms. Weisshahn told Ms. Michaels that she felt she (Ms. Michaels) should have representation at the meeting and reminded her that Mr. Radtke had suggested she have representation. Ms. Michaels then lost her temper and shook her finger at Ms. Weisshahn stating the she did not want Ms. Weisshahn at the meeting and that it was her right not to be represented. During this time she became louder, aggressive and more hostile and began to shake her finger at Ms. Weisshahn more forcefully. As Ms. Michaels' intensity grew Ms. Weisshahn became aware of children in close proximity (10-15 feet) and backed away from the situation by telling Ms. Michaels that she would not attend the meeting. According to Ms. Weisshahn, Ms. Michaels' tone of voice was "hostile and scary." The confrontation lasted somewhere between 30 seconds and 2 minutes. Ms. Weisshahn did not provoke the incident with Ms. Michaels and felt that it was a continuance of Ms. Michaels' past behavior. Following the verbal confrontation with Ms. Michaels, Ms. Weisshahn felt shocked, threatened and scared. She was very upset for the rest of the day and her workday was disrupted. The events of that exchange continue to bring back unpleasant memories for Ms. Weisshahn. She called the Association President, Terri Angell, who advised her to inform management about the incident, which she did.

7. The conversation between Ms. Michaels and Ms. Weisshahn on October 20, 2005 took place during normal working hours and related strictly to Association business. The conversation was not expressly permitted or agreed to by the Board.

8. Nancy Hasbargas, a Library Media Paraprofessional working in the same area in which the Michaels/Weisshahn confrontation took place, observed the incident. At the time students were working about 15 feet away from the confrontation and were close enough to see and hear the event. She observed Ms. Michaels become very upset and shake her finger, getting angrier and louder as the confrontation continued and she heard the conversation relate to union representation at the next day's meeting. According to Ms. Hasbargas, Ms. Michaels was "pretty enraged". Ms. Weisshahn did not raise her voice and looked "dumbfounded" and told Ms. Michaels that she would not appear at the meeting the next day. Following the incident Ms. Weisshahn was visibly upset, as was Ms. Hasbargas, and Ms. Weisshahn's voice and hands were shaking. It was difficult for them to refocus and get back to work. The incident lasted a couple of minutes. While co-workers in the library have had brief conversations during work hours in the past about non-business related events like Packer games and weekend activities, they have not been upset about them nor have the conversations disrupted work activity. The workers in the library are "very adamant" about not "talking union" during work hours due to contractual prohibitions against doing so.

9. Nancy Andrews is the high school librarian media specialist and the District library leader. She supervises the library media paraprofessionals, including Michaels, Weisshahn and Hasbargas, and provides for the proper work environment for them. She has responsibility to organize and assign tasks for them and to ensure that those tasks are completed. Shortly following the confrontation with Ms. Michaels, Ms. Weisshahn came to Ms. Andrews' office and reported the incident. She was crying, she was upset and she was shaking. Ms. Andrews described her as being emotional and distraught. Ms. Andrews told her to take some time and to calm herself. Ms. Andrews was generally concerned about conversations unrelated to business taking place, especially around the students, and was concerned that the incident with Ms. Michaels and Ms. Weisshahn took place near students. Ms. Andrews asserts that discussing union matters in the workplace during work hours is prohibited. She restricts those conversations to breaks and lunch periods or off-work hours so as to ensure that her workers are doing their jobs and are not distracted therefrom. She asserts that she is particularly sensitive to discussions about union matters due to the fact that she has a union Vice-President, Ms. Weisshahn, working in her office and due to the fact that she considers union discussions in the workplace to be in violation of the collective bargaining agreement but states that she treats union discussions and personal discussions equally. Her focus is on work productivity.

10. Charles Radtke is the Assistant Superintendent of the District and has, among other duties, responsibilities for maintaining employee personnel files. He also has responsibilities relating to the grievance procedures associated with the Association contract. In this regard he works with other supervisors in the investigation and rendering of employee discipline and was involved in the investigation and discipline following the

Michaels/Weisshahn confrontation of October 20, 2005, as well as the events which led to the discipline referenced in finding of fact # 4 which resulted in the meeting of October 19, 2005 referenced in Finding of Fact # 5. During his investigation into the August, 2005 incident he met with Ms. Michaels and expressed his concerns, as well as the concerns of other co-workers involved in that incident, about her inappropriate conduct in the form of verbal abuse and disrespectful behavior to others and he worked with her supervisors to formulate and implement an improvement plan to help her in dealing with her issues. As a result of the August, 2005, incident he decided to discipline Ms. Michaels in the form of a letter of reprimand which was presented to Ms. Michaels at the meeting of October 19, 2005. Following the Michaels/Weisshahn confrontation on October 20, 2005, Mr. Radtke conducted an investigation and concluded that Ms. Michaels' behavior upset the work environment. Consequently he issued discipline in the form of a two day suspension without pay. During the time of his investigation, and at the time he determined the extent of discipline to be levied, he did not consider the issue of the potential conduct of union business during work hours. His analysis was based solely upon the disruption to the work environment caused by the confrontation and the apparent continuing nature of Ms. Michaels' problems with communication with her co-workers. It was not until the after the implementation of the discipline that the Complainant raised the issue of union business by way of a defense to the discipline. Mr. Radtke asserts that his response to the Michaels/Weisshahn incident would have been the same had she exhibited the same anger and hostility and created the same amount of disruption regarding any other non-union matter.

11. The record does not establish by a clear and satisfactory preponderance of the evidence that the District's conduct described in Findings of Fact 10 interfered with, restrained or coerced employees in the exercise of their rights under Sec. 111.70(2).

12. The record does not establish by a clear and satisfactory preponderance of the evidence that the District's conduct described in Findings of Fact 10 was motivated in whole or in part by hostility toward the exercise of the employee's MERA protected rights.

13. By the conduct described in Finding of Facts 6 and 7 of engaging in Association business during normal working hours when not expressly permitted or agreed to by the Board, the Complainant violated the terms of the collective bargaining agreement then in force.

CONCLUSIONS OF LAW

1. The District's actions in disciplining Ms. Michaels as a result of the October 20, 2005 interaction with Ms. Weisshahn did not interfere with, restrain or coerce employees in the exercise of protected rights under Sec. 111.70(2), Stats., and therefore the District has not committed prohibited practices within the meaning of Sec. 111.70(3)(a)1, Stats.

2. The District's actions in disciplining Ms. Michaels as a result of the October 20, 2005 interaction with Ms. Weisshahn have not been shown either to have been motivated in whole or in part by hostility toward the exercise of protected rights under Sec. 111.70(2), Stats., or to constitute a prohibited practice within the meaning of 111.70(3)(a)3, Stats.

ORDER

The complaint filed in the above matter is dismissed.

Dated at Wausau, Wisconsin this 6th day of February, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steve Morrison /s/

Steve Morrison, Examiner

RHINELANDER SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint initiating these proceedings, Ms. Michaels alleged that the District violated Secs.111.70(3)(a)1 and 3 by suspending her based upon her conduct on October 20, 2005 during a conversation with her Association Vice-President. The District denied that it committed any prohibited practice and sought dismissal of the complaint.

Complainant's Position

When the District suspended Ms. Michaels for two days following a conversation with her Vice-President concerning union representation at an upcoming meeting with administration officials it interfered with her right to speak frankly with her Association Vice-President and committed a prohibited practice under 111.70(3)(a)1, Stats. Whether the District intended to interfere with her rights is not relevant and if, after an evaluation of 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 therefrom. Citing, JEFFERSON COUNTY, DEC. NO. 26845-B (WERC, 1992), *aff'd* 187 Wis. 2D 647 (Ct. App. 1994) and cases cited therein.

She does not lose her statutory protections unless her conduct is "flagrant", and the conduct here was not "flagrant." See, VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 2003). It was actually Ms. Weisshahn who escalated the tenor of the conversation by not acknowledging Ms. Michaels' right to exclude Ms. Weisshahn at the meeting the following day. Had she done so the conversation would have ended there.

Ms. Michaels did not threaten Ms. Weisshahn and was not violent. She did not touch Ms. Weisshahn and she did not use any obscenities. Rather, at most she simply raised her voice angrily. Such conduct is not "flagrant" and is not misconduct regardless of Ms. Weisshahn's subjective feelings about her actions. In any event, a union officer should expect members to angrily address them from time to time, especially when a union officer refuses to acknowledge a member's rights. While Weisshahn may have felt unnerved by the conversation she should understand that dealing with angry members is part of the job. Because of Ms. Weisshahn's inexperience in the position of Vice-President she may have had a subjective overreaction to the incident.

The fact that students in the vicinity may have heard Ms. Michaels raise her voice does not undermine the protections afforded by Sec. 111.70(2), Stats. Hearing testimony only speculated that students may have heard the exchange because direct testimony on that issue was not presented.

Ms. Michaels' brief conversation with Ms. Weisshahn was not prohibited by the collective bargaining agreement because the two were not "conducting business" (i.e. transacting Association business under Article 3.A of the CBA). The members have the right to engage in brief conversations about union matters on work time as this is different than holding a strategy meeting or other activities that "conducting business" suggests.

The fact that Ms. Michaels had previously filed a grievance against the District alleging that the District had disciplined her without just cause does not render this complaint defective since an arbitrator could not have considered the allegations herein but would have been restricted to the issue of just cause as applied to the collective bargaining agreement. In other words, the grievance would not have addressed the issue of whether her misconduct rose to the level of losing 111.70(2) rights while this complaint does result in such a consideration. The complainant argues that it is theoretically possible for the District to have just cause for discipline and still interfere with her protected activity. In any event, the continuance of her grievance prior to filing this complaint would have been futile because both the District and the Association leadership were against her (they had already told her they would not pursue arbitration) and the deck would have been stacked and she would have lost the grievance. Since her grievance would have been futile she need not have pursued it. Citing, MILWAUKEE POLICE ASSOCIATION, DEC. NO. 29412-A (WERC, 1999) and cases cited therein, and the VILLAGE OF POYNETTE, DEC. NO. 31178-A (WERC, 2005).

In conclusion, the complainant asserts that "(T)he District should not have concerned itself with a brief communication between a union member and her Vice-President that dealt exclusively with union matters." State law provides protection for such short discussions and the District violated that law when it disciplined Ms. Michaels for it.

District's Position

In the absence of any evidence that the employer has treated intra-workday discussions concerning "union business" differently from any personal, non-work related discussions, Section 3.A of the collective bargaining agreement precludes the Examiner from concluding that Complainant's alleged concerted activity was lawful. Section 3.A provides:

> Association Business: Except as otherwise herein expressly permitted or agreed to by the Board, Association business shall be transacted outside of the normal working hours. Grievances may not be processed by an employee during working hours unless mutually agreed upon otherwise. (Dist. Ex. 1 at 3)

The above constitutes a voluntary and binding contractual agreement which establishes the rule that no union business will occur during and employee's normal working hours. An employee who engages in union business during work hours violates the agreement absent proof of the employer's express authorization to allow an exception. Citing KENOSHA BD. OF EDUC., DEC. NO. 6986-C at 22 (WERC, 1966) the District notes that the Commission has long held that similar work rules which regulate, in a non-discriminatory way, the activities of its

employees and their representatives on the employer's time and premises which may arguably limit the rights and protected activities of employees as established in Section 111.70, Stats. shall be presumed valid.

It is undisputed that Ms. Michaels was conducting "union business". Complainant's representative asserted so during the prior grievance process; the complaint itself states that the conversation with her co-worker concerned "strictly union business"; and the Complainant concluded her testimony at the hearing by emphasizing that her interaction with Ms. Weisshahn concerned "strictly union business." The record is also without contradiction that the conversation between Ms. Michaels and Ms. Weisshahn occurred during normal working hours. Also, the record confirms that no prior arrangements for the conversation had been made in advance. Accordingly, Section 3.A of the contract is applicable.

Where the parties single out "Association business" in the contract for express treatment it is plausible to conclude that the parties intended to distinguish "Association business" from other personal, non-work related business. The District has been consistent and nondiscriminatory in enforcing the rule that sustained or extended conversations concerning union business or otherwise must be discontinued and held at another time. The District has disciplined employees, including the Complainant, for non-union-related conduct during work time which was similarly angry, intimidating and disrespectful toward co-workers. There is no evidence in the record suggesting that the District restricts work time concerted activity falling under Section 3.A of the contract to any greater degree than it does non-union-related activity.

The Complainant's attempts to equate her angry, intimidating and disruptive conduct to a brief, non-disruptive exchange of pleasantries is not supported by the evidence.

To be protected by MERA an employee's conduct must be both lawful and concerted, citing CITY OF LA CROSSE, DEC. NO. 17084-D at 4-5 (WERC, 1983). The Complainant has failed to prove that her conduct constituted lawful activity. Her activity violates the CBA because it was an intra-workday conversation about a union matter and because she escalated that interaction into a disruptive confrontation. Conduct which breaches a binding contract and violates Sec. 111.70(3)(b)4 Stats. is not lawful, concerted activity and remains subject to disciplinary sanctions.

The District's decision to address the Complainant's disruptive behavior was lawful and supported by its legitimate operational interests. Even assuming that the Complainant was engaged in lawful, concerted activity her right to engage in such activity is not without limits. The Commission balances the interests of employees and employers in determining whether otherwise lawful and concerted activity is "protected" or "unprotected." Citing, MILWAUKEE BD. OF SCH. DIR., DEC. NO. 31732 at 7 (WERC, 2006) and cases cited. Employer interference with lawful, concerted activity must be justified by reference to its legitimate operational interests. Such a balancing test must consider both the nature and the weight of the parties' competing interests.

The District here has a substantial interest in regulating the behavior of the Complainant herein even though the conduct is related to union business. The full description of the incident and its aftermath weighs in favor of the District's actions as follows:

1. The Complainant's angry outburst toward her co-worker occurred in an area near to where high school students were working and they were close enough to see and/or hear the outburst.

2. Another employee unrelated to the Michaels/Weisshahn incident was forced to observe the incident in the course of performing her duties and was upset and disturbed thereby.

3. The District has an interest in preventing future employee-on-employee intimidation in the public and semi-public areas of the school building. When one union member verbally berates and intimidates another municipal employee during the employee's workday, the employer has no control over when and where those actions may occur.

4. Ms. Michaels' actions disrupted the work environment. It distracted Ms. Harsbargas from her work and neither Ms. Harsbargas nor Ms. Weisshahn could concentrate on their work following the incident.

5. The District has a compelling interest in enforcing the commitments it obtained from the Union as expressed in the collective bargaining agreement. The contractual prohibition against engaging in "Association business" during the workday was negotiated freely as part of the give-and-take that occurs at the bargaining table, and a ruling in favor of the Complainant would improperly diminish the District's contractual rights.

6. There is no evidence that the District discriminated against concerted activity in attempting to enforce a prohibition against intimidating and disruptive conduct that occurs during the workday. On the contrary, the evidence shows the District to have been consistent and non-discriminatory.

7. The District acted in response to a complaint of a co-worker (also a union officer) who believed in good faith that inappropriate conduct had occurred. (Tr. at 29-30). The good faith complaint of the co-worker provided sufficient cause for the District to have investigated the incident.

On the other side of the balance questions concerning (1) the Complainant's interest in her ability to engage in concerted activity at the time, place and manner reflected in the record, and (2) whether the District's decision to treat this Complainant's conduct as a disciplinary matter could reasonably be viewed to dissuade employees from engaging in lawful, protected conduct in the future. As to the time, place and manner of the Complainant's conduct an

important question is whether she had a compelling need to safeguard her rights by engaging in concerted activity when and where she chose to do it. No such compelling need was present in this case. The record offers no evidence suggesting that her conversation with Ms. Weisshahn could not have waited for a more appropriate time and place away from the library. Because of this the Complainant's interest in conducting her "union business" becomes substantially less weighty. As for timing, other options were available:

1. Work break;

2. Lunch period;

3. After work;

4. Before work the next day;

5. Work break during the next day;

6. At the beginning of the meeting the following day at which Ms. Weisshahn was scheduled to serve a union representative.

So, while a ruling in favor of the District may have some minimal effect on an employee's desire to engage in concerted activity at the time and place of his or her choosing, the operational concerns of the employer outweigh that minimal impact.

Relative to concerns with any potential "chilling effect", no such threat exists. The only thing other union members will take away from this discipline is that there can be consequences for losing your temper and disrupting the work environment, and, if an employee wishes to have harsh and angry words with a union officer, use some common sense to find an appropriate time and place.

Complainant's Reply

Ms. Michaels simply informed her union Vice-President, perhaps forcefully, that she did not want Ms. Weisshahn to represent her. The District distorts her discussion, misinterprets the collective bargaining agreement, applies incorrect legal standards and fixates on Ms. Michaels' discussion of union matters. Ms. Michaels had a right to communicate with her union Vice-President, especially when this communication was brief and she was "at a distance" from Weisshahn. Also, there is no evidence of any disruption apart from Ms. Weisshahn's subjective over-reaction.

If the District is correct, that "the analysis in this case largely begins and ends with Section 3.A of the labor agreement", then the Complainant must prevail. The District's interpretation of the contract creates a chillingly oppressive rule - one the Association never agreed to and does not exist. Under such an interpretation, the District could discipline an

employee for asking a colleague what time a union meeting was and if the colleague intended to attend. Ms. Michaels' communication constituted no more than this and would have taken no more than a couple of seconds had Ms. Weisshahn not opposed her and insisted she attend the meeting. This brief encounter did not violate the CBA because the CBA does not prohibit this type of communication. The parties to the CBA agreed to proscribe only the type of Association business which would detract from member's work duties, like holding meetings or having lengthy discussions, and the Association would never have agreed to the blanket prohibition suggested by the District. Any argument that Ms. Michaels' communication was unlawful is "patently absurd." The members of the Association have the right to give brief messages to their officers which do not take any meaningful time away from their work duties, as here, and Ms. Michaels had no obligation to arrange a different time or place to do it. No "balancing test" for competing interests is necessary, as the District suggests. The WERC has applied such a test where an employer imposes a rule that potentially interferes with an association's protected rights. The District rules are not an issue here.

Citing COUNCIL 24 V. DEPARTMENT OF CORRECTIONS, DEC. NO. 30340-B (WERC, 2004) and cases cited therein, the Complainant asserts that when an employer alleges misconduct and issues discipline for protected, concerted activity, the employer has committed a prohibited practice unless the individual has engaged in flagrant misconduct. Here, the Complainant has established a *prima facie* case of interference and the WERC must now evaluate whether the Complainant engaged in flagrant misconduct thereby stripping the individual of statutory protection. There is no balancing test. Ms. Michaels did not engage in flagrant misconduct or, for that matter, any misconduct at all.

The District's characterization of the Complainant's actions are grossly exaggerated. Ms. Michaels never created the threat or any disruption. She stood two feet from Ms. Weisshahn and Library Media Specialist Nancy Andrews never even heard the brief discussion from her library office. If the District's characterization of the event is correct, Ms. Andrews certainly would have heard it. Ms. Weisshahn's subjective reaction to Ms. Michaels should not determine whether Ms. Michaels engaged in flagrant misconduct. The focus should be on objective facts such as the brevity of the discussion, Ms. Michaels' distance from Ms. Weisshahn and the fact that Ms. Andrews could not hear the exchange.

District's Reply

The evidence does not support a retaliation claim under Sec.111.70(3)(a)3 Stats. and the Claimant has not argued the claim in her briefs. The evidence shows that the District's disciplinary action was based solely on the District's conclusion that misconduct had occurred during the course of allegedly MERA-protected activity. In this type of scenario, the WERC has concluded that the proper analysis occurs under Sec. 111.70(3)(a)1 Stats., citing STATE OF WISCONSIN, DEC. NO. 30340-B at 14-15 (WERC, 2004); CLARK COUNTY, DEC. NO. 30361-B at 16 n.7 (WERC, 2003) and SCHOOL DIST. OF NEW BERLIN, DEC. NO. 31243-B at 18 (WERC, 2006).

The Complainant failed to introduce any evidence at hearing or set forth any argument which would support a claim of unlawful discrimination or retaliation under Sec. 111.70(3)(a)3 and the Examiner should dismiss that claim. Once dismissed, the only remaining issues surround the claim brought under Sec. 111.70(3)(a)1 alleging interference with a MERA-protected activity.

The District does not assert that the Complainant's failure to pursue her grievance relating to this event precludes her claim under Sec. 111.70(3)(a)1 so long as the Complainant does not assert any claim under Sec. 111.70(3)(a)5. This disagreement is moot anyway. The parties' stipulation on the record affirms the fact that the Complainant is not asserting that claim and for the purposes of this case the District is not arguing that the abandoned grievance bars the Sec. 111.70(3)(a)1 claim.

The Complainant's assertion that the phrase "Association business" cannot plausibly be construed to include a disruptive conversation concerning the scheduling of union representation in contradicted by the plain language of the contract, the Complaint, and Complainant's own testimony. The Complainant implicitly recognizes (at pages 5-6 of her Initial Brief) that if her conduct violated the CBA then that conduct would not have been lawful concerted activity. Consequently, she has failed to prove a necessary element of her claim under Sec. 111.70(3)(a)1. She offers only a single argument in opposition to this significant barrier to her claim. At page 5 of her initial brief she asserts:

Even a far stretch of imagination could not rationally cast [Michaels'] brief communication as "conducting business."

In other words, the broad phrase "Association business shall be conducted outside of the normal working hours" cannot be interpreted to cover a discussion with a union officer concerning representation at an upcoming meeting. This view is contradicted by every available interpretative aid found in the record. First, the plain language of the contract is very broad. It covers all "Association business" and provides no exceptions. It does not limit the prohibition to cover only, for example, (1) the work of Association officers; (2) meetings with the Association's designated WEAC representatives; or (3) bargaining committee strategy sessions. The plain language is not limited to any particular slice of internal "Association business" but, if the Complainant's interpretation were to be found to be correct, there would be so-called "obvious" exceptions for relatively brief discussions concerning matters of Association business which turn into hostile and disruptive confrontation. It is not irrational or a stretch of the imagination to focus on Section 3.A relative to overtly disruptive "Association business" which occurs during the workday. The District has treated other non-work related and personal conversations in the same way it treated this situation and hence it has been consistent and nondiscriminatory toward the union. In fact, the Complainant herself was disciplined shortly before this incident for engaging in similarly hostile, angry and disruptive conduct during the workday. The discipline issued to the Complainant as a result of the October 20, 2005 incident is consistent with a nondiscriminatory concern about inappropriate and disruptive conduct in the workplace. Second, the Examiner should test the Complainant's

assertions about what sort of conduct is considered "Association business" within the meaning of Section 3.A against her own statements on the record.

Because both the Complainant and the Complainant's representative have expressly characterized Complainant's conduct as "Union business" it rationally follows that the conduct was also "Association business" within the plain meaning of the contract. The District argues there is no distinction between the two. Complainant's argument that Ms. Michaels' conduct was lawful is consequently not persuasive. In addition, the Complainant has failed to show that she was engaged in lawful MERA-protected activity when she lost her temper and intimidated a co-worker during normal working hours.

This case should not hinge on whether there is direct testimony regarding students who actually saw/heard the confrontation, as argued by the Complainant. First, such evidence would only be relevant if the Examiner were to conduct a full-scale balancing of employer/employee interests and that test would only be required in the event the Examiner were to find that the Complainant were engaged in lawful, concerted activity. Second, the employer's interests in establishing reasonable parameters on the type of conduct expected of employees is not diminished simply because the worst case scenario of potential results of that conduct failed to occur. An employee may be disciplined for conduct even though it did not result in the worst possible outcome. The evidence clearly shows that students could have easily observed Ms. Michaels' behavior. This would have been wholly inappropriate and, notwithstanding the Complainant's belief that the students' observation of this incident would have been "no big deal", the District thinks otherwise. The District cannot be placed in a position of trying to prevent such conduct and enforce rules against it if students can observe employees modeling the same behavior without consequence. There is evidence of disruption in the record. Both Ms. Weisshahn and Ms. Harsbargas confirmed that. Ms. Michaels chose to confront Ms. Weisshahn in an area where she was sure to disrupt the work of otherwise uninvolved co-workers. While Complainant discounts the seriousness of her conduct because she did not issue violent threats, make physical contact or use foul obscenities, she fails to consider that the time and place of the conduct added to the overt level of hostility and aggression are relevant considerations when balancing competing interests.

The Complainant's attempt to place responsibility on Ms. Weisshahn for the Complainant's loss of control is not supported by the evidence. The weight of the evidence shows only that Ms. Weisshahn attempted to confirm that representation at the meeting would be in Ms. Michaels' best interests. At the time of the confrontation Ms. Michaels harbored some fresh animosity toward Ms. Weisshahn (Tr. At 16-17) and her disproportionate response to Ms. Weisshahn was likely triggered by that animosity.

DISCUSSION

Alleged discrimination violation of Secton 111.70(3)(a)3, Stats.

Section 111.70(3)(a)3 makes it a prohibited practice for a municipal employer individually or in concert with others "[t]o encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or any other terms or conditions of employment." In order to establish employer discrimination under Section 111.70(3)(a)3 the Complainant bears the burden of proving by a clear and satisfactory preponderance of the evidence each of the following elements: (1) that the Complainant has engaged in protected, concerted activity; (2) that the employer was aware of such activity; (3) that the employer was hostile to such activity; and (4) that the employer's complained of conduct was motivated, at least in part, by such activity. MUSKEGO-NORWAY V. WERC, 35 Wis. 2D 540 (1967); and e.g., CEDAR GROVE-BELGIUM SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91).

The Examiner concludes that the Complainant has failed to meet that burden.

Section 111.70(2) provides municipal employees with certain rights. Broadly stated, they are "to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. . ." These rights are enforced by Sections 111.70(3) and 111.70(4) of the MERA and "protected" activity refers to those lawful and concerted acts identified and enforced by the MERA. Consequently, acts which are not lawful or concerted under Sec. 111.70(2) of the MERA are not "protected" by the MERA. See, CITY OF LACROSSE, DEC. NO. 17084-D (WERC, 10/83).

The evidence establishes that, during a meeting with Administration officials on October 19, 2005, Ms. Michaels and her Union representatives, one of whom was Union Vice-President Weisshahn, Ms. Michaels became convinced that Ms. Weisshahn was not acting in Ms. Michaels' best interests at the meeting. Another meeting was scheduled for October 21, 2005 for the purpose of continuing the discussion of October 19th. Because Ms. Michaels was unhappy with Ms. Weisshahn's representation during the October 19th meeting, Ms. Michaels decided that she would attend the meeting on the 21st without representation. On October 20th Ms. Michaels encountered Ms. Weisshahn in the high school library and called her aside in order to inform her of this decision. During this conversation Ms. Michaels became loud, aggressive and threatening toward Ms. Weisshahn. The confrontation caused a disruption in the library which adversely affected co-worker Harsbargas, who witnessed the episode, and caused both Ms. Weisshahn and Ms. Harsbargas to experience difficulty in continuing their work. In addition, the confrontation took place in an area near students and could easily have been overheard by them. As a result of this incident the District issued discipline to Ms. Michaels in the form of a two-day suspension without pay, consistent with its progressive disciplinary policy.

The District's decision to discipline Ms. Michaels related exclusively to the disruption she caused in the workplace and had no relationship to any union-related activity. The

evidence establishes that the issue of "union activity" was injected into the mix, by the Complainant, only after the District had taken steps to discipline Ms. Michaels. The evidence does not establish by the requisite clear and satisfactory preponderance standard that the District's actions were motivated, in whole or in part, by hostility toward employees' engaging in activities protected by MERA.

The District forcefully argues that because the activities of Ms. Michaels violated Article 3, Section A of the CBA and, hence, Sec. 111.70(3)(b)4 Stats., they were not lawful and thus not "protected" by the MERA. The Examiner is not aware of any Commission case law in support of this argument and does not so conclude here.

Therefore, upon consideration of the record as a whole, no Sec. 111.70(3)(a)3, Stats. discrimination has been proven.

Alleged independent interference violation of Section 111.70(3)(a)1, Stats.

Section 111.70(3)(a)1, Stats. makes it a prohibited practice for a municipal employer "[t]o interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. 2." The rights identified in Sec. 111.70(2) are those which are "lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." (see, CITY OF LACROSSE, *supra*). 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).

The interference claim herein fails based upon the well established rule 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 to violate Sec. 111.70(3)(a)1, Stats., if the employer had a valid business reason for its actions. E.g. RACINE UNIFIED SCHOOL BOARD, DEC. NO. 29074-B (Gratz, 4/98); BROWN COUNTY, DEC. NO. 28158-F (WERC, 12/96); CITY OF OCONTO, DEC. NO. 28650-A (Crowley, 10/96), *aff'd by operation of law*, -B (11/96); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 27867-B (WERC, 5/95); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 27484-A (Burns, 7/93); *aff'd by operation of law*, -B (WERC, 7/93); CITY OF MILWAUKEE, DEC. NO. 26728-A (Levitan, 11/91), *aff'd on rehearing*, -D (WERC, 9/22); CEDAR GROVE-BELGIUM SCHOOL DISTRICT, DEC. NO. 28549-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). The Commission has historically employed a balancing test weighing the rights of the employees and their representatives against the obligations and duties of the municipal employer. KENOSHA BOARD OF EDUCATION, DEC. NO. 6986-C (WERC, 2/66). The

Commission has characterized this balancing test as "permitting an employer to 'interfere with its employee's 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 employer has a legitimate business interest in maintaining order and decorum in the school for the benefit of the employees and for the benefit of the students. The District's operational needs require no less. In weighing the competing interests of the parties, the Examiner finds that the disruption to the employer's workplace and to its employees as set forth in Finding of Facts 6 and 8, in conjunction with the fact that students were in the immediate vicinity of the confrontation, combined with the Complainant's vitriol during the incident, outweighs the relatively insignificant inconvenience to the Complainant to have chosen a more appropriate time and place to exercise her rights.

On the basis of the foregoing, the Examiner has concluded that no independent interference prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats. has been proven in this case.

Accordingly, the Examiner has dismissed the Complaint in all respects.

Dated at Wausau, Wisconsin this 6th day of February, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steve Morrison /s/
Steve Morrison, Examiner

SM/gjc
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