

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS BOARD

EAU CLAIRE COUNTY INSTITUTION EMPLOYEES,  
LOCAL 254, AFSCME, AFL-CIO,

Complainant,

v.

EAU CLAIRE COUNTY,

Respondent.

Case IV  
No. 9509 MP-11  
Decision No. 6790

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. John A. Lawton,  
for the Complainant.

Mr. Edmund A. Nix, District Attorney, for the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above entitled matter having come on for hearing before the Wisconsin Employment Relations Board at the Eau Claire County Courthouse, Eau Claire, Wisconsin, on January 30, 1964, Commissioner Zel S. Rice II being present; and the Board having considered the testimony, arguments, and briefs of Counsel, and being fully advised in the premises, does hereby make and file the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That the Eau Claire County Institution Employees, Local 254, AFSCME, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization representing municipal employees in conferences and negotiations with municipal employers on matters of wages, hours and conditions of employment, and has its offices at 119 Monona Avenue, Madison, Wisconsin.

2. That Eau Claire County, hereinafter referred to as the Respondent, is a municipal employer, having its offices at Eau Claire, Wisconsin; and that as part of its statutory function the Respondent operates a county home for the aged, known as the Mount Washington Home, hereinafter referred to as the Home, in the City of Eau Claire, Wisconsin.

3. That on December 26, 1962, following an election conducted by it, the Wisconsin Employment Relations Board certified the Complainant as the collective bargaining representative of all employees of the Home, except administrators, supervisory personnel and confidential office employees.<sup>1/</sup>

4. That James J. Sullivan commenced his employment at the Home on March 31, 1957, while a high school student, as a part time kitchen helper and orderly; that Sullivan continued as a part time employe until September, 1959 when he was employed full time; that on January 2, 1961 Sullivan was assigned to work as a full time orderly, assisting patients in their personal needs as well as lifting them in and out of their beds and similar duties; and that Sullivan continued in such employment until the date of his discharge, August 12, 1963.

5. That during the course of his employment, Sullivan, who has a disability in that his left leg is shorter than his right, has been absent from work on occasions, due to difficulty with his back; that at least on two occasions Sullivan filed claims for workman's compensation during the period of his employment as a result of not being able to work because of his back problems; that on said occasions the question of Sullivan's ability to perform his duties or his absences from work were not questioned by the Respondent; that on June 10, 1963 Sullivan injured his back at home while moving a house trailer, and did not work for a three week period thereafter; that following his return to active employment and prior to July 16, 1963 Sullivan, because of his troublesome back refused to assist in lifting two heavy patients in and out of bed; that on July 16, 1963 such refusal was reported to the Home's Superintendent, Mrs. Mildred Henning by the Head Nurse and the Home's Doctor; and that on the latter date Henning placed an order for a Hoyer lift,

<sup>1/</sup> Dec. No. 6183

a mechanical device utilized in lifting patients in and out of beds, the purchase of which had been authorized in a meeting of the Board of Trustees of the Home on or about June 11, 1963.

6. That in the morning of July 24, 1963 at a meeting with the Board of Trustees Henning informed said Board of Sullivan's refusal to lift the two patients in and out of bed; that said Board instructed Henning to require Sullivan to obtain a statement from his physician describing Sullivan's physical condition for the reason that the members of the Board of Trustees did not desire to compel Sullivan to perform duties contrary to the advice of Sullivan's physician; that at said meeting, and prior thereto, neither the Board of Trustees nor Henning questioned Sullivan's ability to perform his work, and there was no discussion or consideration of terminating Sullivan's employment because of his physical condition.

7. That following the aforesaid meeting and on the same date, the bargaining committee of the Complainant, which included the Board of Trustees and Henning, in negotiations on matters pertaining to wages, hours and working conditions of the employees of the Home; that said meeting marked Sullivan's first appearance as a member of the Complainant's bargaining committee; that during the course of the meeting, Eugene Doyle, a representative of the Complainant, not an employee of the Respondent, pressed for a procedure for the immediate processing of grievances, suggesting that the immediate processing of grievances would avoid the possibility that grieving employees might "sit down" until the grievance was acted on by the Respondent; that thereupon, representatives of the Respondent, including Henning and the Home's physician, Dr. Nezowski, apparently interpreting Doyle's remarks as a strike threat, became upset and accused Complainant's bargaining Committee of such a desire and the resultant patient neglect; that Henning thereupon questioned Sullivan as to whether he would, under such circumstances, refuse to work; that while Sullivan was collecting his thoughts, Henning, while standing, and Dr. Nezowski, the

latter while walking about the room, pointed their fingers at Sullivan, and in loud voices demanded that he answer the question; that as a result of the threatening and loud manner of said representatives of the Respondent, Sullivan became provoked into shouting, "Don't shout at me. Talk to me like a man,"; that after he was again told to answer the question put to him, Sullivan indicated a belief that he would not sit down until the grievance was settled; and that shortly thereafter the negotiation meeting was terminated.

8. That on the following day Henning requested Sullivan to obtain a statement from his physician setting forth his physical capabilities; that on July 26, 1963 Sullivan presented to Henning the statement of his physician as follows:

"I advised the patient to limit his activities to his abilities and I think, if he can refrain from bending and lifting, he will get along very well. He is also somewhat overweight, and was advised to cut this down."

9. That on August 10, 1963, without making any further investigation as to Sullivan's condition or as to the length of time the condition preventing him from lifting the heavier patients would prevail, Henning presented the aforementioned physician's report to the Board of Trustees; that at such time Henning did not inform the Board of Trustees that she had ordered the Hoyer lift, which had not as yet been delivered; that when the Board of Trustees questioned Henning as to the possibility of transferring Sullivan either to maintenance or kitchen tasks, Henning replied that neither transfer could be accomplished; that thereupon on that date the Board of Trustees, on the suggestion of Henning, resolved that Sullivan be discharged; and that on August 12, 1963, Sullivan was called to Henning's office, where Henning requested Sullivan to resign, and that when Sullivan refused to do so, Henning discharged him.

10. That the discharge of Sullivan by the Respondent was not motivated by Sullivan's physical ability to perform his duties, but

rather such action by the Respondent was motivated by Sullivan's activity and membership on the bargaining committee of the Complainant and was for the purpose of discouraging lawful concerted activity among its employees on behalf of the Complainant.

Upon the basis of the above and foregoing Findings of Fact, the Board makes the following

#### CONCLUSION OF LAW

1. That Eau Claire County, by Mrs. Mildred Henning, Superintendent, and by the Board of Trustees, of the Mount Washington Home, by discharging James J. Sullivan, discriminated in regard to the tenure of his employment to discourage membership in, and activities on behalf of Eau Claire County Institution Employees Local 254, AFSCME, AFL-CIO, and thereby has engaged, and is engaging, in prohibited practices within the meaning of Section 111.70 (3) (a) 2, and 111.70 (3) (a) 1 of the Wisconsin Statutes.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Board makes the following

#### ORDER

IT IS ORDERED that Eau Claire County, its Superintendent of the Mount Washington Home and the Board of Trustees of Mount Washington Home, and their agents, shall immediately

1. Cease and desist from

- (a) Discouraging membership in the Eau Claire County Institution Employees Local 254, AFSCME, AFL-CIO or any other labor organization of its employees by discharging any of its employees, or by discriminating against them in any other manner pertaining to their tenure, term or condition of employment.
- (b) In any other manner interfering with, restraining or coercing its employees in the exercise of their right to self-organization, to affiliate with and be represented by Eau Claire County Institution

Employees Local 254, AFSCME, AFL-CIO, or any other labor organization of their choice, in conferences and negotiations with Eau Claire County and its representatives, on questions of wages, hours and conditions of employment, or to refrain from any or all such activities.

2. Take the following affirmative action which the Board finds will effectuate the policies of Section 111.70 of the Wisconsin Statutes.

- (a) Immediately offer to James J. Sullivan reinstatement to his former position without prejudice to any rights and privileges which he previously enjoyed.
- (b) Make whole James J. Sullivan for any loss of pay which he may have suffered by reason of discrimination against him by payment to him of sums of money equal to that which he normally would have earned as wages from the date of his discharge, August 12, 1963 to the date of an unconditional offer of reinstatement less any net earnings which James J. Sullivan may have received elsewhere during such period, and less the amount of unemployment compensation, if any, received by James J. Sullivan during said period, and in the latter regard, to reimburse the Unemployment Compensation Division of the Wisconsin Industrial Commission any unemployment compensation received during said period by James J. Sullivan.
- (c) Notify all of its employees, by posting in conspicuous places in its office and where notices to employees are usually posted in the Mount Washington Home, where all employees may observe them, copies of the Notice attached hereto and marked "APPENDIX A".

Copies of such Notice shall be prepared by Eau Claire County, and shall be signed by the Board of Trustees and the Superintendent of the Mount Washington Home, and shall be posted immediately upon receipt of the copy of this Order, and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Superintendent of the Mount Washington Home to be sure that said Notices are not altered, defaced or covered by other material.

- (d) Notify the Wisconsin Employment Relations Board in writing within five (5) days from the date of the receipt of this Order, of the steps that have been taken to comply therewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 3rd day of July, 1964.

SEAL

WISCONSIN EMPLOYMENT RELATIONS BOARD

By Morris Slavney  
Morris Slavney, Chairman

Arvid Anderson  
Arvid Anderson, Commissioner

Zel S. Rice II  
Zel S. Rice II, Commissioner

"APPENDIX A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Board and in order to effectuate the policies of Section 111.70 of the Wisconsin Statutes, we hereby notify our employees that:

WE WILL NOT discourage membership in Eau Claire County Institutional Employees 254, AFSCME, AFL-CIO, or any other labor organization of our employees, by discharging any of our employees, or in any other manner discriminate against them, in regard to their hire, tenure, or any term or condition of their employment.

WE WILL immediately offer James J. Sullivan reinstatement to his former position in the Mount Washington Home, without prejudice to any rights and privileges which he previously enjoyed and we will make James J. Sullivan whole for any loss of pay that he may have suffered by reason of the discrimination against him, by paying him the sum of money which he normally would have earned as wages from the date of his discharge, August 12, 1963, to the date of our unconditional offer of reinstatement, less any other earnings which he may have received during said period, and less any unemployment compensation, if any, received during said period. We shall also reimburse the Unemployment Compensation Division of the Wisconsin Industrial Commission for any unemployment compensation paid to James J. Sullivan.

All our employees are free to become, or remain, or refrain from becoming, or remaining, members of Eau Claire County Institutional Employees 254, AFSCME, AFL-CIO, or any other labor organization.

EAU CLAIRE COUNTY  
MOUNT WASHINGTON HOME

By its Board of Trustees

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By its Superintendent

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Dated this            day of July, 1964.

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



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MEMORANDUM ACCOMPANYING FINDINGS  
OF FACT, CONCLUSION OF LAW AND ORDER

The Union alleged that the Municipal Employer interfered, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 111.70 of the Wisconsin Statutes and further violated said Section by discharging employee James J. Sullivan in a discriminatory manner and thus also discouraged membership and activity in and on behalf of the Union. The Municipal Employer generally denied the allegation in the Complaint and affirmatively alleged that Sullivan's discharge resulted from his failure to perform the services for which he had been employed and that there were no job classifications in the institution which he could have fulfilled.

The issue in this proceeding is whether or not Sullivan's discharge was discriminatory within the meaning of Section 111.70(3)(a)2 of the Wisconsin Statutes, and whether said discharge was also for the purpose of interfering with, restraining or coercing other employees of the Municipal Employer in the exercise of their right to engage in concerted activity and to be represented for the purposes of collective bargaining by a representative of their own choice, contrary to Section 111.70(3)(a)1 of the Statutes.

The record compels the conclusion that Sullivan was discharged because of anti-union reaction and because of animus generated by the heated exchange at the July 24 collective bargaining

session.

The Union has the burden of establishing the Municipal Employer's motive for discharging Sullivan. The Union contends that the true motivation for Sullivan's discharge was his concerted activity. The representatives of the Municipal Employer have denied such motivation. Motivation for any act may be properly inferred if and when the preponderance of evidence relating to the total conduct of the parties supports such an inference.

There was no charge of misconduct on the part of Sullivan, and the Municipal Employer claims that the only reason for the discharge was Sullivan's medical problem. However, the evidence does not support that conclusion. Sullivan had a history of medical problems of the same nature prior to June of 1963. These problems were never considered serious by the Municipal Employer and were never utilized as the basis for any previous consideration of terminating Sullivan's employment even though Sullivan first refused to lift one of the patients after an injury in 1963. As a matter of fact, the Chairman of the Board of Trustees, Mr. Lindner, testified that the Board of Trustees had requested Mrs. Henning, the Superintendent, to request Sullivan to produce a certificate from his physician showing what he could and could not do, for the reason that the Municipal Employer, as expressed by the Board of Trustees, did not desire to compel Sullivan to perform duties contrary to his doctor's instructions. At that time there was no consideration by any of the members of the Board of Trustees with respect to discharging Sullivan, and Mrs. Henning testified that at that time she had no thought of terminating Sullivan's employment.

Immediately following the decision to require Sullivan to produce a medical report, the parties met in a bargaining session where a heated exchange occurred between Mrs. Henning and Sullivan. The exchange of words on the part of Sullivan was not disrespectful

of his superior to such an extent that it constituted insubordination, but was merely a demand that he be treated like a man. At the next meeting of the Board of Trustees Mrs. Henning recommended that Sullivan be discharged, purportedly based on the medical report which had been received from Sullivan's physician. This medical report was very brief and was not a detailed statement of Sullivan's condition. It merely indicated that Sullivan should limit his activities and refrain from bending and lifting. There was no indication as to the length of time Sullivan should refrain from such activity, and at the hearing there was medical evidence introduced by the Union which indicated that Sullivan's physical condition was such that he could perform the duties normally assigned to him. When the Board of Trustees inquired of Mrs. Henning as to whether or not Sullivan could perform other duties in maintenance work or in the kitchen she immediately stated that he could not, and recommended Sullivan's termination. The Board of Trustees had previously authorized the purchase of a Hoyer lift, which was a mechanical device to assist orderlies in lifting patients. The actual order for such device was placed by Mrs. Henning on the date she became aware that Sullivan had refused to lift a patient. She had never advised the Board of Trustees that said device would soon be delivered, nor that it would be of great assistance to Sullivan, or any other attendant, in lifting heavy patients. As a matter of fact, when the device actually did arrive, it was only utilized to lift the patient which Sullivan had previously refused to lift.

From the evidence it seems clear that Mrs. Henning was quite disturbed and upset by the exchange of words between her and Sullivan regarding the proposed grievance procedure. Sullivan was provoked in making the heated statements to Mrs. Henning in his capacity as a member of the Union's bargaining committee, and while dealing with the Municipal Employer on behalf of other employes whom the Union represented.

It is an objective of Section 111.70 to protect the exercise by employees of their rights to self-organization and collective bargaining through representatives of their own choosing in order that differences or disputes concerning wages, hours and working conditions may be resolved by the process of collective bargaining. Unquestionably it is essential to the accomplishment of this purpose that, in their dealings with municipal employers, employee representatives must be treated on a plane of equality with the representatives of the municipal employers, rather than as subordinates, as they are in the performance of their duties in their employment. In spite of possible personal offense, the employee representatives should be permitted to maintain a position or status as seems reasonably related to their objectives in their capacity as representatives. For the effective exercise of these rights on behalf of the employees, the employee representatives must be protected against any form of interference, restraint, coercion, discrimination or retaliation of any sort by any representative of a municipal employer. In light of these considerations, it is apparent that Sullivan's remarks were well within the permissible and protected limits of the legitimate representation of employees as contemplated by the Statute. The representatives of the Municipal Employer, during the course of bargaining, should not have pointed their fingers at Sullivan and shouted at him as though he were a school boy subject to their personal discipline. Sullivan's demand that he be treated like a man was proper. He had a right to be treated with dignity. Good faith collective bargaining requires that the parties engaged in such bargaining treat each other with mutual and equal respect.

The summary fashion of the dismissal of Sullivan indicated an unwillingness on the part of either Mrs. Henning or the members of the Board of Trustees to make a thorough investigation of Sullivan's actual physical condition. The report of his physician was brief and not in detail. If the Board and Mrs. Henning

had truly been interested in determining the medical condition of Sullivan, they should have given him an opportunity to explain his condition, or they should have requested that he obtain a more detailed report from his doctor in order that the Municipal Employer could determine whether or not Sullivan was properly able to perform his duties. The Board of Trustees might have also considered whether or not Sullivan would be able to perform his duties after the arrival of the Hoyer lift. When the Board of Trustees first delved into the possibility of discharging Sullivan, it evinced a true interest in his physical condition, and Mr. Lindner testified that the only reason for asking for the medical report from Sullivan was because the Municipal Employer did not desire to force Sullivan to perform any work contrary to the orders of Sullivan's physician. However, after the bargaining session on the same day, and after the exchange between Sullivan and Mrs. Henning, there seemed to be no interest on behalf of the Municipal Employer to determine Sullivan's true physical condition. Mrs. Henning seemed particularly determined to discharge Sullivan without pursuing further into his physical condition or giving Sullivan an opportunity to work in some other capacity. Mrs. Henning's failure to notify the Board of Trustees of the approaching delivery of the Hoyer lift and, as a result, the failure of the Board of Trustees to consider that Sullivan would be able to use the Hoyer lift, is evidence that Sullivan's discharge was not motivated by his physical condition.

The Municipal Employer infers in its brief that Sullivan's relatively minor role as a member of the bargaining committee, as compared to other members of said committee, would preclude him from being a target of anti-union sentiment. Sullivan's demeanor when testifying at the hearing herein was that of a docile and submissive type of person who would be reluctant to assert himself and, therefore, he appeared to be an easy target for intimidation. It is interesting to note that at the

bargaining session Mrs. Henning turned to Sullivan first when questioning whether or not an employe would not work until a grievance was settled.

Chapter 111.70 of the Wisconsin Statutes was designed to protect not only municipal employes in their concerted activities, but also their representatives, no matter what their status or the extent of their participation in union affairs and negotiations. Sullivan was singled out by Mrs. Henning in an attempt to intimidate him, and when he asserted his rights as a member of the bargaining committee, he was selected by Mrs. Henning as the person on the committee who would be discharged. We are convinced that Sullivan was selected for discharge by Mrs. Henning for the reason that his physical condition could be used as a pretext to camouflage the true motivation for the discharge. Mrs. Henning could not have so conveniently fabricated grounds for discharging any other members of the bargaining committee.

We are satisfied, therefore, that the true reason for Sullivan's termination of employment was his activity as a member of the bargaining committee and as a representative of the Union, and the discharge under such circumstances not only constituted an act of illegal discrimination with respect to Sullivan's employment, but also constituted an interference with the right of all the employes, including Sullivan, to engage in self-organization and to affiliate with the Union for the purposes of representation in conferences and negotiations with the Municipal Employer on matters pertaining to their wages, hours and working conditions.

Dated at Madison, Wisconsin this 3rd day of July, 1964.

WISCONSIN EMPLOYMENT RELATIONS BOARD

By

Morris Slavney  
Morris Slavney, Chairman

Arvid Anderson  
Arvid Anderson, Commissioner

Zel S. Rice II  
Zel S. Rice II, Commissioner