

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS BOARD

-----:
LOCAL 33, AMERICAN FEDERATION OF STATE, :
COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO :
and MILWAUKEE DISTRICT COUNCIL 48, :
AMERICAN FEDERATION OF STATE, COUNTY :
AND MUNICIPAL EMPLOYEES, AFL-CIO, :
Complainants, :
vs. :
CITY OF MILWAUKEE and ELSWORTH L. :
SALISBURY, :
Respondents. :
-----:

Case LI
No. 11043 MP-31
Decision No. 8017

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. John S.
Williamson, Jr., for the Complainants.
Mr. John J. Fleming, City Attorney, by Mr. John F. Kitzke,
Assistant City Attorney, for the Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above entitled matter having come on for hearing before the Wisconsin Employment Relations Board on October 11, 1966 at the Milwaukee State Office Building, Milwaukee, Wisconsin, Howard S. Bellman, Examiner, being present; and the Board having considered the evidence, arguments and briefs of Counsel, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Local 33, American Federation of State, County and Municipal Employees, AFL-CIO and Milwaukee District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO, hereinafter jointly referred to as the Complainant, are affiliated labor organizations having offices at 615 East Michigan Street, Milwaukee, Wisconsin.
2. That the City of Milwaukee, hereinafter referred to as the Respondent City, is a municipality in the County of Milwaukee, duly incorporated under the laws of the State of Wisconsin.
3. That Elsworth L. Salisbury, hereinafter referred to as Respondent Salisbury, is an individual residing at 9529 West Kaul Avenue Milwaukee, Wisconsin, and is a supervisor in the employ of the Respondent City.

4. That the Complainant is the certified bargaining representative of certain employees of the Respondent City, including employees assigned to the Respondent City's Municipal Garage, under the supervision of Respondent Salisbury.

5. That during a period of time extending from a few minutes before midnight August 4, 1966, to approximately 12:20 a.m. August 5, 1966, there was a meeting at the Municipal Garage that was voluntarily attended by some of the employees under Respondent Salisbury's supervision, which meeting was called by employee Joseph Krueger for the purpose of discussing an election of a new steward to represent Complainant; that Respondent Salisbury attended such meeting for approximately five minutes, but did not call the meeting or know of its purpose until he so attended it; that Respondent Salisbury, while present at said meeting advised employees present that meetings of members of the Complainant should not be held on the premises of the Respondent City; that neither Respondent Salisbury nor any other representative of Respondent City initiated or participated in the scheduling of the meeting among members of the Complainant; and that the limited participation of Respondent Salisbury at said meeting did not interfere with, restrain or coerce any of the employees of the Respondent City with respect to their membership or activity on behalf of the Complainant.

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

CONCLUSION OF LAW

That neither Respondent City of Milwaukee nor Respondent Elsworth L. Salisbury has committed any prohibited practices within the meaning of Section 111.70, Wisconsin Statutes, with respect to the meeting of employees held in the Municipal Garage on August 4 and 5, 1966.

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


ORDER

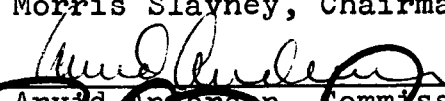
IT IS ORDERED that the complaint filed in the instant matter be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 5th day of May, 1967.

WISCONSIN EMPLOYMENT RELATIONS BOARD

By


Morris Slayney, Chairman


Arvid Anderson, Commissioner


Zel S. Rice II, Commissioner

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MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

The complaint of prohibited practices in this proceeding was filed with the Board by the Union on September 16, 1966. A hearing was held on October 11, 1966, and final argument was completed on March 30, 1967, when the Union declined to file a reply brief.

The Respondents did not file an answer to the complaint prior to the commencement of the hearing, but elected to interpose an oral answer at the hearing. The Union moved, in effect, that the oral answer be ignored and that it be granted an order based upon its complaint. This motion must be denied in conformity with the Board's uniform policy with respect to the filing of answers.

ERB 12.03(6) of the Board's rules states:

"Failure to file a timely answer, in the absence of extenuating circumstances recognized by the board, constitutes an admission of and a waiver by such party of a hearing as to the material facts alleged in the complaint."

However, ERB 10.01, setting forth the purpose and principals of construction to be applied to such rules states, in part, that "The Board...may waive any requirements of these rules unless a party shows prejudice thereby." There is no showing of prejudice in the instant case and ERB 12.03(6) supra is held to have been waived by the Board.

At the hearing Counsel for the Respondents brought to attention that a copy of the complaint was not served upon Respondent Salisbury.

However, Counsel explicitly waived any objection to proceeding in the matter.

The complaint alleges violations of Section 111.70(3)(1) which prohibits "Interfering with, restraining or coercing any municipal employe in the exercise of the rights provided in Section 111.70(2) for such employes." At the hearing, the Respondents moved for the dismissal of the complaint on the ground that inasmuch as the rights allegedly violated are "employe" rights the Complainant, not being an employe, cannot bring the complaint.

This motion must be denied^{1/} pursuant to Section 111.70(4)(h) which provides that "Any labor organization or any individual affected by prohibited practices herein is a proper party to proceedings by the Board to prevent such practice under this subchapter." The Respondents argue, however, that the complaint fails to allege that the Complainant was "affected" by the alleged prohibited practices. This contention is also rejected and it is noted that the complaint does allege that the City, through an agent, engaged in conduct to be described below, toward one of Complainant's stewards, which conduct is alleged to constitute a violation of the cited statutory subsection. Further, ERB 12.02 of the Board's rules declares that a complaint "may be filed by any party in interest."

The Respondents again moved for the complaint's dismissal during the course of the hearing following the cross-examination of Kenneth A. Germanson, an official of the Complainant, who signed and swore to the verification attached to the complaint. The verification states that the signator "has read the above and foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to such matters he believes it to be true." Germanson's testimony indicated that the non-conclusionary allegations in the complaint were not matters of which he had direct personal knowledge and the Respondents contend that on that ground the complaint is inadequately verified.

This motion to dismiss by the Respondents is also denied. The reference in the verification to matters stated on information and belief is sufficient to protect the complaint from attack on this basis.

^{1/} Waunakee Jt. School District No. 1 (6706) 4/64.

Respondent Salisbury is an Assistant Automotive Mechanic in the Bureau of Municipal Equipment of the Public Works Department. He is assigned to the evening shift which is scheduled from 4:00 p.m. to midnight at the City's Edison Parking Lot Facility. In a Direction of Election involving certain employees of the City, which issued in January, 1963,^{2/} the Board held that certain such Assistant Automotive Mechanics were supervisors and thus ineligible to vote, whereas other employees so classified were not supervisors. The position held by Salisbury was not in existence at the time of that Direction. However, both parties agree, and evidence in the record indicates, that Salisbury is a supervisor. It is further indicated that his authority extends over twelve employees during his shift as well as three employees on the night shift which begins at midnight.

Salisbury, during the period discussed herein, was also a member of the Complainant Union. There is no evidence that his membership was ever a required condition of his employment or that he was not free at all times to cease being a member of the Union, however.

A few minutes before the end of the evening shift on August 4, 1966, Salisbury was approached in his office by Joseph Krueger, an Automotive Mechanic under his supervision, and asked by Krueger to announce through an intercommunications system to Carl Danes and Eric Madison that Krueger wished to speak with them in a certain locker room. Danes and Madison are also under Salisbury's supervision and work in the tire shop which, apparently, is somewhat remote from where the other employees that he supervises work. Salisbury complied with Krueger's request and did so, according to the evidence, without previous knowledge of its significance or explanation by Krueger. Danes testified that Salisbury said, "Carl, if you have time, would you please come upstairs after midnight? Joe Krueger would like to talk to the men." and "If you can, tell Eric Madison to come up, too."

A few minutes after midnight Salisbury went to the locker room where he found Krueger, Danes, Madison, second shift employees Raymond Julga, Oscar Boness, Henry Wicht, Frank Ulatowski, Robert Poplin; and third shift employees Harry Pietrzak, Robert Gehm and James Dunn. Ulatowski was the Union steward with respect to the employees involved herein.

^{2/} Decision No. 6215.

According to his testimony, upon arriving at the locker room, Salisbury heard Madison say something about the employees being dissatisfied with their steward and selecting a new steward. According to Salisbury, this was his first knowledge of the subject of the meeting. Then Steward Ulatowski said that it was improper to hold a Union meeting on City property and Krueger replied that the employees should settle their differences without involving others, according to Salisbury's recollection. Salisbury expressed his agreement with the Steward's assertion and left the group having been with them only three or four minutes. Salisbury further testified that all of the employees were talking and that he learned at that time that a difference between Krueger and Julga was also pertinent to the employees' discussion.

After 15 or 20 minutes, according to Salisbury, he returned to the locker room where he found only the three third shift employees, and Krueger, Julga, Ulatowski and Poplin talking in a group. At that time Salisbury said goodnight and left the premises.

Harry Pietrzak, the only third shift employee to testify, came to work at about 11:45 p.m. and was told by Krueger at about that time that there was to be a meeting. At the meeting, Pietrzak recalls, Krueger stated to the group that there should be an election of a new steward and that the problem had started when Julga had filed a certain grievance (to be discussed below). After about 5 minutes, according to this witness, the meeting broke into shouting and several simultaneous conversations.

Danes attended the discussion and recalls Salisbury's appearing there about two or three minutes after its commencement. He further testified that after Krueger explained that he wanted to have a discussion with the employees about grievances and troubles among the employees everyone began to talk at once. At that point Danes left.

Robert Poplin was at the locker room a few minutes before midnight. Apparently some employees were preparing to leave at that time and Krueger asked them to meet to discuss the removal of the steward. Poplin testified that Salisbury was present when Krueger stated the purpose of the meeting. Poplin recalls that Madison said that the removal should be done in a proper manner and not behind the subject's back. He further remembers that at some time Salisbury said "a meeting is a meeting." It was also Poplin's testimony that the employees were

previously unaware of the meeting and that at the meeting "bedlam broke loose and then everybody started to talk." The remarks attributed by this witness to Salisbury and Madison jibe with Salisbury's testimony.

Raymond Julga also testified as to the meeting in question. Like Poplin, he recalls that the meeting began a few minutes before midnight with an announcement by Krueger that the meeting was to discuss complaining to superiors about trifles and "turning in" a Union member. Then Krueger indicated, according to Julga, that he would "get to" Julga later. Julga also remembers that the steward said that it was improper to have a Union meeting at that place and that Salisbury said in response, "a meeting is a meeting." Madison then stated, according to Julga, that the removal of the steward should not be carried out in an underhanded manner. Then, Julga states, an argument developed between himself and Krueger with respect to an incident to be discussed below in which Julga and Krueger were at odds.

The incident referred to in Julga's testimony and in Pietrzak's testimony involved an occurrence during the week previous to August 4, 1966. At that time Salisbury was absent on vacation and his substitute, Braun, was temporarily off the premises. Krueger, who was a leader, in the absence of the supervisor, asked Julga, his helper, to do something and Julga refused. Krueger reported this to Braun who disciplined Julga. Julga filed a grievance concerning the incident with Steward Ulatowski. The grievance was pending when the August 4, 1966 meeting took place.

There is no evidence that attendance at the meeting of August 4, 1966, was required explicitly or implicitly by Salisbury. Neither is there any indication on the record that Salisbury was instructed or advised by any of his superiors that the meeting should be held.

On September 19, 1966, Ulatowski and Julga filed charges within the Union against Salisbury. The charges specified a provision of the Union's Constitution allegedly violated by:

"...Acting in collusion with management to the detriment of the welfare of the union or its membership, by calling and condoning a meeting in which an attempt was made to remove a duly elected steward and by participating in secret meetings with another union member (Joseph Krueger) and management to undermine the union, its members and its policies, and,

...Willful violation of a legally negotiated and approved collective bargaining agreement, by calling a union meeting on City time..."

There is no evidence as to what procedures or results, if any, followed as consequences of these charges.

In his testimony, Harry Pietrzak stated that on one or two occasions between mid-July, 1966 and August 4, 1966, Krueger had spoken of an employe meeting for the purpose of changing stewards. There is also evidence of previous hostility between Salisbury and Steward Ulatowski. During March, 1966, a grievance was settled by Salisbury's posting an apology to Ulatowski for making certain remarks about the latter. There has been, in addition, a continuing dispute between the supervisor and the steward with respect to men being assigned to the work of higher classifications than they hold.

The matter of the August 4, 1966 meeting was also the subject of a grievance. In its reply to that grievance the City stated:

"No Union meeting was held. It is the supervisor's prerogative to call or allow meetings for management purposes whenever such meeting does not violate Section 111.70 of the State Statutes and the Union contract. The meeting in question was a voluntary meeting of some of the men who wanted to see if they couldn't get better feelings in working together. The Supervisor allowed this. It was not a Union meeting and no Union business should have been conducted in the presence of the Supervisor."

Apparently this grievance, like the internal Union charge described above referred to Part II, Section D of the labor agreement between the City and the Union. That provision declares: "2. No Union meetings shall be held on city time." The Union's contention that the City's answer to the grievance admits that Salisbury called the meeting is rejected as the answer, in fact, asserts merely that the meeting was "allowed".

The evidence indicates that the meeting of August 4, 1966 was conceived and initiated by Krueger in response to Steward Ulatowski's handling of Julga's grievance and in order to depose Ulatowski. There is no evidence that Krueger and Salisbury conspired in these purposes or even that Salisbury was aware of them. Salisbury's calling of two employes to the meeting, as described above, is not sufficient grounds for a contrary inference. Salisbury, because of prior conflicts, may have welcomed Krueger's efforts once he learned of them, but that possibility is not an adequate basis for inferring that he promoted those efforts, either.

It is noteworthy that in the intraunion charge against Salisbury, the framer recognized the need to allege conspiracy and previous meetings between Salisbury and Krueger.

The meeting itself was, according to the evidence, disorderly and, for most of its brief duration, composed of several simultaneous conversations. This being the case, it is not possible to determine enough of what was said and done to reach conclusions as to the effect that was likely to arise from the meeting.

Salisbury's attendance at the meeting was sufficient for him to learn of its purpose and for him to see that no structured discussion was going to occur. He stated to the gathering that no "union meetings" were to be held on the premises and left shortly thereafter, having stayed about 5 minutes. When he left, the meeting had already begun to disintegrate and there was no reason to conclude that a "union meeting" was about to commence or was going on.

Salisbury might have ordered the gathered employees to get to work or leave the premises but he had no reason to conclude that a lengthy session was under way and such an assertion of authority may have been inconsistent with the usual degree of discipline imposed by this supervisor.

Cases cited by the Union, in its brief, stand for the proposition that attendance by supervisors at Union meetings, for unlawful purposes, are violative of the National Labor Relations Act. However, the cases cited involve a regular weekly union meeting^{3/} and an organizational meeting called by union officials conducting a membership campaign.^{4/} The instant case is distinguishable from the above as the meeting under discussion herein was a union meeting only in the sense that union members were there to discuss a union problem. It was neither sponsored by or scheduled by the Union, nor was it led by a Union official. Further, as stated, Salisbury's purpose, according to the evidence, cannot be found to have been to subvert the Union.

Based upon the foregoing, and the record as a whole, it is concluded that neither the City nor Salisbury acted in such a way as to constitute a violation of the employees' rights under Section 111.70.

Both of the parties, in their briefs, raise questions with respect to the somewhat ambiguous position of supervisors who are also

^{3/} Brookside Industries, Inc., 133 NLRB 842, 308 (F2d) 224 (4th Cir. 1962).

^{4/} W. T. Carter and Brother, 90 NLRB 2020.

union members. Of course, a supervisor can only be in such a position voluntarily and an employe organization is not compelled to accept a supervisor as a member. Therefore, a supervisor who finds his roles incompatible may choose to quit the union or tolerate his situation. The union which accepts supervisors chooses to risk their participation in the union's business. A supervisor should not, however, join a union in order to act as an agent of the employer in the union's processes.

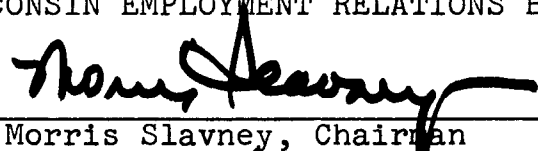
With respect to the general problem of supervisors being members of the same labor organization as rank and file employes, the Board has stated the following:

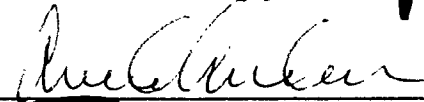
"Supervisory personnel, because of their status with a municipal employer, could create the situation where the municipal employer would be dealing with itself if the supervisors were allowed to control the bargaining representative. The law abhors any possible conflict of interest or even a taint of conflict of interest. However, there is nothing in Section 111.70 which provides that mere membership of supervisors in a labor organization contaminates that organization for purposes under the Statute. The fact that supervisory personnel are members of, or may hold office in, any labor organization subject to the provisions of Section 111.70 may raise a suspicion, but does not in itself establish domination or interference with the organization by the municipal employer employing such supervisory personnel."^{5/}

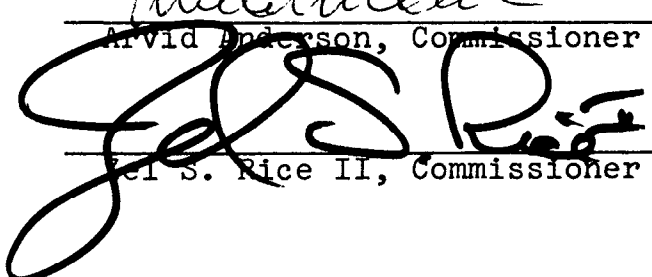
Dated at Madison, Wisconsin, this 5th day of May, 1967.

WISCONSIN EMPLOYMENT RELATIONS BOARD

By


Morris Slavney, Chairman


Arvid Anderson, Commissioner


J. S. Rice II, Commissioner

^{5/} Joint School District #1, City of West Allis (6544) 11/63; City of Milwaukee (6960) 12/64.