

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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BUILDING SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 150, AFL-CIO,

Complainant,

vs.

SAGE NURSING HOME,

Respondent.  
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Case IV  
No. 11631 Ce-1163  
Decision No. 8179-B

Appearances:

Eisenberg & Kletzke, Attorneys at Law, by Mr. Sydney M. Eisenberg,  
for the Complainant.

Michael, Best & Friedrich, Attorneys at Law, by Mr. Marshall  
R. Berkoff, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter, and the Commission having authorized Byron Yaffe, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Section 111.07(5) of the Wisconsin Employment Peace Act, and hearings on such complaint having been held at Milwaukee, Wisconsin, on September 20, September 25, October 2 and October 3, 1967, before the Examiner, and the Examiner having considered the evidence, arguments and briefs of counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the Complainant, Building Service Employees International Union, Local 150, AFL-CIO, hereinafter referred to as the Union, is a labor organization and has its offices at 135 W. Wells Street, Milwaukee, Wisconsin.

2. That the Respondent, Sage Nursing Home, hereinafter referred to as the Employer, is a Wisconsin Corporation operating a nursing home at 9632 West Appleton Avenue, Milwaukee, Wisconsin, and that a separate partnership owns the real estate, equipment and fixtures of

No. 8179-B

said operation.

3. That on June 29, 1967, the Wisconsin Employment Relations Commission directed a representation election to be conducted among the employes of the Employer in a stipulated bargaining unit to determine whether said employes wished to be represented by the Union; that said election was conducted on July 18, 1967; and, thereafter, the Commission certified the results of the election in which a majority of the employes chose not to be represented by the Union.

4. That during the months of July and August, 1967, the Employer discharged employes Zeophis Wayne, Shirley Johnson and Rosie Fears; and, in addition, the employment of employes Roberta Fayne and Vernell Burt was terminated.

5. That there exists no clear and satisfactory preponderance of the evidence that the Employer had any knowledge of the Union membership, activities or sympathies of the above-named employes, and that the terminations of said employes were for reasons other than their Union activities.

6. That the Employer granted wage increases to twenty-six (26) employes during the payroll periods ending July 8, 1967 and July 22, 1967, and that said increases were granted because of employe promotions, merit increases, previous commitments, and nurses aide certifications which were issued by the Milwaukee Health Department during this period; and that there exists no clear and satisfactory preponderance of the evidence that said increases were granted for the purpose of influencing the outcome of the representation election conducted by the Commission on July 18, 1967.

Upon the basis of the above and foregoing Findings of Fact the Examiner makes the following

#### CONCLUSIONS OF LAW

1. That the discharges of employes Zeophis Wayne, Shirley Johnson and Rosie Fears and the termination of employes Roberta Fayne and Vernell Burt were not motivated by the Union membership, activities or sympathies of said employes, and that Sage Nursing Home, by terminating the employment of said employes, has not committed an unfair labor practice within the meaning of Section 111.06(1)(c) of the Wisconsin Employment Peace Act.

2. That Sage Nursing Home, by granting wage increases to certain employes during the payroll periods ending July 8, 1967 and July 22, 1967, did not commit an unfair labor practice within the meaning of

Section 111.06(1)(a) and (c) of the Wisconsin Employment Peace Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law the Examiner makes the following

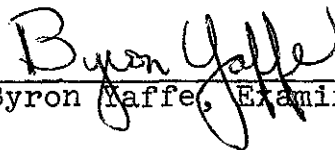
ORDER

IT IS ORDERED that the complaint filed in this proceeding naming Sage Nursing Home as Respondent be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 1st day of March, 1968.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Byron Gaffe, Examiner

STATE OF WISCONSIN

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	Complainant,	:
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MEMORANDUM ACCOMPANYING FINDINGS OF  
FACT, CONCLUSIONS OF LAW AND ORDER

The original complaint in this matter alleged that the Respondent had engaged in "a series of wilfull employment discharges of certain employes who are all Union members in good standing" and that such discharges were based upon a union referendum campaign and the union membership of the employes. The complaint also asserted that the discharges were racially discriminatory in nature. The Respondent thereafter filed a motion with the Commission to strike the portions of the complaint which alleged that the actions taken by the Employer were racially discriminatory, and to dismiss the entire complaint on the grounds that the complaint was vague and uncertain; the Commission lacked jurisdiction over the subject matter; several causes of action were improperly united; and the complaint did not state facts sufficient to constitute a cause of action.

The Commission thereafter issued an order denying the motion to dismiss the complaint and further ordered that the allegations of racial discrimination be stricken from the complaint.

STATEMENT OF FACTS AND POSITION OF THE PARTIES

On May 23, 1967, the Complainant Union filed a representation and referendum petition with the Wisconsin Employment Relations Commission, and on June 29, 1967, the Commission directed a representation election to be conducted among the employes in a stipulated collective bargaining unit; in addition, the Commission dismissed the Union's petition for a referendum without prejudice. The representation election was held on July 18, 1967, and on July 27, 1967, the Commission certified the results of the election in which a

majority of the employes chose not to be represented by the petitioning Union.

Termination of Employment of Roberta Fayne

Roberta Fayne testified that during the month of July 1967, she asked Mr. Samuel Morris, the Executive Director of Sage Nursing Home, for a one-week's leave of absence during the week of July 21, and Mr. Morris granted her request. At the time that she requested the leave of absence, she also asked for a \$25.00 advance on her salary in order to take her children to visit her parents in the South, and Mr. Morris also gave her the advance. When she returned from her leave of absence, employe Fayne contends that she telephoned Mr. Morris to tell him that she was ready to return to work. However, Mr. Morris advised her not to return to work the next day, and that he would call her when she was needed. She was never subsequently called. Mrs. Fayne thereafter went to the Nursing Home and picked up her final pay check, from which the Nursing Home deducted the \$25.00 advance which she had previously received. Mrs. Fayne testified that at no time did she receive any explanation why she had not been permitted to return to work after she had returned from her authorized leave of absence.

Mr. Samuel Morris testified that Mrs. Fayne was absent in July 1967 for one week without permission, and was told upon her return that she had been replaced and that she should call within four or five days to see if any openings became available. The Employer contends that employe Fayne, approximately four or five days prior to her unauthorized leave of absence, advised the Director of Nurses at the Nursing Home that she had to have a leave of absence, but she gave no reason for her request. Employe Fayne was advised by the Director of Nurses that there were already four employes scheduled for vacations during the week she requested the leave of absence and therefore, there would not be a sufficient number of nurses aides and home assistants on her shift if she were permitted the leave of absence during the week she requested such leave. Employe Fayne then indicated that she would take the week anyway, and the Director of Nurses referred her to Mr. Samuel Morris. The Director of Nurses thereafter sent a note to Mr. Morris indicating that Mrs. Fayne wanted a week off, and also indicating that four employes were already scheduled to be off that week. Mr. Morris received the note prior to his meeting with Mrs. Fayne, and when Mrs. Fayne advised Mr. Morris that she was taking the leave, Mr. Morris, relying on the note,

advised her that the Home would be short of help on her shift without her, and, therefore, she could not have the leave of absence during the week she requested it.

The Employer further asserts that when Mrs. Fayne called after having taken the unauthorized leave of absence, she was advised to call back within three or four days to see if there would be work available for her, but she did not call back and returned only to pick up her pay check. Mr. Morris testified that he never told Mrs. Fayne that she was discharged or that she had been permanently replaced.

The record indicates that employe Fayne signed a Union card on July 13, 1967; however, there is no evidence in the record that the employe was overtly active in the Union in any way. In addition, there is no other evidence in the record that the Employer had any knowledge of employe Fayne's Union membership or sympathies. Mrs. Fayne testified that she never carried Union cards and never solicited Union membership on the premises or elsewhere. The only evidence of her Union activities was that she had signed a card and had voted.

#### Termination of Vernell Burt

Miss Vernell Burt testified that on August 4, 1967, when she was working the 3:00 to 11:00 P. M. shift, she had an argument with another employe working on the same shift, Mrs. Marianne York. Mr. Samuel Morris appeared during the argument and told Miss Burt that when she finished work he would like to talk to her. Miss Burt told Mr. Morris that if he wanted to see her, he would have to talk to her at that time. Thereafter, Miss Burt and Mr. Morris went to Mr. Morris' office. Miss Burt testified that once they were in his office she attempted to discuss her problems with Mrs. York, but Mr. Morris only wanted to discuss some beer he found in the employes' refrigerator. During this discussion, which both sides admit became quite heated, Miss Burt asserts that Morris told her to "hit the clock". After punching out, Miss Burt contends that Mr. Morris ordered a cab for her, and sent her home. Miss Burt admits that while she was waiting for the cab, she may have had a few words with Mrs. York, but denies that she started a fight.

The Employer contends that on August 4, 1967, Mrs. Marianne York, a nurses aide working on the same shift with Miss Burt, advised Mr. Morris that Miss Burt had reported to work under the influence of alcohol, and that she and other employes had brought beer into the Nursing Home and put the beer in the employes' refrigerator. Mrs. York testified that after she had witnessed the employes sneaking

the beer into the Nursing Home, she was threatened by these employes and thereafter reported the incident to Mr. Morris. After she had reported the incident, Mr. Morris checked the refrigerator and found one dozen bottles of beer. He then advised Miss Burt that he wished to talk to her after work, but Miss Burt told him that if he wanted to talk to her, he would have to talk to her at that time. Mr. Morris testified that they then went to his office where he asked Miss Burt whether she knew anything about the beer which was in the employes' refrigerator. She denied having any knowledge of the beer. During this conversation, Mr. Morris asserts that Miss Burt became quite angry and stated that he obviously would not listen to her, and, therefore, she was going to punch out and quit. He then told her that if that was what she wanted to do, "there is the clock", referring to the timeclock. Mr. Morris and other Employer witnesses testified that Miss Burt thereafter attempted to engage in a fight with Mrs. York, and in fact physically attacked her. Mr. Morris and Mr. Aaron Boxer, partners in the Nursing Home, testified that they had to restrain Miss Burt in order to prevent her from inflicting physical harm on Mrs. York. Miss Burt denies that any such altercation occurred.

Miss Burt testified that she signed a Union card and must have dropped it, because about four or five days prior to the election, Mr. Morris returned the card to her. Mr. Morris, however, denied returning any union card to Miss Burt. Miss Burt further testified that she did talk to some of the employes about the Union, but that Mr. Morris had never observed her doing so.

There is no additional evidence in the record that Mr. Morris or any other management or supervisory representative of the Employer had any knowledge of Miss Burt's union activities or sympathies.

#### Termination of Employment of Zeophis Wayne

Zeophis Wayne testified that on August 8, 1967, Mr. Samuel Morris called her into his office and asked her which employes brought the beer which he found in the employes' refrigerator into the Nursing Home. She denied having any knowledge of employes bringing beer into the Home, but told Mr. Morris that perhaps because there was a curfew in the City of Milwaukee during this time, some employes may have been keeping beer in the refrigerator to take home at the end of the 3:00 to 11:00 P. M. shift, since it would not be possible to buy beer after work. Miss Wayne testified that Mr. Morris told her that she was responsible for the conduct of the employes working

under her, that he had been getting complaints about these employes, and therefore, he would have to discharge her. She also testified that during this conversation Mr. Morris stated that one of the reasons for her discharge was that she was not on his "team", but since she had been a good employe, he was going to give her the vacation pay to which she was entitled, a week's pay, and references.

Miss Wayne asserted that the only responsibilities which she had as a section leader were to assist employes if they had problems and also to distribute medication to the patients. She further asserted that she had no supervisory responsibilities and was not responsible for the conduct of the employes with whom she worked.

Mr. Morris testified that Miss Wayne did have supervisory responsibilities and was responsible for the conduct of the employes in her area. He further asserted that he had received complaints about patient care in the section where Miss Wayne was a supervisor, and that he talked to Miss Wayne prior to her discharge about her supervisory responsibilities. Mr. Morris testified that during this previous conversation, he pointed out to her that patient lights were not being promptly answered, that patient care was generally deteriorating, and that nurses aides were leaving the floors without permission and were taking extended breaks. It is asserted that this conversation took place in early July, and that during the conversation Miss Wayne admitted there was room for improvement and that she would see to it that these problems would be corrected. After this conversation Mr. Morris decided that he would give Miss Wayne a 10¢-per-hour increase effective July 24, 1967, with the hope of providing an incentive to Miss Wayne to solve these problems. This wage increase was put into effect and was received by Miss Wayne on her last pay check in early August; however, she received no notification of the increase prior to picking up her check. Mr. Morris testified that on the day of her discharge he called Miss Wayne into his office and recalled the conversation which he had with her in early July. He told her that complaints by patients were still coming in and that she had not accomplished the improvements which they discussed earlier. In addition, Mr. Morris contends that at this meeting he advised Miss Wayne that he had received reports of her harrassment of employe York, and in addition, that beer had been found in the employes' refrigerator, and that it was his understanding that Miss Wayne knew the employes who had put the beer in the refrigerator. Mr. Morris testified that Miss Wayne told him that Vernell Burt and employes Benson and Fears



brought the beer into the Nursing Home and had put it in the refrigerator, but that they were going to take the beer home, and that they had purchased it early and brought it into the Home because of the curfew. Mr. Morris also testified that he checked the refrigerator twice, and the second time that he checked it, two bottles of beer were missing. However, when he asked Miss Wayne to explain this, she could not explain what happened to the two missing bottles of beer.

Because of the continued patient complaints and the incident involving beer in the employees' refrigerator, Mr. Morris testified that he advised Miss Wayne that she would be discharged, but in view of her past performance at the Home, she would receive two weeks' vacation pay, and in addition would be paid for the remaining portion of the week.

Miss Wayne testified that she was made a union steward on July 13, 1967, and that she knew that Mr. Morris knew of her Union activities since she had been advised by an employe in the kitchen that management knew who the union stewards were. Mr. Morris, however, denied having had any knowledge of Miss Wayne's Union position or activities. There is no evidence in the record other than this conflicting testimony, of the Employer's knowledge of Miss Wayne's Union activity.

#### Termination of Employment of Rosie Fears

The Complainant asserts that during the early part of August, 1967, Rosie Fears was called into the office of Mr. Morris and was advised that the girls were complaining that she did not do good work and had a poor attitude; whereupon she was fired and given a week's pay in advance. Miss Fears testified that Mr. Morris told her if she needed a reference, she should give his name and he would tell them she was fired because the Home was overstaffed. Mr. Morris testified that Miss Fears had not been a satisfactory employe, and that he had discussed her performance with her on several occasions. He had received reports from the nurses in charge that Miss Fears handled patients roughly, ignored instructions, exhibited a bad attitude, and had generally poor working habits. The testimony of the Director of Nurses supports these contentions.

Mr. Morris denied having told Miss Fears that he would tell prospective employers that she was fired because the Home was overstaffed, and instead stated that he indicated only that she could use his name as a reference.

Miss Fears testified that she signed a Union card, but she

had no knowledge whether Mr. Morris or any supervisor knew that she was a Union member. She also admits having talked to some of the girls about the Union, but there is no evidence in the record that any of the Nursing Home management or supervisors knew or had reason to know of her activities.

#### Termination of Employment of Shirley Johnson

The Complaint with respect to the above named employe states:

"That during the second week of August, 1967, SHIRLEY JOHNSON was accused of hitting a patient and discharged; when confronted with the accusation, SHIRLEY JOHNSON denied same and Mr. Morris told her that Judy Mallett, the girl she was working with, had already talked to him; whereupon, leaving work that morning, said SHIRLEY JOHNSON and Judy Mallett had words. When SHIRLEY JOHNSON came into work that night, Mr. Morris had her time card in his office, fired her and sent her home in a taxicab; that said SHIRLEY JOHNSON is a Union member of Local 150."

During the hearing the Complainant Union failed to produce any evidence with respect to the circumstances surrounding the discharge of Miss Johnson. The Respondent, however, did introduce evidence to the effect that Miss Johnson was discharged together with another employe because of a fight which these employes engaged in on the premises.

#### ALLEGATIONS OF RACIAL DISCRIMINATION

The Complainant Union asserts that the discharges of all of the above named employes were racially discriminatory because the Union organizer who was active in the campaign at the Nursing Home was a Negro. Accordingly, the Union asserts that it is relevant to this proceeding that the five employes named in its complaint were Negroes, since the Employer related Union membership with the race of the employes.

The Respondent argues that there is no evidence in the record that the Employer, during or after the Union campaign, considered the race of any of the Union representatives who were active in the campaign, or the race of the employes named in the Union's complaint, in taking the action it took against said employes. The testimony of Mr. Samuel Morris was to the effect that prior to the counting of the ballots in the representation election conducted by the Commission, he had never met the Union representatives who were active in organizing the employes in the Nursing Home, and specifically, he did not

know that the Union employed a Negro organizer, nor that a Negro organizer was active in the campaign.

The Employer further asserts there is no substance to the Union's allegation that the discharges were racially discriminatory, and in support of its position, the Employer notes that approximately 60 percent of the present employes at the Nursing Home are Negro, and since the election, the Respondent has hired more Negroes than Caucasians. In addition, the Employer also asserts that promotions and wage increases have been granted to employes of both races, without discrimination.

#### ALLEGED UNLAWFUL WAGE INCREASES

During the hearing the Union amended its complaint, and in said amendment specifically alleged that the Employer, during the two-month period prior to the election and during a similar period after the election, granted increases to employes in the bargaining unit, such increases further accentuating the effect of the discriminatory conduct referred to in the original complaint. The Respondent denied that during the two-month period prior to and after the representation election, wage increases were given to any of the employes which were discriminatory or in any way violative of Section 111.06(1)(c) of the Wisconsin Statutes.

During the two payroll periods ending July 8, 1967, and July 22, 1967, twenty-six (26) employes received wage increases. The Union asserts that these increases were motivated by the Union representation election, while the Respondent Employer asserts that the increases were granted for three reasons: promotions, merit increases and the certification of nurses aides.

The record demonstrates that it was the policy of the Employer not to advise employes prior to their receipt of the check reflecting a pay increase, that they had received an increase. Thus, employes receive the notification of a pay increase when they pick up their checks, which occurs three days after the end of the payroll period. There is no evidence in the record that any employes had any knowledge or notification of any increase received during the period in question until the checks reflecting the increases were actually received by said employes.

The Employer contends that eighteen of the 26 employes who received increases during this period received them because they had been certified as nurses aides by the City of Milwaukee Department of Health; four employes received increases because they were promoted during this period, and four employes received increases because of merit.

The Employer asserts that there is an established policy in the Nursing Home that employes who receive a nurses aide certification from the City Health Department will also receive an automatic wage increase. Employes who are not certified prior to employment are advised at the time they are hired that upon receiving such certification, they will receive a wage increase of an unspecified amount. This practice was confirmed by testimony of the employes as well as the testimony of the Employer's witnesses. The Employer contends that during the period in question, eighteen employes took the certification exam and were certified as nurses aides, and, therefore, all of these employes received increases.

Mr. Milton Morris, the Co-Administrator of the Nursing Home, testified that the four employes who were promoted during the period in question received additional job duties or were transferred to jobs with greater responsibility, and as a result of their additional duties and responsibilities, they were given increases. With respect to the four employes who received merit increases during this period, Mr. Milton Morris testified that these increases were granted to employes because of inequities which the Employer became aware of at the time it granted increases to all of the employes who had been certified as nurses aides.

With respect to the allegation that the Negro employes were discharged in part because of their race, Mr. Morris pointed out that of the 26 employes who received increases during the period in question, ten were Negroes. He also explained that the number of employes who received certifications in July was unusual because the Employer had for the first time provided its own training course at the Nursing Home, so that more home assistants were able to take the course and pass the nurses aide examination.

The Employer asserts that the two employes who received extra increases, received such increases due to prior commitments made by Mr. Morris at the time of their employment because of their previous experience.

It is therefore asserted that all of the increases questioned by the Complainant were made for reasons other than union considerations, and this contention is supported by the fact that no promises were made to employes regarding increases and no commitments were made during the campaign with respect to such increases.

## DISCUSSION

It is clear to the Examiner that in a complaint alleging discriminatory discharge based upon the Union activities or sympathies of employes, the Complainant must prove by a clear and satisfactory preponderance of the evidence that the discharge was motivated by the employer's anti-union animus, and that the employer had knowledge of the union sympathies or activities of the employes discharged.<sup>1/</sup> In the Examiner's opinion, even if the testimony of all the complainant employes with respect to the circumstances surrounding their terminations is credited, the Union has failed to demonstrate by any credible evidence, either direct or circumstantial, that the Employer had knowledge of the union activities and sympathies of the terminated employes, and that the action taken by the Employer against said employes may have been based upon such activities. In the absence of such evidence, there is no basis for concluding that the employes were terminated because of discriminatory motives, and, therefore, the Examiner finds that the Union has failed to sustain its burden of proof since it has not shown by a clear and satisfactory preponderance of the evidence that the terminations were motivated by the union membership, activities, or sympathies of the terminated employes.

There is absolutely no evidence in the record that the Employer had any reason to believe that employes Roberta Fayne, Rosie Fears and Shirley Johnson were either Union members or sympathetic to the Union's campaign.

As the Examiner has indicated above, the Union has failed to produce any evidence with respect to the events surrounding Miss Johnson's termination, and, therefore, it has clearly failed to meet its burden of proof in demonstrating that the discharge of this employe was motivated by the employe's union affiliation, activities or sympathies. Therefore, the complaint with respect to Miss Shirley Johnson is dismissed.

The Union has also failed to demonstrate that Rosie Fears and Roberta Fayne engaged in any Union activities which came to the attention of the Employer, and accordingly, there is no evidence in the record upon which the Examiner could conclude that the Employer

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<sup>1/</sup> Section 111.07(3) of the Wisconsin Employment Peace Act provides: "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence." See Charles Bakke, d/b/a Lakeside Industries, Dec. No. 4508, 4/57; Dorothy Utschig, d/b/a Utschig Dairy, Dec. No. 5194, 5/59; See also NLRB v. Whitfield Pickle Co., C.A. 5 (1967), 37 F 2d 576; Riggs Distler & Co., Inc. v. NLRB, C.A. 4 (1963), 55 LRRM 2145.

had any reason to believe that these employes were active in or sympathetic towards the Union. Both employes testified that they signed Union cards; however, there is no evidence that they engaged in any additional union activities on the premises of which the Employer was aware. Therefore, even assuming that the Union has demonstrated that these employes were discharged without good cause, it has failed to prove by a preponderance of the evidence that the discharges were at all related to or motivated by their union membership, activities or sympathies. The Examiner accordingly finds that the Complainant Union has failed to prove an essential element to a finding that the Employer has committed an unfair labor practice within the meaning of Section 111.06(1)(c) of the Statute, and the complaint with respect to Roberta Fayne and Rosie Fears is also dismissed.

Employe Vernell Burt testified that the Employer did have knowledge of her union activities, since Mr. Samuel Morris, several days before the election, returned to her a signed union card which she had allegedly lost. Mr. Morris, however, denied ever having returned a union card to Miss Burt. Although Miss Burt testified that Mr. Morris returned her lost union card, there is no supporting evidence in the record that any individuals witnessed Mr. Morris returning the card. The testimony of Miss Burt with respect to the circumstances surrounding her termination is totally inconsistent with the description of said events by Mr. Samuel Morris, Mr. Aaron Boxer, and Mrs. Marianne York. The Examiner does not believe that it is necessary in this proceeding to make credibility determinations with respect to the varying accounts of the termination of Miss Burt; however, the dispute as to whether Mr. Morris returned the union card to Miss Burt does appear to be critical. In view of the fact that Miss Burt's testimony with respect to the return of the union card is totally unsupported in the record, and of the vagueness of Miss Burt's testimony on cross examination with respect to the events which took place immediately after her employment was terminated, and lastly, in view of the fact that much of Miss Burt's testimony was contradicted not only by Mr. Morris and Mr. Boxer, the Respondents in this proceeding, but also by Mrs. York, the Examiner does not credit Miss Burt's statement that Mr. Morris returned a signed union card to her shortly before the election. Miss Burt's testimony regarding her lost union card constitutes the only evidence in the

record which would indicate that the Employer had knowledge of her union activities and sentiments, and the Examiner, having discredited this statement, therefore finds that the Union again has failed to demonstrate by a preponderance of the evidence that the action taken against Miss Burt was based upon her Union activities or sympathies. Because the Union has failed to prove this essential evidentiary element, the Examiner therefore will dismiss the complaint alleging the unlawful discriminatory termination of Miss Vernell Burt.

As has been noted above, Miss Zeophis Wayne testified that she had been told by a supervisory employe in the kitchen that management knew who the Union stewards were, and she therefore concluded that the Employer had knowledge of her union activities, since she had been appointed the Union steward for the second shift on July 13, 1967, five days before the election. Miss Wayne also testified that when she was discharged by Mr. Morris, he stated that one of the reasons for her discharge was the fact that she was not on his "team." These two statements constitute the only evidence in the record that the Employer had any knowledge of Miss Wayne's union activities or sympathies. Because such knowledge by the Employer is critical, the Examiner again must determine whether the Union has sustained its burden of proof and has demonstrated by a preponderance of the evidence that the Employer's discharge of Miss Wayne was motivated by her union activities and sympathies. The Examiner has already noted that an essential element in a discharge case is substantial evidence of the Employer's knowledge of the discharged employe's union membership, activities, or sympathies. In this proceeding the Union introduced hearsay evidence, totally unsupported elsewhere in the record, of the Employer's knowledge of Miss Wayne's Union activities. The Union did not attempt to introduce any direct evidence that any supervisor or management representative knew who the Union stewards in the Nursing Home were, and, in the Examiner's opinion, such hearsay evidence, standing alone, does not have sufficient probative value to conclude that the Employer had knowledge of Miss Wayne's union activities. Miss Wayne also testified that Mr. Morris told her that one of the reasons for her discharge was that she was not on his "team." Even if this testimony is credited, the record does not contain sufficient evidence to infer that this statement was related to her union activities. In fact, if the assertions of Mr. Morris are credited to the effect that Miss Wayne was not performing her supervisory responsibilities in a satisfactory manner, the statement could reasonably be construed as referring to the Employer's

supervisory team, as opposed to Miss Wayne's conclusion that it referred to her union activities. Therefore, in the Examiner's opinion, the Union again has not demonstrated by sufficient direct or indirect proof that the Employer's discharge of Miss Wayne was motivated by her union activities, nor is there any evidence, except for the hearsay evidence introduced by Miss Wayne, which is totally unsupported elsewhere in the record, that any supervisors or representatives of management knew that Miss Wayne had been appointed the Union steward on the second shift. Accordingly, because this essential element has not been proven by the Union, the complaint alleging that Miss Wayne was discriminatorily discharged is dismissed.

In the Examiner's opinion, the Union has completely failed to demonstrate that the Employer's conduct affecting the tenure of of the employes named in the complaint was based upon the race of said employes, nor that the Employer associated the race of the employes with their Union sympathies and activities because of the fact that an organizer active in the campaign at the Nursing Home was a Negro. The Union has failed to introduce any evidence (a) that a Negro organizer was active in the campaign, (b) that the Employer knew that a Negro organizer was active in the campaign, (c) that Negro employes were overtly active in the campaign, and (d) that the Employer discriminated against Negro employes with respect to any terms and conditions of employment. In fact, the only evidence in the record supports the contention of the Employer that the allegation of racial discrimination is totally without substance; the evidence indicates that there are presently more Negro employes in the Nursing Home than Caucasians, and promotions and other pay increases have been granted to Negro as well as Caucasian employes since the election. The Examiner therefore concludes that the allegation that the discharges were racially discriminatory and that such discrimination also evidences Union discrimination is totally without merit.

Lastly, the Union asserts that the Employer granted wage increases to certain employes during and after the Union campaign and election, which further accentuated the discriminatory actions of the Employer alleged in the original complaint. The record, however, does not support this contention. The only evidence in the record that the Employer promised to increase salaries if employes voted against the Union was the testimony of Miss Zeophis Wayne to the effect that employe Mary Alexander had made such a statement. However, Mrs. Alexander, whose testimony the Examiner credits, denied that she



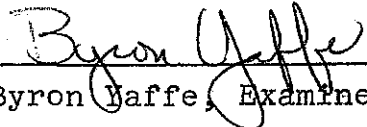
had made the statement, and further testified that no management representative or supervisor had made any statement promising benefits to her at any time.

The record is clear that no promises of wage increases were made to employes during the Union campaign. Although the Employer admits that there were an unusual number of wage increases granted during this period, the unusual number of increases was explained by the fact that the Nursing Home had just initiated its own training program for nurses aides, and, therefore, an unusually large number of Home Assistants were able to take the nurses aide training course and examination and were subsequently certified by the City Health Department. The Union failed to produce any evidence contradicting the assertion of the Employer that the increases were granted because of its established policy of granting such increases to newly certified nurses aides, and that the remaining wage increases were granted because of promotions, merit increases and previous commitments. The only evidence in the record supports the Employer's contention that the increases were customary and in accord with the past practices of the Employer. Absent any credible evidence of Employer interference, such as promised benefits to employes contingent upon the outcome of a representation election or the activities of the employes during the Union campaign, and absent any evidence that the increases were unusual in view of the past practice of the Employer,<sup>2/</sup> in the Examiner's opinion, the Union has again failed to demonstrate by a clear and satisfactory preponderance of the evidence that the wage increases in question were related to the Union campaign or activities of the employes receiving such increases, and the complaint alleging that the increases were discriminatory and unlawful shall therefore be dismissed.

Dated at Madison, Wisconsin this 1st day of March, 1968.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Byron Gaffe, Examiner

<sup>2/</sup> Lov-It Creamery, Dec. No. 2954, 8/51; Washington County Hospital and Home, Dec. No. 7694-C, 9/67; NLRB vs. Exchange Parts, 375 U. S. 405 (1964); Imco Container Co. vs. NLRB, CA 4 (1965) 346 F. 2d 178; Higgins Industries, Inc., 150 NLRB 106, (1964); Phillips Mfg. Co., 148 NLRB 1420, (1964).