

ROBERT RUBIN,

VS.

Respondent.

Appearances:

Mr. Vernon Swanson, Assistant City Attorney, for the Respondent.

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter, and the Commission having appointed 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 hearing on such complaint having been held at Oshkosh, Wisconsin on March 19, 1968, 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, Conclusion of Law, and Order.

1. That the Complainant, Robert Rubin, is an individual residing at 1345 Ontario Street, Oshkosh, Wisconsin.

2. That the Respondent, City of Oshkosh, is a municipal employer having its principal offices at the Oshkosh City Hall, 215 Church Avenue, Oshkosh, Wisconsin.

continued to act as union steward in the Sanitation Department until he was discharged on September 8, 1967.

4. During the last week of August and the first week of September 1967, Rubin was on vacation. When he returned to work on September 6, Rubin heard that three employees in the Sanitation Department had been seen by a supervisor entering an unauthorized building during working hours. Rubin briefly questioned two of the employees, and thereafter asked the Superintendent of the Sanitation Division what he knew about the matter. Rubin was advised that a decision in the matter by the Director of Public Works was pending.

5. On September 7, 1967, the three employees who had been seen entering the unauthorized building were advised at approximately 2:00 P. M. to report to the office of the Administrative Assistant to the City Manager and Personnel Director, Charles Ott, in the City Hall at 2:30 P. M. At approximately 2:26 P. M. Rubin was also told to appear at the meeting scheduled at 2:30 P. M. Rubin advised his supervisor that he would be late for the meeting because he first had to pick up his automobile.

6. Shortly after 2:30 P. M. Ott saw the three employees on the City Hall parking lot and asked the Superintendent of the Sanitation Division where Rubin was. He was advised that Rubin was first picking up his automobile and that he would be late for the meeting. Ott then called the President of the Local Union and told him to either appear himself or to send the Chief Steward to assure that the employees had a Union representative, since the meeting was to be a disciplinary proceeding.

7. At approximately 3:00 P. M. Rubin met the three employees on the parking lot of City Hall, and after a short discussion, the employees and Rubin agreed that he would appear on their behalf at the meeting and would request a postponement in order to give him an opportunity to investigate and determine the facts in the matter.

8. Rubin went into Ott's office alone, while the three employees waited in the hall outside the office. Ott asked where the employees were, and Rubin replied that they were in the hall; he then requested a postponement of the meeting in order to permit him the opportunity to further investigate the facts in the matter. Rubin's request was rejected, and after a heated argument, Ott suggested that Rubin leave the office.

9. After Rubin left the office he advised the employees that he was unable to obtain a postponement and that they would have to await the

decision of the City before taking any further action. He further advised the employees that they "might as well go home."

10. After Rubin and the three employees left the City Hall, the Union President and Chief Steward arrived and were told by Ott that the employees and Rubin had left. The President of the Union attempted to find the employees, and in doing so, he met Rubin on the City Hall parking lot. The Union President asked what happened at the meeting and where the employees were, and Rubin replied that he had sent the employees home because he would not subject them to a "kangaroo court." The Union President thereafter advised Ott that the employees had been sent home.

11. On the morning of the following day, September 8, 1967, the three employees in question received notices that two had been suspended for three days and that one had been suspended for six days because this was a second offense.

12. Rubin worked on September 8, 1967, but at the end of the day he received a letter from Ott advising him that his employment had been terminated for the following reasons:

- A) Failing to follow instructions of a supervisor.
  - 1. On September 7 you were told to report to the Personnel Office at 2:30 P. M. You did not!
- B) Insubordination.
  - 1. By failing to follow instructions of your supervisor during working hours, you are guilty of insubordination.
- C) Inciting City employees.
  - 1. You incited fellow employees to disregard the orders of a supervisor during working hours.

13. Rubin appealed the discharge through the grievance procedure established in the collective bargaining agreement, and the grievance was ultimately denied. He also requested the Executive Board of the Local Union to appeal the decision, and such request was unanimously rejected.

14. That Rubin's discharge was motivated in part by his zealous conduct as the Union representative of the employees at the disciplinary meeting on September 7, 1967.

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

#### CONCLUSION OF LAW

That the discharge of Robert Rubin was motivated in part by his conduct as a Union representative of certain employees during a

disciplinary meeting, and that City of Oshkosh, by discharging Robert Rubin for the above stated reason, discriminated against him because he engaged in protected activities and thereby has committed and is committing prohibited practices within the meaning of Section 111.70 (3)(a)1 and 2 of the Wisconsin Statutes.

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

ORDER

IT IS ORDERED that the Respondent, City of Oshkosh

1. Cease and desist from discouraging employees from engaging in protected activities as union officials, by discharging any of its employees or by discriminating against them in any other manner pertaining to their tenure, term or condition of employment.
2. Take the following affirmative action which the Examiner finds will effectuate the policies of Section 111.70, Wisconsin Statutes:
  - a. Immediately offer to Robert Rubin reinstatement to his former position without prejudice to any rights or privileges which he previously enjoyed.
  - b. Make whole Robert Rubin for any loss of pay which he may have suffered by reason of the discrimination against him by payment to him a sum of money equal to that which he normally would have earned as wages from the date of his discharge to the date of an unconditional offer of reinstatement, less any net earnings which Robert Rubin may have received elsewhere during such period.
  - c. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the receipt of this Order what steps have been taken to comply therewith.

Dated at Madison, Wisconsin this 23<sup>rd</sup> day of July, 1968.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Byron Yaffe, Hearing Examiner

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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ROBERT RUBIN,

Complainant,

vs.

CITY OF OSHKOSH,

Respondent.  
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Case III  
No. 11916 MP-49  
Decision No. 8381-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER

Statement of Facts

Robert Rubin, the Complainant in this proceeding, prior to his discharge had been employed in the Sanitation Department of the City of Oshkosh for a period of nineteen and one-half years, including approximately three years in the military service. In 1965 Rubin was elected union steward by the employees of the Sanitation Department and he continued to act as steward until he was discharged on September 8, 1967.

During the last week of August and the first week of September 1967, Rubin was on vacation. When he returned to work on September 6, he learned that while he was on vacation three employees in the Sanitation Department had been seen by a supervisor entering an unauthorized building during working hours. He briefly questioned two of the employees, and subsequently asked the Superintendent of the Sanitation Division about the matter. He was advised by the Superintendent that a decision in the matter by the Director of Public Works was pending.

On the following day, September 7, at approximately 2:00 P. M., the three employees in question were advised to report to City Hall at 2:30 P. M.; at approximately 2:20 P. M., Rubin was also told to report to City Hall at 2:30 P. M. for a meeting to discuss the three

and then would go to City Hall.

Rubin met the three employees on the parking lot of the City Hall at approximately 3:00 P. M., and after a short discussion the employees and Rubin agreed that Rubin would appear on their behalf at the meeting and would request a postponement, since he had not had an opportunity to investigate the matter and therefore he would not be able to properly represent the employees.

While the three employees waited in the hall, Rubin went into the meeting. Representing the City were Charles Ott, the Administrative Assistant to the City Manager and Personnel Director, the Superintendent of the Sanitation Division, and another supervisory official. Ott asked where the employees were, and Rubin replied that they were in the hall. Rubin then requested a postponement of the meeting in order to permit him the opportunity to investigate the facts in the matter. The request was rejected, and after a heated argument Ott advised Rubin to leave the office. Rubin thereafter advised the employees that he was unable to obtain the postponement, and that they would have to await the decision of the City before taking any further action. Rubin then advised the employees that they "might as well go home."

When Ott saw the three employees waiting for Rubin on the parking lot prior to the meeting, he asked the Superintendent where Rubin was, and he was advised that Rubin was picking up his automobile before coming to the meeting. Ott then called the President of the Local Union and told him to come to the meeting or to send the Chief Steward in order that the employees would have a Union representative, since the meeting was to be a disciplinary proceeding. After Rubin and the three employees left the building, the Local Union president and Chief Steward arrived and were told that the employees and Rubin had left. The President of the Local Union attempted to find the employees, but they had already left the parking lot; however, he did meet Rubin on the parking lot, whereupon he asked what happened at the meeting and where the employees were. Rubin replied that he sent the employees home, since he would not subject them to a "kangaroo court." The Local Union President thereafter returned to Ott's office and advised him that Rubin had sent the employees home.

On the following day the three employees in question received notices that two had been suspended for three days, and one had been suspended for six days because this had been a second offense.

Rubin worked the following day, but at the end of the day he received a letter from Ott informing him that his employment had been terminated for the following reasons:

- A) Failing to follow instructions of a supervisor.
  - 1. On September 7 you were told to report to the Personnel Office at 2:30 P. M. You did not!
- B) Insubordination.
  - 1. By failing to follow instructions of your supervisor during working hours, you are guilty of insubordination.
- C) Inciting City employes.
  - 1. You incited fellow employes to disregard the orders of a supervisor during working hours.

Rubin filed and appealed the discharge through the grievance procedure established in the collective bargaining agreement; and the grievance was ultimately denied. Rubin also requested the Executive Board of the Local Union to appeal the decision, and such request was unanimously rejected.

#### Position of the Parties

The Complainant asserts that he had the right to be present at the meeting in which the City intended to discipline the employes in question, since it was an admitted practice of the City to have a union steward present not only during meetings involving the processing of grievances, but at all meetings where employes are to be disciplined. It is further argued that although Rubin had a right to be present at the meeting in question because of his status as a union steward, the City had no right to order him to be present, since his presence was not related to his job in any manner, but instead was a matter of right growing out of his status as a union official. Accordingly, the City had no authority to order Rubin to report to the meeting at 2:30 P. M., and therefore, by reporting one-half hour late, the Complainant asserts that he did not commit an act of insubordination which would justify his discharge.

It is further pointed out by the Complainant that he had no opportunity to investigate the matter involving the three employes before the disciplinary meeting, since at no time prior to 2:30 P. M. on September 7 had he been notified that the employes were to be disciplined for their alleged actions. In cases of this type, the Complainant submits that a union steward has the inherent right to appear on the behalf of employes and to represent them, particularly where the employes' consent to have the steward act as their spokesman, as they did in this instance. Since the City admits that the

three employees were entitled to representation by a union steward at the meeting in question, the Complainant argues that the steward, as the employees' representative in such a meeting, was entitled to participate in the meeting after a full and complete investigation and determination of all of the relevant facts. The Complainant asserts that neither the employees nor the Complainant had ever been advised of the purpose of said meeting, and in fact, only one of the three employees knew that disciplinary action might be taken against them. Under such circumstances, the Complainant asserts that he would have been remiss in his duties as union steward and representative of the employees had he not strenuously attempted to obtain a postponement of the disciplinary meeting in order to give the employees adequate Union representation.

With respect to the allegation by the Respondent that the Complainant induced the employees to act contrary to their supervisor's order, the Complainant asserts that the record does not support such a conclusion, since all that the Complainant told the employees after the meeting was that "we might as well go home," and such statement does not constitute either "incitement" or "direction" of employees amounting to insubordination.

Accordingly, it is submitted that by discharging the Complainant because of his zealous conduct as a union steward, the City has interfered with the Complainant's right to engage in protected conduct and has discriminated against him because of such conduct, and accordingly, the City has committed a prohibited practice under Section 111.70(3)(a)1 and 2, Wisconsin Statutes.

The City submits that the evidence fails to show that the discharge of the Complainant was motivated by his protected concerted activities. The record instead indicates that the Complainant interfered with the City's right to discipline its employees by advising the employees not to appear at the disciplinary meeting. It is further submitted that the record clearly demonstrates that even if the Complainant was of the opinion that the employees in question were being deprived of contractual rights, the employees should have been advised by the Complainant to comply with the order to report to the meeting, and they thereafter could have filed a grievance under the procedure established in the collective bargaining agreement. It is submitted that the Complainant had no rights at the disciplinary proceeding except to appear as a witness to guard against any violation of the employees' rights under the collective bargaining agreement. Accordingly, because the Complainant did not abide by the rules prescribed for



such proceedings, and in fact advised the employees to ignore their supervisor's order to report to said meeting, the Complainant acted in an insubordinate manner, and was therefore properly discharged.

#### Discussion

It is clear, under both the National Labor Relations Act, as amended, and the Wisconsin Statutes, that no matter how many valid reasons exist for discharging an employee, if an employee's discharge is partially motivated by protected union activities, the discharge is unlawfully discriminatory and violates both the federal and state statutes.<sup>1/</sup> In the Examiner's opinion, this principle is clearly applicable to the instant case.

The record indicates that Robert Rubin, in the capacity of a union steward representing employees in a disciplinary proceeding, energetically and zealously attempted to provide adequate representation and obtain due process for three employees who were about to be disciplined by the City of Oshkosh, their employer. It is conceded by the City that Rubin was entitled to be present at the disciplinary proceeding as a union steward, but it is further asserted that he was only permitted to witness the proceeding. The City contends that any questions with respect to due process should have been filed as a grievance subsequent to the meeting during which the employees were to be disciplined. The record, however, does not support the City's interpretation of the Steward's limited rights in such a proceeding. The Local Union President testified that although the steward generally attends disciplinary meetings merely as a witness, employees may request the steward to "represent" them in such proceedings, and it is an accepted practice for the City to permit the steward to act as the spokesman for the employees under such circumstances.<sup>2/</sup>

The right of a union steward to represent employees, particularly where the employees have agreed to such representation, implies that the steward may act as the advocate for such employees. As an employee representative and advocate, the steward must not fear personal

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1/ Muskego-Norway Consolidated Schools, Joint School District No. 9, et al., 35 Wis. (2d) 540 (1966); St. Joseph's Hospital vs. WERE, 264 Wis. 396, 1953; Wonder State Mfg. Co. v. N.L.R.B. (6th Cir. 1964), 331 Fed. (2d) 737, 738; N.L.R.B. v. Symons Mfg. Co. (7th Cir. 1964), 328 Fed. (2d) 835, 837; Marshfield Steel Co. v. N.L.R.B. (8th Cir. 1963) 324 Fed. (2d) 333, 337.

2/ Transcript, P. 79.

reprisals based upon his demeanor in the proceeding and the forcefulness with which he represents the employees. To permit an employer to punish a steward for zealous conduct in such a proceeding, unless such conduct is totally unreasonable under the circumstances, clearly interferes with the employees' right to union representation free of employer interference, restraint and coercion. To require that the steward merely witness, without participating in, such a proceeding, does not permit the employees to have union representation, and since the employees in this instance chose to have their steward represent them, and in addition, since the record indicated that employees may and have in the past authorized their union stewards to "represent" them in disciplinary proceedings, the discharge of the steward for attempting to represent the employees, as he construed this responsibility, clearly interfered with his protected right to represent employees as a union official.

The National Labor Relations Board has frequently held that where union stewards have been discharged for zealously and energetically carrying out their duties, either in processing grievances or in enforcing collective bargaining agreements, such discharges are unlawfully discriminatory, since such activities are protected under the National Labor Relations Act, as amended.<sup>3/</sup> Similarly, under Section 111.70, Wisconsin Statutes, union stewards are protected from personal reprisals based upon the performance of their official union duties.

Accordingly, although there may be some legitimate reason for the City to have discharged Rubin since he advised the employees to disregard their supervisor's order to report in person to the meeting on September 7, it would appear from the City's overall conduct that Rubin's discharge was motivated, at least in part, by his zealous efforts to represent the employees in the disciplinary meeting, which is, in the Examiner's opinion, clearly protected activity.

In support of this conclusion, the record indicates that Ott was apparently dissatisfied with Rubin's conduct during such proceedings since even though he knew that Rubin would report to the meeting, when Rubin was delayed he called the Local Union President and asked that another Union representative appear at the meeting to provide representation for the employees who were to be disciplined. Ott admitted that the decision to discharge Rubin was made immediately

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<sup>3/</sup> Mead & Mount Construction Co., 167 NLRB, No. 79, 1968; H. E. Wiese, Inc., 159 NLRB, No. 145, 1968; Symons Manufacturing Co., 141 NLRB 558, (1963), enforced 328 F (2d) 835, 1964.

after the heated argument between Ott and Rubin over the requested postponement of the disciplinary meeting.

Although the letter advising Rubin of his discharge indicates that he was discharged in part because he failed to obey an order and was thereby guilty of insubordination, the Examiner agrees with the Complainant's argument that Rubin's failure to report to the meeting exactly at 2:30 P. M. did not amount to insubordination justifying his discharge, since the order did not relate to Rubin's job duties, but instead related to his duties as a union official. Although the employees had the right to have Rubin present at the disciplinary proceeding, and Rubin had the right to appear on their behalf as their union representative, the City had no authority, in its employer-employee relationship, to direct him to report to the meeting in his capacity as a union official. In any event his tardiness at the meeting clearly does not constitute sufficient cause for discharge, particularly since he was given only four minutes notice of the meeting; he had advised his supervisor that he would be late because he had to pick up his automobile prior to the meeting; and he reported to the meeting within one-half hour. Even if the City had the authority to direct him to attend the meeting, his tardiness clearly did not justify his discharge, particularly after having been employed by the City more than fifteen years. Under such circumstances, the Examiner finds the Union's failure to support Rubin in this dispute extremely difficult to understand.

In view of all the foregoing, the Examiner finds that the City, by discharging Robert Rubin, has committed a prohibited practice within the meaning of Section 111.70, Wisconsin Statutes, because the discharge was motivated, at least in part, by his zealous efforts on behalf of the employees at the disciplinary meeting held on September 7, 1967. Accordingly, the Examiner will require the City to offer Rubin reinstatement to his former position and will further require that he be made whole for any losses incurred because of his discharge.

Dated at Madison, Wisconsin this 23<sup>rd</sup> day of July, 1968.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Byron Yaffe  
Byron Yaffe, Hearing Examiner