

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROBERT RUBIN,

Complainant,

vs.

CITY OF OSHKOSH,

Respondent.

Case III  
No. 11916 MP-49  
Decision No. 8381-D

ORDER AFFIRMING HEARING EXAMINER'S  
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Examiner Byron Yaffe having, on July 23, 1968, issued Findings of Fact, Conclusion of Law and Order in the above entitled matter, and the above named Respondent, City of Oshkosh, having, pursuant to Sections 111.70(4)(a) and 111.07(5) of the Wisconsin Statutes, timely filed a petition with the Wisconsin Employment Relations Commission for a review of the Examiner's Findings of Fact, Conclusion of Law and Order; and the Commission having, on August 6, 1968, issued an Order granting leave to the parties to file briefs with respect to the Petition for Review and at the same time setting aside the Examiner's decision pending final action thereon by the Commission; and the Commission having reviewed said Findings of Fact, Conclusion of Law and Order, the entire record, the Petition for Review, and the briefs filed by the parties, and being fully advised in the premises hereby adopts the Findings of Fact, Conclusion of Law and Order of the Hearing Examiner, and in that regard issues the following

ORDER

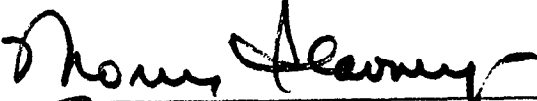
Pursuant to Sections 111.70(4)(a) and 111.07(5), Wisconsin Statutes, the Wisconsin Employment Relations Commission hereby adopts the Hearing Examiner's Findings of Fact, Conclusion of Law and Order as its


Findings of Fact, Conclusion of Law and Order, and, therefore, the Respondent, City of Oshkosh, shall immediately take the action set forth therein and notify the Wisconsin Employment Relations Commission within ten (10) days of a receipt of a copy of this Order as to what steps it has taken to comply therewith.

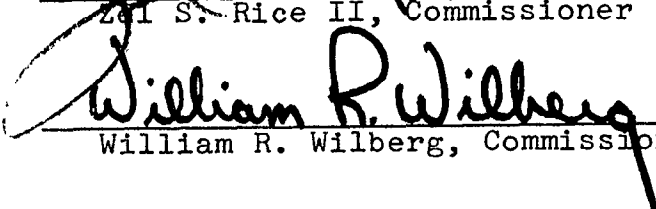
Given under our hands and seal at the City of Madison, Wisconsin, this 18th day of October, 1968.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
\_\_\_\_\_  
Morris Slavney, Chairman

  
\_\_\_\_\_  
Zel S. Rice II, Commissioner

  
\_\_\_\_\_  
William R. Wilberg, Commissioner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

-----  
ROBERT RUBIN, :  
 :  
 Complainant, : Case III  
 : No. 11916 MP-49  
 vs. : Decision No. 8381-D  
 :  
 CITY OF OSHKOSH, :  
 :  
 Respondent. :  
 :  
-----

MEMORANDUM ACCOMPANYING ORDER AFFIRMING HEARING  
EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On July 23, 1968, Hearing Examiner Byron Yaffe issued his Findings of Fact, Conclusion of Law and Order in the instant matter, wherein he concluded that the discharge of Robert Rubin by the Municipal Employer was motivated in part by Rubin's conduct as a Union representative for certain employes during a disciplinary meeting, and that by such discharge the Municipal Employer discriminated against Rubin because he had engaged in protected activities, and as a result, the Municipal Employer was found to have committed prohibited practices within the meaning of Section 111.70(3)(a)1 and 2 of the Wisconsin Statutes. The Examiner ordered the Municipal Employer to cease and desist from such activity, to offer Rubin reinstatement, and to make him whole for wages lost as a result of such discrimination.

The Municipal Employer timely filed a Petition for Review, and the Commission, on August 6, 1968, issued an order granting leave to the parties to file briefs with respect to the Petition for Review, and at the same time set aside the Examiner's decision pending final action thereon by the Commission.

In its Petition for Review the Municipal Employer alleges that the evidence did not sustain the findings made by the Examiner, and

We shall first discuss the contention that the Commission has no jurisdiction in the matter.

In the complaint initiating this proceeding, Rubin, as the Complainant, alleged in part that while he was engaging in performing his duties as a union steward and exercising his rights as defined in Section 111.70(2), he was discharged for such activities, and thereby the Municipal Employer committed a prohibited practice within the meaning of Section 111.70(3)(a)2.

Prior to the conduct of the hearing herein before the Examiner, the Municipal Employer filed a Demurrer, wherein it moved that the complaint be dismissed on the basis that the Commission lacked jurisdiction of the subject matter in the complaint since Rubin was discharged under Section 64.11(3) of the Wisconsin Statutes and, therefore, that Section 111.70(3)(a)2 was not applicable. Also prior to the conduct of the hearing, the Examiner overruled the Demurrer, finding that, inasmuch as the complaint alleged that the Municipal Employer discharged Rubin because of his union activities, the complaint therefore clearly arose under Section 111.70(3)(a)2.

The Municipal Employer contends that the protection given to employes in their concerted activity pursuant to Section 111.70 is not applicable with respect to the discharge of Rubin since Section 64.11(3) of the Wisconsin Statutes provides that the City Manager, which is the form of municipal government in Oshkosh, may remove an employe where the conduct of the employe becomes unsatisfactory to him. Such a contention raises the issue of whether the authority of the City Manager under Section 64.11(3), Wisconsin Statutes, is subject to the limitations of Section 111.70. Our Supreme Court, in the Muskego-Norway School District Case,<sup>1/</sup> stated that the provisions of Section 111.70 "apply to the authority of school districts to the same extent as the authority of other municipal governing bodies," and that, therefore, the school laws involved in that case were subject to the limitations established in Section 111.70. The Supreme Court further stated that, "Modification of statutes is a question of legislative policy. In 1959 the Legislature enacted Section 111.70(3)(a) which prohibits municipal employers, including school districts, from

---

<sup>1/</sup> 35 Wis. (2d) 540.

1. Interfering with, restraining or coercing any municipal employe in the exercise of the rights provided in sub. (2).
2. Encouraging or discouraging membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment.

This also restricts the reasons a teacher can be refused re-employment. A school board may not terminate a teacher's contract because a teacher has been engaging in labor activities."

In applying the reasoning of the Supreme Court, it is obvious that the authority granted to city managers in Section 64.11(3) is limited by the subsequent enactment of Section 111.70(3)(a). We, therefore, affirm the Hearing Examiner's order in overruling the Demurrer filed by the Municipal Employer and conclude that the Commission had jurisdiction to proceed and determine the issues raised in the complaint.

In its brief in support of its Petition for Review the Municipal Employer further argues that during the course of the hearing it moved before the Hearing Examiner that the complaint be dismissed on the grounds that the Complainant had not met the burden of proof required to establish any unfair labor practice, and further, that the Hearing Examiner did not rule on said motion. While the Hearing Examiner did not specifically discuss the motion in his decision, it is apparent that said motion was denied inasmuch as the Hearing Examiner determined that the evidence was sufficient to establish that the Municipal Employer had discriminatorily discharged Rubin in violation of his rights granted under Section 111.70.

We now proceed to the crux of this proceeding, and that is whether Rubin's discharge consisted of unlawful discrimination because of his union activities. The sole reasons which compelled the Municipal Employer to discharge Rubin were stated in the letter terminating his employment, as follows:

- "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."

The instructions given to Rubin by his supervisor to report to the Personnel Office at 2:30 P.M. were given to Rubin in his capacity as a union steward and in the performance of the function of representing the employes involved in the subject matter of the meeting and not in connection with his normal duties as an employe. Furthermore, Rubin's reason for not reporting immediately at 2:30 P.M. appears to be reasonable inasmuch as he desired to use his personal car since he had completed his assigned duties for the day. While it is true that the employes' wages in the department involved were paid on the basis that they normally worked until 3:15 P.M. daily, the evidence established that the actual work was considered completed by 2:30 P.M. on most dates, and on this particular day Rubin was told to check out prior to the scheduled 2:30 P.M. meeting.

Rubin was a union steward, a position recognized in the collective bargaining agreement existing between the Union and the Municipal Employer. The supervisory employes of the Municipal Employer had no right to supervise Rubin's activity in the performance of his duties as a steward. The Municipal Employer could not have insisted that steward Rubin appear at that meeting. By doing so it would have unlawfully interfered with the internal affairs of the union.

One final ground for the discharge of Rubin was the fact that he "incited" the three employes involved to disregard the orders of the supervisor to appear at the meeting. Rubin had requested an adjournment of the meeting in order to give him an opportunity to talk to all three employes involved with respect to the incident of which they were charged. After he entered the meeting room without the three employes and insisted upon an adjournment of the meeting for the purpose of such investigation, the Municipal Employer's Administrative Assistant to the City Manager denied the request and advised Rubin to leave the office. Rubin then instructed the three employes involved not to attend the meeting, and they did not attend the meeting. The next day the three employes received notification of their suspension, which determination had been made by agents of the Municipal Employer prior to the meeting which was scheduled on the previous day.

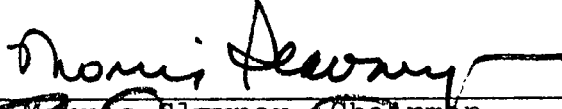
There is no evidence that Rubin in any way threatened the three employes with any reprisals if they failed to heed his advice not to attend the meeting. Their failure to attend the meeting was the choice they ultimately made. It is interesting to note that while Rubin was discharged because of his action in "inciting" the employes not to attend the meeting, the disciplinary action meted out to the three employes by the Municipal Employer was not based on their failure to attend the meeting but rather on the incident which caused the meeting to be scheduled in the first place. It is indicative of a discriminatory motive that the employes who did not attend the meeting were not disciplined for such failure but that Rubin received the ultimate penalty of discharge for advising them not to do so. The activity of Rubin with respect to the meeting and his advice and instructions to the employes in regard thereto was performed in his capacity as a union steward and not in the performance of his normal duties as an employe of the Municipal Employer. As a union steward Rubin was charged with representing the employes subject to his stewardship. He reasonably felt that as a steward he should have been given the opportunity to look into the charges involving the three employes in order to properly perform his duties as a steward. The fact that the Municipal Employer's action was motivated by the reasonable activity engaged in by Rubin as a steward, which activity was not connected with his duties as an employe, in itself interfered with Rubin's concerted activity and discouraged his activity as a steward, and his discharge constitutes unlawful discrimination in violation of Section 111.70(3)(a)1 and 2.

We, therefore, affirm the Hearing Examiner's decision in all respects.

Dated at Madison, Wisconsin, this 18th day of October, 1968.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Morris Blavney, Chairman