STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

HOSPITAL EMPLOYEES LOCAL NO. 292 BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, Complainant, vs. WOOD COUNTY (EDGEWATER HAVEN), Respondent.	Case XII No. 13424 MP-78 Decision No. 9437-A

Appearances:

Mr. Roy T. Traynor, Attorney at Law, appearing on behalf of the Complainant.

Mr. Lawrence R. Nash, Corporation Counsel, appearing on behalf of the Municipal Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter, and the Commission having appointed John T. Coughlin, 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 a hearing on such complaint having been held at Wisconsin Rapids, Wisconsin, on March 5, 1970, 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 Hospital Employees Local No. 292, Building Service Employees International Union, AFL-CIO, hereinafter referred to as Complainant Union, is a labor organization with its office located at the Wausau Labor Temple, P.O. Box 538, 320 South Third Avenue, Wausau, Wisconsin.

2. That Edgewater Haven is a hospital owned and operated by Municipal Employer Wood County, hereinafter referred to as Respondent, and has its offices at Port Edwards, Wisconsin.

3. That on March 18, 1969, Sandra Johnson was hired by Respondent to work in its housekeeping and kitchen department as a part-time probationary employe.

4. That the Union and Respondent were at all times relevant parties to a collective bargaining agreement that contained the following language:

A. "ARTICLE V

Section 1.

DISCHARGE

a. The employer has the right to discharge any employee for sufficient and reasonable cause but the representatives of the Union shall with reasonable promptness be advised by the Employer of the reason or reasons for such discharge, except in case of an immediate discharge. the Union Steward on duty will be called in to witness such discharge, or warning. If a discharged employee claims injuctice (sic), the grievance shall be presented to the Employer within forty-eight (48) hours from time of discharge. Should it be found upon joint investigation by the Union and the Employer that the employee has been unjustly discharged, such employee shall be immediately reinstated to his or her former job without loss of rank and shall be compensated for all time lost at the regular rate of wages received by such employee."

. . .

B. "ARTICLE VI

EMPLOYMENT. SENIORITY, PROMOTIONS, TRANSFERS, LAYOFFS AND RESIGNATIONS.

Section 1.

EMPLOYMENT

. . .

b. All new or rehired employees shall serve a probationary period of not more than sixty (60) days during which time such employees can be dismissed without assigning any cause."

. . .

C. "ARTICLE X

GRIEVANCE PROCEDURE

Any difference or misunderstanding which may arise between the Employer and the employee or the Employer and the Union shall be handled as follows:

a. The employee, Union committee and/or the Union representative shall present the grievance to the Superintendent. If a satisfactory solution cannot be reached, the grievance shall be reduced to writing by the employee and/or the Union. Any agreement reached or answer given by the Superintendent to a written grievance shall be in writing with a copy provided for the employee and the Union.

b. If a satisfactory settlement is not reached, as outlined in "a" within one (1) week, the employee, the Union committee and/or the Union representative may present the grievance in writing to the Board of Trustees. The request for such meeting must be given within one (1) week of receipt of the written or oral answer of the Superintendent to the Grievance. Such a meeting shall be held at the next regular meeting of the Board of Trustees.

c. If a satisfactory settlement is not reached, as outlined in "b" of this Article, either party to this agreement may present the grievance in writing to the Wood County Board of Supervisors for a decision."

5. That on April 25, 1969, William Van Offeren, Administrator of Edgewater Haven, called a meeting of all employes to inform them of a general layoff that was to commence on May 2, 1969 and because of said layoff certain part-time jobs would be available; that Van Offeren offered Sandra Johnson the 4:00 to 8:00 p.m. shift plus relief work but that said Johnson turned down both of these offers.

6. That on May 2, 1969, Sandra Johnson was laid off along with approximately sixteen other employes.

7. That on or about June 16, 1969, Stella Boyles, President of Complainant Union and Alice Kangas, Sandra Johnson's mother and Union Vice President, asked Administrator Van Offeren if he would consider rehiring Sandra Johnson; that on June 19, 1969 pursuant to this request, Van Offeren rehired Sandra Johnson as a probationary part-time employe in the kitchen and housekeeping department.

8. That on September 17, 1969 Sandra Johnson officially joined Complainant Union.

9. That on September 18, 1969 the Union and Respondent commenced contract negotiations.

10. That on September 26, 1969 Sandra Johnson received a phone call from Administrator Van Offeren's office stating that her employment was terminated and that she was not to report to work that afternoon at 4:00 p.m. as previously scheduled; that there was no evidence adduced to demonstrate that Respondent knew that Sandra Johnson had joined the Union at the time of her discharge or that Respondent's termination of Sandra Johnson was motivated by any sort of anti-union animus.

11. That on September 27, 1969 Sandra Johnson received a letter dated September 26, 1969 which stated as follows:

> "Per telephone conversation on September 26, 1969, this is to confirm your termination of employment effective September 26, 1969."

12. That on October 29, 1969 grievances were filed by Union President Stella Boyles and by Sandra Johnson's mother and Union Vice President, Alice Kangas, concerning said Johnson's termination.

13. That on December 9, 1969 Union President Stella Boyles and Vice President Alice Kangas met with Administrator Van Offeren, Respondent's attorney, and certain unspecified trustees concerning the aforementioned grievances; that on January 22, 1970, a meeting was held concerning said grievances between the Personnel Committee of the Wood County Board of Supervisors and the aforementioned Union officials as provided for in Step c, the final step in the collective bargaining agreement between the Union and Respondent, which agreement does not provide for final and binding arbitration.

14. That at no stage in the grievance procedure did Respondent advise the Union of the reason or reasons for Sandra Johnson's termination other than that she was a probationary employe and as such it had the right to discharge her without explainaing the cause.

15. That some time in mid-February of 1970 the Union and Respondent concluded the negotiations and entered into a new collective bargaining agreement.

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

CONCLUSIONS OF LAW

That Respondent, Wood County (Edgewater Haven) did not discharge Sandra Johnson because she joined Complainant Union and that therefore said Respondent did not violate Sections 111.70(3)(a)1 and 2 of the Wisconsin Statutes.

NOW, THEREFORE, it is

ORDERED

That the complaint filed in this matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 14th day of January, 1971.

By John T. Coughlin
John T. Coughlin, Examiner

STATE OF WISCONSIN

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MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint in the instant matter was filed on January 2, 1970. After the close of the hearing and issuance of the transcript, the parties filed post-hearing briefs, which briefs were received on May 18 and May 28, 1970.

PLEADINGS

The complaint alleges that Respondent violated Section 111.70 (3)(a)2 of the Wisconsin Statutes by discriminatorily discharging Sandra Johnson because she joined the Union and that by so doing derivatively violated Section 111.70(3)(a)1 by interfering with her right to affiliate with a labor organization of her own choosing. 1/

Respondent in its answer denies that it discriminated against Sandra Johnson, that it discouraged membership in Complainant Union or that Sandra Johnson had completed her probationary period at the time of her discharge. It further denies that it had knowledge of

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1/ Section 111.70(3)(a)2 provides that municipal employers are prohibited from "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". Section 111.70(3)(a)1 prohibits municipal employers from "Interfering with, restraining or coercing any municipal employe in the exercise of the rights provided in sub (2)". Section 111.70(2) provides that "Municipal employes shall have the right of self-organization, to affiliate with labor organizations of their own choosing and the right to be represented by labor organizations of their own choice in conferences and negotiations with their municipal employers or their representatives on questions of wages, hours and conditions of employment, and such employes shall have the right to refrain from any and all such activities".

Sandra Johnson's Union membership at the time of her discharge. Respondent alleges four affirmative defenses to the allegations contained in the complaint:

First, that the Wisconsin Employment Relations Commission, hereinafter referred to as the Commission, under the authority of Section 111.70 of the Wisconsin Statutes, is without jurisdiction to hear matters involving municipal employment of the type alleged in the complaint; 2/ second, that under Article VI, Section 1b of the current labor agreement a probationary employe can be dismissed without assigning any cause (See Findings of Fact #4B for the complete text of that contract provision), that the causes and reasons for the discharge of Sandra Johnson were not in any way related to Union membership, that "the causes and reasons for discharge of Sandra Johnson which would adequately support discharge under the terms of the contract, are not material to this matter because Sandra Johnson at the time of her discharge was a probationary employee, and was not subject to the terms of the contract"; third, that if there were any merit to the subject matter of the complaint it would be subject to the grievance procedure provided for in the contract and that Complainant did not exhaust its remedies under the grievance procedure (See Findings of Fact #4C for the complete text of the grievance procedure); fourth, that even if there were any merit to the subject matter of the complaint, the Complainant has failed to act timely within the terms of the collective bargaining agreement to challenge the discharge of Sandra Johnson or to process the grievances concerning said discharge and that Complainant is therefore foreclosed by the terms of the collective bargaining agreement from "making complaint as to the subject matter of this action". (See Findings of Fact #4A for the contractually provided for definition of timeliness as it relates to discharge).

FACTS

The essential facts in this case are as set out in the Findings of Fact and are not in dispute and therefore need not be repeated. However, it is felt that further amplification of a few salient facts are in order.

During the course of the hearing Respondent, through its attorney, started to question its witness, Hospital Administrator Van Offeren, about the causes for Sandra Johnson's discharge. At that point the attorney for Complainant Union objected to the questioning of that witness or other Respondent witnesses that could potentially have been called to substantiate the cause of Sandra Johnson's discharge on the basis that Respondent in paragraph 10 of its answer specifically stated that, "The causes and reasons for discharge of Sandra Johnson...are not material to this matter..." and that it prepared its case based upon

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2/ The Examiner finds Respondent's first affirmative defense that the Commission is without jurisdiction to be frivolous in that one of the reasons for Section 111.70's creation was to give the Commission the power to hear allegations of prohibited practices of the very type alleged in this case. Specifically, Section 111.70(4) and (4)(a) give the Commission (then Board) jurisdiction over prohibited practices involving municipal employers. (Respondent's other three affirmative defenses will be reviewed in the discussion section of this memorandum.)

the above-quoted assertion. It was at this juncture that Respondent agreed that it would not go into the specifics of the causes for Sandra Johnson's discharge other than Administrator Van Offeren's testimony that said discharge was for good cause.

EMPLOYER'S POSITION

The Employer's position as expressed in its affirmative defenses numbers 2, 3 and 4 as well as its argument in its brief revolve around the collective bargaining agreement it has with Complainant Union. Respondent stresses the fact that the then current collective bargaining agreement between itself and the Union provided in Article VI, Section 1b, supra, that, "All new or rehired employes shall serve a probationary period of not more than sixty (60) days during which time such employees can be dismissed without assigning any cause". In conjunction with this position Respondent contends that if cause is material (and Respondent contends that it is not) then Sandra Johnson was discharged for sufficient cause under the contract, that her discharge was in no way related to her Union activity and that she was in fact a probationary employe at the time of her discharge.

The Employer further contends that even assuming that there was merit to the Union's contention that this matter properly is subject to the grievance procedure, that Complainant did not exhaust said procedure. Finally, it avers that Complainant should be foreclosed from complaining about this matter at this time because the grievances filed concerning Sandra Johnson's discharge were not timely filed under the terms of the contract, which contract states in Article V, Section 1a, supra, that, "If a discharged employee claims injuctice (sic), the grievance shall be presented to the Employer within forty-eight (48) hours from time of discharge".

UNION'S POSITION

The Union argues that Sandra Johnson was in fact not a probationary employe at the time of her discharge and that therefore the Employer by the terms of Article V, Section 1a, supra, of the contract required Respondent to assign a cause for her discharge. The Union avers that Sandra Johnson was discriminatorily discharged because of her Union activity. It bases this conclusion on the fact that she had only nine days prior to her termination joined the Union and that she is in fact the daughter of Alice Kangas, the Union Vice President.

The Union contends that Respondent refused to explain the reasons for Sandra Johnson's discharge during the time when contract negotiations were in process in order to discourage Union membership. The Union argues that the reason Sandra Johnson was discharged in such an abrupt manner, without being given adequate explanation as to the causes of termination, was in fact to discriminate against her and by doing so "vicariously" discriminated against her mother resulting in the discouragement of Union membership during contract negotiations.

Finally, the Union contends that there have been two negative effects flowing from the alleged discriminatory discharge of Sandra Johnson. First, in reference to new employes joining the Union after completing their probationary period the Union points out that its President, Stella Boyles, testified that, "Well, it seemed before (referring to the time prior to Sandra Johnson's discharge) as soon as their time was up they just couldn't wait to join the Union. But,

since this has happened, on this particular job especially, they haven't joined". Second, Boyles testified that after Sandra Johnson's discharge certain unnamed employes told her that, "Maybe the same thing could happen to them, if that happened to Sandy (the dischargee). And then that they didn't feel, maybe, that the Union was doing as much for them as they possibly could by allowing something like this to happen". 3/

DISCUSSION

The major thrust of the Employer's argument is that Sandra Johnson was a probationary employe and consequently by the terms of its collective bargaining agreement with the Union it did not have to give any reason for discharging her. However, the Examiner finds this contractual defense and the other contractual defenses raised by the Employer to be inappropriate. The fact that under its contract the Employer did not have to give a reason for discharging an employe does not allow it to violate Section 111.70(3)(a)2 of the Wisconsin Statutes by "Encouraging or discouraging membership in any labor organization...by discrimination in regard to hiring, tenure or other terms or conditions of employment". 4/ Consequently, the Examiner does not find it necessary to make a ruling as to whether Sandra Johnson was or was not a probationary employe at the time of her discharge.

It is well settled that an employer may discharge an employe for any reason or for no reason under Wisconsin Statute 111.70 or similarly under the NLRA, as amended, provided only that the discharge was not in any way motivated by a desire to encourage or discourage union membership. 5/ In addition, it is equally well settled that the burden is on the complainant to prove that an employe's discharge resulted fro

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3/ It should be carefully noted that both the statements by Boyles referred to above were unsubstantiated by any other supporting testimony or evidence and that the second statement was allowed into evidence over Respondent's hearsay objection, not to prove the truthfulness of the statements that were made but merely to show that the conversations took place in her physical presence.

4/ In an almost identical fashion Section 8 (a) (3) of the NLRA, as amended, provides that it is an unfair labor practice for an Employe to interfere with employes right of self-organization "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization". In a fact situation quite similar to that found in the instant case, the NLRB in Lapeer Metal Products Co., 134 NLRB 1518, 1520, ruled that, "Moreover, while it may not have been necessary, as alleged for Respondent, under its contract with the Teamsters, to give any reason for discharging employees during their probationary period, this is no license under Federal law to interfere with or discriminate against such employees for the exercise of their rights to self-organization or to refrain therefrom (emphasis supplied)."

his union activity. 6/ Thus, the Union has the burden to establish that Sandra Johnson was discharged because of her Union activity. It is only after the union has established this by clear and satisfactory preponderance of the evidence that the employer has any obligation to come forward and show that the discharge was in fact not related to union and/or other protected activity. 7/

THE 111.70(3)(a)2 ALLEGATIONS 8/

The Union's position as noted previously is premised on the fact that at the time of Sandra Johnson's discharge the Union and Respondent were about to commence contract negotiations, that Sandra Johnson's mother is a Union official and the alleged negative effects that her discharge had on Union membership. The Commission has previously held that, "A complaint alleging interference and discrimination based upon the union status of an employe must be supported by a clear and satisfactory preponderance of the evidence that the action taken with respect to the employe was motivated by the Employer's anit-union animus, and that the employer had knowledge of the employe's union status and attitudes. In the absence of such evidence, the complaint must be dismissed, since the Complainant would fail to sustain its burden of proof (emphasis supplied)." 9/

In the case at hand, Respondent's Administrator specifically denied that he had knowledge that Sandra Johnson had recently joined the Union when he terminated her. In addition, the Union has been unable to come forward with even a scintilla of evidence to demonstrate that Respondent had knowledge of Sandra Johnson's membership, thereby making it impossible even to infer that the Employer had such knowledge. Even assuming arguendo that the Union was able to show Employer knowledge as to Sandra Johnson's Union membership, it failed to demonstrate by a preponderance of the evidence that Sandra Johnson's discharge was motivated by Respondent's desire to discourage Union activity. There is no evidence that Sandra Johnson was active in the Union or that she held Union office. The only evidence adduced concerning her Union activity was that she had recently joined the Union. The courts have consistently held that mere union membership standing alone is not a sufficient ground upon which to base an inference that the discharge of a union member was because of said membership. 10/ To accept the Union's argument that Respondent's real motivation was "vacarious" in nature in that by discharging the Union Vice President's daughter it somehow discriminated against her mother, thereby discouraging Union activity, is to stretch the Examiner's power to give credit to inference beyond its breaking point. Even assuming arguendo that this premise might be true, there is a total lack of evidence to show Respondent

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6/ Wauwatosa Board of Education, Dec. No. 8319-B, 6/68, affirmed in relevant part Dec. No. 8319-C, 7/68.

7/ Ibid.

8/ It should be noted that Complainant also alleged a derivative 111.70 (3)(a)1 interference violation. Therefore, if the 111.70(3)(a)2 allegation fails the 111.70(3)(a)1 allegation must necessarily also fail.

9/ Wauwatosa Board of Education, Dec. No. 8319-B, 6/68, at page 15.

10/ N.L.R.B. v. Williams Davies Co., (7th Cir. 1943), 135 F. 2d 179, 183, cert. denied 320 US 770; John S. Barnes Corp. v. N.L.R.B. (7th Cir. 1955), 190 F. 2d 127, 129; N.L.R.B. v. Wagner Iron Works, (7th Cir. 1951), 220 F. 2d 126, 133, cert. denied 350 US 981.

hostility toward Sandra Johnson's mother or toward the Union in general. The Union has been the collective bargaining agent for Respondent's employes since 1955 and although the then current contract negotiations were held over a protracted period of time, tough bargaining cannot be equated to anti-union animus.

In view of the foregoing, the Examiner finds that Complainant Union has failed to demonstrate by a preponderance of the evidence that Respondent discriminatorily discharged Sandra Johnson because she had joined Complainant Union and that derivatively Respondent did not interfere with said Johnson's rights guaranteed to her by Section 111.70(2) of the Wisconsin Statutes and that therefore the complaint in this matter is without merit.

Dated at Madison, Wisconsin, this 14th day of January, 1971.

By John T. Coughlin
John T. Coughlin, Examiner