STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 82 AND WISCONSIN STATE EMPLOYEES ASSOCIATION, COUNCIL 24, AFSCME, AFL-CIO, Complainant, vs. UNIVERSITY OF WISCONSIN-MILWAUKEE, JAMES BRIESEMEISTER, DONALD MORATZ, Respondents.	Case XVIII No. 13944 PP(S)-8 Decision No. 9800-A

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Jack Carlson, and Mr. Bruce Davey, Attorney at Law, appearing on behalf of the Complainant.

Mr. Gene Vernon, Attorney, appearing on behalf of the Respondents.

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 Robert B. Moberly, 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 said complaint having been held at Milwaukee, Wisconsin, on September 10, 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 Wisconsin State Employees Association, Council 24, AFSCME, AFL-CIO, and its affiliate Local 82, hereinafter referred to as Complainant, is a labor organization having its principal offices at 148 East Johnson Street, Madison, Wisconsin.

2. That Respondent University of Wisconsin-Milwaukee, hereinafter referred to as the State Employer, is a state employer as defined in Section 111.81(13) of the State Employment Labor Relations Act, with its principal office at Chapman Hall, 2310 East Hartford Avenue, Milwaukee, Wisconsin.

3. That the State Employer maintains a Department of Campus Protection and Security, and in said Department employs Police Officers and Security Officers; that Police Officers have powers of arrest, while Security Officers do not; that there are fourteen Police Officer positions and six positions having supervisory authority over Police Officers; that at all times material herein the two highest supervisory

positions, Police Chief and Police Lieutenant, were vacant; that at all times material herein the following four persons were the supervisors of Police Officer personnel: Donald Moratz (Acting Police Chief and Police Sergeant), James Briesemeister (Police Detective), Kenneth Lawson (Police Sergeant), and Frank Springob (promoted to Police Sergeant on May 3, 1970); that of the fourteen authorized Police Officer positions, only seven to eight positions were filled at the times material herein; that the Police Officers occupying these positions were George Carey, Arvid Heimann, Jerome James, Anthony Jones (terminated as Police Officer 6-27-70), Gerald Kelly, William Kiekow, John Niemczyk, and George Panich (terminated 5-30-70).

4. That at all times material herein the Complainant was the certified exclusive collective bargaining representative of "all employes of University of Wisconsin-Milwaukee, including stock clerks and storekeepers, but excluding clerical employes, library assistants, supervisors, managerial and confidential employes, administrative assistants, professional and limited term employes, and all craftsmen, consisting of sheet metal workers, carpenters, electricians, painters, plumbers and steamfitters"; that employes classified as Police Officers are included in said unit, while the Police Sergeants and Police Detective are excluded from the unit as supervisors; that the Complainant and the State Employer are parties to a collective bargaining agreement covering employes in the aforementioned collective bargaining unit, effective March 16, 1970, through March 15, 1972; and that said agreement contains a four-step grievance procedure providing for final and binding arbitration of grievances arising under the agreement in the fourth and final step.

5. That the Professional Policemen's Protective Association, University of Wisconsin-Milwaukee, hereinafter referred to as the PPPA, is a labor organization whose membership consists of certain Police Officers and supervisors employed in the Department of Campus Protection and Security of the State Employer; that said organization was initiated by Police Officer Gerald Kelly and held its first meeting on Sunday, April 5, 1970; that at said meeting Officer Kelly was elected President of the PPPA, Detective Briesemeister was elected Vice President and Police Officer Springob (promoted to Sergeant on May 3, 1970) was elected Secretary-Treasurer; that at all times material herein other members of the PPPA included Acting Chief Moratz, Sergeant Lawson and Police Officer Heimann; that Acting Chief Moratz and Sergeant Springob also were members of Complainant; and that none of the above supervisors requested any employes under their supervision to join the PPPA or resign from the Complainant.

6. That on April 14, 1970, Police Officer Kelly, on behalf of the PPPA, filed an election petition with the Wisconsin Employment Relations Commission requesting an election among the eleven Police Officers and Sergeants then employed in the Department of Campus Protection and Security of the State Employer; that at the hearing on said petition on June 8, 1970, Detective Briesemeister and Officer Kelly made appearances for the PPPA and participated in its behalf; that the State Employer and the Complainant appeared in opposition to

bar to the election and as a result no question of representation existed.

7. That responsible labor relations representatives of the State Employer did not have knowledge of the existence of the PPPA until the receipt of the representation petition filed by the PPPA; that on August 18, 1970, following the hearing on the representation petition and following the filing of the instant prohibited practices complaint on July 10, 1970, the Coordinator of Employment Relations for the University of Wisconsin issued the following memorandum:

> "TO: University Departments
>
> FROM: G. Thomas Bull, Coordinator
> University Employment Relations
>
> DATE: August 18, 1970
>
> Concern has been expressed with situations where supervisory, managerial, and confidential personnel are active in the same labor union of which employes they supervise are members or which is the certified bargaining agent for the employes they supervise.
>
> Supervisors excluded from a certified bargaining unit are not covered by the State Employment Labor Relations Act (SELRA) in the definition of state employe [S. 111.81 (12)]. Therefore, they do not have the same right to 'form, join, or assist labor organizations' as employes covered by SELRA and in the bargaining unit do. S. 111.84 (1) (b) has a provision that protects the State from prohibited practice charges if a supervisor is allowed to be an 'active member or officer', but this language does <u>not</u> mean the State <u>must</u> allow the supervisor to be active in a union.
>
> Supervisors are expected to represent the policy and person of the State as an employer in the labor-management relationship. For a supervisor to be active in a union with which he must often deal adversely is a conflict of interest that cannot be allowed to exist if the labor-management relationship is to be a sound one.
>
> Therefore, it is the policy of the University of Wisconsin that operating units should require all supervisors and managerial personnel to be free of any active role as a member or officer of the union that is the collective bargaining agent for the employes they supervise or of any other union that alleges to represent such employes."

That on August 19, 1970, the Director of Personnel of the University of Wisconsin-Milwaukee sent copies of the above memorandum to all supervisors in the Department of Campus Protection and Security, along with the following cover letter:

"The University of Wisconsin-Milwaukee was recently charged with the violation of certain 'prohibited practices' under the State Employment Labor Relations Act, or specifically, Sec. 111.84 Wis. Stats. The filing of these charges prompted, in part, the need for the development of a University of Wisconsin policy concerning union activity by supervisory and managerial personnel of the University, a copy of which is attached.

Although the attached policy statement is not intended, in any way, to reflect the accuracy or inaccuracy of the allegations pending before the Wisconsin Employment Relations Commission, you are hereby informed that the following specific activities by supervisory and managerial personnel of the University are now prohibited:

1. The encouragement or discouragement of membership in any labor union.

2. A role in the development of policy or organization of any labor union.

3. The holding of office in any labor union.

If you have any further questions concerning this matter, please contact me at your convenience.

Sincerely,

Jack Matzke
Director of Personnel"

8. That Anthony Jones was hired by the State Employer as a janitor on March 1, 1967; that on June 1, 1968, Jones was hired by the State Employer as a Security Officer and worked as a Security Officer until March 8, 1970, when he was promoted to a Police Officer; that when Jones became a Police Officer he commenced the usual probationary period for that position of six months.

9. That on June 18, 1970, Jones was discussing the small size of his hat with his immediate supervisor, Sergeant Lawson, in the departmental office along with two Security Officers; that during the course of the conversation Detective Briesemeister walked into the office and stated that Jones should get a haircut like a policeman wears; that Jones told Briesemeister that he had just gotten a haircut two weeks ago; and that Briesemeister then walked out and Jones went on his tour of duty; that Jones did not get a haircut because he did not feel he needed one; that about a week later, Detective Briesemeister asked Jones why he hadn't gotten a haircut yet; that Jones told Briesemeister "I just had one;" that Briesemeister said "You get one by tomorrow night; cut your sideburns;" that Jones then finished his tour of duty; that the next day Detective Briesemeister

"Well I advised you to get a haircut;" that Jones asked how long he would be off, and Moratz said, "Probably until you get a haircut;" that Acting Chief Moratz then talked to Detecitve Briesemeister and Sergeant Lawson, and then made the decision to terminate Jones for failure to obey two direct orders of the supervisor and himself; that the next day, Acting Chief Moratz called Jones at home; and that Jones said he still had not gotten a haircut, and Moratz then told him that he was terminated.

10. That at all times material herein, Jones was a member of Complainant and was not a member of the PPPA; that at the time Moratz hired Jones he knew Jones was a member of Complainant.

11. That on June 30, 1970, Acting Chief Moratz reported the termination of Jones to the Chancellor's Office of the State Employer with the following memorandum:

"TO: Dr. J. Solon
Asst. Chancellor

FROM: Donald Moratz
Act'g. Chief

SUBJECT: A. Jones Termination

Sir:

On Thursday, 6-18-70, probationary police officer Anthony Jones was advised by a police supervisor to get his hair cut. He replied, "I just got it cut." The supervisor again told him to get it cut and bring up the side-burns.

On Wednesday, 6-24-70, at 4:35 pm a supervisor ordered officer A. Jones to get a hair-cut and to bring up the side-burns before 3:00 pm 6-25-70. (His next tour of duty) At this time he again replied, "I just got it cut." Also at this time another supervisor was present and in full agreement that this order was justified.

On Thursday, 6-25-70, he reported for his 3:00 pm tour of duty without a haircut and was asked why he did not comply with the orders as stated. He replied, "I didn't have time." The supervisor instructed him to write a 'matter of' (report) WHY he did not get a hair-cut and then not to report for duty until further notice.

Officer Jones left the department without writing the report as instructed.

On Thursday, 6-25-70, at 4:35 pm, Officer Jones phoned me to state that he had been sent home to get a hair cut by a supervisor. He stated that he didn't think he needed one and was not going to get a haircut. I instructed him to comply with the supervisor's orders and explained to him that he was on probation. Jones stated that he didn't think he needed one and was not going to comply, that he was being picked on. I told him that no one was picking on him and that he must obey a supervisor's orders and ordered him to get a haircut. Officer Jones refused.

Probationary officer Jones has failed to present a smart military appearance. He has failed to submit to routine training procedures by disregarding the instructions and direct orders of a superior officer (s).

The subject's conduct is not consistent with established policies of the UWM Police service and I have terminated him as of Friday, June 26, 1970. He is to be completely separated from this and the security branch of this department for refusal to obey orders which is vital to both positions.

Sincerely,

Donald G. Moratz
Donald G. Moratz
Act'g. Chief, UWM Police"

On July 3, 1970, Acting Chief Moratz gave written notice to Jones of his termination with the following letter:

"Mr. Anthony T. Jones
4638 North 126th Street
Butler, Wisconsin 53007

Dear Mr. Jones:

I regret to take this action, but I find it necessary to terminate your employment at the University of Wisconsin-Milwaukee as a Police Officer. Your uncooperative attitude and failure to obey repeated orders from your immediate supervisor and myself can no longer be condoned.

The specific instance I am referring to was this: On Thursday, June 18, 1970, you were instructed by your supervisor to get a hair cut. Your insubordinate attitude towards this request, failure to write a report about it and your repeated refusal to obey a direct order in this regard is completely unacceptable to this department and a violation of the UWM Work Rule #1.

Since this action is taken as a result of a University of Wisconsin-Milwaukee Work Rule violation, you have ten (10) days in which to appeal the action either to the State Personnel Board, in accordance with 16.24 (1) (a), Wisconsin State Statutes; or to the University of Wisconsin-Milwaukee Personnel Director in accordance with Article 4 of the University of Wisconsin-Milwaukee, Local 82 agreement.

Sincerely,

Donald G. Moratz,
Acting Chief, Campus Protection"

12. That upon receipt of Acting Chief Moratz' letter of July 3, 1970, Jones and Complainant Union filed a grievance in accordance with the contractual grievance procedure; that the State Employer denied the grievance at the first, second and third steps of the grievance procedure; that on July 17, 1970, the State Employer, through its Director of Personnel, informed Jones in the following letter of its disposition of the grievance:

> "Mr. Anthony T. Jones
> 4638 N. 126th St.
> Butler, Wisconsin 53007
>
> Dear Mr. Jones:
>
> I have reviewed the circumstances of your recent discharge from employment at UWM, and wish to inform you that the following action is now being taken
>
> 1. Your probationary employment as a Police Officer is terminated effective June 27, 1970.
>
> 2. You are restored to your former classification of Security Officer I effective June 28, 1970 at a salary of $567 per month (your former Security Officer I salary plus a $25.00 per month pay plan adjustment, and a $20.00 per month mandatory merit adjustment on June 28, 1970.) Full back pay at this rate will be paid to you, and will be included with the paycheck you receive on August 6, 1970.
>
> 3. Restoration to your Security Officer I classification is with full Civil Service status, since you have already completed a probationary period in that classification.
>
> 4. Acting Police Chief Moratz will be in touch with you in the very near future to arrange your next scheduled work shift.
>
> We regret the inconvenience caused you by the delay in resolving this matter; but hope that action will effect a satisfactory conclusion.
>
> Sincerely,
>
> Jack Matzke
> Director of Personnel"

That on August 3, 1970, Complainant Union advised the State Employer that it was appealing the grievance of Anthony Jones to final and binding arbitration as provided in the contract; that on the same date the Union also set forth its formal appeal to arbitration, stating that the issue was whether the Employer violated certain provisions of the collective bargaining agreement in discharging Anthony

Jones; and that at the time of hearing on the instant prohibited practice charge, the matter was still on appeal to the Arbitrator.

13. That Police Officer Anthony Jones was discharged by the State Employer for the reason that he would not comply with his supervisor's orders to get a haircut; and that said discharge and Jones' subsequent reinstatement to the position of Security Officer was not motivated by Jones' membership in Complainant, nor was it motivated by his refusal to become a member or participate in the activities of the PPPA.

14. That George Panich was employed by the State Employer as a Police Officer for approximately eighteen months; that he objected to Acting Chief Moratz when interim merit raises were granted to Acting Chief Moratz, Sergeants Springob and Lawson, and Detective Briesemeister; that he also requested of Acting Chief Moratz that he be placed on the day shift in place of Police Officer Kelly, over whom he had a few days' seniority, but that said request was denied; and that Officer Panich voluntarily quit the employ of the State Employer on or about May 30, 1970; that Officer Panich was a member of Complainant Union and was not a member of the PPPA; and that Officer Kelly also did not receive an interim merit increase.

15. That in early June 1970 Sergeant Springob discussed the PPPA with Police Officer Jones on one occasion; that Sergeant Springob explained to Jones "that the tentative association would provide us with the protection as necessary as professional Police Officers; in case of a false arrest, provide us with insurance; that we would have somebody to talk with us more than we have;" that Sergeant Springob did not ask or otherwise "put any pressure" on Jones to join the PPPA, or ask him to withdraw from Complainant Union; that Sergeant Springob knew that Jones was a member of the Complainant Union; and that Sergeant Springob was at all times material herein also a member of the Complainant Union.

16. That Police Officer Jerome James had been an employe of the State Employer about two and one-half years at the time of hearing; that he joined Complainant on July 7, 1970, and is not a member of the PPPA; that shortly after joining Complainant he became the union steward and wore a button stating "Union Steward;" that in the middle of July, Sergeant Springob ordered him to take the button off and threatened him with suspension if he did not; that James took the button off but said the Union wanted to know if anybody ordered him to take off the button; that Springob replied, "Don't let those people fill your head with a bunch of bull shit and let you do the dirty work for them and leave you hanging;" that neither Acting Chief Moratz nor Detective Briesemeister ever asked James to join the PPPA or to withdraw from Complainant Union.

17. That Police Officer Kiekow has been employed by the State Employer since February 15, 1970; that he is not a member of either Complainant Union or the PPPA; that in early May 1970, Kiekow was patrolling the campus in a squad car when he met Detective Briesemeister and got into a conversation with him; that Briesemeister asked who

further stated that Panich was a chronic complainer and trouble maker and that all he did was write grievances; that Briesemeister further stated that if Kiekow was smart, he wouldn't associate with them and he would make sure that he took the right side; that during the course of this conversation Detective Briesemeister did not mention the PPPA; and that neither Detective Briesemeister nor Acting Chief Moratz ever asked Kiekow to join the PPPA, but that Patrolman Kelly asked him to join the PPPA; that in April of 1970 James asked Acting Chief Moratz to be placed on the first shift, and the request was denied.

18. That Acting Chief Moratz, in granting interim merit increases to certain employes and not others, and in denying the requests of Officers Panich and Kiekow to be placed on the first shift, was not motivated by union activity of any persons in Complainant, nor was he motivated by anyone's refusal to become a member of or participate in the activities of the PPPA.

19. That responsible management representatives did not have knowledge of, approve of or ratify the actions of its supervisors described in Findings No. 15, 16 and 17; that said supervisors in said situations were not acting on behalf of the State Employer within the scope of their authority; and that there was no reasonable cause for employes to believe that said supervisors were acting for or on behalf of the State Employer in the situations in question.

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

CONCLUSIONS OF LAW

1. That the Respondent University of Wisconsin-Milwaukee, in discharging Police Officer Jones and in refusing to reinstate him to the position of Police Officer, did not commit, and is not committing, any prohibited practices within the meaning of Sec. 111.84 (1) (c), Wisconsin Statutes, or any other prohibited practices within the meaning of any other subsection of Sec. 111.84 (1), Wisconsin Statutes.

2. That the Respondent University of Wisconsin-Milwaukee, by the actions of its supervisors in becoming members of the PPPA and in participating actively as members and officers of said organization, did not commit any prohibited practices within the meaning of Sec. 111.84 (1) (b), Wisconsin Statutes, or any other prohibited practices within the meaning of any other subsection of Sec. 111.84 (1), Wisconsin Statutes.

3. That the Respondent University of Wisconsin-Milwaukee, by certain statements and actions of its Supervisors, did not interfere with, restrain or coerce its employes in the exercise of their rights guaranteed under Sec. 111.82, Wisconsin Statutes, and accordingly did not commit any prohibited practices within the meaning of Sec. 111.84 (1) (a) of the Wisconsin Statutes.

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 in the above matter be, and the same hereby is, dismissed.

Dated at Milwaukee, Wisconsin, this 30th day of April, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert B. Moberly
Robert B. Moberly, Examiner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 82 AND WISCONSIN STATE EMPLOYEES ASSOCIATION, COUNCIL 24, AFSCME, AFL-CIO,	:	
Complainant,	:	Case XVIII No. 13944 PP(S)-8
vs.	:	Decision No. 9800-A
UNIVERSITY OF WISCONSIN-MILWAUKEE, JAMES BRIESEMEISTER, DONALD MORATZ,	:	
Respondents.	:	

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant Wisconsin State Employees Association, Council 24, AFSCME, AFL-CIO, and its affiliate Local 82, alleges in its complaint that Respondents University of Wisconsin-Milwaukee (hereinafter referred to as the State Employer), James Briesemeister and Donald Moratz engaged in prohibited practices within the meaning of Section 111.84, Wis. Stats., and states the following in support of said allegation:

"1.) Respondent, State of Wisconsin, the University of Wisconsin-Milwaukee, is the state employer as defined in Wisconsin Statutes 111.81 (13).

2.) Respondents James Briesemeister and Donald Moratz are persons who act and have acted on behalf of the state employer as supervisors at the UW-M.

3.) Complainant is the exclusive collective bargaining agent for employees in the Campus Protection and Security Department, among others, as set out in the Wisconsin Employment Relations Commission Certification of Representatives and identified as Case III, No. 11269, SE-3, Decision No. 8296-C, dated February 9, 1968.

4.) Complainants believe the respondents have persuaded and cajoled police officers of the UW-M into joining the Professional Policemen's Protective Association of the University of Wisconsin-Milwaukee in contravention of 111.84 (1) (a) and have been doing so since on or about March 1, 1970.

5.) Complainants believe the respondents have participated in initiating and creating the Professional Policemen's Protective Association of the University of Wisconsin-Milwaukee and have been doing so since on or about March 1, 1970 in contravention of 111.84 (1) (b).

6.) Complainants believe respondents have discharged Anthony Jones, a police officer and member of the Complainant Labor organization because of his membership in the complainant organization, in contravention of 111.84 (1) (c).

7.) Complainant believes Respondent Briesemeister is an officer of the Professional Policemen's Protective Association of the UW-M and represented that organization at a hearing before the Wisconsin Employment Relations Commission regarding the Petition of Gerald Kelly, in contravention of 111.84 (1) (b)."

In its request for relief, Complainant requested an order directing that Respondent "be restrained and enjoined from engaging in conduct in violation of 111.84 (1) (a), (b) and (c); that they be ordered to reinstate Anthony Jones to his former employment with full restoration of benefits; that they be ordered to post notices in appropriate and conspicuous places acknowledging the commission of prohibited practices and the injunction therefrom; that they be ordered to notify the Wisconsin Employment Relations Commission in writing of their compliance with its orders, and for other relief as is necessary or appropriate under the circumstances."

Respondent failed to file an answer, but at the hearing, conducted September 10, 1970, Respondent admitted Allegations 1, 2 and 3 of the Complaint; denied Allegations 4, 5 and 6 of the Complaint; and admitted Allegation No. 7, except that it does not believe there is a violation of Section 111.84 (1) (b). Complainant and the State Employer filed briefs on November 17, 1970.

The Professional Policemen's Protective Association, University of Wisconsin-Milwaukee, hereinafter referred to as the PPPA, was not named as a party and did not make a formal appearance, but its representative was present at the hearing.

FACTS

The State Employer maintains a Department of Campus Protection and Security in which it employs both Police Officers and Security Officers. Police Officers have powers of arrest, while Security Officers do not. There are fourteen Police Officer positions in the department, and six supervisory positions having supervisory authority with respect to Police Officers. The two highest supervisory positions, Police Chief and Police Lieutenant, were vacant at all times material herein. Sergeant Donald Moratz was the Acting Police Chief, and the other three supervisory employes were Detective James Briesemeister, Sergeant Kenneth Lawson and Sergeant Frank Springob (promoted to Police Sergeant on May 3, 1970). Of the fourteen authorized Police Officer positions, only seven to eight positions were filled during the period in question here.

Complainant is the certified collective bargaining representative

are excluded from the unit as supervisors. Complainant and the State Employer are parties to a collective bargaining agreement covering employes in this collective bargaining unit, and said agreement contains a four step grievance procedure providing for final and binding arbitration of grievances arising under the agreement in the fourth and final step.

The Professional Policemen's Protective Association, University of Wisconsin-Milwaukee, hereinafter referred to as the PPPA, is a labor organization initiated by Police Officer Gerald Kelly, and whose membership consists of some of the Police Officers and supervisors employed in the Department of Campus Protection and Security. The first meeting of the PPPA was held on Sunday, April 5, 1970. At this meeting Officer Kelly was elected President of the PPPA, Detective Briesemeister was elected Vice President and Police Officer Springob, promoted to Sergeant on May 3, 1970, was elected Secretary-Treasurer. Other members of the PPPA include Acting Chief Moratz, Sergeant Lawson, and Police Officer Heimann.

On April 14, 1970, Police Officer Kelly, on behalf of the PPPA, filed an election petition with the Wisconsin Employment Relations Commission requesting an election among the eleven Police Officers and Sergeants then employed in the Department of Campus Protection and Security of the State Employer. At the hearing conducted by this agency on June 8, 1970, Detective Briesemeister and Officer Kelly made appearances for the PPPA and participated in its behalf. The State Employer and the Complainant appeared in opposition to the petition filed by the PPPA. On July 24, 1970, Detective Briesemeister, Sergeant Springob and Officer Kelly signed a brief submitted to the Commission on behalf of the PPPA. On September 15, 1970, the Commission dismissed the election petition on the basis that the present collective bargaining agreement between Complainant and the State Employer constituted a bar to the election and as a result no question of representation existed.

In addition to being members of the PPPA, Acting Chief Moratz and Sergeant Springob were members of Complainant.

Further facts are set forth in the opinion.

ISSUES

The issues in this case are whether the State Employer:

I.) violated Sec. 111.84 (1) (c), prohibiting the encouragement or discouragement of membership in any labor organization by discrimination, in its discharge of Anthony Jones from his Police Officer position, or in its subsequent reinstatement of Jones to the position of Security Officer;

II.) violated Sec. 111.84 (1) (b), prohibiting the initiation, creation or domination of any labor organization (with certain provisos), because of supervisory membership and participation in the PPPA; and

III.) violated Sec. 111.84 (1) (a), prohibiting interference with, restraint or coercion of state employes in the exercise of their employe right of self-organization and the right to form, join or assist labor organizations.

PERTINENT STATUTORY PROVISIONS

111.81 DEFINITIONS. When used in this subchapter:

. . .

(12) "State employe" includes any employe in the classified service of the state, as defined in s. 16.08, except employes who are performing in a supervisory capacity, and individuals having privy to confidential matters affecting the employer-employe relationship, as well as all employes of the board.

(13) "State employer" means the state of Wisconsin, and any department thereof, or appointing officer, as defined in s. 16.02 (3), and includes any person acting on behalf of the state and any of its departments or agencies within the scope of his authority, express or implied.

. . .

111.82 RIGHTS OF STATE EMPLOYES. State employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities.

. . .

111.84 PROHIBITED PRACTICES. (1) It shall be a prohibited practice for a state employer individually or in concert with others:

(a) To interfere with, restrain or coerce state employes in the exercise of their rights guaranteed in s. 111.82.

(b) To initiate, create, dominate or interfere with the formation or administration of any labor or employe organization or contribute financial support to it, but the state employer shall not be prohibited from reimbursing state employes at their prevailing wage rate for the time spent conferring with its officers or agents. It shall not be a prohibited practice, however, for an officer or supervisor of the state employer to remain or become a member of the same labor organization of which its employes are members, when they perform the same work or are engaged in the same profession, provided, that after 4 years from the effective date of this subchapter said supervisor shall not participate as an active member or officer of said organization.

(c) To encourage or discourage 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.

. . .

(2) It is unfair labor practice for a state employe individually or in concert with others:

(a) To coerce or intimidate a state employe in the enjoyment of his legal rights, including those guaranteed in s. 111.82.

. . .

(3) It is a prohibited practice for any person to do or cause to be done on behalf of or in the interest of state employers or state employes, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by subs. (1) and (2).

. . .

111.94 TITLE OF SUBCHAPTER V. This subchapter may be cited as the 'State Employment Labor Relations Act.'

SECTION 3. This act shall become effective January 1, 1967.

. . ."

POSITION OF THE COMPLAINANT UNION

Complainant notes that after the April 5 meeting, four of the eight members of the PPPA were supervisors, and that of the three elected offices in the organization, two were held by supervisors. It also states that it is uncontroverted that the supervisors were active in the election proceeding before the PPPA, especially noting that Detective Briesemeister participated in the hearing on the election petition filed by the PPPA, and Briesemeister and Sergeant Springob signed the posthearing brief on behalf of the PPPA. Complainant contends that the supervisors' participation in the PPPA constituted a prohibited practice under Sec. 111.84 (1) (b). It recognizes that the statute provides that it shall not be a prohibited practice for a supervisor to become a member of the same labor organization of which its employes are members, but states that "the protection afforded the Employer against a charge of prohibited practice for supervisory membership in labor organizations must be limited to membership in the majority representative." It argues that the supervisors created and dominated the PPPA, and concludes that Sec. 111.84 (1) (b) was violated by membership of supervisors in a labor organization and creation and domination by supervisors of the PPPA.

Complainant also argues that treatment by the supervisors of nonmembers of the PPPA constituted violations of Sec. 111.84 (1) (a) and Sec. 111.84 (1) (c). It states that the allegedly coercive tactics of the supervisors caused Police Officer George Panich to quit, Police Officer Jerome James to join Local 82, and Police Officer Anthony Jones to be discharged. It states that the discharge of Anthony Jones was without cause, that Jones's hair style did not constitute a valid basis for discharge, and that the discharge was part of a pattern of harassment of nonmembers of the PPPA.

Complainant also argues that the State Employer cannot escape responsibility for the unlawful acts of Briesemeister and Moratz. It argues that these two men have been claimed by the Employer as supervisors and as such their acts are of the Employer.

As a remedy for the alleged violations, Complainant requests that Briesemeister, Moratz and the State Employer be enjoined from these activities, and that Jones be reinstated to his full pre-discharge status.

POSITION OF THE STATE EMPLOYER

The State Employer argues that the failure of Anthony Jones to successfully complete his probationary period was unrelated to any union activity. It states that there are differences between the Security Officer and Police Officer functions and that a Police Officer is required to exercise sound judgment and act responsively without question to the direct orders of his superiors. It notes that Jones was a probationary employe, and that the important consideration in placing him in a Security Officer position rather than a Police Officer position was his refusal to carry out a direct order. It states that the State Employer determined that Jones was not demonstrating the necessary capabilities required for the position of Police Officer, and that it is not the function of the Commission to determine whether Jones was suitable for this position. It argues that Complainant had the burden of proof to demonstrate that the removal of Jones was the result of his union activity and that the record is entirely barren of any such proof. It points out that Jones was merely a member of the Complainant Union, that he held no office, and was not active in any other capacity. It points out that Acting Chief Moratz is himself a member of the Complainant Union, and that Moratz had knowledge of Jones's membership in Complainant Union at the time he applied for and was promoted to the position of Police Officer.

The State Employer contends that mere membership of supervisory personnel in a labor organization of which its employes are members does not constitute a prohibited practice, and that, to the contrary, Sec. 111.84 (1) (b) specifically provides that such membership shall not constitute a prohibited practice. It argues that the evidence established that none of the supervisory personnel ever requested employes under their supervision to join the PPPA, or requested such employes to withdraw from Complainant Union as a result of the creation of the PPPA. In fact, several employes in the Department of Protection and Security still retain membership in the Complainant Union, including Acting Chief Moratz and Sergeant Springob.

The State Employer contends its conduct was consistent with labor relations and in no way can be construed as a prohibited practice. The undisputed evidence is that the management of the State Employer had no knowledge of the PPPA prior to its filing of an election petition with the W.E.R.C. and that the State Employer opposed the petition filed by the PPPA. It further notes the subsequent policy established to prevent any active participation by supervisory personnel in labor organizations due to the inherent conflict of interest involved. Finally, it takes issue with the Complainant's position that it is permissible for a supervisor to retain membership in a labor organization only when that organization is the certified representative. The State Employer contends that there is no such distinction found in the law and that the language of Sec. 111.84 (1) (b) clearly states that it shall not be a prohibited practice for a supervisor to retain membership in the same labor organization of which its employes are members. It argues that there are no qualifications indicating that such organization must be the certified representative, and that if such qualifications were intended the Legislature would have so provided.

DISCUSSION

I. Discharge of Anthony Jones

The Complaint alleged that "respondents have discharged Anthony Jones, a police officer and member of the Complainant Labor organization because of his membership in the complainant organization, in contravention of 111.84 (1) (b)." Jones was discharged from the position of Police Officer on June 27, 1970, for his refusal to comply with his superiors' orders to get his hair cut. The facts surrounding the discharge and the subsequent rehiring of Jones by the State Employer as a Security Officer are fully described in Findings of Fact Nos. 8 through 13, and it is unnecessary to reiterate them here.

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 with respect to the employe was motivated by the employer's anti-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. 2/

In the instant case, there is a complete lack of proof that the discharge was motivated by union activity or by anti-union animus on the part of the State Employer. Acting Chief Moratz, the person who carried out the discharge, had knowledge of Jones's membership in Complainant Union, but he also had such knowledge at the time he hired Jones and it is thus unlikely that Jones's discharge was motivated by such membership. Moreover, Moratz also was a member of the Complainant Union as well as a member of the PPPA. Further, there is no evidence that Jones was active in the Union or held a union office. The only evidence concerning Jones's activity was that he was a member of the Union. The mere fact of union membership is insufficient to infer that the discharge of a union member was because of such membership. 3/ Detective Briesemeister, upon whose recommendation the discharge was made, was a member of the PPPA and not a member of the Complainant Union, but there was absolutely no evidence that his recommendation was motivated by Jones's membership in Complainant Union or his failure to join the PPPA. There was also no evidence that the upper level management of the State Employer, in reinstating Jones to the position of Security Officer rather than Police Officer, was motivated by anti-union reasons or by Jones's union membership. The Union challenges the validity of the reasons for Jones's discharge and his reinstatement only to the position of Security Officer, and says there was no valid cause for the State Employer's action. However, the only question in cases of this nature is whether the discharge was in any way motivated by a desire to encourage or discourage union membership, not whether the discharge was for cause. 4/ The latter question can be determined through the grievance procedure established

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2/ Sec. 111.07(3), Wis. Stats.; Motor Bus Co., Dec. No. 4455, 2/57; Charles Bakke, d/b/a Lakeside Industries, Dec. No. 4508, 4/57; Mt. Carmel Nursing Home, Dec. No. 6352, 5/63.

3/ See Wood County, Dec. No. 9437-A, 1/71, and cases cited therein.

4/ Muskego-Norway Consolidated Schools, Joint School District No. 9, et al., 35 Wis. 2d 540 (1966); St. Joseph's Hospital v. W.E.R.B., 264 Wis. 396 (1953); School District No. 6, City of Greenfield, Dec. No. 6195, 12/62

in the collective bargaining agreement, which includes final and binding arbitration as the final step. Complainant apparently recognizes this fact, since at the time of the hearing on the prohibited practice case Complainant was also seeking relief through the arbitration process. On the question of whether Jones's discharge was the result of his union membership, Complainant failed to carry its burden of proof and the Complaint must be dismissed.

II. Supervisory Membership and Participation in the PPPA

The Complaint alleged that respondents participated in initiating and creating the PPPA, and further alleged that Detective Briesemeister is an officer of the PPPA and represented that organization at the hearing on its election petition before this agency, in contravention of Sec. 111.84 (1) (b).

Supervisors Detective Briesemeister and Sergeant Springob are officers in the PPPA, and membership in the PPPA includes supervisors Acting Chief Moratz and Sergeant Lawson. Detective Briesemeister actively participated in representation proceedings before this agency on behalf of the PPPA, and, along with Sergeant Springob, also signed a brief submitted to the Commission in the representation proceeding on behalf of the PPPA. Upper-level management did not know of the existence of the PPPA until receipt of the election petition filed by the PPPA.

Under the National Labor Relations Act, such participation of supervisors in the formation or operation of a labor organization, except in very unusual circumstances, is regarded as illegal initiation or domination by the employer even if the employer knows nothing about the union or the supervisors' activity at the outset and refuses to aid it when the employer learns of its existence. 5/ A private employer also usually is found to have illegally interfered with the administration of the union when its supervisors participate in union affairs to the extent of holding union office. 6/

However, the State Employment Labor Relations Act, hereinafter referred to as SELRA, deliberately provides a different schematic framework for the participation of supervisors in labor organizations. Prior to the passage of the SELRA, it was a common practice in the state for both the State Employer and state employe labor organizations to permit supervisors to join and participate actively in such labor organizations, including the holding of office. The Legislature recognized this practice when considering the SELRA and, in an attempt to avoid undue disruption of existing relationships, made provision for supervisory membership in labor organizations, and also provided a four-year "grace" period in which there would be no statutory prohibition of supervisory participation as active members or officers of such employe organizations.

Under Sec. 111.84 (1) (b), it is specifically provided that it shall not be a prohibited practice for a supervisor of a state employer "to remain or become a member of the same labor organization of which its

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5/ Bottfield Refractories Company, 45 LRRM 1522 (NLRB 1960); Cities Service Oil Company, 8 LRRM 241 (NLRB 1941)

6/ Local 636, Plumbers v. NLRB, 47 LRRM 2457, (D.C. Cir. 1961)

employes are members, when they perform the same work or are engaged in the same profession." Under this provision it is clear that the membership of supervisors Briesemeister, Springob, Moratz and Lawson in the PPPA does not constitute a prohibited practice, since mere membership of supervisors in labor organizations under the conditions set forth does not constitute a prohibited practice. The legislation also provides that "after four years from the effective date of this subchapter said supervisor shall not participate as an active member or officer of said organization." The subchapter became effective January 1, 1967. The clear implication and only reasonable interpretation of this statutory provision is that up to January 1, 1971, there was no statutory prohibition against supervisors participating as active members or officers of the same labor organization of which its employes are members. In prohibiting such supervisory participation after January 1, 1971, it must be assumed that the Legislature intended to not prohibit such participation up to that date.

The Complainant recognizes these concepts and, indeed, has been a beneficiary of them. Numerous supervisory employes, including supervisors Moratz and Springob in the instant case, have been members of Complainant and participants in its affairs. Complainant argues, however, that these provisions regarding supervisors must be limited to supervisors who are members of the majority bargaining representative, and are not applicable to supervisors who are members or active participants of "raiding" labor organizations. As the State Employer notes, the law provides no such limitation, but instead applies broadly to supervisors who are members of the same labor organization of which its employes are members. There is no qualification limiting its effect to the majority representative or foreclosing the provisions to minority or "raiding" labor organizations. If such a qualification was intended, the Legislature would have so provided.

Thus the membership and holding office of supervisory personnel in the PPPA, as well as their active participation in a representation proceeding before this agency involving the PPPA, did not constitute prohibited practices under the SELRA. The allegations to the contrary are herein dismissed. If the facts involved in this case existed after January 1, 1971, the end of the "grace" period, it is possible that a different result might obtain. However, that set of facts is not presented here and no consideration of these circumstances is made.

III. Alleged Coercive Treatment by Supervisors of Nonmembers of the PPPA

Paragraph 4 of the Complaint alleged that the Respondents have "persuaded and cajoled police officers of the UW-M into joining the Professional Policemen's Protective Association of the University of Wisconsin-Milwaukee in contravention of 111.84 (1) (a)." In its brief, Complainant singles out Acting Chief Moratz and Detective Briesemeister, and these two supervisors are named respondents along with the State Employer. Certain conduct by Sergeant Springob also appears to be in question, although Springob was not made a respondent and is a member of Complainant as well as a member of the PPPA.

There was a complete dearth of evidence implicating Acting Chief Moratz of any conduct other than membership in the PPPA. As noted in Part II of this opinion, there is no statutory prohibition against such

membership. There was no evidence that Acting Chief Moratz ever requested or coerced anyone to join the PPPA or to quit the Complainant. He himself was a member of Complainant. There was no evidence that he threatened or coerced or otherwise interfered with employe activity. There was no evidence that his denial of the request of Officers Panich and Kiekow to be placed on the day shift in place of Officer Kelly was based on union activity of these officers. Similarly, there was no evidence that interim merit raises were granted on a preferential basis to PPPA members. It is interim raises that were involved, not annual merit increases, and the amount of money available for distribution was not large. Acting Chief Moratz decided to grant the small increases available to the most senior men, who were the supervisors in the department. However, there is no evidence that Moratz made this decision on the basis of membership in the PPPA. Police Officer Kelly, the founder and President of the PPPA, also did not receive an interim merit increase. It is likely, if the increase were granted to employes rewarding them for their activity in the PPPA, that Officer Kelly would have received a portion of the increase since he was the President and most active member.

Sergeant Springob, who is a member of Complainant as well as of the PPPA, had a discussion with Officer Jones on one occasion in June of 1970 about the PPPA. Sergeant Springob explained to Jones "that the tentative association would provide us with the protection as necessary as professional Police Officers; in case of a false arrest, provide us with insurance; that we would have somebody to talk with us more than we have." Officer Jones testified that Sergeant Springob asked Jones to join the PPPA, but Sergeant Springob denies that he made such a request. I find that Sergeant Springob, who was also a member of Complainant, was the more reliable witness, and, from his demeanor and general frankness on the witness stand, credit his denial, particularly since Jones also testified that Sergeant Springob did not "put any pressure" on him to join the PPPA. Springob's discussion with Jones was noncoercive in nature and cannot be said to have interfered with employe rights.

In July of 1970, an incident occurred between Sergeant Springob and Officer James, described in Finding No. 16. On another occasion Detective Briesemeister made certain comments in a casual conversation with Officer Kiekow, described in Finding No. 17. These statements are anti-complainant and pro-PPPA in nature and are not to be condoned. However, in viewing the entire set of circumstances these comments must be regarded as casual and isolated episodes by minor supervisory employes which would not justify a finding of prohibited practices against the Employer. At worst, these incidents were sporadic cases of individual bias and personal views expressed by low-ranking supervisors. Moreover, these instances cannot be infered to be the responsibility of the State Employer. The record did not show responsible authoritative management representatives to be acquainted with any of these incidents so heavily relied upon by the Union. The supervisors were not acting on behalf of the state within the scope of their authority; 7/ more importantly, there was no reasonable cause for the employes to believe that the supervisors were acting for or on behalf of the State Employer in the situations in question. The applicable rule has been quoted as follows:

. . .

> "But mere isolated expressions of minor supervisory employees, which appear to be nothing more than the utterance of individual views, not authorized by the employer and not of such a character or made under such circumstances as to

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7/ Section 111.81 (13), Wisconsin Statutes.

justify the conclusion that they are an expression of his policy, will not ordinarily justify a finding against him." 8/

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As stated in another case involving activity of minor supervisory employes:

> "the controversies complained of took place without evidence of the slightest knowledge on the part of petitioner's management. . . . There is no evidence that the supervisors who engaged in controversy represented the company in what they said about the union. In fact there is cogent evidence to the contrary in all the proven acts of the management." 9/

In the instant case there also are affimative acts of management tending to rebut the charge of unlawful interference, restraint or coercion. Upon learning of supervisory activity in the PPPA, the Employer issued guidelines requiring all supervisors to be free of any active role as a member or officer of any union alleging to represent employes they supervise and specifically prohibited the encouragement or discouragement of membership in any labor union, and certain other union activity. 10/ Additionally, when the PPPA filed its election petition among Police Officers in the Department of Protection and Security, the State Employer joined Complainant in vigorously opposing said petition. These acts dilute considerably and in fact negate Complainant's change of favoritism by the State Employer toward the PPPA.

In considering these allegations the Examiner notes that the only allegation of Complainant was that the State Employer committed prohibited practices under Sec. 111.84 (1); there is no allegation that the PPPA committed interference or other prohibited practices under Sec. 111.84 (2), or that the individual supervisors involved committed such prohibited practices under Sec. 111.84 (2) or (3). The record does not support the claim that the State Employer committed interference, restraint and coercion. Therefore, after a full and complete consideration of all of the evidence and arguments presented, the complaint regarding this charge also must be dismissed.

Dated at Milwaukee, Wisconsin, this 30th day of April, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert B. Moberly
Robert B. Moberly, Examiner

8/ NLRB v. Hinde & Dauch Paper Co., 23 LRRM 2197 (4th Cir. 1948), quoting NLRB v. Mathieson Alkali Works, 7 LRRM 393 (4th Cir.). See also Reed Motor Co., Dec. No. 1681, 6/48; NLRB v. General Industries Electronics Co., 69 LRRM 2455 (8th Cir. 1968); Dayton Food Fair Stores, Inc. v. NLRB, 68 LRRM 2971 (6th Cir. 1968); Collins & Aikman Corp. v. NLRB, 68 LRRM 2320 (4th Cir. 1968).

9/ Pittsburgh Steamship Co. v. NLRB, 25 LRRM 2428, 2436 (6th Cir. 1950).

10/ These restrictions are set forth in Finding No. 7. They are also the subject of a pending prohibited practice case against the State Employer filed by the PPPA, the merits of which are not commented upon here.