

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 150, SERVICE EMPLOYEES'	:	
INTERNATIONAL UNION, AFL-CIO,	:	
	:	
Complainant,	:	
	:	
vs.	:	Case II
	:	No. 11482 MP-92
JOINT SCHOOL DISTRICT NO. 1, VILLAGE	:	Decision No. 10218-A
OF HOLMEN <u>ET AL</u> ,	:	
	:	
Respondent.	:	
	:	

Appearances:

Mr. Roger Jacobson, Business Representative, appearing on behalf of the Complainant.
Bosshard, Sundet & Nix, Attorneys at Law, by Mr. John Bosshard, appearing on behalf of the Respondent.

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 George R. Fleischli, 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 Statutes; and hearing on said complaint having been held at LaCrosse, Wisconsin, on April 20 and June 14, 1970, before the Examiner; and the Examiner having considered the arguments, evidence and briefs 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 Local 150, Service Employees' International Union, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization having its principal offices at 135 West Wells Street, Milwaukee, Wisconsin.
2. That Joint School District No. 1, Village of Holmen, et al, hereinafter referred to as the Respondent, is a Municipal Employer with offices at Holmen, Wisconsin, and operates a public school system in the Holmen, Wisconsin area.
3. That Merlin Paudler was hired by the Respondent on March 2, 1970, and began working for the Respondent as a custodian on March 4, 1970; that prior to being hired Paudler filed an application for the position of custodian wherein he stated that he would be willing to drive a school bus as a substitute driver in addition to performing the duties of a custodian; that Harold Ankerson, who was then the Respondent's School Superintendent, was advised by the Respondent's Board of Education that Paudler's application was accepted contingent upon Paudler's willingness to become a substitute bus driver, and that Ankerson so advised

Paudler at the time he was hired; that Jean Rastall, a clerical employe who works in the office of the Respondent's School Superintendent, had conversations with Paudler at the time he was hired and a few weeks thereafter wherein Paudler stated that he was aware of the fact that he was expected to become a substitute bus driver, but indicated that he did not desire to do so; that sometime before Ankerson retired on July 15, 1970, Ankerson had a conversation with Paudler regarding Paudler's failure to obtain a bus driver's license but that Ankerson did not pursue the matter because there was no shortage of bus drivers at that time and he felt that the new School Superintendent, who was hired on July 1, 1970, should handle the problem.

4. That on July 1, 1970, Wayne Diekrager began working for the Respondent as its School Superintendent; that sometime thereafter and before September, Diekrager selected Paudler to become the head custodian at the high school with duties including the transmission of orders from the high school principal to the other three custodians.

5. That from July 1, 1970, until October 30, 1970, Ankerson continued to work for the Respondent as a consultant on transportation and therefore Diekrager did not concern himself with transportation problems; that when Ankerson quit his duties as consultant, Diekrager took over the duties of supervising transportation; that soon after taking over the duties of supervising transportation, Diekrager discovered that there was a shortage of substitute bus drivers; that after failing in an attempt to hire additional, substitute bus drivers through advertising, Diekrager discussed the problem with the Respondent's Board of Education and was advised by the Board that Paudler was hired contingent upon his willingness to become a substitute bus driver; that, after discussing the problem with Ankerson, Diekrager sent Paudler a letter dated December 18, 1970, which reads as follows:

"The Board of Education has informed me that it was their understanding that you were to have acquired a bus driver's license. It appears that this was one of the conditions of employment which the Board expressed to you at the time you were hired. Mr. Ankerson has confirmed that this was discussed with you. I am therefore hoping that you will take the necessary tests at your earliest convenience. Julian Olson and/or Mrs. Rastall will provide any help or information which you may need (in regard to procedures, etc.)"

6. That a few days after Diekrager sent Paudler the letter dated December 18, 1970, Diekrager had a conversation with Paudler in the presence of Julian Olson, the Respondent's District Supervisor of Transportation wherein Paudler was advised that he was expected to work with Olson in learning necessary procedures to obtain a bus driving license; that Paudler told Diekrager in the presence of Olson that he, Paudler, would proceed to become qualified as a substitute bus driver; that, since said conversation with Diekrager, Paudler has made no effort to qualify as a substitute bus driver.

7. That sometime prior to November 3, 1970, certain nonprofessional employes of the Respondent including Paudler became interested in being represented by the Complainant for purposes of collective bargaining and such fact was known to Diekrager; that on November 3, 1970, Paudler and John Dettinger, the Respondent's District Supervisor of Maintenance and Custodial Services, were called into Diekrager's office and shown a book purporting to deal with the law regarding supervisors; that Diekrager

indicated to Paudler and Dettinger that the book established that Paudler and Dettinger were supervisors and therefore not eligible to be represented by the Complainant; that thereafter and as a result of said action by Diekrager, Paudler contacted Roger Jacobson, the Complainant's Business Representative, who sent Diekrager a letter dated November 20, 1970, which reads as follows:

"It has come to our attention that you have been calling employees into your office and interrogating them about their Union activities. It might be well for you to consider the consequences of such acts.

This Union will not tolerate the interrogation, coercion, or intimidation of any employee. We would suggest that you allow the employees their right guaranteed under the law to a fair and impartial election.

Any further reports to our office of this type of conduct will result in charges being issued against you."

8. That the Complainant filed a petition with the Commission on November 16, 1970 seeking an election among all full-time and all part-time employees of the Respondent, excluding confidential, professional and supervisory employees, and that notice for the hearing on said petition was received by Diekrager on November 18, 1970; that the hearing on the petition was held on December 7, 1970, and that during the course of the hearing the Respondent took the position that Paudler, Dettinger and Gordon Knudson, the head custodian at the elementary school were supervisors and therefore should not be included in the bargaining unit sought in the petition; that on December 10, 1970, the Commission determined that Paudler, Dettinger and Knudson were not supervisors; 1/ that on January 21, 1971, an election was conducted by the Commission among the employees included in the bargaining unit described above which election resulted in ten employees voting in favor of being represented by the Complainant and 24 employees voting against being represented by the Complainant.

9. That on January 20, 1971, Paudler was absent from the high school for a period of time beginning sometime after 6:25 p.m. and ending sometime before 8:15 p.m. which period of time was in excess of his normal lunch period of 30 minutes; that there were no custodians in the high school building during the period of Paudler's absence; that the elementary school building was locked during the period of Paudler's absence thereby causing some inconvenience to certain persons who sought access to the elementary school and could find no custodian to let them in.

10. That at various times after March 4, 1970, and before December 1970, Paudler expressed critical opinions regarding the competence and behavior of certain present and former administrators to Diekrager and several present and former Board members and employees which opinions were in no way related to his, Paudler's, wages, hours and working conditions or his interest in being represented by the Complainant or any other labor organization.

11. That Paudler was called into Klettenberg's office on January 21, 1971, and advised by Klettenberg that he was dissatisfied

1/ Joint School District No. 1, Village of Holmen, et al, (10059) 12/70.

with Paudler's conduct on the previous evening; that Dettinger was present for at least a portion of the discussion between Paudler and Klettenberg and that Dettinger advised Paudler that although Paudler's custodial work was good, Dettinger had a number of dissatisfactions with Paudler's conduct which he intended to take to the Board of Education; that Dettinger discussed his dissatisfaction concerning Paudler with the Board of Education and on January 26, 1971, Dettinger advised Paudler that he intended to recommend to the Board of Education that Paudler be terminated; that on February 4, 1971, Dettinger sent Paudler a letter which reads as follows:

"I am recommending to the Board of Education of Holmen Area Schools that your employment with the Holmen Area School District be terminated February 28, 1971. The reasons for dismissal are as follows:

- 1) General - Failure to abide by policies established by the Board of Education.

Specific- You have not obtained a bus driver's license as directed to do so by the Board of Education and Mr. Ankerson (former Superintendent) at the time of hiring (March 2, 1970). You were again directed to do so on December 18, 1970. (See attached letter).

- 2) General - Failure to accept responsibility for supervision of other employees.

Specific- Two other employees under your supervision were allowed to leave their jobs on January 20, 1971 (between hours of 6:25 and 8:15 p.m.) There was no prior knowledge nor consent on the part of the Secondary Principal or the Superintendent.

- 3) General - Failure to conduct your work activities in a responsible manner.

Specific- You were absent from your job site on January 20 (Between the hours of 6:25 and 8:15 p.m.) The building which you are responsible for was unattended and some entrance doors locked which resulted in ill feelings on the part of those entering the building. (Between 20 - 40 people)

- 4) General - Failure to use reasonable discretion and reasonable judgment when commenting on school policies and/or activities. Your attitudes and actions have hampered the educational operation of Holmen Area Schools.

Specific- You have made critical and derogatory statements regarding the work activities and personal activities of Mr. Harold M. Ankerson, Mr. Charles Klettenberg, and Mr. Paul Nelson.

If you wish to have this matter reviewed by the Board of Education, please inform me of such desire within seven days from the date of this letter. (February 11, 1971). A formal hearing will then be arranged at which time you may present your response to the four reasons for dismissal. If a

hearing is not requested, I will recommend to the Board of Education that official action be taken at the next regular monthly meeting which will be held at 8:00 p.m. on February 15, 1971."

12. That after receiving the letter dated February 4, 1971, Paudler asked for a hearing before the Board of Education which hearing was granted and held on February 16, 1971; that Paudler was present with a representative from the Complainant labor organization and was provided an opportunity to present evidence and argument in response to the allegations contained in the letter dated February 4, 1971; that Paudler, through his representative, alleged that said allegations were not the real reason for the proposed discharge and declined to offer any evidence or argument in response to said allegations; that immediately thereafter the Respondent's Board of Education voted to terminate Paudler and notified him that he was terminated effective February 28, 1971.

13. That Merlin Paudler was discharged by the Respondent for the reasons set out in the letter dated February 4, 1971 and not because of his activities on behalf of the Complainant or other protected activities.

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

CONCLUSIONS OF LAW

1. That Joint School District No. 1, Village of Holmen et al did not discriminatorily discharge Merlin Paudler because of his activities on behalf of the Complainant or other protected activities and that therefore the discharge of said Merlin Paudler was not in violation of Section 111.70(3)(a)1 or Section 111.70(3)(a)2 of the Wisconsin Statutes. 2/

2. That Joint School District No. 1, Village of Holmen et al did not interfere with, restrain or coerce Merlin Paudler or John Dettlinger in the exercise of their rights under Section 111.70(2) of the Wisconsin Statutes when its agent, Wayne Diekrager called them into his office on November 3, 1970, and discussed their alleged supervisory status and did not commit a prohibited practice within the meaning of Section 111.70(3)(a)1 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 this matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 1st day of December, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

2/ All references to Section 111.70 of the Wisconsin Statutes as that section was worded prior to November 11, 1971.

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MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complainant alleges that the Respondent discharged Merlin Paudler because of his activity on behalf of the Complainant labor organization and other protected activity. If proven, such conduct would violate Section 111.70(3)(a)1 and Section 111.70(3)(a)2 of the Wisconsin Statutes. 1/ In addition the Complainant alleges that the Respondent "has engaged in a pattern of threats, promises, interrogations and surveillance and thereby interfered with, restrained and coerced employees in the exercise of their rights". If proven, such conduct would constitute a violation of Section 111.70(3)(a)1 of the Wisconsin Statutes.

The Respondent denies that Paudler was discharged for the reasons alleged or that it has engaged in the other conduct alleged and by way of affirmative defense alleges that Paudler was discharged for certain reasons unrelated to the reasons alleged.

The Complainant argues in its brief that the "sole reason" for the discharge was discriminatory. The evidence adduced at the hearing clearly established that there was a substantial basis in fact to support the reasons given for the discharge. Therefore, unless the evidence establishes by a clear and satisfactory preponderance of the evidence that a part of the motivation was discriminatory the complaint should be dismissed.

Knowledge

The only evidence in the record that would tend to support a finding that Diekrager was aware of Paudler's interest in the Complainant is the conversation that took place in Diekrager's office on November 3, 1970. Paudler had made the original contact with the Complainant and had signed a card prior to that meeting. However, there is no showing that Diekrager was aware of either of those facts on November 3, 1970.

1/ The decision in this case is controlled by Section 111.70 of the Wisconsin Statutes as it read at the time of the alleged violation and not as amended on November 11, 1971.

Diekrager did not admit to having any knowledge that some of his employes were interested in being represented by the Complainant until later in November when the Notice for Hearing on the election petition was received. Commission records disclose that the Respondent did not receive official notice of the pending petition until November 18, 1970. The fact that Diekrager called Paudler and Dettinger into his office for the purpose of showing them the law regarding supervisors indicates that he must have had knowledge that some of his employes were interested in being represented by the Complainant as early as November 3, 1970. Diekrager admitted to being uncertain of the date of the discussion with Paudler and Dettinger so it is possible that Diekrager was mistaken regarding the date on which he first acquired the knowledge that some of his employes were interested in being represented by the Complainant. In either event, the inference that Diekrager had such knowledge on November 3, 1970 is very compelling.

Finding that Diekrager knew that some of his employes were interested in a union is not the equivalent of finding that Diekrager knew that Paudler had made the initial contact with the Complainant's Business Representative or even that Paudler had signed a card. There is no evidence of record, other than the conversation which was had at the meeting, that would justify the latter inference and the content of that conversation is in serious dispute.

On adverse examination Diekrager stated that he merely showed Paudler and Dettinger a book purporting to deal with the law regarding supervisors and labor organizations and let them draw their own conclusions. According to Paudler and Dettinger, Diekrager told them that they were supervisors and could not vote. In later direct testimony Diekrager admitted that he told Paudler and Dettinger that "as supervisors they had some responsibility to the district, there should be some loyalty." 2/ Because of the agreement of Paudler and Dettinger on this point and because of Dettinger's later statement the Examiner is satisfied that Dettinger clearly indicated that he was of the opinion that Paudler and Dettinger were supervisors and not eligible to be represented by the Complainant.

The fact that Diekrager may have known that some of his employes were interested in being represented by the Complainant and may have advised Paudler and Dettinger that he believed that they were supervisors and therefore ineligible to vote in any election does not, absent more, support a finding that he knew whether or not either Paudler or Dettinger was actively supporting the Complainant or even if they were interested in being represented by the Complainant. They both had been given certain supervisory functions to perform and Respondent maintained that they should be excluded as supervisors when the election hearing was subsequently held on December 7, 1970. The fact that Diekrager was wrong on the question of the supervisory status of Paudler and Dettinger does not establish that he had knowledge that Paudler was active in his support of the Complainant or that the purpose of the conference was to threaten Paudler. Diekrager had given Paudler some supervisory functions to perform and Diekrager had a basis in fact for claiming that Paudler and Dettinger were supervisors.

2/ Transcript, at page 46.

Motivation

Paudler claims that Diekrager told him that if he continued with his union activity he "would be sorry." 3/ If in fact such a statement was made by Diekrager, the record is clear that Diekrager not only had knowledge of Paudler's activities on behalf of the Complainant but threatened him if he continued in those activities. When asked whether or not he told Paudler he would be sorry, Diekrager denied that he had ever made such a statement. 4/

The Complainant's case must stand or fall on the question of whether or not Diekrager made the statement indicating that he knew that Paudler had been active on behalf of the Complainant and threatening him unless he ceased. The other witness to the conversation, Dettinger, was called by the Complainant but did not testify as to the alleged threat. Dettinger's entire testimony on the meeting of November 3, 1970 reads as follows:

"Q Do you recall the meeting in Mr. Diekrager's office with you and Mr. Diekrager present on November 3rd of 1970?

A Yes, I probably was there.

Q Did Mr. Diekrager make statements to you in regard to your being a supervisor and not eligible to vote?

A He told me I couldn't vote, yes.

Q Subsequently did you vote in the union election?

A Yes, I did." 5/

Dettinger was never asked on direct examination or on cross examination whether or not he heard Diekrager threaten Paudler. The failure to put this critical question to Dettinger is most unfortunate since his answer might well have resolved the conflict in the testimony over the question of whether or not Diekrager threatened Paudler. Because of this lack of corroboration or denial on Dettinger's part the conflict must be resolved on the basis of the other evidence of record.

The Reasons Given for the Discharge

Although Diekrager's letter directing Paudler to get a license came shortly after the Union came into the picture, the Respondent was able to show without contradiction, that Diekrager did not become aware of Paudler's failure to become a substitute bus driver until Ankerson resigned on October 30, 1970. If the Respondent had used Paudler's failure to get a license as a basis for summarily discharging him in November or even December the timing of the discharge would suggest that Diekrager was using Paudler's failure to get the license as an excuse to fire him. But Diekrager did not act summarily; he gave Paudler two opportunities to comply with the stipulation under which

3/ Transcript, at pages 16 and 22.

4/ Transcript, at page 47.

5/ Transcript, at page 25.

Paudler was hired. Although Diekrager's letter is not in the form of an ultimatum it clearly indicated that Paudler was expected to get the license and Diekrager subsequently went to the trouble of making arrangements with Olson, in Paudler's presence, for Paudler to learn the necessary procedures. Even when Diekrager subsequently decided that Paudler should be terminated he put his decision in the form of a recommendation thereby giving Paudler an opportunity to tell the Board of Education that he had changed his mind. Paudler's failure to avail himself of that opportunity was a decision made at his own peril.

The other reasons given as the basis for discharge were considered to be of lesser importance by Diekrager and the Board of Education. Even so they are not without basis in fact. Paudler was absent from the high school for at least an hour and fifteen minutes on the night of January 20, 1971 and the building was left unattended during his absence. The doors to the elementary school were locked and there was no custodian available to open them to the public. While the questions raised by the Complainant of whether Paudler had been adequately advised that he was responsible for the scheduling of lunch breaks and unlocking doors might have some bearing on the question of whether or not it was fair to hold him personally responsible for the absence of the other custodians or the locked doors, the fact remains that Paudler was absent and he was the head custodian. He was given an opportunity to explain his side of the story to the Board of Education and he failed to avail himself of that opportunity. The inquiry here is not whether he was discharged for reasons that were fair but whether or not the real reason or part of the reason was his union activity.

Finally, the claim that Paudler had made critical remarks about the competence and behavior of present and former administrators was generally substantiated by the Respondent. The exact number and content of those remarks may be in dispute, but the fact remains that Paudler did make critical remarks on several occasions. The fairness of penalizing Paudler for such remarks in light of the fact that he is both a parent and a taxpayer might be brought into question but there is no claim that Paudler was engaging in protected concerted activity within the meaning of Section 111.70(2) of the Wisconsin Statutes when he made the remarks in question.

Anti-Union Sentiments

There is evidence of record which indicates that the Respondent maintained an official policy of neutrality with regard to the Union. Although the Respondent could have engaged in permissible propaganda activities in an effort to dissuade its employees from selecting the Complainant organization it deliberately chose not to do so. The only evidence or record which the Union can point to as evidence of possible anti-union animus is the candid remark of the President of the Board of Education that Paudler's activities on behalf of the Complainant may have been an "irritant". In context, the remark reads as follows:

"Q Now Mr. Paudler contends that the real reason that his employment was terminated was because of his union activities in December and November of 1970. Could you state what the fact is with respect to that matter?

A I have difficulty understanding why he would say this, because we cooperated in every way. Mr. Diekrager's attitude to the board was whichever way it goes, this is not the big thing. And at the time of the election I was present and took part in the supervising of the election along with the member from the union. And I don't think there was ever any hostility shown between us. As a matter of fact, I have no hostility toward Mr. Paudler or anybody else in the union movement.

Q So far as you then as the president of this board and as a representative of that school board, the fact that Mr. Paudler may have been active in the union activities played no role in his discharge, is that correct?

A There was consideration of these other things before that came up. I suppose I could say that was an irritant; but it wasn't a serious thing affecting his employment.

Q Did it play any factor or role in his discharge?

A Not in my mind, no." 6/

Although the Complainant argues that this remark is evidence of anti-union sentiment, the Complainant admits that the Board of Education played no role in the decision to discharge Paudler. 7/ The Examiner must agree that the remark can be read as some evidence of possible anti-union sentiments on the part of the President of the Board of Education. However, there is no evidence of record that the sentiments expressed played any role in the decision to terminate Paudler and the Complainant does not allege that it did.

Insufficiency of the Evidence

The Complainant has failed to produce any substantial evidence to support the claim that Diekrager was motivated in whole or in part by a desire to discriminate against Paudler because of his activities on behalf of the Complainant other than Paudler's claim that he was threatened by Diekrager on November 3, 1970. Although there was a witness present at the time of the alleged threat and that witness was called to testify on behalf of the Complainant, the Complainant failed to obtain his corroboration. On the other hand the Respondent has established that it had substantial reasons to discharge Paudler which were unrelated to his activities on behalf of the Complainant. The decision to act on those reasons was not closely related in time to Paudler's activities on behalf of the Complainant. Paudler was given several opportunities to eliminate the Respondent's main criticism which opportunities he chose to ignore. On the basis of the above the Examiner is satisfied that the Complainant has failed to prove by a clear and satisfactory preponderance of the evidence that the

6/ Transcript, at page 34.

7/ Complainant's brief at page 4.

decision to discharge Merlin Paudler was based in whole or in part on his activities on behalf of the Complainant or other concerted activities.

Alleged Interference, Restraint
and Coercion

There is no evidence of record to establish the Complainant's allegation that the Respondent "engaged in a pattern of threats, promises, interrogations and surveillance". In fact, the evidence of record supports the Respondent's claim that it maintained an official position of neutrality. However, the conference which took place in Diekrager's office on November 3, 1970 does require some comment.

The Examiner is satisfied that Diekrager did indicate to Paudler and Dettinger that they were supervisors and not eligible to vote in the election. In fact Diekrager was wrong in his understanding of the law as it related to Paudler and Dettinger. However, the evidence of record indicates that Diekrager had reason to believe that they were supervisors. The Examiner has not been able to find a case where an employer has been found guilty of an act of interference based on a good faith misstatement of the law regarding an employe's eligibility to vote where the misstatement was not accompanied by a threat. 8/ To find that such conduct, standing alone, constituted an act of interference would unduly inhibit an employer and discourage him from raising legitimate questions of status for fear that he might later be found to be wrong.

Dated at Madison, Wisconsin, this 1st day of December, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

8/ In Patterson Fire Brick Co. 26 LRRM 1256, 90 NLRB 660 an employer was found to have committed an act of interference when its agent threatened an employe who the agent knew was not a supervisor.