STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CITY OF BOSCOBEL EMPLOYEES, WCCME, AFSCME, AFL-CIO, Complainant, vs. CITY OF BOSCOBEL, Respondent.	Case IV No. 15048 MP-99 Decision No. 10618-A

Appearances:
Mr. Walter J. Klopp, District Representative, for the Complainant Union.
Mr. John E. Barnett, City Attorney, for the Respondent 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 Robert M. McCormick, 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 Boscobel, Wisconsin, on December 9,1971, before the Examiner; and the Examiner having considered the evidence, arguments 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 City of Boscobel Employees, WCCME, AFSCME, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization having its principal offices at 4646 Frey Street, Madison, Wisconsin.

2. That City of Boscobel, hereinafter referred to as the Respondent, is a Municipal Corporation and has its offices at City Hall, Boscobel, Wisconsin.

3. That on June 22, 1971, after a representation election conducted by this Commission, the Complainant was certified as the exclusive collective bargaining representative of all employes of the City of Boscobel, excluding water and electric utility employes, clerical employes, law enforcement personnel, supervisory and confidential employes; that on July 2, 1971, Complainant, by its representative, Walter Klopp, advised the Respondent by letter of the identity of three local union officers selected by its members, President, William Camp; Secretary, LeRoy Bolchen; and Treasurer, Joe E. Ferrel; that the Complainant presented its initial demands in writing to Respondent on August 6, 1971; that the negotiating committees of the Complainant and Respondent met in bilateral negotiations in efforts to reach an initial collective agreement on October 20 and 27, 1971, and November 23, 1971, though the parties, as of the last such meeting, remained in disagreement over matters involving wages and conditions of employment.

4. That on October 19, 1971, the Street Commissioner, Mr. Art Turner, after conferring with the street committee of the City and learning of a required reduction in work force, notified Mr. Joe Ferrel that he was to be laid off as of October 29, 1971, because of a lack of work; that in September and October 1971, Turner verbally reprimanded Ferrel for loafing on the job; that as of said date the Respondent employed at least four individuals with hiring dates later than the June 1, 1970, hiring date for Ferrel, namely, LeRoy Bolchen (6-15-70), Dorris Staskal (4-1-71), Gerald Haile (4-26-71), and James Mayne (5-24-71).

5. That on October 20 and 27, 1971, in the course of bargaining sessions between the parties, the Complainant raised objections to the scheduled layoff of Ferrel, contending that a layoff of a union officer out of seniority order would tend to interfere with the bargaining relationship; that the Complainant was unable to dissuade the Respondent from laying off Ferrel; that on October 29, 1971, the Respondent cut back one employe from its work force, by placing Ferrel on layoff status; that two (2) other union officers, Camp and Bolchen, were retained in active employment in the Street Department.

6. That in early October 1971, the Respondent decided to cut back its Street Department crew after a special project had been completed; that at no time material herein were the Respondent and Complainant parties to any collective bargaining agreement; that no other separate agreement, or arrangement, between said parties existed for any time material herein which required the Respondent to consider an employe's length-of-service in matters affecting tenure, or for layoff; that at no time material herein did the Respondent follow a policy or practice that reflected the Respondent accepting an employe's length-of-service as determinative of the order of layoff.

7. That Joe E. Ferrel was laid off by the Respondent because of a lack of work resulting in a cut back in its work force, and that Respondent's act of removing Joe E. Ferrel from active employment on October 29, 1971, was not because of his activities on behalf of the Complainant, or for his engagement in other protected activities.

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

CONCLUSIONS OF LAW

1. That the City of Boscobel did not effectuate the layoff of Joe E. Ferrel on October 29, 1971, for the purpose of discriminating against him because of his activities on behalf of Complainant, or for the purpose of interfering with his rights, or the rights of any of its employes, to engage in concerted activity on behalf of said labor organization, or any other labor organization, and therefore, the Respondent, City of Boscobel, did not commit, and is not committing, any violation of Section 111.70(3)(a)2 or Section 111.70(3)(a)1 of the Wisconsin Statutes.1/

2. That the City of Boscobel by its conduct of first meeting and negotiating thereafter with Complainant on October 20 and 27, and November 23, 1971, in an effort to reach an initial collective agreement, though remaining in disagreement over certain matters involving wages and conditions of employment, did not interfere with, restrain or coerce its employes in the exercise of their rights under Section 111.70, and therefore, did not commit, and is not committing, any prohibited practices within the meaning of Section 111.70 of the Wisconsin Statutes.

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

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 filed in the instant proceeding be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 2nd day of March, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Robert M. McCormick, Examiner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEADINGS AND LACK OF CLAIM FOR RELIEF UNDER 1969 STATS., SECTION 111.70:

Complainant alleges that the Respondent placed Joe E. Ferrel on layoff status on October 29, 1971, with the knowledge that he was the Local Union Treasurer, and at a time proximate to the commencement of negotiations for the purposes of discouraging membership in the Complainant Union, and further alleged that said layoff of a Union officer interfered with the employes' rights under Section 111.70(2), all in violation of Sections 111.70(3)(a)2 and 111.70(3)(a)1 of the Wisconsin Statutes.2/

The Complainant also alleged inter alia:

> "A proposed agreement by the Union was sent to the City on August 6, 1971. Despite repeated calls and requests to set up a meeting it was not until the end of October that the City finally agreed to meet with the Union.
>
> . . .
>
> That the reluctance and failure of the City to meet within a reasonable time was by design to frustrate and discourage the employes from membership in the Union."

The Respondent denied any such violations, and affirmatively alleged that it had effectuated a layoff of Ferrel because of lack of work, and that it had met and bargained with Complainant on three separate occasions.

At the outset of hearing the Union in the course of presenting its opening statement, indicated that it desired to present evidence relating to Respondent's bargaining-table conduct covering the period August 6, 1971, through October 27, 1971, for purposes of proving an "interference" violation. The Examiner ruled that such evidence would not be relevant, and that there was no claim for relief under Section 111.70 to remedy an alleged "refusal to bargain", or to remedy such conduct under color of an interference violation (111.70(3)(a)1).

2/ All references made to Section 111.70 are to the language of said provision before the November 11, 1971, amendment unless otherwise set forth in its amended form.

The Examiner reaffirms said ruling, since the bargaining-table conduct occurred prior to November 11, 1971, the date that the 111.70 amendment, Laws of 1971, Chapter 124, first established "a refusal to bargain" as a prohibited practice (111.70(3)(a)4).3/ Accordingly, that portion of the complaint relating to the alleged bargaining-table conduct of the Respondent has been dismissed, since the Complainant's complaint fails to state a claim for relief under the statute in existence prior to the amendment.

LAYOFF OF FERREL:

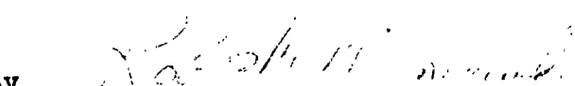
The record discloses that the Respondent, in the autumn of 1971, experienced a completion of some projects. Though the Respondent need not prove a negative concerning whether its motivation for effectuating the layoff of Ferrel was to discourage union membership, nevertheless the record clearly indicates that on at least two (2) occasions, from the credited testimony of the Street Superintendent, that Ferrel had been verbally reprimanded for deficient performance of his job. The record further discloses that the Respondent had no collective agreement or practice with the Union or with its employes making seniority determinative for layoffs.

Other than the evidence that Respondent had knowledge that Ferrel was an officer of the Local Union, the Complainant has failed to produce a scintilla of evidence in support of its allegation that Respondent's conduct constituted either interference with the employes' rights, or that Respondent adversely affected Ferrel's tenure to discourage union activity, or because he was a union activist.

Typically a labor organization seeks the protection of the seniority principle for its members in a labor agreement. Where it has been unable to secure same, it cannot resort to the sanctions of a contract to prevent layoffs out of seniority order. However, the mere fact that a union member, or one union officer in a small work force, is laid off and a junior employe retained, does not mean that an employer has violated 3(a)1 or 3(a)2 of 111.70. There must be some evidence indicating further disparate treatment; or evidence of a pretextual basis for the selection for layoff; and evidence of animus or hostility of the employer against the employes acting in concert. The record here discloses no such conduct. The complaint has therefore been dismissed.

Dated at Madison, Wisconsin, this 2nd day of March, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Robert M. McCormick, Examiner

3/ LaCrosse County Institution Employees, Local 227, AFSCME vs. WERC, 52 Wis. 2d 295 (1971); Board of Education, City of Green Bay et al, (WERC 9095-E), 9/71.