

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROBERT F. KRIMMER, SR. AND RUSSELL
STANKE,

Complainants,

vs.

GRACELAND CEMETERY,

Respondent.

Case II
No. 15765 Ce-1434
Decision No. 11607

Appearances:

Murphy, Shapiro, Gorsky & Dubin, Attorneys at Law, by Mr. Carl

L. Dubin, appearing for the Complainants.

Quarles, Herriott, Clemons, Teschner & Noelke, Attorneys at Law,
by Mr. George H. Whyte, Jr., appearing for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter, and hearing on said complaint having been held at Milwaukee, Wisconsin on July 31, 1972, Chairman Morris Slavney and Commissioner Jos. B. Kerkman being present, and the Commission having considered the evidence and arguments 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 Complainants Robert F. Krimmer, Sr. and Russell Stanke are individuals residing at 4633 West Brentwood Court, Milwaukee and 7316 West Congress, Milwaukee, Wisconsin, respectively.
2. That Graceland Cemetery, hereinafter referred to as the Respondent, is a non-profit religious cemetery owned and operated by Grace Lutheran Church, Trinity Lutheran Church and St. John's Lutheran Church, and has its place of business at Milwaukee, Wisconsin.
3. That Laborers International Union of North America, AFL-CIO, Local 989, hereinafter referred to as the Union, is a labor organization representing employees for the purposes of collective bargaining, and has its office at 4200 South First Place, Milwaukee, Wisconsin; and furthermore, that at all times material herein, the Union and the Respondent were parties to a collective bargaining agreement, covering the wages, hours and working conditions of all regular full-time, part-time and seasonal employees in the employ of the Respondent, excluding office clerical employees, salesmen and supervisors.

4. That at all times material herein, five steady 1/ non-office employees, including the Complainants, were employed by the Respondent; and had authorized check off of their Union dues.

5. That Stanke commenced his employment with the Respondent in April, 1962, and has performed various tasks including laying headstones, driving truck, setting monuments, painting, guiding the grave digging equipment and cutting grass, but excluding grave digging with the mechanized Dynahoe; and that prior to April 25, 1972, Stanke had neither been reprimanded nor disciplined in his work for the Respondent.

6. That Krimmer was employed approximately six years by the Respondent, throughout which time he served as Union steward, and has performed the following duties: general building maintenance, including painting, carpentry and electrical work; soaking and sodding graves; burial plot preparation; cutting grass; digging graves with the Dynahoe or backhoe; and that during his employment, he was disciplined on a singular occasion, September 9, 1968, when he received a three-day disciplinary suspension from the Cemetery's General Manager, which advised Krimmer that:

"...if you do not correct your defective attitude toward work and supervision, improve your substandard level of performance, and cease interfering with the efficient performance of other Graceland employees, you will be discharged at the time of the next violation of these orders. . ."

7. That in January, 1972, during the life of the collective bargaining agreement, the Respondent unilaterally effectuated a wage increase for its employees which was not bargained over with the Union.

8. That in February, 1972, the Respondent hired Frank J. Zens as General Manager, replacing the former General Manager, David E. Branch; that the Respondent, at all times material herein, was heavily in debt, and that its grounds were in a state of neglect, in that numerous graves were unsodded, other graves were sunken, and markers remained tilted; and that due to such conditions, the Respondent received approximately 370 complaints filed by the families of those interred in the Cemetery.

9. That in mid-April, 1972, a second piece of grave digging equipment was purchased by the Respondent, and that like the first Dynahoe or backhoe, it is operated by one employee while a second employee stands graveside to guide the machinery.

10. That Zens observed Krimmer on April 13, 1972 at approximately 1:15 p.m., from the office window with the aid of binoculars, neglecting his work assignment of soaking graves for approximately 45 minutes while sitting on a log; and that neither a verbal nor written reprimand was issued to Krimmer.

1/ A steady employee is defined in Article II, Section 1 of the agreement as: "one who carries on the regular work of the cemetery and is listed as such by the Employer. He shall be possessed of sufficient experience, skill and ability to perform all of the usual and regular types of work carried on in the cemetery of the Employer in accordance with established work standards."

11. That on April 17, 1972, at approximately 12:30 p.m., Krimmer encountered Zens painting the windows of the Cemetery office; and that discussion transpired, in which Krimmer stated that Zens' painting violated the collective bargaining agreement in that it took work away from steady employees and, furthermore, that it did not look good for prospective buyers to see the office manager in overalls; and that conversation regarding the general financial situation of the Cemetery ensued.

12. That on April 18, 1972, at approximately 8:30 a.m., Zens sought out Krimmer on the Cemetery grounds and, read aloud Article VIII, Section 4 of the collective bargaining agreement as follows:

"The Employer/and or his agents shall not perform work that is normally performed by the workers, except in the emergency event that no worker is available who can do so";

and having never witnessed any employees painting, and believing nothing to have ever been painted, Zens stated to Krimmer that nothing in the contract precluded painting by the General Manager; and further after reading aloud Article VIII, Section 2 as follows:

"The Employer may from time to time make and post rules consistent with this agreement and all workers shall comply faithfully with such rules",

Zens stated that a series of rules concerning the operation of the Cemetery would be enacted, and that any employees who did not like them could leave, to which Krimmer responded that any rules which did not conflict with the agreement were "fine".

13. That, according to Zens, such rules were motivated by the "constant complaint between the Union and non-union employees about rotation of jobs and their job assignment"; that further motivation stemmed from the necessity of having all steady workers able and willing to operate grave digging machinery in order to meet work requirements during employees' vacation or illness; that the general condition of the equipment was also a consideration; and that subsequent to the aforementioned discussion with Krimmer, rules concerning jobs and equipment assignment and equipment abuse were orally conveyed to Foreman Robert Koehler. 2/

14. That on April 18, 1972 at approximately 2:30 p.m., Zens observed Krimmer relaxing on the tractor, while Stanke shoveled dirt into the cart; and that neither a verbal nor written reprimand was issued to Krimmer.

15. That Foreman Koehler, at 8:30 a.m. on April 24, 1972, informed Stanke that he would be expected to dig graves with the Dynahoe, a task previously performed by three other employees not including Stanke, or resign his Union membership; and that on the same afternoon, Stanke met with Zens who reiterated that Stanke would have to operate the grave digging equipment or drop out of the Union; that Zens requested Stanke to do the later; that Stanke told Zens that he did not want to operate the Dynahoe and asked if he could be kept off such assignment; that Zens indicated to him that, under the terms of the contract, he could be given light work for light pay; and that thereupon Stanke asked whether he could

2/ During the period of time which elapsed between the events described herein and hearing in the matter, Foreman Koehler was also dismissed.

perform light work for regular pay if he were not a member of the Union, to which Zens replied that it was a remote possibility but that he was uncertain and would check with his attorney on the matter; and that thereupon, Stanke stated that he would like to withdraw from the Union.

16. That during said meeting, Stanke signed a letter prepared by Zens' secretary and addressed to the Union's Business Manager, Al Milak, the text of which reads as follows:

"This is to serve as notice that effective this date, April 24, 1972, I have withdrawn from Memorial Park Workers and Cemetery Employees (sic) Local 989.

Therefore, no further Union dues are to be withdrawn from my wages.

Russell Stanke /s/";

that during the preparation of the letter, Zens stated that Stanke would save \$100 by dropping out of the Union and that Zens only had one more man to go; and that Stanke then returned to work.

17. That on April 24, 1972 at approximately 4:00 p.m., Zens observed Krimmer entering the tool shed thirty minutes prior to quitting time and, failed to reappear after ten minutes; that Zens then went to the shed and found Krimmer sitting with his feet on the desk; and that neither a verbal nor written reprimand was issued to Krimmer.

18. That on April 25, 1972, Stanke called the Respondent's office to request the day off and that such request was granted.

19. That on April 26, 1972, a little after 8:00 a.m., Stanke informed Foreman Koehler that Milak, the Union Business Manager, was coming to see Zens at 11:30 a.m. that morning and that Stanke requested time off as of 11:30 a.m.; and that subsequent to the transmission of such information by Koehler to Zens, Zens went out on the ground to straighten scheduling difficulties due to the absence of another employee, and to discuss Stanke's request for time off; that Zens then asked Stanke what the problem was whereupon Stanke refused to talk to him, stating that he wanted to talk to his Union Representative first; and that Zens suspended Stanke at approximately 9:00 a.m. until further notice because Zens desired to know what Stanke intended to do about staying in or resigning from the Union, and informed Stanke that he would call him at 4:25 p.m. that day to see if Stanke was "straightened out" so he could go back to work; and that subsequently Stanke told the Foreman that he, having discussed the matter with Krimmer, was staying in the Union.

20. That later on April 26, 1972, Milak met with Zens to discuss, what he believed to be, the coercion of Stanke by Zens to resign from the Union, whereupon Milak requested Stanke's presence and learned of Stanke's suspension, and the circumstances surrounding same; that Milak requested Stanke's suspension be put in writing, to which Zens replied that he did not think it was necessary because if Milak and Zens talked to Stanke, as Zens informed Stanke he would at 4:25 p.m. that afternoon, they could see if they could get him back to work; and that further discussion transpired concerning Krimmer's admonition of Zens for window painting.

21. That at 4:25 p.m. on April 26, 1972, Zens telephoned Stanke whereupon he was informed that Stanke had not spoken to the Union Business Manager as of that time; and that Zens told Stanke to call him at home or the office as soon as Stanke had made a decision.

22. That on May 3, 1972 at approximately 2:45 p.m., Zens observed Krimmer sitting against a stone instead of mowing the grass as he had been assigned; and that neither an oral nor written reprimand was issued to Krimmer.

23. That on the afternoon of May 5, 1972, an on-the-job injury sustained by one of the steady employees resulted in the reassignment of John F. Thumann to a grave preparation with Krimmer; and that Thumann refused to work with Krimmer because of Krimmer's slow work pace, and Thumann walked off the job before a funeral at approximately 2:00 p.m. without permission, and returned to work the following day; and that Thumann was not disciplined for such action.

24. That Krimmer, on May 5, 1972 was given a sealed envelope by Foreman Koehler which contained notification of his termination; and that upon discharge of Krimmer, the majority status of the Union among the Respondent's employees was destroyed.

25. That said letter of termination addressed to Krimmer does not make reference to any specific incidents of unsatisfactory performance by the Complainant, but reads as follows:

"Once again you are expressing your visible and vocal displeasure at work you have been assigned. The manner and pace of your performance is substandard.

Your attitudes and performance have made your unwillingness to work very apparent to your fellow employees and to management. This has been a very damaging factor to the morale and efficiency of the work force. It has been a disrupting factor in the usual and regular types of work carried on in the cemetery in accordance with established work standards.

In view of and with consideration to all these factors and in light of several warnings leading to a previous disciplinary suspension, no further warnings will be issued. With your refusal to correct and accept the proper attitude, your employment by Graceland Cemetery, is terminated for the good of all parties."

26. That the date of expiration of the collective bargaining agreement between the Union and Respondent was July 1, 1972; and that the Union on May 15, 1972, timely notified Respondent of its intention to reopen negotiations for a new contract; and that on May 22, 1972, Respondent informed the Union that said contract would not be renewed or renegotiated.

Based on the above and foregoing Findings of Fact, the Commission makes and files the following

CONCLUSIONS OF LAW

1. That Graceland Cemetery, by the action of its agent, Frank J. Zens, on April 24, 1972, wherein he implied that Russell Stanke could perform light work for regular pay if he resign from the Union and thereby coerced Russell Stanke into resigning from the Laborers International Union of North America, AFL-CIO, Local No. 989, interfered with Stanke's exercise of the right guaranteed him under Section 111.04 of the Wisconsin Statutes, and has committed an unfair labor practice within the meaning of Section 111.06(1)(a) of the Wisconsin Employment Peace Act.

2. That Graceland Cemetery, by indefinitely suspending Russell Stanke and discharging Robert F. Krimmer, Sr., discriminated against,

and is discriminating against, said employees because of their union membership, and has committed, and is committing, unfair labor practices within the meaning of Section 111.06(1)(c) and Section 111.06(1)(a) of the Wisconsin Employment Peace Act.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission issues the following

ORDER

IT IS ORDERED that the Respondent, Graceland Cemetery, its officers and agents shall immediately:

1. Take the following affirmative action which the Commission finds will effectuate the policies of the Wisconsin Employment Peace Act:

(a) Immediately offer to Russell Stanke full and complete reinstatement to his former or substantially equivalent position, without prejudice to his seniority rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the discrimination against him, by payment to him a sum of money equal to that which he would normally have earned as an employee from the date of his indefinite suspension to the date of the unconditional offer of reinstatement made pursuant to this Order, less any earnings he may have received elsewhere during this period, and less the amount of unemployment compensation, if any, received by him during this period, in the event he received unemployment compensation benefits, reimburse the Unemployment Compensation Division of the Wisconsin Department of Industry, Labor and Human Relations in such amount. The computation of the amount, if any, due and owing Russell Stanke, shall not include the period from October 2, 1972 through December 15, 1972.

(b) Immediately offer to Robert F. Krimmer, Sr., full reinstatement to his former position or to a substantially equivalent position; without prejudice to his seniority or other rights and privileges and to make him whole for any loss of pay he may have suffered by reason of the discrimination against him, by payment to him a sum of money equal to that which he normally would have earned as an employee, from the date of his termination to the date of the unconditional offer of reinstatement made pursuant to this Order, less any earnings he may have received elsewhere during this period, and less the amount of unemployment compensation, if any, received by him during this period, in the event he received unemployment compensation benefits, reimburse the Unemployment Compensation Division of the Wisconsin Department of Industry, Labor and Human Relations in such amount. The computation of the amount, if any, due and owing Robert F. Krimmer, Sr., shall not include the period from October 2, 1972 through December 15, 1972.

(c) Notify all of its employees by posting in conspicuous places on its premises, where notices to all its employees are usually posted, a copy of the notice attached hereto and marked Appendix A. Such copy shall be signed by the General Manager for the Respondent, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by said General Manager to insure that said notice is not altered, defaced or covered by any other material.

2. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the receipt of a copy of this Order as to what action it has taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 23rd day of February, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Morris Stavney
Morris Stavney, Chairman

Ze S. Rice II
Ze S. Rice II, Commissioner

I dissent:

Jos. B. Kerkman
Jos. B. Kerkman, Commissioner

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission we hereby notify our employees that:

1. WE WILL offer to Russell Stanke and Robert F. Krimmer, Sr. reinstatement to their former, or substantially equivalent, positions without prejudice to their seniority or other rights and privileges, and we will make them whole for any loss of pay suffered by them (except for the period from October 2, 1972 through December 15, 1972) as a result of our discriminatory indefinite suspension of Russell Stanke and discriminatory discharge of Robert F. Krimmer, Sr. from April 26, 1972 and May 5, 1972, respectively, until the date of this notice.

2. WE WILL NOT discourage membership in Laborers International Union of North America, AFL-CIO, Local No. 989 or any other labor organization by discharging or otherwise discriminating against any employee in regard to his hire, tenure of employment or terms or conditions of employment.

3. WE WILL NOT interfere with our employees' exercise of their rights guaranteed under Section 111.04 of the Wisconsin Statutes which consist of 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 the right to refrain from any or all such activities.

Graceland Cemetery

By

Frank J. Zens, General Manager

Dated the _____ day of February, 1973.

This Notice must remain posted for thirty (30) days from the date hereof and must not be altered, defaced or covered by any other material.

GRACELAND CEMETERY, II, Decision No. 11607

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Complainants, in their complaint filed on June 15, 1972, allege that the Respondent committed unfair labor practices within the meaning of Section 111.06(1)(a) and Section 111.06(1)(c) of the Wisconsin Statutes by discriminatorily suspending indefinitely employee Russell Stanke and discharging employee Robert Krimmer, Sr.

Respondent, in its answer, avers that Complainant Stanke voluntarily quit and further denies that the discharge of Krimmer was not discriminatory, and that none of the Respondent's actions constituted action prohibited by Section 111.06(1)(a) or Section 111.06(1)(c).

The facts in the case are set forth in the Findings of Fact above. Discussion hereinafter will be directed to specific consideration of those Facts.

Discussion:

Section 111.06(1)(a) provides that: "it shall be an unfair labor practice for an employer individually or in concert with others...to interfere with, restrain or coerce his employees in the exercise of rights guaranteed in section 111.04." The rights guaranteed in Section 111.04 include, *inter alia*; the following: "...the right of self-organization and the right to form, join or assist labor organizations..." Furthermore, Section 111.06(1)(c) specifies that it is an unfair labor practice:

"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."

The conflicting testimony regarding the precise events herein, mandates an indepth consideration of the record as a whole. Having reviewed the timing and perceptions of said incidents, the Commission finds a sufficient preponderance of the evidence to support the following conclusions.

The Respondent argues that Stanke voluntarily quit his employment in that he failed to notify Zens of his decision, as per their telephone communication of April 26 at 4:25 p.m. To further substantiate the foregoing, the Respondent cites Stanke's subsequent job application with a retail store which specified that he had "quit" his previous employment. The connotation accompanying a job application response of "indefinitely suspended" concerning past employment is sufficient motivation for falsely attributing termination of previous employment to a "quit". We conclude that Stanke did not quit his employment but was, in fact, suspended until further notice, which he has not received to date.

The April 24th meeting concluded with Zens telling Stanke that he would check with his attorney as to the feasibility of Stanke quitting the Union (which he did during the meeting) and performing light work for regular pay. We conclude that Stanke's withdrawal from the Union on April 24th to have been coerced. The only plausible reason for

such action by Stanke (whether requested by Zens or Stanke) was a direct or implied offer of benefit, namely, light work for regular pay.

Two days later, Stanke was suspended "until he straightened himself out" and made a decision as to what he was going to do. Testimony did not establish whether or not Zens did, in fact, talk to his attorney prior to the suspension. If Zens had talked to his attorney, at the time of Stanke's suspension he could have indicated that either 1) Stanke would be required to perform the Dynahoe work, or hypothetically 2) that as a non-union member, Stanke could receive regular pay for light work. Consequently, the suspension could have been attributable to either 1) Stanke's refusal to operate the Dynahoe, or 2) his refusal to drop out of the Union. Why would Zens suspend Stanke before he had an answer from his attorney? Or if he had an answer, why would he not cite his attorney's response as a basis for or explanation of Stanke's suspension?

The only element in the situation known to have changed between April 24 and 26, was that Stanke rejoined the Union. We conclude that based on the record as a whole, Stanke was discriminatorily suspended indefinitely because of his continued union membership.

We are not satisfied that the discharge of Krimmer on May 5th was motivated by his unsatisfactory work performance. Granted, Krimmer's job performance has been exceedingly less than exemplary. However, his actual work record has remained unblemished by written warning or oral reprimand for more than three years. Krimmer's unsatisfactory work performance could not be expected to improve without constructive criticism and express warning of the consequences of failing to better his work effort. Not only did the Respondent remain silent in the face of Krimmer's inferior work, but also tolerated Thumann's walking off the job. Neither Krimmer nor Thumann were disciplined for their actions.

We conclude that the Respondent's lax enforcement of discipline gives credence to a finding that Krimmer's discharge was not motivated by his substandard work. We are satisfied that Krimmer's continued role as Union Steward and active guardian of the collective bargaining agreement provided impetus for his discharge. Based on the foregoing and record as a whole, we conclude that Krimmer's discharge was discriminatory.

Lastly, we find the timing of various actions of the Respondent to support the aforementioned conclusions. In January, the debt-ridden Respondent unilaterally granted a wage increase without bargaining over it with the Union. In April, the Respondent suspended indefinitely one Union member; in May, the Union Steward was discharged, thereby destroying the Union majority. The reopening date of the contract was May 15. We conclude that the timing of the aforementioned suspension and discharge further substantiate the discriminatory motives of the Respondent's actions in violation of the Wisconsin Employment Peace Act.

To remedy the unfair labor practices found herein, the Commission has ordered the Respondent to cease and desist from its unlawful activity and has ordered, among other things, to make the employees whole for loss of earnings suffered by them as a result of Stanke's indefinite suspension and Krimmer's termination, from the dates of their suspension and termination to the date on which the Respondent

unconditionally offers them reinstatement. However, the Commission granted Complainant's counsel's extensions for the time for filing his brief in the matter, with the understanding that such extension of time would negate any back pay due and owing during the period of such extension, specifically from October 2, 1972 through the date on which the brief was received, December 15, 1972.

Dated at Madison, Wisconsin, this 23rd day of February, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Morris Slavney
Morris Slavney, Chairman

Zel S. Rice II
Zel S. Rice II, Commissioner

I dissent from the conclusions reached by my fellow Commissioners that the respondent committed the unfair labor practices as set forth in the Conclusions of Law, for the reason that I am not satisfied that the Complainants have established any unfair labor practices by a clear and satisfactory preponderance of the evidence.

Jos. B. Kerkman
Jos. B. Kerkman, Commissioner

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