

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NATIONAL UNION OF HOSPITAL & HEALTH
CARE EMPLOYEES, A DIVISION OF RWDSU,
AFL-CIO, AND ITS AFFILIATE 1199W,

Complainant,

vs.

FAMILY HOSPITAL,

Respondent.

Case VI
No. 17809 Ce-1534
Decision No. 12616-E

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT AND
CONCLUSION OF LAW AND MODIFYING EXAMINER'S ORDER

Examiner Stanley H. Michelstetter II having on July 22, 1975 issued his Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above-entitled proceeding wherein the above named Respondent was found to have discriminated against an employe and interfered with said employe's rights under Section 111.04 of the Wisconsin Employment Peace Act in violation of Section 111.06 (1) (a) and (c) thereof, by suspending said employe from work because of her support for the Complainant labor organization, and wherein the Respondent was ordered to cease and desist therefrom and to take certain affirmative action with respect thereto; and the above named Respondent having, pursuant to Section 111.07(5) of the Wisconsin Employment Peace Act, timely filed with the Wisconsin Employment Relations Commission a petition for review, an amended petition for review, and supplemental specifications and argument in support thereof; and the above named Complainant having filed a statement in opposition to said petition for review; and the Commission, having reviewed the entire record in the matter including the petition for review, the amended petition for review, and the supplemental specifications and argument in support thereof, and the Complainant's opposition thereto, being fully advised in the premises and being satisfied that the Examiner's Findings of Fact and Conclusion of Law be affirmed, but however that the Order issued by the Examiner be modified;

NOW, THEREFORE, it is

ORDERED

1. That the Wisconsin Employment Relations Commission hereby adopts the Examiner's Findings of Fact and Conclusion of Law issued in the above entitled matter as its Findings of Fact and Conclusion of Law.

2. That the Wisconsin Employment Relations Commission hereby modifies the Examiner's order to read as follows:

ORDER

IT IS ORDERED that Family Hospital, its officers and agents, shall immediately take the following affirmative action which the Commission finds will effectuate the policies of the Wisconsin Employment Peace Act:

No. 12616-E

- (a) Pay Julia Meier the sum of \$102.80 which the Commission has determined is the extent of the loss of wages and benefits suffered by reason of the discrimination against her.
- (b) Notify all employees, by posting in conspicuous places on its premises, where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix A". Appendix A shall be signed by Walter G. Harden on behalf of Family Hospital. Appendix A shall be signed and posted immediately upon receipt of a copy of this Order and shall remain posted for sixty (60) days thereafter exclusive of the day of receipt. Reasonable steps shall be taken by the Respondent to insure that said notice is not altered, defaced or covered by other material.
- (c) Notify the Wisconsin Employment Relations Commission in writing, within ten (10) days following the date of this Order, as to what steps have been taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this *28th* day of July, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Morris Slavney*
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Charles D. Hoornstra
Charles D. Hoornstra, Commissioner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission (WERC), and in order to effectuate the policies of the Wisconsin Employment Peace Act, we hereby notify our employees that:

1. By our action in discriminatorily suspending Julia Meier for the period February 21, 1974, to March 1, 1974, we have discouraged membership in National Union of Hospital & Health Care Employees, a Division of RWDSU, AFL-CIO, and its Affiliate 1199W, and by such suspension we have also interfered with, restrained and coerced our employees in the exercise of their right of self-organization, to form labor organizations, to join or assist National Union of Hospital & Health Care Employees, a Division of RWDSU, AFL-CIO, and its Affiliate 1199W, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or any mutual aid and protection.
2. WE WILL, therefore, pay to Julia Meier the sum of \$102.80 to reimburse her for the loss which she suffered as a result of her discriminatory suspension for the period from February 21, 1974, to March 1, 1974.

Family Hospital

By _____
Walter G. Hadden

Dated this _____ day of _____, 1976

THIS NOTICE MUST REMAIN POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF EXCLUSIVE OF THAT DATE AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS
OF FACT AND CONCLUSION OF LAW AND MODIFYING EXAMINER'S ORDER

In its original petition for review which was filed on July 29, 1975 the Respondent did not specify the basis for its dissatisfaction with the Findings and Order of the Examiner. The Complainant filed a statement in opposition to said petition on July 31, 1975. On August 1, 1975 the Respondent filed an amended petition for review wherein it specified the grounds for its dissatisfaction which reads as follows:

"1. That the findings of fact, conclusions of law, order and memorandum accompanying the same are clearly erroneous as to material facts as established by the clear and satisfactory preponderance of the evidence and prejudicially affects the rights of the respondent, petitioner herein.

2. That the findings of fact, conclusions, order and memorandum accompanying the same omit material facts necessary to the determination of the issues in this case and which material facts are undisputed or established by the clear and satisfactory preponderance of the evidence and which omission prejudicially affects the rights of the respondent, petitioner herein;

3. That substantial questions of law or administrative policy was [sic] raised by any necessary legal conclusions in said order as heretofore entered by the examiner;

4. That substantial questions of law or administrative policy are raised by the material facts, some of which are omitted in the findings of fact and conclusions of law herein, and which questions are not answered or erroneously answered in said legal conclusion or order;

5. That the said memorandum accompanying said findings of fact, conclusions of law and order relies on facts not in evidence, creates inferences upon inferences, omits the real legal issues raised by the pleadings and record and applicable legal authorities governing the same;

6. That the findings and order were not made within 60 days after hearing testimony and arguments of the parties, as required by Section 111.07(4), Wis. Stats.; and

7. That one year has expired between the date of the specific act or unfair labor practice alleged in the complaint and the findings and order of the examiner herein and, therefore, said findings and order are barred by Section 111.07(14), Wis. Stats."

That, along with its petition for review, the Respondent submitted a motion for an extension of time in which to specify those portions of the Examiner's decision which were alleged to be erroneous and to designate those portions of the record relating thereto and asked that a schedule be established for the filing of such specifications and written arguments. On August 8, 1975 the Commission granted the Respondent's motion and afforded the Complainant an opportunity to respond thereto 1/. On August 19, 1975 the Respondent filed its

1/ Decision No. 12616-C.

supplemental specifications and argument. The Complainant did not file any response thereto. It is the Complainant's position, as stated in its original statement of opposition to the petition for review, that the Examiner's decision was based on well settled principles of law which were amply supported by the evidence. The Complainant relies on the arguments contained in its brief to the Examiner in support of its position on the petition for review.

Upon review of the record and the Respondent's arguments in support of its petition for review we conclude that the Examiner's Findings of Fact are complete in that they set out all of the operative facts which relate to the question of whether the discipline imposed on Meier was discriminatorily motivated and constituted an act of interference, and that the Examiner's Findings of Fact are supported by a clear and satisfactory preponderance of the evidence. Furthermore, we conclude that the Examiner correctly applied the law to the facts, and that the other legal arguments raised by the Respondent in its petition for review are without merit.

While not disagreeing with the rationale of the Examiner, the Commission concludes that the Examiner's finding that the reason given was pretextual and that the real motivation was related to Meier's support of Complainant and was intended to discourage that support is particularly appropriate in view of the following:

1. In the past the "discipline" imposed on employees for posting materials without prior authorization was, at most, removal of the notice and a verbal warning by the employee's supervisor.
2. Even in a case where an employee solicited sales on the employer's premises the employee was merely given a verbal warning.
3. The Respondent's agent, Hadden, admitted that the Employer pursues an official anti-union policy and that the content of the notice (i.e. pro-union) made it a "flagrant" violation.
4. The only other incident involving an employee who posted "devisive" information resulted in a verbal warning from the employee's supervisor after the second incident.
5. In this case the employee was called back to work during a period when she would normally be sleeping and confronted by most of the top management officials of the Respondent hospital and asked to apologize. When she failed to do so, she was suspended indefinitely from work.

On the evidence of record the conclusion is inescapable that the enforcement of the rules in question was a mere pretext for discouraging Meier from supporting the Complainant. It would appear from reading the Respondent's brief to the Examiner, and its arguments in support of its petition for review, that the Respondent is apparently of the opinion that the validity of the Examiner's decision somehow turns on the question of whether the rules which were invoked in disciplining Meier are valid. The Examiner's decision did not specifically deal with the question of whether the rules in question constitute a valid exercise of the Respondent's right to manage its property, or whether they constitute an unjustified interference with the rights of the employees and there is no need to do so on the facts or pleadings in this case. It is sufficient to conclude that the action taken against Meier was motivated, not by reason of her violation of the rules in question, but because of her support for the Complainant Union.

The other legal arguments raised by the Respondent in its petition for review are likewise without merit. It is clear that the failure of the Examiner to issue his findings and order within sixty days after hearing testimony and arguments did not deprive the Commission of jurisdiction to remedy the violations in question. 2/ Furthermore, a simple reading of Section 111.07(14) of the Wisconsin Employment Peace Act discloses that the statute of limitations set out therein refers to the institution of proceedings under Section 111.07 and not to the conclusion of such proceedings.

Inasmuch as the Commission's jurisdiction to enforce the provisions of the Wisconsin Employment Peace Act in the case of not-for-profit hospitals has been pre-empted by the subsequent enactment of federal legislation, we have modified the Examiner's order to make it clear that the Commission will not attempt to enforce its order in this case except as may be necessary to remedy the violation which occurred before the National Labor Relations Board assumed jurisdiction. Like the Examiner, we are satisfied that there is no conflict between the provisions and policies of the Wisconsin Employment Peace Act enforced herein and the provisions and policies of the National Labor Relations Act, as amended, which are now applicable to the Respondent. However, in spite of such consistency, the Commission is pre-empted from attempting to abate or remedy any alleged violations of the Examiner's cease and desist order, which may have occurred since the effective date of that federal legislation.

Dated at Madison, Wisconsin this 28th day of July, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Charles D. Hoornstra
Charles D. Hoornstra, Commissioner

2/ Muskego-Norway Consolidated Schools et. al v. WERB, 32 Wis 2d 478 (1967).