

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 150, SERVICE & HOSPITAL	:	
EMPLOYEES' INTERNATIONAL UNION,	:	
AFL-CIO,	:	
	:	
Complainant,	:	
	:	
vs.	:	Case XIII
	:	No. 18071 Ce-1547
	:	Decision No. 12839-B
KATAHDIN FOUNDATION, INC. d/b/a	:	
NORTHWEST GENERAL HOSPITAL,	:	
	:	
Respondent.	:	
	:	

Appearances:

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Kenneth R. Loebel, appearing on behalf of the Complainant Union.

Petri, Stocking, Meixner & Zeisig, Attorneys at Law, by Mr. Edmond F. Zeisig, appearing on behalf of the Respondent Hospital.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

Local 150, Service & Hospital Employees' International Union, AFL-CIO, having filed a complaint of unfair labor practices on June 20, 1974 with the Wisconsin Employment Relations Commission alleging that Katahdin Foundation, Inc. d/b/a Northwest General Hospital has committed certain unfair labor practices within the meaning of the Wisconsin Employment Peace Act; and on June 27, 1974, the Commission having appointed Marshall L. Gratz, a member of its staff to act as Examiner and make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and Examiner Gratz having first noticed the matter for hearing set for July 31, 1974, and thereafter having granted three postponements, at the requests of parties, and having last scheduled the matter for hearing on October 4, 1974, at the Milwaukee State Office Building, Milwaukee, Wisconsin; and at the outset of the hearing, the parties and Examiner Gratz having agreed that the Commission should appoint a substitute Examiner to hear and decide the matter and that hearing be adjourned; and the substitute Examiner, Robert M. McCormick of the Commission's staff having reopened and conducted hearing on October 4, 1974, at the outset of which the parties stipulated that the Commission could issue and mail its formal Order Substituting Examiner on October 4, 1974, though received after hearing date; and both parties thereafter having filed briefs and reply briefs by December 18, 1974; 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 Orders.

FINDINGS OF FACT

1. That Local 150, Service & Hospital Employees' International Union, AFL-CIO, hereinafter referred to as the Union, is a labor organization having its principal offices at 6427 West Capitol Drive, Milwaukee, Wisconsin; and that at all times material herein, said Union has been the exclusive bargaining representative of non-professional employees employed by the Respondent Hospital.
2. That Katahdin Foundation, Inc. d/b/a Northwest General Hospital, hereinafter referred to as the Hospital, is a non-profit corporation engaged in the operation of a hospital at 5310 West Capitol Drive, Milwaukee

Wisconsin, and that from at least 1970 to September of 1973, 1/ William P. Babcock had been the Administrator, and agent of the Hospital; and that for all times material herein since September 1973, Mr. Charles Butrick has been the Administrator and agent of the Hospital.

3. That other agents of the Hospital who have occupied supervisory positions for all times material herein are identified as: Oakley Quartana, Director of Building and Grounds; Michael Karuschak, Personnel Director; and Michael Benson, Executive Housekeeper and Supervisor over the Housekeeping and Linen Departments.

4. That the Hospital and Union have been parties to successive collective bargaining agreements since 1967, including the last such agreement effective October 30, 1972 at least through October 30, 1974 covering the wages, hours and conditions of employment for non-professionals which contains in part the following provisions material herein:

"ARTICLE I
Recognition

Section 1. The hospital recognizes the Union as the duly authorized collective bargaining representative for all full time and part time employees of KATAHDIN FOUNDATION, INC., d/b/a NORTHWEST GENERAL HOSPITAL (OSTEOPATHIC), [excluding] supervisors, confidential employees, office employees, registered nurses, and licensed practical nurses.

. . .

ARTICLE III
Non Discrimination

Section 1. Neither the Hospital or the Union may discriminate against any employee for reasons of race, religion, sex, age, national origin, or union status.

. . .

ARTICLE VI
Seniority

Section 1. Seniority is defined as the length of time that an employee has been hired from his most recent hiring date, excluding unpaid leaves and other unpaid absences of more than two weeks.

. . .

Section 4. Seniority will cease upon: (a) discharge, (b) quitting, (c) absence from work without notification and satisfactory explanation to the hospital, (d) continuous layoff for one (1) year, or the length of seniority to time of layoff, whichever is less, (e) if after being laid off, the employee does not return to work within five calendar days after written notice to return.

. . .

ARTICLE XIII
Employee Security

Section 1. In case of sickness or absence of less than six (6) months, and through no fault of his own, an employee shall be

1/ Unless otherwise specified, all dates hereinafter refer to 1974.

returned to his own classification. After six (6) months, an employee shall be given employment where he is qualified.

ARTICLE XXIII Disciplinary Action

Section 1. An employee may not be discharged without just cause; however, discharge for the following offenses may be made without warning or notice; (1) failure to carry out the orders of the Supervisor, (2) insubordination, (3) use of abusive language toward another person, (4) intoxication or drinking on duty, (5) unauthorized possession of narcotics, (6) dishonesty or theft, (7) deliberate misconduct which results in damage to property or person, (8) disclosure of any information relating to the condition, treatment, prognosis or other matters of a nature personal to a patient, physician, or Hospital personnel.

. . .

Section 3. Any dispute as to whether an employee committed the particular offense or participated therein will be subject to the grievance procedure, provided it is presented in accordance with the outlined grievance procedure. If it is determined that the employee did not commit the alleged offense, or participated therein, the Hospital will reinstate the employee with seniority credit and back pay for actual time lost.

. . .

ARTICLE XXIV Grievance and Arbitration

Section 1. The Hospital agrees to meet with duly accredited officers and committees of the Union upon grievances pertaining to meaning or application of the agreement. For this purpose, an orderly procedure is provided.

. . .

Step 3. Failure to resolve at this step, the grievance is then presented to the Administrator who shall investigate and provide for a meeting of Union and Hospital representatives for negotiation purposes within five (5) working days. The Hospital shall provide written disposition within three (3) working days of the meeting. Failure to resolve at this step, either party may file 'intent to appeal' to arbitration within five (5) working days.

. . .

Section 4. Arbitrators shall limit their decisions to interpretation of existing contract; they may not amend, add to, or detract from said contract."

5. That Shirley Day was employed by the Hospital from 1966 at least through September, 1972 as an attendant in the Linen Department; that as an attendant she emptied laundry containers of fresh linen, distributed linens to the floors and checked various floors for their linen needs; that from at least 1967 to 1972, Day served as the Union's Chief Steward dealing with representatives of the Hospital with respect to grievances of bargaining unit employees and over matters of contract administration.

6. That in September of 1972, Administrator Babcock called Day to a meeting in his office attended also by a second management representative, Ruth Olsen, Coordinator, for the purpose of persuading Day to fill a supervisory position in the Linen Department then about to be vacated by the departure of a Mrs. Sevvick; that in the course of such discussion Day advised Babcock that she wished to remain "Union" and that she was reluctant to assume responsibility for the bookkeeping and medicare-type record keeping; that at a subsequent meeting between Babcock, Olsen and Day, management further indicated their desire to have Day assume responsibility for the Linen Department, advising her that the Executive Housekeeper was also quitting; that Olsen, with Babcock's approval, agreed to perform the bookkeeping and medicare-records tasks; that Babcock further agreed to assign Day as a temporary supervisor at a wage of 25 cents per hour over the attendant's rate until such time as the Hospital secured an Executive Housekeeper.

7. That Day accepted the temporary supervisory assignment and thereafter was responsible for the ordering and checking of delivered linens, distribution of linens and direction of the activities of the three and one-half attendants in the department; that in said capacity Day made limited log entries of delivered linen, and she reported directly to the Administrator; that shortly after said arrangement with Babcock, Day terminated her voluntary dues checkoff through Hospital payroll deduction, but otherwise continued to maintain membership in the Union and paid her dues manually at least through December 1973; that Day also continued to function as a member of the Union's Executive Board from at least September 1972 to November 1973 an affiliation which Hospital management had knowledge of at least through October 1973.

8. That sometime in September 1973, the Hospital was in the process of changing Administrators and Babcock called Day to his office; that in the course of the meeting between Day, Babcock and the new Administrator Charles Butrick, Babcock apprised Butrick of Day's temporary status as Supervisor in the Linen Department, and of the fact that she was in the Union; that Butrick indicated that such facts would present no problem.

9. That sometime in late September or early October 1973, Butrick advised Day that it would be better if she resigned from the Union's Executive Board; that Day did resign from said Board but continued to maintain her Union membership until January 1974.

10. That for all or part of the period between late 1972 and November 1973, the Hospital temporarily assigned a Mrs. Tillman, an employee from the bargaining unit, to act as Executive Housekeeper; that in December 1973 the Hospital hired Michael Benson for the position of Executive Housekeeper.

11. That on March 12, 1974, Administrator Butrick called Day to his office and in the presence of Benson, the Executive Housekeeper, explained to Day that Benson was taking over supervision of the Linen Department as part of his responsibilities and that she was accountable to him as an employee; that Butrick asked Day after said explanation "Is this what you want Shirley"; and that Day responded "Yes, that is exactly what I want"; that on the same day Butrick issued an interdepartmental memo explaining the change in terms of the departmental order of supervision which reads as follows:

"To: ALL DEPARTMENT HEADS

Date: MARCH 12, 1974

Subject: LINEN DISTRIBUTION DEPARTMENT

Effective this week, the Linen Distribution Department will now be functioning under the supervision of the Director of Housekeeping and will be a division of that department."

12. That on March 12, 1974, at the end of her workday, Day executed a checkoff authorization card for the Union to present to management for payroll deduction of regular monthly Union dues.

13. That on March 14, 1974, Quartana issued a memo to Mrs. Day which read as follows:

To: MRS. SHIRLEY DAY

Date: MARCH 14, 1974

Subject: LINEN DISTRIBUTION DEPARTMENT

To supplement Mr. Butrick's memo, dated March 12, 1974, both Mr. Benson and myself desire that you remain as supervisor of the Linen Distribution Department with accountability to Mr. Benson, Director of Housekeeping.

Any questions for Linen or matters pertaining to linen distribution will be directed to yourself, as has been the past practice.";

that Day discovered the aforementioned memo in an envelope handed to her by Benson; that Day after reading it asked Benson what it meant in light of management's representations on March 12; that Benson acknowledged that on March 12, she had been relieved as a supervisor; that Benson ended the conversation by telling Day, "Forget the damn thing."

14. That on March 22, 1974, Benson informed Day that he had been instructed by management to advise her that she was obliged to take on the supervisor duties in Linen or be fired; that Day called the Union's representative, Don Beatty, and requested that he come to the Hospital to meet with supervision over her problem; that Benson was present when the call was made; that Benson agreed to meet with Beatty.

15. That at the outset of a meeting between Benson, Day and Beatty on March 22, Quartana came in and advised the group that there was no need for Beatty's presence because Day could have any job in the linen room that she desired; that Beatty and Day pressed the matter of a lead-girl rate for Day and for the application of the Hospital policy of paying 25 cents per hour premium for the time Day might replace the regular supervisor; that Quartana advised Beatty and Day that he had no authority to agree upon the rate question; that Beatty, Day and Quartana proceeded to Butrick's office for a meeting on the rate question; that Butrick reaffirmed that Day could return to her original position but that he desired to discuss the rate question later.

16. That for the period between March 12 and March 28, 1974, Day performed the tasks of Linen Attendant except for an isolated ordering of linens at Benson's request; that on March 28, 1974, Day was called to a meeting attended by Butrick, Quartana, Karuschak and Benson and told that management was satisfied with her work but nonetheless, she had to take the supervisor job in Linen or be terminated; Day declined and returned to the Linen Department and performed the duties of an attendant up to May 14, 1974; that Day continued to receive the 25 cents premium rate in excess of Attendant's rate for the period between March 22 and May 13, 1974; that Day called such fact to Benson's attention, who dismissed the overage by suggesting to Day that "she should take all she could get".

17. That on March 28, 1974, the Union over Beatty's signature, requested arbitration or mediation over the matter of the Hospital's insistence that Day leave the bargaining unit to take a supervisory job; that on March 29, in reply to the Union's submission of Day's authorization for dues checkoff, the Hospital declined to honor said authorization on grounds that Day was a supervisor.

18. That on May 14, 1974, Benson called in Day and told her she was fired for refusing to perform the supervisor's duties in the Linen Department; that Benson advised Day that there was nothing wrong with her work but that her Union work was not appreciated by supervision, and that her difficulties arose from her signing for Union checkoff; that Benson further advised Day to the effect that management expressed a concern that with Day in the linen room in the bargaining unit, possibly to function as the Chief Steward, there would be two zealots enforcing the contract to the point that management would be unable to make a move; that thereafter Day told Quartana that she had been fired; that Karuschak and Quartana conferred and agreed that Day was to be suspended for five work days with an opportunity to return on May 22 to decide whether she would accept the supervisory duties; that on May 16, Karuschak issued a written suspension to that effect, citing that Day had "deliberately refused a work assignment by [her] Department Head."

19. That on May 22, 1974, Day returned and met with Benson and Karuschak, who refused to permit two Union stewards to attend; that said management representatives told Day she could return as a supervisor but not as an employee; that Day declined to return as a supervisor of Linen and thereupon management issued a termination notice advising Day that she was fired for refusing to take a supervisory position and for refusing to follow orders of her Department Head; that the only orders of supervision that Day refused to follow was management's insistence that she accept a non-unit position as a supervisor.

20. That on or near May 15, 1974, pursuant to the contractual grievance-arbitration procedure, the Union requested that the Hospital arbitrate Day's discharge grievance; that the Hospital refused to arbitrate same.

21. That Day served as a temporary supervisor from at least October 1972 to March 12, 1974, pursuant to an understanding with management arranged by Administrator Babcock; that on March 12, 1974, the Hospital, through Butrick, advised Day that she could perform in a non-supervisory capacity as a linen attendant; that after again pressing Day between March 14 and 22 to serve as a supervisor, Hospital management reached a grievance-settlement with the Union which resulted in the Hospital's acceptance of the Union's position that Day be permitted to function as a bargaining unit employee.

22. That the conduct of Hospital representatives between May 14 and May 22, 1974, by first constructively discharging Day on May 14 and thereafter conclusively discharging her on May 22 for her refusal to accept the Hospital's condition for her reinstatement, namely, the order of its Department Head that Day accept a supervisory position or be terminated constituted the Hospital's imposition of a violative condition upon a bargaining unit employee to retain her tenure; that the Hospital in fact discharged Day for her insistence on being treated as a bargaining unit employee and for her expressed desire to be associated with the Union as an employee covered by the contractual protection of the labor agreement; and that a further motivation for Day's discharge was manifested by the Hospital through the conduct of its agent, Benson, namely, to discourage Day from actively participating as a Union steward in the enforcement and administration of the labor agreement.

Based on the above and foregoing Findings of Fact, the Examiner makes and enters the following

CONCLUSIONS OF LAW

1. That Michael Benson, Charles Butrick, Oakley Quartana and William Babcock, for all times material herein, were agents of the Respondent Hospital, acting within the scope of their authority, express or implied

2. That Katahdin Foundation, Inc., d/b/a Northwest General Hospital, through its authorized agents, by reinstating its ultimatum to Shirley Day on May 14 to May 22, 1974, which was first communicated to Day on March 22, 1974 to the effect that Day had to function as a supervisor in the Linen Department or face termination, and by its act of discharging Day on May 14 and reaffirming same on May 22, 1974, discriminated against Day in regard to the tenure of her employment to discourage Day from associating as a member of Local 150, Service and Hospital Employees' International Union, AFL-CIO, and to discourage her from engaging in activities on behalf of said labor organization for her self-protection as an employee covered by the then-existing labor agreement, and thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Sections 111.06(1)(c) and 111.06(1)(a) of the Wisconsin Employment Peace Act; that Respondent, by its aforementioned conduct of insisting that Day function as a supervisor or be terminated, followed by its discharge of Day, violated the existing collective bargaining agreement, Article III, Non Discrimination, by discriminating against Day as to her tenure "for reasons of union status", and thereby engaged in, and is engaging in an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

3. That the grievance-settlement agreement entered into on March 22, 1974, between representatives of the Katahdin Foundation, Inc. d/b/a Northwest General Hospital and Local 150, Service & Hospital Employees' International Union, AFL-CIO, wherein said parties agreed that Shirley Day was to be treated as a bargaining unit employee assigned to the duties of an attendant in the Linen Department, with her hourly rate subject to future negotiations, is a collective bargaining agreement subject to the right of enforcement within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

4. That Katahdin Foundation, Inc. d/b/a Northwest General Hospital by its conduct of March 28, 1974 and May 14 to May 22, 1974, namely its repudiation of the aforesaid grievance-settlement of March 22, 1974, by insisting that Shirley Day function as a supervisor or be terminated, thereby violated a collective bargaining agreement between it and Complainant Union, within the meaning of the Act; that on or near May 15, 1974, said Respondent Hospital by refusing to proceed to arbitration over the discharge of Shirley Day did violate the grievance-arbitration provisions of the then existing collective bargaining agreement; that the Katahdin Foundation, Inc. d/b/a Northwest General Hospital by its aforementioned breaches of the collective bargaining agreements has engaged in, and is engaging in, an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and enters the following

ORDERS

IT IS ORDERED that Northwest General Hospital, its officers and agents, shall immediately:

1. Cease and desist from:

- (a) Violating the collective bargaining agreement entered into on October 30, 1972 by and between Respondent Hospital and Local 150, Service & Hospital Employees' International Union, AFL-CIO, covering the non-professional employees of Northwest General Hospital including any grievance-settlement agreement it may have reached with said labor organization.

- (b) Discouraging membership and activity on behalf of Local 150, Service & Hospital Employees' International Union, AFL-CIO or any other labor organization by discharging or otherwise discriminating against any employee in regard to the hire, tenure of employment, or in regard to any term or condition of employment.
- (c) In any other manner interfering with, restraining or coercing its employees in the exercise of their right to join, assist and be represented by Local 150, Service & Hospital Employees' International Union, AFL-CIO, for the purposes of collective bargaining and other mutual aid or protection.

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

- (a) Offer to Shirley Day immediate and full reinstatement to her former position, at the applicable contractual rate for Linen Attendant, without prejudice to her seniority, benefits, or other rights and privileges previously enjoyed by her, and make her whole for any loss of benefits or pay she may have suffered by reason of the discrimination against her (including complete restoration of seniority rights from her original date of hire), by payment to her the sum of money equal to that which she would normally have earned or received as an employee, from the first date of her termination to the date of the unconditional offer of reinstatement made pursuant to this Order, less any earnings she may have received during said period.
- (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". Copies of such notice shall be signed by the Administrator on behalf of the Respondent Hospital, and Appendix A shall be signed and 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 the Respondent Hospital to insure that said notices are not altered, defaced or covered by other material.
- (c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply with said Order.

Dated at Madison, Wisconsin this 30th day of December, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M. McCormick
Robert M. McCormick, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

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

1. WE WILL offer to Shirley Day immediate and full reinstatement to her former position at the applicable contractual rate, without prejudice to her seniority rights or privileges previously enjoyed by her, and make Shirley Day whole for any loss of pay which she may have suffered by reason of the discriminatory discharge.
2. WE WILL NOT discourage membership in, or activity on behalf of, Local 150, Service and Hospital Employees' International Union, or any other labor organization, by discharging, terminating the employment of any employee or force an employee under threat of discharge to accept a supervisory position; or otherwise discriminate against any employee with respect to the hire, tenure of employment or in regard to any term or condition of employment.
3. WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights of self-organization, to join or assist Local 150, Service and Hospital Employees' International Union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection, including their right to seek the coverage and protection of any existing collective bargaining agreement negotiated between this Employer and Local 150, Service & Hospital Employees' International Union.

KATAHDIN FOUNDATION, INC. d/b/a NORTHWEST
GENERAL HOSPITAL

By _____
Administrator, Northwest General
Hospital

Dated this _____ day of _____, 1975.

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.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDERS

PLEADINGS AND PROCEDURE:

The Complainant Union in its complaint alleged, *inter alia*, that Respondent Hospital violated the existing collective bargaining agreement: by its refusal to arbitrate the question of Shirley Day's termination, by rescinding an agreement made with the Union that Day was to be relieved of supervisory functions, and by terminating Day for reasons in contravention of the Recognition and Employment Security provisions of the labor agreement.

The Union further alleges that the Hospital discriminatorily discharged Day for her union status and activity in violation of the contract and the Employment Peace Act.

The Respondent Hospital in its answer admits that it refused to proceed to arbitration in the matter of Day's termination and denies:

" . . . that it ever reversed its position with respect to the status of Shirley Day; or that it violated the Recognition, Employment Security or the Non Discrimination provisions of the contract; that Day was ever relieved of her supervisor functions; or that Day was discharged for her Union activity and status."

The Hospital further alleges as an affirmative defense: that Day was employed as a supervisor, not subject to the labor agreement and therefore the Union had no basis to grieve for her; and that Day was terminated for "her failure to carry out orders of her superiors."

The parties at hearing presented evidence and argument with regard to the contractual and statutory standards governing the merits of Day's contested discharge as well as evidence pertinent to the substantive question as to whether Day was, in fact, an employee entitled to the protection of the contract and the Act. 2/

The Hospital advanced no claim that the Examiner could not decide the contractual questions as to possible violative conduct on their merits, including the question as to whether Day is entitled to the protection of the contract as an employee.

In view of the Hospital's defense on the merits against the Union's several claims of contractual violations, arguably supporting the reinstatement of Day, the Examiner is not required to defer the question of the Hospital's alleged violations of the labor agreement to arbitration in the event the Union prevails on the issue of Day's employee status. 3/

At the outset of hearing, the Respondent submitted a motion to dismiss on the ground that the Complainant was estopped from asserting, in the instant complaint proceeding, that Day was an employee entitled to the protection of the contract and the Act. The Hospital argued that the doctrine of collateral estoppel applied because Day, the appellant in a proceeding before the Appeal Tribunal of Employment Security - Unemployment Compensation Division of DILHR, was denied benefits on the basis that she refused to return to work as a supervisor, thereby quitting (108.04(7)) or suspended for other good cause (108.04(6)(b)). The Hospital submitted the decision of the Appeal Tribunal in support of its motion to

2/ Section 111.06(1)(a)(c) and (f) of the Wisconsin Employment Peace Act.

3/ Bi-State Trucking Corp. (9924-A & B) 8/71.

dismiss and argued that the Union was estopped from litigating in this proceeding the questions of Day's non-supervisory status and the alleged discriminatory discharge, given the UC's determination on the merits that Day's status was always that of a supervisor and that she was not discharged for union activities.

The Examiner, herein, denied said motion on grounds that the Unemployment Compensation Appeal Tribunal was called upon to apply a different statutory standard, and in fact was not obliged to determine Day's employment status under terms of a labor agreement; or whether she was discharged for union activity within the meaning of Section 111.06(1)(c) of the Act.

Said denial of the motion is reaffirmed and supported by the authorities. The parties are not the same (the Union is party-complainant here) in this proceeding as in the UC forum; the statutory standards to be applied by this Commission are different from those in Section 108.04(6) and (7). 4/ This Commission has determined that a UC decision granting or denying unemployment benefits is not admissible in a complaint proceeding to prove cause or a discriminatory motive, or lack thereof. 5/

POSITIONS OF PARTIES:

The Union contends that the evidence indicates that Hospital representatives were aware of Day's activities on behalf of the Union, even as early as Butrick's first days as Administrator when he asked her to resign from the Union's Executive Board. In addition the evidence is unrefuted that Mike Benson, then Director of Housekeeping, told Day that the reasons for her termination on May 14, 1974, were because of her act of signing for Union checkoff and the prospect of her again enforcing the Union contract as a steward.

The Union points out that on March 22, Butrick knew that Day sought out the Union representative and that the Union was supporting her when Butrick met with Beatty in a grievance meeting. The Hospital's defense, that she was a supervisor and not an employee does not wash. The Union urges that the sequence of events from March 12 clearly indicates that management's justification for terminating Day was a pretext. After management had issued its first memo on March 12, and had given Day reason to believe she would no longer function as temporary supervisor, Day signed a checkoff card and fellow employees began to circulate a petition on the premises to have her become Chief Steward. Hospital representatives sought to renege on their initial action, again claiming that Day was a supervisor. Thereupon Day brought in Union representation and management arrived at a settlement with Beatty which has the force of a collective bargaining agreement, which accord permitted Day to hold any job in Linen that she wanted. Thereafter from May 14 to May 22, following a hint of a further renege by management, on March 28, the Hospital repudiated the March 22 agreement and again trucked out its demand that Day was compelled to accept a supervisory job.

At hearing, management witnesses testified that they had no fault with Day and indeed she was so good that management wanted her to become a supervisor. In its brief, the Hospital would rely upon that fact and argue that, even if it were prepared to terminate Day as an employee, the former stance rebuts the charge that it separated Day because of her union activities. The Union urges that the Hospital knew full well

4/ Kenosha Unified School District No. 1 (12029-C & D) 12/73.

5/ Briggs & Stratton Corp. (9530-A & B) 12/71; see also Seyfert Foods Co., 109 NLRB 800, 810, p. 5 and Aerowax Corp., 104 NLRB 246, 247 - where NLRB treats as relevant UC decisions dealing with "employee misconduct" but holds that same are not binding upon the Board as to issues over which it has exclusive jurisdiction.

that it could remove Day at its whim and caprice once she could be pressured into casting her lot with supervision, thus outside the protection of the contract and the Act.

The Union urges that the Hospital be found to be in violation of Section 111.06(1)(f) by its renege of the grievance-settlement agreement reached with the Union on March 22; it further urges that where, as here, the Hospital's motive for taking the actions it did is to discriminate against the employee for having engaged in union activities protected by the Act, then the fact that the labor agreement provides for arbitration should not deter the Commission from finding that the Hospital violated Sections 111.06(1)(a) and (c).

The Union in its prayer for relief seeks an order of reinstatement and a remedy making whole Day for wages, benefits and conditions denied because of the violative discharge.

The Hospital contends that an examination of the record reveals a number of conflicts on the crucial evidentiary facts: That contrary to Day's testimony Butrick testified that at no time did the former administrator tell him that Day's position was temporary supervisor, nor did her personnel files so indicate; that Butrick only told Day she would be reporting to Benson, and not that Benson was the new supervisor in Linen; that Butrick was never aware of Day's union activities from March through May, but only had knowledge of her Union Executive Committee position in the Autumn of 1973, which Butrick (possibly mistaken) gave no weight to because she was not on checkoff for union dues; that concerning the events of March 22 and the meeting with Beatty, Quartana's testimony indicates that he stated to Day and the Union that he did not have the authority to grant Day a change in classification for the higher rate she was seeking, nor the latitude to return her to a linen attendant job; the disagreement over her rate, which Beatty acknowledges, prevented agreement to return Day as an employee; that when Butrick issued the memo of March 12th (which was somewhat inartfully worded) Day seized upon its possible ambiguity to rid herself of her responsibilities as supervisor in the linen room with the hope of remaining there as an over-rated attendant; that when management learned that some employees were confused by the memo, management issued a clarifying memo, and Day received an explanation of the departmental reorganization.

The Hospital argues that Day had her "day in court" on the question of her claimed employee status and as to whether she was allegedly terminated for her union activities. The Appeal Tribunal found against her on both contentions; and that said earlier adjudication, under the doctrine of collateral estoppel, should bind the Commission.

The Hospital argues that Day's status as a supervisor was never changed by management. She cannot unilaterally change her position so as to accrue the coverage of the contract or to satisfy the definition of an "employee" under Section 111.02(3). The record is clear that Day refused to perform supervisory duties, primarily record-keeping in the Linen Department, after May 14th, even though she willingly accepted the higher wages of that position.

With respect to Day's claim that she had an arrangement with the previous administrator to function as a temporary supervisor, if the record supports such an initial private agreement, the record nonetheless indicates that it was transitory, and not supported by the Hospital's personnel records. Day herself testified that she was to cease functioning as a supervisor, once the Hospital secured an Executive Housekeeper. The record indicates that Day collected a premium salary and functioned as linen room supervisor long after Executive Housekeeper was filled. Furthermore, the Union contract does not require that the Hospital permit Day to

bump a permanent attendant to layoff status. Rather than to engage in an outright refusal to perform her supervisory duties for which she sought premium wages, Day should have explained her desire to return to the unit and then waited for a vacancy as linen attendant, at the applicable contract rate.

In conclusion the Hospital argues that the facts here are similar to those in U.S. Steel Workers vs. General Fireproofing 464 F 2d 726 (1972) where the 6th Circuit overruled the District Court and held that a dispute involving a unit employee who was promoted to a position of supervisor, was not arbitrable under the contract because the individual private agreement could not be given the weight of a collectively bargained accord, otherwise entitled to be arbitrated under controlling federal case law.

The Hospital requests that the complaint be dismissed on grounds that Day is not an employee and because the evidence fails to establish any unlawful motivation on the part of the Hospital in making the discharge.

ANALYSIS AND CONCLUSIONS:

The basic issues for determination herein are whether Day was an employee entitled to the protection of the Act and the contract, including a grievance-settlement; and whether the Hospital discriminatorily fired Day for her insistence on her union status and for her union activities within the meaning of both the labor agreement and Section 111.06(1)(c) of the Act.

In resolving these issues the record before the undersigned presents some conflicting testimony regarding certain material facts. Accordingly, it has been necessary to make credibility findings, based in part on such factors as material inconsistencies in testimony, and inherent probability of testimony, as well as the totality of the evidence. Isolating the factor, demeanor of the witnesses, though considered, each witness' demeanor caused no disbelief of any of their testimony. It shall be noted that any failure to completely detail all conflicts in the evidence does not mean that such conflicting evidence has not been considered, it has.

The Hospital's arguments as to the application of the doctrine of collateral estoppel have been dealt with in discussion under Pleadings and Procedure, supra, and suffice it to say that the decision of the UC - Appeal Tribunal of DILHR is not binding upon the Commission, even though the UC examiner may have made findings regarding Day's supervisory status and as to the absence of discriminatory motive in making the discharge; (See Briggs & Stratton and Kenosha Unified District No. 1, supra).

Employee Status of Day; Hospital-Union Conduct in the Bargained Settlement-Agreement:

Day testified that she had at least one meeting with the former administrator in September of 1972, at which Coordinator, Mrs. Olsen, was present in the course of which Day finally agreed to accept the duties of supervisor in the linen room to replace one Mrs. Sevic; and that Babcock agreed to her conditions for doing so, namely, that her assignment would be a temporary one because she wished to remain union; and that she would return to her unit position when the Hospital secured a permanent Executive Housekeeper. The testimony of Mrs. Olsen, a former management employee, corroborates Day's testimony.

Day further testified that when she heard that a new administrator was to take charge in the Autumn of 1973, she again approached Babcock and requested that he advise the new Administrator, Butrick, of the temporary nature of her supervisory assignment. In this regard, Olsen's

testimony again confirms that of Day. Though the evidence indicates that Day removed herself from payroll checkoff of Union dues soon after acquiring such supervisory duties in September 1972, Day's uncontroverted testimony indicates that she paid union dues manually through the period September 1972 to May 1974.

Day further testified, and Butrick confirms as much in his testimony, that Day was asked by Butrick in October of 1973 to resign from the Union Executive Committee. Butrick testified that he believed at the time that Day was with management and that her occupancy of the Committee position did not cause him to believe that she continued her Union membership.

Day also testified that she spoke with Babcock and Butrick in a meeting in the Autumn of 1973, just prior to the departure of Babcock, and raised the question of the prior arrangement which gave birth to her temporary supervisory status, and that Babcock confirmed such fact with Butrick. (Tr. p. 25 and p. 47). Butrick denies that Day or Babcock ever advised him of such an arrangement. (Tr. p. 64).

The Union submitted as evidence without objection, a memorandum (Exhibit No. 13) executed by the former administrator on May 20, 1974, at a time when Mrs. Olsen and Mr. Babcock (both witnesses) were present, which confirms the Babcock-Day arrangement as Day represented it to be in her testimony, namely, that Day was to function "on a temporary basis until the Hospital hired an employe to fill the position."

Butrick testified that a Mrs. Tillman had the title and responsibilities of the Executive Housekeeper in September of 1973 when he came to be Administrator. Both Mrs. Day and Olsen, the former management employe, testified on direct and cross-examination that Mrs. Tillman was placed by Babcock in the position of acting Executive Housekeeper on a temporary basis, much as Babcock had assigned Day; and testified that Mike Benson was the next permanent Executive Housekeeper to replace one Mrs. Christenson, who left in 1972. Butrick confirmed that Babcock placed Tillman in said position but that he had no knowledge that she was temporary and he could not say that Olsen was in error in recounting her personal knowledge of Babcock so advising Tillman that she too was temporary.

A further examination of the internal inconsistencies in Butrick's testimony and that of other Hospital witnesses when examining the total record, is appropriate in resolving the conflict between Butrick's testimony and that of Olsen and Day. Quartana, Director of Building and Grounds, testified on cross-examination that management representatives present at the March 22 meeting with Beatty and Day, were aware of Day's representation and reliance on the Babcock arrangement of 1972 to buttress that her assignment was a temporary one. He further testified that management representatives were going to check out the records. Karuschak, Hospital Personnel, testified that only Day's personnel records were checked and they revealed no specific entry by Babcock designating Day as temporary.

The Hospital would have the Examiner discredit the testimony of Olsen, who formerly served in a management position under Babcock, with respect to the conflict regarding the temporary assignments of both Day and Tillman. The undersigned would credit Olsen's version and conclude that no permanent Executive Housekeeper was hired until Benson in December of 1973.

Butrick gave some further indication that management was not interested in anything more than a cursory investigation of Day's claim of temporary supervisory status when he testified in response to interrogation by counsel for the Union as follows:

By Mr. Loebel:

"Q Have you talked to Mr. Babcock at all?

A No, sir.

Q Did you authorize your attorney to talk to Mr. Babcock to see what arrangements Mr. Babcock had made with Mrs. Day?

A Yes.

Q Did you?

A Yes.

Q And he conveyed back what Mr. Babcock had said, correct?

A Conveyed back.

Q And you were aware Mr. Babcock did put Mrs. Day in that position on a temporary basis, isn't that correct?

A According to the statement, yes.

Q And according to the facts that was--it was relayed to you by your attorney . . . that Mr. Babcock had said that Mrs. Day had come one day before he left and said would you put me back in the Union. He would have done so? You knew that?

A I heard that entered in the testimony.

Q But you don't feel that commitment that Mr. Babcock made should be honored?

A I do not." 5/

In resolving the question as to whether Babcock told Butrick of the temporary status of Day's supervisory assignment, the Examiner credits the testimony of Day and Olsen, and gives weight to the memorandum executed by Babcock; and I discredit Butrick's testimony. The undersigned concludes that Day had the status of an employee covered by the labor agreement and that she functioned as a temporary supervisor from the time of Administrator Babcock's conditional assignment in 1972 to at least March 14, 1974.

COLLECTIVELY BARGAINED GRIEVANCE-SETTLEMENT:

The Hospital urges that even if the evidence does establish the existence of the Babcock-Day arrangement, it was transitory in nature, long since abandoned by Day's acceptance of a supervisor's salary and her performance of the duties, but otherwise not enforceable because it was not sanctioned by the labor agreement.

The record discloses that on March 22, after the Hospital had issued conflicting memos as to Day's supervisory status in Linen, Day asked Union representative, Beatty, to meet with Benson, after Benson and other management representatives began to insist from March 14 on, that Day was not a unit employee. Quartana interrupted the start of the meeting between

together. Beatty testified that Quartana told him that management agreed that Day could have any job in Linen that she wanted and that Butrick and Quartana confirmed that the matter was settled, leaving the question as to whether Day should receive a lead-girl job rate to future discussion. The Hospital argues that because Day and the Union were looking for a higher rate than the contract rate, that there was no agreement. However, Quartana's testimony under cross-examination, corroborates Beatty's version when in response to interrogation by Union counsel, he testified as follows:

By Mr. Loebel:

"Q Did you at any time tell Mr. Beatty there was no problem with--Mrs. Day could have whatever she wanted?

A Yes, I did." 6/

Quartana was Benson's supervisor, and it was he who told Beatty and Benson that a grievance session was not required.

The Examiner credits Beatty and Day's testimony which together with Quartana's aforementioned testimony convinces the undersigned that the Hospital abandoned its position of March 14, and arrived at an agreement with the Union establishing that Day was a unit employee in the Linen Department and that she could have any non-supervisory job there she desired, with the question of lead rate or linen attendant rate reserved for future determination. Such an oral accord may be enforced as a collective bargaining agreement though in the form of a grievance-settlement agreement. 7/ The conduct of the Hospital from March 28 to May 22, 1974, in repudiating said agreement by insisting that Day perform the duties of a supervisor in Linen violated the provisions of a collective bargaining agreement; and the Hospital's imposition of such a violative condition and its subsequent discharge of Day violated said collective bargaining agreement and Section 111.06(1)(f) of the Act.

Contractual Prohibition Against Hospital Discrimination Against Employees for Reasons of Union Status:

The record establishes that the Hospital, under Butrick's administration, was aware as early as March 14 of Day's insistence that she be treated as a bargaining unit employee and not as a supervisor. The Hospital confirmed Day's right to function as an employee under the contract when it effectuated the settlement agreement with the Union on March 22, which in the words of a management representative, resulted in "Day being able to have any job in the Linen Department that she wanted."

The uncontroverted testimony of Day indicates that Benson, an agent of the Hospital, advised Day on or near May 14 that the reason she was being suspended and possibly discharged, if she did not agree to perform as a supervisor, was because she signed the Union checkoff card, in effect, because she insisted upon being treated as a bargaining unit employee. Benson's statement went even further, as described in Day's unrefuted testimony which shall be discussed further under Discriminatory Discharge for Union Activity. When Day returned after the suspension and still refused to be treated as a supervisory employee, management confirmed the constructive discharge of May 14 and advanced the pretextual reason for its action, namely, Day's refusal to accept a work assignment from her department head. The Examiner concludes that the Hospital discharged Day for her insistence upon being treated as a bargaining unit employee and thereby discriminated against her in terms of tenure because of her union

6/ Tr. p. 67.

7/ Stolper Industries, Inc. (8157) 8/67.

status contrary to Article III, Non Discrimination provision of the labor agreement; and that the Hospital thereby committed a violation of Section 111.06(1)(f) of the Act.

QUESTION OF DISCRIMINATORY DISCHARGE UNDER SECTION 111.06(1)(c) OF THE ACT:

The Hospital argues in brief that the Union would rely on the fact that Day's execution of a Union checkoff card soon after management's first memo in early March of 1974, which Day believed changed her status, caused the Hospital to reverse what is claimed was a decision to re-establish her as an employee rather than a supervisor, allegedly for the reason that Day might become active in Union affairs. The Hospital points out that the acknowledgment of the checkoff card was not received from the Union until March 27.

The Examiner notes that the date of said receipt of the checkoff authorization was five days after the meeting between management and the Union where a grievance-settlement was reached between the parties to treat Day as an employee in the bargaining unit.

On March 28, one day after the Hospital became aware of the checkoff authorization, and at a time coincident with the circulation of the petition on the premises by other employees, which sought to persuade the Union to appoint Day as Chief Steward, Butrick, Quartana and Benson called Day into Butrick's office and again requested that she take the duties and remain as supervisor in Linen. Day declined. In testimony which the Examiner credits, Day attributed the following reply to Butrick, "You either do it or else"; and Day, from her testimony, when pressing for an explanation of "or else" received Butrick's elaboration, "or else there is no position down there."

The record discloses that after the Hospital's confrontation of March 28, in the course of which its representatives did renege on the agreement of March 22 with the Union, the Hospital left the matter in limbo until May 14. The record discloses that Benson and Quartana conferred and became disturbed over Day's failure to perform the book work in Linen which a supervisor there was expected to do.

The evidence regarding the Hospital's knowledge of Day's activities on behalf of the Union reveals that Quartana and Butrick both knew that Day had performed as Chief Steward prior to her late 1972 assignment as temporary Linen supervisor. Butrick in testimony admitted that he asked Day to resign from the Union Executive Committee in October 1973 soon after he had succeeded Babcock as Administrator, though for some strange reason Butrick did not associate her Union office with active union membership. At a time when Hospital representatives were insisting that Day was supervisory (March 22) Butrick, Quartana and Day knew that Day sought Union representation through Beatty; and in fact management met with the Union and perceived that Beatty was making efforts to secure her contractual status as a bargaining unit employee. This contrasts with Butrick's testimony on cross-examination to the effect that he thought the Union would frown upon letting a supervisory employee bump into an attendant's position in Linen.

There is no direct evidence that Butrick, Quartana or Karuschak knew of the employees' circulation of the petition to secure Day's return as Chief Steward for the Union. However, there is sufficient evidence to support an inference that the Hospital had such knowledge from the chain of events from March 14 to May 22nd, and the timing of the March 28 confrontation and management renege of the grievance-settlement agreement reached on March 22.

More importantly, such knowledge may properly be attributed to Hospital management from the credited testimony of Day, wherein she related the declarant-supervisor Benson's remarks made on or near May 14. The record discloses that Benson quit employment about a month prior to hearing.

There is no explanation from the record as to why he was unavailable as a Hospital witness to possibly refute the testimony of Day.

Day recounted that Benson told her, "If you were not on checkoff all of this would not have taken place". (Tr. p. 35). Day further testified that Benson told her, "There is nothing wrong with your work Shirley, it is your Union work that isn't liked here." (Tr. p. 36). Day then recounted that Benson asserted the following declaration, which she testified, that Benson attributed to discussions of management including Butrick, just before her discharge:

"One or the other has to go - with that nigger six blocks away, we won't be able to move in this building."

(Apparently a demeaning reference to a Mr. Walker, a black and Chief Steward, who worked in another wing of the Hospital.)

The undersigned is constrained to give probative weight to these admissions against interest attributed to a Hospital agent and declarant Benson, which otherwise would certainly be hearsay. I have no reason to discredit Day, the dischargee.

Receipt of such testimony as admissions by a declarant-supervisor to establish unlawful motivation of a management principal was supported in a decision of the NLRB, Draco Corp. 115 NLRB 931, 37 LRRM 1442 (1956) where the Board reversed a trial examiner's exclusion of an employee-witness' testimony as hearsay and concluded:

". . . that, under ordinary agency principles, the testimony of [rank and file employees] as to [the supervisor's] statement which was uncontradicted, was competent evidence on the basis of its being an admission by an agent of the Respondent acting within the scope of the agent's authority."

The NLRB reached a different conclusion in Orenduff Inc. 118 NLRB 859, 40 LRRM 1274 (1957) which can be distinguished from this case, as the Board distinguished Draco Inc. Orenduff, the owner-principal, denied the statement attributed to him by a declarant foreman, which foreman was not called as a witness by the General Counsel. The Board credited the testimony of the owner Orenduff over that of the witness-discriminatees.

The undersigned credits Day's testimony, and when viewed with the total evidence, the timing of the Hospital's conduct and the renege of its March 22 agreement, the Examiner concludes that the Hospital's ascribed reason for Day's discharge, namely, that she "disobeyed the order of a department head and refused to perform in a supervisor position" was a pretext. The Hospital's true motivation was to prevent Day from functioning as an active union member, who otherwise could claim the protection of the Union contract.

Dated at Madison, Wisconsin this 30th day of December, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M. McCormick
Robert M. McCormick, Examiner