

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondent.

No. 12839-C

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Examiner's Findings of Fact

The Findings of Fact of the Examiner can be summarized as follows: Shirley Day, an employee included in the bargaining unit represented by the Union, and at the time a Union steward, in September, 1972, at the request of the then Administrator of the Respondent (Babcock) was assigned as a temporary supervisor until such time as the Hospital was able to employ an Executive Housekeeper. Shortly after said assignment, Day terminated her dues checkoff authorization, but continued to pay dues to the Union, at least through December, 1973, and continued to function as a member of the Union's Executive Board in November, 1973, a fact known by agents of the Respondent. From late 1972 through November 1973 another employee in the bargaining unit acted as the Executive Housekeeper. In December 1973 the Respondent employed one Benson in the latter position.

On March 12, 1974 ^{1/} Day presented a new checkoff authorization, requesting that the Respondent commence dues checkoff to the Union. On March 14 Day received a memo from Quartana, the Director of Buildings and Grounds, to the effect that the Respondent desired Day to remain a supervisor, despite the fact that on March 12 Benson had informed Day that she had been relieved of her supervisory duties. Nevertheless, on March 22, Benson advised Day that, pursuant to instructions from management, Day would be required to take on supervisory duties or be terminated. On the latter date, pursuant to Day's request, the Union president, Day and management representatives including the then Administrator, Butrick, met with regard to the matter, during which meeting an agreement was reached to the effect that Day could continue as an employee in the bargaining unit, but that her request for a 25¢ per hour premium to be paid at times when Day would perform supervisory duties was not resolved. Despite said agreement, on March 28 representatives of management advised Day that, unless she assumed the supervisory position, she would be terminated. Day declined to assume supervisory duties and that also on March 28 the Union requested the Respondent to proceed to arbitration with respect to the above ultimatum. On the following day the Hospital declined to honor Day's newly authorized dues check off. Day continued to perform bargaining unit work up to May 14, on which date she was discharged by Benson, who gave as the reasons for such action that (1) she had refused to perform supervisory duties, (2) although her work was satisfactory her "union work" was not appreciated by management, (3) her difficulties arose as the result of her executing a new dues checkoff authorization, and (4) management was concerned with the possibility of her acting as the Union's Chief Steward. On May 15 the Union requested the Respondent to proceed to arbitration with respect to the discharge. The Respondent refused to so proceed. After Day advised Quartana of her discharge, the latter conferred with the Personnel Director, and thereupon Day's discharge was reduced to a suspension for five days to May 22, during which period she could decide whether she desired to take on supervisory responsibilities. On the latter date Day was offered the supervisory position. She refused same and thereupon was discharged.

The Examiner's conclusionary findings of fact were set forth as follows:

^{1/} All dates hereinafter refer to the year 1974 unless otherwise indicated.

"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."

The Examiner's Conclusions of Law and Order

The Examiner concluded that by the above activity the Respondent committed unfair labor practices in violation of the Wisconsin Employment Peace Act in discriminating against Day because of her concerted activity, by violating the collective bargaining agreement, as well as the oral agreement reached on March 22. The Examiner, among other things, ordered the Respondent to offer Day reinstatement and to make her whole for wages and other benefits lost by her as a result of her discharge.

The Petition For Review

The Respondent takes exception to the Examiner's Findings of Fact with respect to (1) Butrick's knowledge of Day's temporary supervisory status, (2) that Butrick agreed that Day could return to bargaining unit work, (3) to the conclusionary findings of fact, specifically those recited in para. 22 of the Examiner's Findings of Fact, and (4) with regard to the findings based on "the hearsay evidence" of Benson. The Respondent also contends that the Examiner exceeded his authority by having ordered Respondent to make Day whole from the date of her discharge, arguing that, since the Examiner did not issue his decision within 60 days following final argument, as set forth in Sec. 111.07(4) of the Wisconsin Employment Peace Act, the period of retroactivity cannot extend beyond sixty days.

Discussion

The Commission has reviewed the transcript of record and concludes that the Examiner did not err in any of his rulings with respect to the evidence adduced during the course of the hearing. In his Memorandum the Examiner discussed the conflicting testimony. He credited the testimony of the Union's witnesses. Further, the testimony of Quartana, an agent of the Respondent, established the facts surrounding the March 22 meeting, as found by the Examiner. With regard to the exception to the Examiner's findings based on "the hearsay evidence" of Benson, it appears that the Respondent has reference to Day's uncontroverted testimony regarding her conversation with Benson as to management's attitude towards Day's union membership and activity,

as set forth in para. 18 of the Examiner's Findings of Fact, 2/ Benson was not called as a witness. 3/ We conclude that said conversation was not excludable from the record under the "hearsay rule". It should be noted that neither during the hearing, nor in its brief to the Examiner, did the Respondent make objection to Day's testimony with respect to said conversation.

With respect to Respondent's argument that the Examiner could not order back pay for the period beyond sixty days following the receipt of final argument, it has been established by our supreme court that Sec. 111.07(14) is directory and not mandatory in nature. 4/

We have therefore affirmed the Examiner's decision in all respects.

Dated at Madison, Wisconsin this 3rd day of November, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Morris Slavney

Morris Slavney, Chairman

Herman Torosian

Herman Torosian, Commissioner

Charles D. Hoornstra

Charles D. Hoornstra, Commissioner

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- 2/ Said evidence supported a portion of the conclusionary Finding of Fact 22.
- 3/ In its brief to the Examiner the Respondent contended, that Benson was in California.
- 4/ Muskego-Norway, etc. v. WERC 32 Wis 2nd 478.