STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MUNICIPAL TRUCK DRIVERS UNION, LOCAL NO. 242, Complainant, vs. CITY OF MILWAUKEE, Respondent.	Case CXLI No. 17938 MP-359 Decision No. 13093

Appearances:
Zubrensky, Padden, Graf & Bratt, Attorneys at Law, by Mr. George F. Graf, appearing on behalf of Complainant.
Mr. James B. Brennan, City Attorney, by Mr. Nicholas M. Sigel, Principal Assistant Attorney, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint having been filed with the Wisconsin Employment Relations Commission in which the above-named Complainant alleged that the above-named Respondent committed prohibited practices within the meaning of Section 111.70 of the Municipal Employment Relations Act (MERA); and hearing in the matter having been held at Milwaukee, Wisconsin on June 26 and July 2, 1974, Commissioner Zel S. Rice II being present; and the Commission having considered the evidence, arguments and briefs of counsel, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Municipal Truck Drivers Union, Local No. 242, referred to herein as the Complainant, is a labor organization with its principal office located at 6200 West Bluemound Road, Milwaukee, Wisconsin.

2. That City of Milwaukee is a municipal employer with its principal office at City Hall, Milwaukee, Wisconsin; and that all persons identified herein as supervisory personnel in Respondent's Bureaus of Municipal Equipment and Sanitation were, at all times material herein, agents of the Respondent, acting within their authority as such.

3. That Complainant is the certified representative of certain employes of Respondent's Department of Public Works, Bureau of Municipal Equipment, referred to herein as the BME; that Complainant and Respondent have been, at all times material hereto, parties to a collective bargaining agreement, referred to herein as the Agreement; and that the Agreement contains, inter alia, a provision for a multi-step grievance procedure culminating in final and binding arbitration of ". . . matters involving interpretation, application or enforcement of the terms of . . ." the Agreement and a provision which reads as follows:

"A. DISCRIMINATION

The City and Union agree not to discriminate against an employe because of legitimate union activities."

4. That the Complainant filed the instant complaint with the Commission on May 17, 1974; and that as of the close of the hearing herein on July 2, 1974, there had been filed and was pending no grievance contending that the facts alleged in the instant complaint constitute a violation of the Agreement.

5. That as of the time of the filing of the instant complaint, there was pending a petition filed with the Commission on May 10, 1974, Milwaukee District Council 48, AFSCME, AFL-CIO, requesting that the Commission direct a representation election among the employes in Respondent's BME presently represented by Complainant; that the instant complaint contains factual allegations which, if proven, could constitute a basis for objection to any election which might be directed pursuant to the aforementioned election petition; and that, therefore, the pendency of the instant complaint proceeding blocks and precludes further processing of said petition, and said petition has been held in abeyance by the Commission pending the disposition of the instant complaint.

6. That Robert Kuchenreuther has been in the employ of Respondent for some 27 years, presently holding the position of Equipment Operator in the BME; that from time to time, during the course of said employment, Kuchenreuther has held offices in the labor organizations representing truck driver employes of Respondent which offices have included the presidency of the predecessor to Complainant, Local 33 of District Council 48, AFSMCE, AFL-CIO; an informal leadership role in the drive for change of representative from Local 33 to Complainant; the recording-secretaryship of Complainant from and after its inception in 1968; and the presidency of Complainant since January 1, 1972; and that in his capacity as an executive board member in Complainant, Kuchenreuther has engaged extensively in grievance initiation and administration, contract negotiation and other concerted activities on behalf of the Complainant.

7. That during at least the period May 17, 1973 - July 2, 1974, BME Assistant Superintendent John Wright has purposefully not assigned Kuchenreuther garbage truck driving duties in one or more of Respondent's nine Bureau of Sanitation areas; and that from and after approximately May 2, 1974, said Wright has purposefully not assigned to Kuchenreuther any garbage truck driving duties.

8. That because of said nonassignment of garbage truck driving duties to him, Kuchenreuther has suffered the loss of certain overtime work opportunities and overtime work and compensation he would have received if he would have been assigned such duties.

9. That Wright's decision to reduce, and later eliminate, garbage truck driving assignments to Kuchenreuther was based upon reports and recommendations of Joseph Alberti, Assistant Superintendent in the Respondent's Bureau of Sanitation, which Bureau utilizes trucks and drivers supplied by BME; that Alberti, in turn, acted on the basis of the reports and recommendations of certain of his field supervisors, including Frank Parker, Walter Schumann, John Tisher, Ray Kosmider and Ignatius Balistreri, that Kuchenreuther was, inter alia, uncooperative, unwilling to accept corrective instructions, belligerent toward supervision and the source of complaints from collection crews with whom he worked.

10. That sometime in April, 1974, Wright advised the then Secretary-Treasurer of Complainant, James Morris, that Kuchenreuther would probably be discharged if he filed a prohibited practice complaint against Respondent.

11. That in early May, 1974, Morris asked one Schleifer, a Bureau of Sanitation field supervisor, whether he was having problems with Kuchenreuther, who was then driving in Schleifer's area; that Schleifer told Morris that he was not; but that, then, on or about May 12,

Schleifer told Morris that Kuchenreuther would not, thereafter, be assigned to Schleifer's area and that Kuchenreuther "would have less problems if he'd get out of the union business."

12. That on January 3, 1973, Kuchenreuther and other leaders were in the process of inspecting picket lines to determine whether all members of Complainant were honoring same during a sympathy strike in support of other employes of Respondent; that at that time, said leaders requested and were denied use of lavatories on Respondent's premises by said Ignatius Balistreri; that at the same time, Balistreri told said leaders of Complainant that they ". . . would never work in [Balistreri's Central Area III] as long as [they] worked for the City"; that Morris was later informed that Balistreri had been reprimanded by Respondent for having made the latter statement; that in July, 1973, Kuchenreuther was driving a garbage route in Balistreri's area and had occasion to encourage other drivers in that area to assert their rights as employes under the Agreement in their dealings with Balistreri; that on July 30, 1973, Kuchenreuther was driving a garbage route in Balistreri's area, Balistreri entered Kuchenreuther's truck and examined the tachograph (an automatic mechanical recording of the day's driving activity) over Kuchenreuther's objection; that thereupon, Kuchenreuther asserted that he intended to abandon his collection crew and immediatly drive his truck back to the garage; that in his reply, Balistreri stated, "I'll get rid of you; I've had enough trouble in this area"; and that immediately thereafter, Kuchenreuther drove the truck to the garage without supervisory authorization.

13. That in July, 1972, BME Superintendent Al Dobrient issued a written reprimand to Kuchenreuther for conducting Union business during working hours in alleged violation of an express provision of the parties' agreement then in existence; that thereafter, Dobrient told Kuchenreuther that under his supervision, Kuchenreuther "won't get an ulcer, but I'll hurt you in your pocketbook"; and that shortly thereafter Kuchenreuther was assigned for several months to a Bureau of Forestry job which provided no regular overtime.

14. That Complainant has not proven by a clear and satisfactory preponderance of the evidence that Respondent's decisions and actions which caused Kuchenreuther to lose overtime were, either in whole or in part, motivated by Kuchenreuther's activities on behalf of Complainant or by any other lawful concerted activities on Kuchenreuther's part.

15. That Complainant has not proven by a clear and satisfactory preponderance of the evidence that Respondent has, between May 17, 1973 and July 2, 1974, issued to Kuchenreuther any oral or written warnings prompted by Kuchenreuther's lawful concerted activities on behalf of Complainant.

On the basis of the foregoing Findings of Fact, the Commission issues the following

CONCLUSIONS OF LAW

1. That Respondent did not encourage or discourage membership in or lawful concerted activity on behalf of Complainant by discrimination in regard to hiring, tenure or other terms or conditions of employment and Respondent did not discriminate against Robert Kuchenreuther because of his lawful, concerted activities and exercise of other rights protected under Section 111.70(2) of MERA

a. when it precluded Robert Kuchenreuther from garbage truck driving assignments in certain Bureau of Sanitation areas and later from all garbage truck driving assignments in its Bureau of Sanitation and thereby caused Robert Kuchenreuther to lose overtime compensation he would otherwise have received; or

b. by issuing verbal or written reprimands to Rober Kuchenreuther prompted by his lawful concerted activities on behalf of Complainant.

2. That since the instant complaint was filed with the Commission on May 17, 1974, the conduct the Employer engaged in prior to May 17, 1973 cannot be cited as a violation of MERA for the reason that it falls beyond the one-year limitation period for prohibited practice complaints established in Section 111.07(14) of the Wisconsin Employment Peace Act as made applicable to municipal employment by Section 111.70(4)(b) of MERA.

On the basis of the foregoing Findings of Fact and Conclusions of Law, the Commission issues the following

ORDER

That the complaint in the instant matter be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 17th day of October, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Zel S. Rice II, Commissioner

_____
Howard S. Bellman, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The instant complaint was filed on May 17, 1974. In it, Complainant alleges that Respondent has committed and is committing prohibited practices in violation of Section 111.70(3)(a)3 of MERA in that:

> "5. For at least the last two years and continuing to date Respondent has discriminated against Robert Kuchenreuther because of his lawful, concerted activities and other rights protected under Section 111.70(2) by the following acts and conduct:
>
> (1) 'Blacklisting' or prohibiting him from working in four of the nine areas in the City by reason of his activities as a union officer;
>
> (2) Depriving him of the opportunity to work overtime through the conduct specified in paragraph (1) above and other artifices; and
>
> (3) Issuing verbal and written reprimands prompted by his lawful concerted activities on behalf of the Union."

Complainant requests that the Commission order Respondent to cease and desist from discriminating against Robert Kuchenreuther and others similarly situated and direct that he be made whole for all earnings lost as a result of the prohibited practices alleged in the complaint.

Pursuant to notice, hearing was first held in the matter on June 26, 1974. Respondent presented its answer in writing to Complainant and the Commission at the outset of the hearing. In its answer, the Respondents deny committing the alleged prohibited practices, plead an affirmative defense noted below and request that the Commission dismiss the complaint. By way of an affirmative defense, Respondents plead that Complainant and Respondent are parties to a collective bargaining agreement providing a grievance procedure culminating in final and binding arbitration of disputes concerning its interpretation, application or enforcement and providing further that "the City and Union agree not to discriminate against an employe because of legitimate union activities." Respondents allege further that Kuchenreuther has the right to grieve the facts at issue herein under the Agreement " . . . subject to all of its conditions . . ." but has failed to do so.

Respondent also orally presented a motion that the Commission not take jurisdiction of the subject matter of the complaint in view of the aforesaid Agreement provisions.

At that point, a motion to intervene was orally made on behalf of Milwaukee District Council 48, AFSCME, AFL-CIO on the ground that the processing of a petition for election filed by said District Council was likely to be blocked by the pendency of the complaint despite the fact that the complaint was, in the District Council's view, frivolous. The motion to intervene was denied for the reasons that said District Council is not a party to the aforesaid Agreement or to the instant proceeding and that said District Council's views concerning the impropriety of the Commission's assertion of jurisdiction herein were identical with those of the Respondent.

Following oral arguments concerning Respondent's motion that the Commission not take jurisdiction of the complaint, ruling thereon was taken under advisement, and the parties presented their cases on the merits.

A. Assertion of Jurisdiction

In support of its affirmative defense and motion, Respondent argues that the Complainant has available to it the arbitration forum agreed upon between the parties as the forum for enforcement of the provisions of their Agreement; that since there is a nondiscrimination provision in their Agreement, the instant complaint amounts to a proceeding to enforce that Agreement provision; that in a contract enforcement proceeding before the Commission, exhaustion of available grievance-arbitration remedies is normally a prerequisite to Commission assertion of jurisdiction and should be so herein; that, in any event, " . . . the Commission will normally defer to the grievance and arbitration procedure, any arbitrable dispute over the enforcement of the provisions of a collective bargaining agreement unless there is a sound policy reason not to do so"; 1/ and that there is no such reason present herein.

Complainant takes the position that agents of Respondent have invited Complainant's officers to take the instant matter up as a prohibited practice and that, therefore, Respondent ought to be estopped now from arguing otherwise. Complainant further asserts that Kuchenreuther ought not be directed to the grievance-arbitration process for relief herein, since (1) the complaint is, to a substantial extent, about Respondent's alleged retaliation against Kuchenreuther for his grievance processing activities and (2) ". . . the matter to be litigated is one going to statutory rights and the right of union representaiton . . . ."

At the outset, it must be noted that, contrary to Respondent's assertion, the instant case is not one for contract enforcement; in that regard, it is unlike all of the Commission cases cited in oral argument by Respondent. 2/ For the instant case involves only an allegation of discrimination - independent of contractual prohibitions - in violation of Section 111.70(3)(a)5. Complainant has not sought herein an exercise of the Commission's contract enforcement authority under Section 111.06 (1)(f) of the Wisconsin Employment Peace Act (WEPA) or under Section 111.70(3)(a)5 of MERA. Thus, those cases cited by Respondent are inapposite herein. Attention ought, instead, be turned to prior Commission cases such a Milwaukee Elks 3/ and Vrsata 4/ wherein the Commission's jurisdiction over allegations of traditional unfair labor practices (e.g., interference, discrimination, unilateral changes) was deferred in favor of arbitration of the dispute on the basis of parallel contractual prohibitions.

In Milwaukee Elks, the Complainant pursued substantially similar remedies for the same employer conduct in both a grievance-arbitration and a traditional unfair labor practice forum. It sought the (then) Board's assistance by requesting not only that the Employer be ordered to honor its promise to arbitrate contractual disputes but also that

---

1/ Citing Milwaukee Board of School Directors, 12028 (5/74).

2/ Amity Nursing Home 8425 (2/68); River Falls Cooperative Creamery 2311 (2/50); F. Burlbut Company 4121 (12/55); Pierce Auto Body Works 6635 (2/64); Milwaukee Board of School Directors 12028 (5/74).

3/ Milwaukee Lodge No. 46 of the Benevolent and Protective Order of Elks of the United States of America, 7753 (10/66).

4/ Milwaukee Board of School Directors 10663-A (3/72).

the Board hear and determine whether the employer conduct constituted unlawful discrimination, unilateral change and interference. The Examiner ordered the Employer to arbitrate the dispute but declined to assert jurisdiction over the traditional unfair labor practices alleged and held the latter issues in abeyance subject to Board determination in the event that the eventual arbitration award were found by the Board, upon review, to be repugnant to WEPA. In so doing, the Examiner issued the following dictum:

> "It is not unusual for contracts providing for arbitration to also forbid conduct which is likewise proscribed by 'unfair labor practice' [or prohibited practice] statutes. In fact, discrimination based upon union activity and unilateral employer action are two types of conduct often so doubly prohibited.
>
> There can be no doubt that this Board has the authority to make determinations and order relief in cases involving noncontractual unfair labor practices, even despite, contrary to, or concurrently with the arbitration of the same matters. The possibility of full relief through arbitration does not preclude this Board from fully adjudicating alleged noncontractual violations of the statutes which it enforces.
>
> However, this Board may also exercise its discretion and decline to determine alleged violations which can be submitted to, and materially resolved and remedied in an arbitration procedure. Such an exercise of discretion is in recognition of and consistent with the policies of this Board, the federal courts . . . and the National Labor Relations Board . . . which favors the settlement of disputes arising out of subsisting collective bargaining agreements by procedures voluntarily predetermined by the parties . . ."

In Vrsata, the Complainant pursued substantially similar grievance-arbitration and traditional prohibited practice remedies for facts, which, if proven, would have constituted interference in violation of Section 111.70(3)(a)1. The Examiner in that case refused to assert the Commission's jurisdiction pending an award review process identical to that called for in Milwaukee Elks. In so doing, the Examiner found inapposite to that case (as we have hereinabove) reference to the exhaustion of remedies doctrine found in contract enforcement cases. Instead, he properly sought guidance from the Milwaukee Elks case, emphasizing the principles set forth therein that the Commission has the authority to determine the traditional unfair labor practice (or prohibited practice) issue and that the decision to assert or withhold jurisdiction with respect to said issue is discretionary. Then, noting that "[t]he Union has filed a grievance and has actively prosecuted that grievance through the grievance procedure, implying by its actions that it regards the subject matter of the grievance as an issue within the scope of the collective bargaining agreement", the Vrsata Examiner found that "[t]he possibility of parallel proceedings in two separate forums on the same facts . . ." made it ". . . appropriate in this case to defer to the settlement procedures contained in the contract, to permit the union those remedies without the need to make an election of the remedies available to it . . . ."

In the instant case, however, unlike Milwaukee Elks, Vrsata and others, 4/ no parallel grievance-arbitration relief is being pursued by Complainant. Moreover, we take official notice of the fact that the

---

4/ In Milwaukee Board of School Directors 11330-B (6/73), the Commission deferred to arbitration allegations of unilateral changes (111.70[3][a] 4) and of agreement violation (111.70[3][a]5). Complainant in that case, as in Vrsata and Milwaukee Elks, was pursuing a remedy for the same employer conduct in the grievance-arbitration forum.

pendency of the instant complaint proceeding presently blocks the processing of the petition of a rival union with respect to the bargaining unit presently represented by Complainant. 5/ It is therefore important that the merits of the complaint be promptly determined in order to remove as quickly as possible the impediment to processing of said petition and to conduct an election that might be directed pursuant to said petition. To hold the instant matter in abeyance as was done in Milwaukee Elks and in Vrsata would very likely prolong the period during which said petition would be blocked by the pendency of the instant proceeding. For the grievance procedure would need to be exhausted, arbitration requested, the matter presented, argued and perhaps briefed by the parties and determined by an arbitrator, and then (if the award were found, upon review, to be repugnant to MERA), reconsidered and redetermined by the Commission, all before the Commission would process the election petition. To dismiss the complaint without prejudice to refiling following issuance of an arbitration award alleged to be repugnant to MERA would be an unacceptable alternative since the possible taint on an election created by the prohibited practices alleged in the complaint would not be resolved upon such a dismissal.

For the foregoing reasons, the Commission has decided to exercise its discretion herein to assert jurisdiction over the allegations of discrimination herein and to determine same on the merits.

B. Alleged Unlawful Discrimination

Complainant alleged and proved that Kuchenreuther was precluded, to his detriment insofar as overtime opportunities are concerned - from driving garbage trucks in various Bureau of Sanitation areas and later in all Bureau of Sanitation areas. Also alleged and proven was the fact that Kuchenreuther has been, for many years, and continues to be an officer in Complainant and an active individual in contract negotaitions and administration on behalf of Complainant.

However, we find in the record no specific evidence that Kuchenreuther was issued any written warnings on or after May 17, 1973. Written warnings issued theretofore cannot, in and of themselves, constitute unlawful discrimination since such would have been issued beyond the one-year-from-date-of-filing limitation period established in Section 111.07(14) of the Wisconsin Statutes. Insofar as any oral warnings Kuchenreuther may have received after May 17, 1973, are concerned, and insofar as the Respondent's reduction and eventful elimination of garbage truck driving assignments and attendant overtime for Kuchenreuther, we find that, on balance, the Complainant has failed to prove, by a clear and satisfactory preponderance of the evidence, that Kuchenreuther's adverse treatment by Respondent has arisen in retaliation for lawful concerted activities on behalf of Complainant.

Complainant, in its brief, notes that since January, 1972, many of the supervisors involved in the decision to adversely treat Kuchenreuther have indicated by their statements and by the timing of their actions that they were punishing Kuchenreuther for his union activities. Specifically, the Union emphasizes the facts found in Findings numbered 10-13, and notes that Kuchenreuther was, for the first time, banned from a Sanitation area shortly after Dobrient made the statement noted in Finding 13.

Respondent, at the hearing, presented substantial evidence to show that any warnings or reductions in garbage truck driving assignments arose by reason of Kuchenreuther's misconduct as an employe. Several supervisors described both their first-hand knowledge of Kuchenreuther

---

5/ That petition has been filed in City of Milwaukee, CXL, 17903, ME-1054.

as an employe who worked in their areas and their second-hand knowledge of complaints, received from collection crews or other supervisors about Kuchenreuther's performance on the job.

For example, Frank Parker, Supervisor in North Sanitation Area III, testified that on several occasions Kuchenreuther (1) had refused to eat at the restaurant designated by Respondent for driver and crew to utilize; (2) recurrently failed, despite corrective instruction, to properly complete Environmental Protection forms concerning his daily truck operation; (3) removed driver instructions from truck cab contrary to BME rules; (4) interfered in discussions between Sanitation supervision and collection crews; (5) was complained of by a crew as inattentive to the crew's activity, i.e., failing to properly coordinate truck movements with collector activity; and (6) appeared unable to respond constructively to corrective instructions from Sanitation supervisors.

Ignatius Balistreri, Supervisor in Central Sanitation Area III, noted the incidents related in Finding 12 and indicated that Kuchenreuther took a belligerent stance toward any criticism he receiveid from supervision.

While Complainant has argued that Parker and Balistreri have indicated by certain statements that they have a bias against union activities, the testimony of said two supervisors is supported by that of Walter Schumann, as to whom no such taint has been asserted. Schumann is Supervisor in North Sanitation Area II in which Kuchenreuther drove at times in both 1973 and 1974. Schumann testified that when in his area, Kuchenreuther repeatedly filed incorrect or incomplete time sheets with him, even though Schumann had attempted on a number of occasions to correct Kuchenreuther's behavior in that regard. There also were discrepancies between overtime claimed by Kuchenreuther and the reasons for which it was claimed on the one hand and Schumann's view of the proper amount of overtime allowable under the extant circumstances on the other. One of Schumann's most experienced and reliable crews, who had never complained about a driver before, complained that Kuchenreuther was inattentive to their activities regarding his truck movement responsibilities. Schumann also found Kuchenreuther unable to receive constructive criticism; instead, Kuchenreuther seemed to Schumann to consider any correction by supervision of his job performance to be harassment.

The record also indicates that Kuchenreuther has been given at least limited notice of supervisory dissatisfaction with his work, has promised Wright that he would try to improve, but has continued to be the source of complaints about his job performance from those "using Bureaus" to which he has been assigned. Respondent also presented evidence establishing that it has consistently honored Kuchenreuther's requests for time off from work (with agreed compensation) for Complainant's contract negotiation meetings with Respondent, and his requests for time off without compensation for grievance meetings with Respondent's representatives. Respondent also showed that Kuchenreuther has not been discriminated against with respect to emergency salting and plowing overtime assignments.

The record does contain several threatening statements by supervisors and some suspiciously timed occurrences as reflected in the Findings of Fact, all of which, taken together, create some doubts whether Kuchenreuther's treatment has arisen wholly on account of poor job performance. On the other hand, it appears that much of the conflict between Kuchenreuther and supervision arises not because of his exercise of statutory rights, but because many of his "complaints about actions of the City" are complaints concerning legitimate corrective comments or actions taken by supervision in response to

perceived deficiencies in Kuchenreuther's job performance. His union office and his rights under Section 111.70(2) of MERA are not an absolute license for Kuchenreuther to perform his work in the manner he alone deems appropriate and without regard for Respondent's rules or its supervisors.

On balance, we conclude that Complainant has not shown by the requisite clear and satisfactory preponderance of the record evidence that Respondent's adverse treatement of Kuchenreuther was, in whole or part, motivated by anti-union animus, or by an intent to punish Kuchenreuther for his lawful concerted activities on behalf of Complainant. Such a showing is necessary for Complainant to prevail where, as here, the alleged violation is of Section 111.70(3)(a)3. 6/

Therefore, the complaint herein has been dismissed.

Dated at Madison, Wisconsin this 16th day of October, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Zel S. Rice II, Commissioner

_____
Howard S. Bellman, Commissioner

6/ See, e.g., City of New Berlin 7293 (3/66); Greenfield School District No. 6, 6195 (12/62).