

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

EARL JACOBS, LOCAL 171 and WISCONSIN	:	
STATE EMPLOYEES UNION, AFSCME,	:	
COUNCIL 24, AFL-CIO,	:	
	:	
Complainants,	:	
	:	Case XLVI
vs.	:	No. 18547 PP(S)-26
	:	Decision No. 13198-B
STATE OF WISCONSIN, DEPARTMENT OF	:	
ADMINISTRATION AND ITS EMPLOYMENT	:	
RELATIONS SECTION,	:	
	:	
Respondents.	:	
	:	

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Richard Graylow, appearing on behalf of the Complainants.
Mr. Lionel L. Crowley, Attorney at Law, Department of Administration, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Earl Jacobs, Local 171 and Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, having filed a prohibited practice complaint with the Wisconsin Employment Relations Commission, herein Commission, alleging that the State of Wisconsin, Department of Administration and its Employment Relations Section have committed a prohibited practice within the meaning of Section 111.82 of the Wisconsin Statutes; and the Commission having appointed Amedeo Greco, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing having been held at Madison, Wisconsin, on March 24, 1975, ^{1/} before the Examiner; and the parties having thereafter filed briefs which were received by June 5; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Local 171 and Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, herein Complainant, is a labor organization and at all times material herein was the exclusive bargaining representative of certain state employees employed by the State of Wisconsin, including employees employed at the University of Wisconsin Hospital in Madison, Wisconsin.
2. That the State of Wisconsin, Department of Administration and its Employment Relations Section, herein Respondents, is an employer within the meaning of Section 111.81(16) of the State Employment Labor Relations Act, herein SELRA; that Kenneth Kissinger, Personnel Director for the Center for Health Services, and Jack Simon, Educational Service

^{1/} Unless otherwise noted, all dates hereinafter refer to 1975.

Assistant III, are employed by the University of Wisconsin in Madison, Wisconsin; and that both Kissinger and Simon are supervisors under Section 111.81(19) of SELRA.

3. That at all times material hereto, Earl Jacobs has been employed by the University of Wisconsin in Madison, Wisconsin; and that Jacobs is in the collective bargaining unit represented by Complainant.

4. That on or about March 7 or 8, Kissinger decided to impose a five-day disciplinary suspension on Jacobs for alleged infractions of certain work rules; that Kissinger thereafter prepared a three-page letter addressed to Jacobs dated March 8 which detailed the alleged offenses and which informed Jacobs of the five-day suspension; that Kissinger met with Simon, Jacobs' immediate supervisor, on the morning of March 8 and told Simon that he, Kissinger, wanted to inform Jacobs of the suspension later that day; and that it was then agreed that Simon would advise Jacobs of that planned meeting.

5. That Simon in the afternoon of March 8 approached Jacobs at his work station and told him that Kissinger wanted to meet with him that afternoon; that Simon did not then inform Jacobs of the purpose of that meeting; that Jacobs and Simon subsequently went to Kissinger's office at about 3:30 p.m.; and that prior to that time, Jacobs never indicated to Simon that he wanted a Union representative to be present at that meeting.

6. That when Simon and Jacobs met with Kissinger, Kissinger immediately informed Jacobs of his suspension; that Kissinger gave Jacobs a copy of the March 8 three-page letter detailing the basis for the suspension; that Jacobs was unable to read the letter; that Kissinger thereafter started reading the letter and had completed reading part of the first page; that Jacobs then tried to leave the room before Kissinger could read the full contents of the letter; that both Kissinger and Jacobs became very angry with each other, with Jacobs attempting to leave, and with Kissinger attempting to keep Jacobs in the room; that Jacobs finally bolted out of the room, before the meeting had been concluded by Kissinger; that this meeting lasted for about ten minutes; that throughout this meeting, neither Kissinger nor Simon asked Jacobs for any information regarding the alleged acts giving rise to the suspension; and that Jacobs never asked for a Union representative at any time during this meeting.

7. That between March 8 and March 11, neither Jacobs nor anyone else on his behalf ever requested that Jacobs and a Union representative meet with Kissinger prior to the commencement of Jacobs' March 11 suspension; that Jacobs was subsequently suspended as of March 11 for five days; that Jacobs thereafter filed a grievance over his suspension, at which time he was accompanied by a Union representative.

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

CONCLUSION OF LAW

That Respondent did not violate Section 111.82 of SELRA, or any other section of SELRA, when Kissinger and Simon met with Jacobs on March 8 to inform Jacobs of his impending five-day suspension.

Based on the foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER

IT IS ORDERED that the complaint filed in the instant matter be,
and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 26th day of August, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By:


Amedeo Greco, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Complainant primarily argues that Jacobs requested Union representation in his March 8 meeting with Kissinger and Simon; that Jacobs was legally entitled to such representation on the ground that the meeting centered on a disciplinary matter; that Kissinger refused to grant Jacobs Union representation; and that that refusal was unlawful under Section 111.82 of SELPA.

Respondent, on the other hand, denies that its agents acted unlawfully at the March 8 meeting with Jacobs. It claims that: (1) Jacobs never requested Union representation that day; (2) Jacobs in any event was not entitled to such representation on the ground that that meeting was not investigatory in nature; and (3) according to Jacobs' own testimony, Jacobs obviated the need for such representation when he walked out of the meeting.

In resolving the foregoing issues, the undersigned has been presented with some conflicting testimony regarding certain material facts. Accordingly, it has been necessary to make credibility findings, based in part on such factors as the demeanor of the witnesses, material inconsistencies, and inherent probability of testimony, as well as the totality of the evidence. In this regard, it should 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. Based upon these factors, the undersigned concludes that any part of Jacobs' testimony which conflicted with the testimony of Kissinger and Simon is discredited in its entirety, as Jacobs simply was not a credible witness. The testimony of Kissinger and Simon, however, is credited, as they testified in a straight-forward manner, and their testimony was totally devoid of the many inherent improbabilities and inconsistencies which permeated Jacobs' testimony.

Accordingly, pursuant to the composite credited testimony of Kissinger and Simon, the record establishes that Simon informed Jacobs of the March 8 meeting at Jacobs' work station, that Jacobs and Simon subsequently went to Kissinger's office where they met with Kissinger, that Kissinger attempted to advise Jacobs of the reasons for his impending five-day suspension, that Jacobs left the meeting before Kissinger could read the letter of suspension, that at no time that day did Jacobs ever request the presence of Union representation, and that, indeed, this subject was never mentioned by either Jacobs, Simon or Kissinger. Further, since the sole purpose of the March 8 meeting was to inform Jacobs of his imminent suspension, and because Kissinger did not there ask Jacobs for any information regarding the alleged rule infractions which led to the suspension, and inasmuch as Kissinger and Simon had investigated those facts fully prior to the decision to suspend Jacobs, it appears that the March 8 meeting was not an investigatory meeting.

Since, then, Jacobs never requested Union representation at any time on March 8, the undersigned finds that the complaint must be dismissed. 2/ In so finding, the Examiner is aware that the Commission

2/ In light of the ultimate disposition herein, it is unnecessary to decide whether Jacobs was entitled to such representation at the March 8 meeting, had he in fact requested it.

has held in prior cases arising under the Municipal Employment Relations Act (MERA) that employes covered by MERA are entitled to Union representation at certain types of meetings. See, for example, Whitehall School District and Board of Education (10268-B) 9/71 and Crandon Joint School District No. 1 (10271-C) 10/71. More recently, the United States Supreme Court has reaffirmed this principle in finding that the National Labor Relations Act, as amended, hereinafter the Act, accords employes under the Act the right to similar representation in certain circumstances. NLRB vs. Weingarten, Inc., 88 LRRM 2689 (1975) and International Ladies' Garment Workers' Union, Upper South Department, AFL-CIO vs. Quality Manufacturing Company, et al., 88 LRRM 2698 (1975). However, in all of the above-cited cases, the affected employes had specifically requested union representation for the meetings in question, and the various holdings all turned on the fact that the denial of such requests was unlawful. Thus, for example, the Court in Weingarten, supra, p. 2691, specifically noted that the National Labor Relations Board held that:

" . . . the right arises only in situations where the employee requests representation. In other words, the employee may forego his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative."

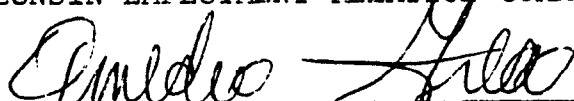
Accordingly, there is no basis in the above cases for holding that an employe is entitled to such representation, even when it has not been so requested. Since Jacobs here failed to make such a request, the Examiner therefore finds that the above-cited cases are inapposite, that Respondents did not act unlawfully when their agents met with Jacobs on March 8, without the presence of a Union representative, and that, as a result, the complaint should be dismissed.

Because the complaint has been so dismissed, the Examiner concludes that it would be inappropriate to pass upon Complainant's request which seeks "a declaratory ruling that all state employes are entitled to the presence of representatives of their choosing during these types of conferences with the Employer", as such a ruling would be sheer dicta, which would not have any precedential value.

Dated at Madison, Wisconsin this 26th day of August, 1975.

WISCONSIN EMPLOYMENT RELATION COMMISSION

By



Amedeo Greco, Examiner