STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| MILWAUKEE DISTRICT COUNCIL NO. 48, AFSCME, AFL-CIO,<br><br>Complainant,<br><br>vs.<br><br>MILWAUKEE COUNTY, ARTHUR SILVERMAN, ANTHONY P. ROMANO, EDMUND J. KRAWCZYK, FRED KNOX AND EDMUND A. MUNDY,1/<br><br>Respondents. | Case LXX<br>No. 18679 MP-418<br>Decision No. 13480-E |

Appearances:
Podell & Ugent, Attorneys at Law, by Mr. Alvin R. Ugent and Ms. Nola J. Hitchcock Cross, for Complainant.
Mr. Patrick J. Foster, Assistant Corporation Counsel, for Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Milwaukee District Council No. 48, AFSCME, AFL-CIO, herein referred to as Complainant, having filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission, herein Commission, alleging that Milwaukee County, herein referred to as Respondent, Arthur Silverman, Anthony P. Romano, Edmund J. Krawczyk, Fred Knox, and Edmund A. Mundy had committed prohibited practices within the meaning of the Municipal Employment Relations Act; and the Commission having appointed Marvin L. Schurke, then of its staff, as Examiner, and the examiner having by Order dated December 2, 1975 ordered Complainant to show cause why the instant matter should not be dismissed; and Complainant having shown cause; and by Order dated March 26, 1976, the Commission having substituted Stanley H. Michelstetter II, a member of its staff, as Examiner to make and issue findings of fact, conclusions of law and orders as provided in Section 111.07(5), Wis. Stats.;2/ and hearing on said complaint having been held March 25, April 8, May 11 and May 12, all in 1976, during

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1/ During hearing, the complaint was dismissed as to Arthur Silverman, Anthony P. Romano, Edmund J. Krawczyk, Fred Knox and Edmund A. Mundy, individually.

2/ All statutory citations herein are to Wis. Stats. unless otherwise noted.

the course of which the Commission having denied Respondent's motion to have the Commission review certain evidentiary and procedural rulings made by the examiner; and, pursuant to an agreement of the parties therefor, the examiner having by Order dated June 15, 1977 corrected the transcript of the proceedings; and the parties having filed briefs and a reply brief, the last of which was received October 26, 1977; and the examiner having considered the evidence and arguments of counsel makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Tnat Milwaukee District Council 48, AFSCME, AFL-CIO is a labor organization with its principal offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin.

2. That Respondent Milwaukee County is a municipal employer within the meaning of Section 111.70(1)(a) and has its principal offices located at 901 North Ninth Street, Milwaukee, Wisconsin; that Arthur Silverman, Anthony P. Romano, Edmund Mundy, and the Milwaukee County Civil Service Commission are agents of Milwaukee County.

3. That at all relevant times Respondent recognized Complainant as the representative of certain of its employes, including, but not limited to, certain employes in its Department of Public Welfare.

4. That Respondent employed Virginia Herzbrun from February 14, 1961 until September 8, 1970 when it discharged her from her then held position of Assistant Casework Supervisor in its Department of Public Welfare; that, as a result thereof, at all times thereafter Respondent did not want to employ Herzbrun.

5. That Respondent reinstated Herzbrun to her former position of Assistant Casework Supervisor effective March 27, 1972 solely as a result of proceedings in an action before the United States District Court for the Eastern District of Wisconsin entitled Herzbrun, et al. v. Milwaukee County, et al., Civil Action No. 70-C-601; that Respondent continued to employ her thereafter until the facts stated in Finding of Fact 8 solely for the same reason, although it did not otherwise wish to employ her.

6. That by order entered October 17, 1974, the United States Court of Appeals for the Seventh Circuit reversed the judgment of the United States District Court for the Eastern District of Wisconsin in the matter specified in Finding of Fact 5 and effectively remanded the cause for dismissal of the action.

7. That on or after October 24, 1974, but prior to Herzbrun's discharge on October 29, 1974 specified in Finding of Fact 8 below, Milwaukee County Supervisor William E. Nagel, purportedly acting on behalf of Respondent, informed Herzbrun she was about to be discharged and suggested she might retain her specific position with Respondent then titled Assistant Casework Supervisor (Court Liaison), if and only if she would resign as president of Complainant; that, throughout the period commencing with, and including, October 24, 1974 and ending with her discharge on October 29, 1974 as specified in Finding of Fact 8 below, Herzbrun exercised the authority in the interest of Respondent to assign its employes who were then members of a bargaining unit represented by Complainant, as well as the authority to effectively recommend their reward and discipline, and that the exercise of said authority was not of a merely routine or clerical nature, but required the use of independent judgment; that, at various times including, but not limited to, the relevant portions of October, 1974, Herzbrun was known by all relevant persons to be president of Complainant; and that Nagel's aforementioned action was not likely to, and did not have the effect of, interfering with, restraining or coercing any municipal employe in the exercise of his or her rights to engage in concerted activity.

8. That on October 29, 1974, while Herzbrun was acting as Complainant's agent in collective bargaining negotiations with Respondent, Respondent, by its agents Silverman and Romano, caused Herzbrun to meet with them in a room separate from those rooms in which negotiations were being conducted and thereupon effectively discharged her; that the manner of effecting said discharge was not likely to, and did not have the effect of, interfering with, restraining or coercing any municipal employe in his or her right to engage in concerted activity; that Respondent discharged Herzbrun on October 29, 1974 solely because it had discharged her in 1970, and not for the purpose of discouraging any of its employes' membership in Complainant, and not for the purpose of interfering with, restraining or coercing any municipal employe in his or her right to engage in concerted activity.

On the basis of the above and foregoing Findings of Fact, the examiner makes and files the following

## CONCLUSIONS OF LAW

1. That since Virginia Herzbrun used independent judgment in exercising the authority in the interest of Respondent Milwaukee County to assign its employes and to effectively recommend their reward or

discipline throughout the period starting with October 24 and ending with October 29, 1974, she was then a supervisor within the meaning of Section 111.70(1)(o)1.

2. That Respondent Milwaukee County, through its purported agent William E. Nagel, by having suggested to Virginia Herzbrun she might retain her position of Assistant Casework Supervisor (Court Liaison) if and only if she resigned as president of Complainant Milwaukee District Council 48, AFSCME, AFL-CIO, did not, and is not, committing a prohibited practice within the meaning of Section 111.70 (3)(a)1 or any other prohibited practice.

3. That Respondent, by having effected the discharge of Virginia Herzbrun while she was acting as a representative of Complainant in collective bargaining negotiations with Respondent, did not, and is not, committing a prohibited practice within the meaning of Section 111.70(3)(a)1 or any other prohibited practice.

4. That Respondent, by having discharged Virginia Herzbrun on October 29, 1974, did not, and is not, committing a prohibited practice within the meaning of Section 111.70(3)(a)1 or (3), or any other prohibited practice.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the examiner makes and files the following

ORDER

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

Dated at Milwaukee, Wisconsin, this 14th day of April, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II
Stanley H. Michelstetter II
Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 29, 1974, Respondent terminated Virginia Herzbrun which termination is herein referred to as the second discharge. Complainant[3/] primarily alleges the second discharge was motivated by Respondent's desire to retaliate against Herzbrun for her protected activity throughout her employment, including employment after her 1972 "reinstatement," and had the effect of interfering with the protected rights of its employes. It points to a series of incidents which it indicates demonstrates Respondent's unlawful motivation. It alleges the manner of effecting this discharge constitutes a separate prohibited practice as well as additional evidence of unlawful motivation. Finally, it alleges the Nagel offer also constitutes an independant prohibited practice, as well as additional evidence of unlawful motivation. It denies Herzbrun was ever a supervisor within the meaning of Section 111.70(1)(o)1.

Respondent denies there is any evidence supporting any inference of unlawful conduct against the Milwaukee County Civil Service Commission and, therefore, seeks dismissal as to them. It also denies the Commission has jurisdiction over the second discharge because it was merely a ministerial act necessary to enforce the first discharge. Thus, it argues this complaint is barred by Section 111.07(14). Alternatively, it alleges the second discharge must be held lawful because it resulted solely from the federal court actions or, in any event, it was not unlawfully motivated. With respect to the manner of effecting the discharge, it alleges it was necessitated by Respondent's perceived need for speed. It denies Nagel's actions are in any manner attributable to Respondent. Alternatively, it alleges Herzbrun was a supervisor and, thus, not entitled to the protections of the Act.

Discriminatory Discharge, Derivative and Independent Interference

Since Herzbrun may not have been a supervisor within the meaning of Section 111.70(1)(o)1 at all times throughout her employment, and

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3/ During the course of the hearing Complainant amended its complaint to allege violations of collective bargaining agreements. Because Complainant's posthearing briefs did not refer to the allegations, I find it has abandoned them.

Complainant asserts the second discharge was motivated by Herzbrun's assertedly protected activity throughout her employment, including such activity after her "reinstatement," I find motivation is the determinative issue with respect to this allegation.

The following factors, among others, demonstrate Respondent discharged Herzbrun on October 29, 1974 solely because it had discharged her in 1970: the nature of the circumstances of the first discharge; Respondent's willingness to undergo extensive, lengthy litigation rather than employ Herzbrun;[4/] the timing and manner of both reinstatement and second discharge; and the lack of any credible evidence tending to show re-establishment of normal employer-employe relationship. Upon the basis of the foregoing, and the record as a whole, I conclude Respondent effected her second discharge solely because it had discharged her in 1970.

Since reviewing the lawfulness of the motivation of the 1970 discharge could only serve to clothe with illegality a discharge which would otherwise be lawful, I find any such inquiry to be barred by the one year limitation specified in Section 111.07(14).[5/] Accordingly, Respondent did not unlawfully discriminate against Herzbrun within the meaning of Section 111.70(3)(a)3, and did not interfere with the rights of any employe within the meaning of Section 111.70(3)(a)1, or otherwise commit a prohibited practice when it discharged Herzbrun October 29, 1974.

Interference By Manner of Discharge

While ordinarily an employer's discharge of a representative of its employes during collective bargaining meetings carries a very serious potential for affecting employes' exercise of protected rights, by affecting their perception, or the reality, of their representatives' independence, the specific facts of this case demonstrate Respondent did not interfere with its employes' protected rights or otherwise commit a prohibited practice by the manner of effecting the second discharge. First, this particular discharge must have had little

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4/ Although I would reach the same result had Respondent merely reinstated her pending the outcome of the litigation.

5/ Nazareth Reg. High School V. NLRB 549 F.2d 873, 94 L.R.R.M. 2897, @ p. 2903 (refusal to rehire) (CA2, 1977); Local Lodge 1424 v. NLRB (Bryan Manufacturing), 362 U.S. 411, 45 L.R.R.M. 3212 (1960).

shock impact because Herzbrun and Complainant's representatives must have anticipated the discharge. Second, the discharge did not occur at a time likely to have had a significant impact on the bargaining. Thirdly, there simply is no evidence whatever of any unlawful motivation behind Respondent's determination to effect the discharge in this manner. Fourthly, Respondent took extraordinary care to insure that the discharge would not affect bargaining by concealing the very fact of discharge from all of its employes and even nonessential management personnel.[6/] Upon the basis of the above and foregoing, and the record as a whole, I find Respondent did not interfere with any of its employes' protected rights or otherwise commit a prohibited practice within the meaning of Section 111.70(3)(a)1 or any other prohibited practice.

Unlawful Interference with Herzbrun's Union Activity[7/]

With respect to the Nagel offer, I conclude that on or after October 24, 1974, but prior to the second discharge, County Supervisor Nagel, purportedly acting on behalf of Respondent, suggested to Herzbrun she might retain the instant specific position[8/] with Respondent, then titled Assistant Casework Supervisor (Court Liaison), if and only if she would resign as president of Complainant.[9/] Because a municipal employer ought to be free to impose discipline upon management personnel for the purpose of complying with Section 111.70(3)(a)2, I find the determinative issue as to whether the aforementioned offer constitutes unlawful interference by Respondent is whether Herzbrun was a supervisor throughout the period of October 24, 1974 to the second discharge.[10/]

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6/ It is Herzbrun, not management personnel, who informed Complainant's representatives she had been discharged.

7/ It does not appear Complainant is arguing any of Respondent's restrictions of Herzbrun's union activity, other than the Nagel offer, constitute separate prohibited practices. In any case, all such restrictions took place no later than June 19, 1973, and, therefore, are barred by the one year limitation in Section 111.07(14).

8/ While there is some ambiguity in Herzbrun's testimony as to whether she inferred the offer was to retain employment in some other form or her specific job, I am satisfied from her testimony as a whole she properly inferred the offer was to retain the instant specific position; see, for example, transcript page 367.

9/ It is unnecessary to determine whether such offer was, in fact, a bona fide offer attributable to Respondent. For the purposes of discussion only, I assume, without deciding, the statements made by Nagel are attributable to Respondent.

10/ See the last two sentences of Section 111.70(3)(a)2 and Milwaukee County (No. 12534-B) @ p. 8 (12/74).

By order dated October 23, 1972, the Commission excluded all positions of Assistant Casework Supervisor including the instant position[11/] in the Department of Public Works from Complainant's unit on the basis that they were supervisory.[12/] Since there is some question as to the effect of a later determination by the Commission and intervening changed circumstances,[13/] I find it useful to specifically determine the supervisory status of the instant position during the relevant period.

In October, 1974, the Assistant Casework Supervisor (Court Liaison) (pay range 21, bi-weekly $511.66 to $587.07) exercised supervisory authority similar to that of the Assistant Casework Supervisors then excluded from the unit.[14/] She supervised six professional Caseworker II's (Court Liaisons) (pay range 19, bi-weekly $472.74 to $511.66), the same number of employes then supervised on an average by Assistant Casework Supervisors. As a consequence of supervising the more highly paid court liaison people, the Assistant Casework Supervisor (Court Liaison) was also paid at one pay range more than Assistant Casework Supervisors (pay range 20, bi-weekly $491.60 to $528.34. The instant position required at least the same qualifications as other Assistant Casework Supervisors.

Caseworker II's (Court Liaisons) were assigned on a rotating basis to the Family Court Commissioner's office, the District Attorney's office or the criminal and civil courts. They were responsible for appearing with Department of Public Welfare records, giving testimony or information therefrom and/or otherwise giving the department's position on matters pending before those agencies. Ordinarily, Caseworker II's spent their entire day at their assigned locations, returning to the department only to obtain files and discuss difficult situations with the Assistant Casework Supervisor (Court Liaison).

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11/ Then also titled Assistant Casework Supervisor.

12/ Milwaukee County (No. 11382) (10/72); see exhibit 8 in those proceedings.

13/ Milwaukee County (No. 11382-D) (9/74) @ p. 3, and motion filed April 5, 1974.

14/ For a review of the Assistant Casework Supervisor's duties and the determination of their supervisory status, see Milwaukee County (No. 11382-D) (9/74) @ pp. 3-7.

As Assistant Casework Supervisor (Court Liaison), Herzbrun was responsible for being in the office from 55% to 90% of her time. On a day-to-day basis she was responsible for overseeing the work of the Caseworker II (Court Liaison) and the Caseworker II's under her direction. In essence, this usually meant providing direction and guidance to them in situations they brought to her attention. A substantial portion of this time was also spent in interceding with the other departments in an effort to make the department's position known with respect to matters in which it had an interest. Only management personnel performed these functions. Also, she was solely responsible for conveying directives or other information from upper management to her employes.

Although it did not require a substantial portion of her time, Herzbrun was responsible for, and, in fact, created, the aforementioned rotation schedule. In addition, like other Assistant Casework Supervisors, she was responsible for ensuring adequate staffing. She routinely approved requests for vacation or personal time, provided the specified number of people were available. Further, Herzbrun oversaw her employes' self-kept time cards.

Herzbrun was not ordinarily scheduled in rotation. Management only sent her to court on isolated occasions. Herzbrun, at her own discretion, filled in for absent employes, and observed other employes in the field. The two functions combined constituted her entire work outside the office.

Just as other Assistant Casework Supervisors did, Herzbrun had minimally participated in the hiring and promotion process, but did exercise considerable authority over transfers to and from her department. Like other Assistant Casework Supervisors, it was she who evaluated probationary and regular employes. Her negative evaluation was likely to have resulted in discipline or discharge for probationary employes or loss of an annual increment to regular employes without an independent investigation by higher level management. While this did not occur in this position, it has in other Assistant Casework Supervisor positions and there is no reason to believe there would have been any difference in the handling of a similar evaluation from Herzbrun.

Although no serious disciplinary situations occurred in the court liaison section, and such situations occur only infrequently in other sections, it is clear it would be Herzbrun who would be solely responsible for initiating discipline and for recommending the nature of the action to be taken. In view of higher level management's conduct

in related situations, I am satisfied her recommendation would be followed without independent investigation in all but the most serious cases.

I conclude that in October, 1974 Herzbrun, as Assistant Casework Supervisor (Court Liaison), exercised the authority in the interest of Respondent to assign its employes, as well as the authority to effectively recommend their reward or discipline in sufficient combination and degree to be deemed a supervisor within the meaning of Section 111.70(1)(o)1. Since she was then a supervisor I find the Nagel offer, if attributable to Respondent, was nonetheless lawful.

On the basis of all of the foregoing, I have herewith dismissed the instant complaint.

Dated at Milwaukee, Wisconsin, this 14th day of April, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II
Stanley H. Michelstetter II
Examiner