

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 2489, WCCME, AFSCME, AFL-CIO,	:	
	:	
Complainant,	:	Case XLII
	:	No. 19405 MP-492
vs.	:	Decision No. 13851-A
	:	
ROCK COUNTY,	:	
	:	
Respondent.	:	
	:	

Appearances:

Mr. Darold O. Lowe, District Representative, on behalf of Local 2489, WCCME, AFSCME, AFL-CIO.
Mr. Victor Moyer, Esq., Corporation Counsel, on behalf of Rock County.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Local 2489, WCCME, AFSCME, AFL-CIO, having filed a prohibited practices complaint 1/ with the Wisconsin Employment Relations Commission, herein Commission, alleging that Rock County has committed a prohibited practice within the meaning of Section 111.70(2) and (3)(a)1 of the Municipal Employment Relations Act, hereinafter referred to as MERA; 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, Conclusion of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Janesville, Wisconsin, on September 3, 1975, before the Examiner; and the parties having waived the filing of briefs; 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 2489, WCCME, AFSCME, AFL-CIO, herein Complainant, is a labor organization and at all times material herein was the exclusive collective bargaining representative of certain full-time and part-time employees employed by Rock County.
2. That Rock County, herein Respondent, constitutes a Municipal Employer within the meaning of Section 111.70(1)(2) of the Wisconsin Statutes; that Respondent's principle place of business is located in Janesville, Wisconsin; that Susan Steininger, Judy Bablitch, and Judy Miller are respectively employed by Respondent as Personnel Director, Director of Social Services, and Administrative Assistant (supervisor of the Bookkeeping Department); and that at all times material hereto, Steininger, Bablitch and Miller have exercised supervisory authority and have acted as Respondent's agents.
3. That Complainant and Respondent are signators to a collective bargaining agreement which provides in Article I, entitled "Management Rights", that Respondent has "the right to transfer or lay-off

1/ The complaint was amended at the hearing.

because of lack of work or other legitimate reasons"; that Article V therein, entitled "Seniority, Promotions", provides for a job posting procedure; and that Article IX, entitled "Grievance Procedure", provides for a grievance procedure which culminates in final and binding arbitration.

4. That employe Marlene Kilmer has been employed by Respondent for about four years, the last two of which have been in Respondent's Department of Social Services; that in March, 1975 ^{2/}, Kilmer, who was then classified as a Clerk III in Respondent's "Employee Payroll Division", became Complainant's Chief Steward; and that Complainant then informed Personnel Director Steininger of that fact.

5. That in May or June, employe Sharon Anderson, classified as a Clerk III in Respondent's "AFDC Payroll" division, vacated her position; that Respondent subsequently posted a job vacancy for that position; that two Clerk II employes, Kathy Jones and Judy Christianson, applied for Anderson's vacated position; that Jones and Christianson underwent testing and were subsequently rated qualified for that position by the State of Wisconsin; and that, notwithstanding said qualifications, Respondent refused to award the posted position to either Jones or Christianson.

6. That Kilmer never bid for Anderson's former position and did not indicate any interest whatsoever in accepting that position; that despite such disinterest, supervisor Miller told Kilmer on June 9 that she would be permanently transferred to Anderson's vacant position; that Kilmer there objected to that transfer; that such objections were to no avail; and that Miller there gave Kilmer a letter which read:

"Effective June 15, 1975 you will be laterally transferred to the position recently vacated by Sharon Anderson. Management does have the right to transfer for legitimate reasons as spelled out in Article I, Section 1.01 of your governing labor agreement.

There are two main reasons for the transfer; Mrs. Bablitch is presently in the process of trying to get the employees payroll clerk position classified as a confidential position. In the process of negotiations this clerk is often asked to compute figures for the county's use and it is felt there could be a possible conflict of interest. In this, and other similar situations, it is possible that the employee could have problems separating job responsibilities and proper lines of communications and authority, with union interests.

You are presently a union steward and it is felt it would be unfair and unreasonable to ask you to become a confidential employee at this time or at a time in the future when a decision is made on this matter.

The other reason for the transfer is that I need someone immediately on the AFDC payroll position. Both positions are critical and important positions to the functioning of

^{2/} Unless otherwise noted, all dates hereinafter refer to 1975.

the unit and the agency as a whole but I can better cover your present position with the present physical separation of the unit and the various job vacancies. It is more advantageous for the agency to have someone familiar with agency policy, personnel and programs to take over the AFDC payroll clerk positions. I feel you are capable of handling the job. The need is there and I have to best utilize what available staff I have to cover the job responsibilities of the unit and the agency." (Emphasis added).

7. That pursuant to the foregoing letter, Kilmer on June 15 was permanently transferred from her former position in "Employee Payroll Division" to Anderson's vacant position in "AFDC Payroll"; that upon being so transferred, Kilmer did not suffer any loss of pay or any other benefits; that there were substantial differences between Kilmer's former position and the one in "AFDC payroll"; and that because of these differences, it was necessary for Kilmer to undergo a training program for several months.

8. That Complainant on June 16 filed a grievance over Kilmer's transfer; that Steininger on July 17 denied said grievance and there stated, inter alia, that:

"While I feel that result of the action taken to transfer Ms. Kilmer to the AFDC Payroll Clerk position was proper, I do not agree that the transfer was accomplished in the best possible manner. In the case of a long-term employee, such as Ms. Kilmer, it might have been more considerate to have discussed the possibility of transfer with her before the final decision to transfer was actually made. If there were circumstances which made the new position unacceptable to her or if she was able to point out alternative solutions, her preferences and suggestions might have created a different result. If the transfer was still necessary, it would have been done with her full knowledge and the knowledge that her concerns and preferences were considered;"

and that following Steininger's denial of the grievance, Complainant did not thereafter request that the matter be submitted to arbitration.

9. That Respondent transferred Kilmer to Anderson's former position in "AFDC Payroll" in part because of Kilmer's union activities.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and enters the following

CONCLUSION OF LAW

1. That Respondent's decision to involuntarily transfer Kilmer to "AFDC Payroll" was partly based on the fact that Kilmer was an active union adherent and that, as a result, such transfer constituted a prohibited practice within the meaning of Section 111.70(3)(a)1 of MERA.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and enters the following

ORDER


IT IS ORDERED that Respondent, Rock County, its officers and agents, shall immediately:

1. Cease and desist from transferring Marlene Kilmer, or any other employes, because of their union activities on behalf of Complainant, or any other labor organization.
2. Take the following affirmative action which the Examiner finds will return the parties to the status quo ante and which serves to effectuate the purposes of MERA:
 - (a) Immediately offer to reinstate Marlene Kilmer to her former position as a Clerk III in "Employee Payroll" which she held prior to the time that she was transferred to "AFDC Payroll".
 - (b) Notify all employes by posting in conspicuous places in its offices where employes are employed copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by Respondent and shall be 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 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 herewith.

Dated at Madison, Wisconsin this *30th* day of January, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Amedeo Greco, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Employment Relations Act, we hereby notify our employes that:

1. WE WILL offer to reinstate Marlene Kilmer to her former position as a Clerk III in "Employee Payroll".
2. WE WILL NOT transfer Marlene Kilmer, or any other employes, because of their Union activities.
3. WE WILL NOT in any other or related manner interfere with the rights of our employes, pursuant to the provisions of the Wisconsin Employment Relations Act.

By _____
Rock County

Dated this _____ day of _____, 1976.

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

The basic issue presented is whether Respondent's involuntary transfer of Kilmer to Anderson's former position in "AFDC Payroll" constituted a prohibited practice, with Complainant asserting, and Respondent denying, that such was the case.

In resolving this issue, 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.

As to the merits of that issue presented 3/ there is no question but that Kilmer was an action union adherent, that that fact was known to Respondent, and that Respondent transferred Kilmer partly because of Kilmer's union activities. Thus, Supervisor Miller expressly acknowledged in her June 9 letter, supra, that the transfer was partly based on the fact that Kilmer's former position was in the process of being made into a confidential position and that, because of Kilmer's union activities, Respondent believed that "it would be unfair and unreasonable to ask you to become a confidential employe . . ." 4/ At the hearing, Miller reiterated that this was one of the factors which caused Kilmer to be transferred. This point was corroborated by Director of Social Services Bablitch who testified to the same effect.

Furthermore, Respondent also asserts that its decision to transfer Kilmer was partly based on the fact that she was the only employe qualified to fill Anderson's vacant position. However, the record establishes that the two bidders for the position, Jones and Christianson, were both rated qualified for that position by the State of Wisconsin and that Respondent knew of that rating before it transferred Kilmer on June 15. Additionally, Miller acknowledged at the hearing that Kilmer needed several months of training on her new job in "AFDC Payroll" and that, in light of such training, it would not have been any more difficult to train either Jones or Christianson for that position. Based upon these facts, there is a serious question as to whether Kilmer in fact was the only qualified employe who could perform Anderson's former duties.

In any event, since Respondent admittedly transferred Kilmer in part because of her union activities, such a transfer was violative of Section 111.70(3)(a)1 of MERA. This is so irrespective of whether Respondent deliberately intended to curtail Kilmer's

3/ Since Respondent makes no claim that the matter herein should be deferred to the contractual grievance arbitration procedure, and because in any event the issue to be resolved turns on whether Kilmer's transfer was violative of her statutory rights, as opposed to her contractual rights, deferral to that procedure is unwarranted.

4/ As the Commission has made no determination that Kilmer's former position is confidential in nature, and inasmuch as the record herein does not warrant such a finding, there is no basis in this record for concluding that that position is confidential.

union activities, as such motivation is not needed to constitute a violation of Section 111.70(3)(a)1. 5/ For, since the transfer was partly based on the fact that Kilmer held a leadership position with Complainant, and because that transfer necessitated a substantial amount of additional training, it is clear that Kilmer in affect was being penalized for engaging in such activity. The imposition of such a penalty, based upon union related considerations, therefore tended to interfere with Kilmer's right to freely join a union and to be an active union adherent. 6/ As a result, the transfer constituted a prohibited practice under Section 111.70(3)(a)1 of MERA.

To rectify that conduct, Respondent is required to take the remedial action noted above.

Dated at Madison, Wisconsin this 30th day of January, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Amedeo Greco, Examiner

5/ Dane County (11622-A) 10/73; Village of Shorewood (1304) 9/74.

6/ See Village of West Milwaukee (9485-B) 10/71 wherein the Commission found that the transfer therein was based on anti-union considerations and that it constituted a prohibited practice.