STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| PETER MOHM III,<br><br>Complainant,<br><br>vs.<br><br>HILLVIEW NURSING HOME, LACROSSE COUNTY,<br><br>Respondent. | Case XLIII<br>No. 20550 MP-629<br>Decision No. 14704-B |

ORDER AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND REVISING EXAMINER'S ORDER

Examiner Dennis P. McGilligan, having on June 22, 1977, issued Findings of Fact, Conclusions of Law and Order in the above-entitled matter, wherein the Examiner concluded that the above-named Respondent (herein County) had committed a prohibited practice within the meaning of Section 111.70(3)(a)3 and 1 of the Municipal Employment Relations Act by suspending and discharging Complainant Peter Mohm III for, at least in part, his protected concerted activity on behalf of Local 150, Service and Hospital Employees International Union, AFL-CIO, and, further, wherein the Examiner found that the County did not discourage membership in Local 150 as a result of its discriminatory suspension and discharge of Complainant Mohm and thereby did not commit an independent prohibited practice; and the Examiner also having concluded that the County did not violate a collective bargaining agreement between the parties, and therefore, did not commit a prohibited practice in violation of Section 111.70(3)(a)5 of the Municipal Employment Relations Act; and the County having, pursuant to Section 111.07(5), Wisconsin Statutes, timely filed a petition requesting the Commission to review the Examiner's decision; and neither party having filed a brief in support of their position in review; and the Commission having reviewed the entire record, including the petition for review, makes and issues the following

ORDER

1. That except for paragraph 31 of the Findings of Fact, the Examiner's Findings of Fact are hereby affirmed and are hereby considered to be the Findings of Fact of the Commission.

2. That paragraph 31 of the Examiner's Findings of Fact is hereby deleted in its entirety.

3. That paragraph 1 of the Examiner's Conclusions of Law is hereby affirmed and considered to be paragraph 1 of the Commission's Conclusions of Law.

4. That paragraph 2 of the Examiner's Conclusions of Law is hereby revised and now deemed to read as follows:

> "2. That Respondent's suspension of Complainant Mohm on May 13, 1976, was due, at least in part, to animus toward Peter Mohm III, because of his protected concerted activity on behalf of Local 150, and therefore Respondent, LaCrosse County, by its authorized representatives, discriminatorily suspended Complainant Mohm and discouraged

Union membership in Local 150 in violation of Sections 111.70(3)(a)1 and 3 of the Municipal Employment Relations Act."

5. That paragraph 3 of the Examiner's Conclusions of Law is hereby revised and now deemed to read as follows:

"3. That Respondent's discharge of Complainant Mohm on May 27, 1976, was due, at least in part, to animus toward Peter Mohm III, because of his protected concerted activity on behalf of Local 150, and therefore Respondent, LaCrosse County, by its authorized representatives, discriminatorily discharged Complainant Mohm and discouraged Union membership in Local 150 in violation of Section 111.70(3)(a)1 and 3 of the Municipal Employment Relations Act."

6. That paragraph 4 of the Examiner's Conclusions of Law is hereby deleted in its entirety.

7. That paragraph 5 of the Examiner's Conclusions of Law is hereby affirmed and considered to be paragraph 4 of the Commission's Conclusions of Law.

8. That paragraph 1 of the Examiner's Order is hereby revised and now is deemed to read as follows:

"1. Cease and desist from discriminating against Peter Mohm III, or any other employes, because of their union activities on behalf of Local 150, Service and Hospital Employees International Union, AFL-CIO, or any other labor organization and from discouraging employes from Union membership in Local 150."

9. That paragraph 2 of the Examiner's Order is hereby affirmed in its entirety and is therefore considered to be paragraph 2 of the Commission's Order.

Given under our hands and seal at the City of Madison, Wisconsin this 31st day of July, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Marshall L. Gratz
Marshall L. Gratz, Commissioner

LACROSSE COUNTY (HILLVIEW NURSING HOME), XLIII, Decision No. 14704-B

MEMORANDUM ACCOMPANYING ORDER AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND REVISING EXAMINER'S ORDER

THE EXAMINER'S DECISION:

The Examiner found that the County's suspension of Complainant Peter Mohm III on May 13, 1976 and his subsequent discharge on May 27, 1976, was due at least in part to animus toward Mohm because of his protected concerted activity on behalf of Local 150, Service and Hospital Employees International Union, AFL-CIO. Accordingly, the Examiner found the County in violation of Section 111.70(3)(a)1 and 3 of the Municipal Employment Relations Act and ordered it to immediately reinstate Mohm with full back pay and to cease and desist from discriminating against Mohm or any other employes because of their Union activity. The Examiner, however, further concluded that the County did not discourage membership in Local 150 as a result of its discriminatory suspension and discharge of Complainant Mohm and therefore did not independently violate Section 111.70(3)(a)3 of MERA.

THE PETITION FOR REVIEW:

The County filed a timely petition for review contending that: (1) the record does not support a finding that the County was somehow guilty at least in part of animus toward Peter Mohm III regarding his union activity and (2) that "returning Peter Mohm III to the work force will be so disruptive as to cause the professional staff to erode and the County would be unable to fulfill its obligation to provide good patient care."

Neither the County, in support of its petition for review, nor the Complainant filed a brief on review.

DISCUSSION:

In order to reverse an examiner's finding of material fact, ERB 12.09(2)(a) requires the Petitioner to show that the finding of fact is "clearly erroneous as established by the clear and satisfactory preponderance of the evidence." In addressing its burden of proof, the County makes no reference to the record, attacks no finding of fact except for the ultimate conclusion of animus, and has, as indicated above, submitted no brief in support of its petition. It is therefore assumed that the County is re-asserting the arguments contained in its brief of September 15, 1976 and reply brief dated October 1, 1976.

The County's brief of September 15, 1976 raises four objections to a finding that the County was motivated by union animus. The first argument was that Complainant Mohm was attempting to somehow use a stipulated settlement of a complaint filed with the Commission on November 25, 1975, upon which an Order for Dismissal was issued on January 9, 1976, as the basis of a showing of union animus. The Examiner, in agreeing with the County, rejected the notion that the stipulated agreement could somehow be considered evidence of the County's union animus. Complainant did not take exception to the Examiner's findings and conclusion in this regard. We agree with the Examiner, and therefore affirm his conclusion.

The County's second objection to a finding of animus was that the County was without knowledge of Mohm's union activity until November 3, 1975. Since many of the disciplinary measures meted out to the Complainant occurred prior to this date, the County argues its actions

could not have been motivated by Union animus. The Examiner specifically rejected this argument, and found that Lindgren was aware of Mohm's appointment on or before October 30, 1975 (Finding of Fact No. 7) a finding unchallenged by the Petition for Review. In so finding the Examiner relied on Lindgren's November 11, 1975 letter to Mohm which the Commission agrees establishes Lindgren's knowledge of Mohm's election as Union Steward on October 30, 1975. In said Letter Lindgren called to Mohm's attention the fact that he (Mohm) had been cautioned twice by Lindgren "to cease harassment of other employees under the guise of Union Steward" and that "these admonitions were made on October 30th, 1975 and November 4th, 1975."

Further it is noted that the specific conduct by the County, i.e., Mohm's suspension of May 13, 1976, and discharge of May 27, 1976, found violative of the Act and forming the basis of the Order, occurred well after November 3, 1975, a time at which the County admittedly possessed knowledge.

The County's third argument is that there existed valid grounds for Complainant's discharge. The record supports a finding that Mohm once called Nurse Van Landuyt a "lazy pig" (Tr. 55, 127), that after having been directed to attend "report," Complainant Mohm refused to do so (Tr. 116, 142, 157, 170, 183); and that he was reprimanded for rule infractions involving patient care (Tr. 172, 184). In specifically finding those matters insufficient to excuse the discharge, the Examiner found these incidents to be pretextual and that the County's action was due at least in part to animus toward Complainant Mohm because of his union activities. Most of the conduct complained of was either born of protected concerted activity, or was the fruit of the campaign of harassment the Examiner found to have been conducted against the Complainant.

Under the Muskego-Norway rule [Muskego-Norway School Dist. No. 9 (7447) 8/65, aff. 35 Wis. 2d 540, 6/67,] it is irrelevant that the employer has legitimate grounds for discharge if one of the motivating factors for the employer's action is the employe's protected concerted activity. We are convinced from the record that while the County may have had some justification to take action against Mohm, one of the motivating factors for Mohm's suspension and discharge was his Union activities. Significant in this regard is Lindgren's own testimony, when asked to characterize Mohm's conduct, that he (Mohm) did not promote a harmonious relationship between management and labor; Dr. Glasser's testimony that morale at Hillview was bad due to the grievance activities and agitation of Mohm; Mary Hickey's testimony that Mohm was always going for grievances and unhappy about everything and Phyllis Blair's testimony that Mohm's processing of grievances while on vacation or on days off was viewed as disruptive. It is clear to the Commission that the management's evaluation of Mohm as an employe was affected by his union activity and that Mohm's suspension and discharge, as found by the Examiner, were due at least in part to animus toward Mohm because of his pro-Union activity on behalf of Local 150. We therefore affirm the Examiner's conclusions in regard thereto.

Finally, the County argues that returning Mohm to the work force will be so disruptive as to cause the professional staff to erode and the County would be unable to fulfill its obligations to provide good

it is a result of the County's action. The County has nowhere argued that it is unable to schedule Hickey and Mohm so as to minimize their contact and would traditionally bear the burden of proving same. An examination of the record discloses that no other employe indicated a refusal to work with Mohm though many supervisory employes expressed distaste for Mohm's union activities.

In short, the record suggests no basis for refusing to reinstate Mohm to his former position and therefore we affirm the Examiner's Order and reinstatement.

Based on the above, we affirm the Examiner in every respect, except for his Finding of Fact No. 31 and his Conclusion of Law No. 4 wherein he concluded that the Company did not discourage membership in Local 150 as a result of its discriminatory suspension and discharge of Mohm.

The Commission does not interpret Section 111.70(3)(a)3 of the MERA to require subjective evidence of employe discouragement where, as here, the Employer has discriminatorily discharged an employe based in part on his union activities. The inherent and forseeable effect of said action is to discourage union membership and activity, so subjective proof of an independent violation of Section 111.70(3)(a)3 is not necessary. We have therefore deleted the Examiner's Finding of Fact No. 31 and modified his Conclusion of Law as reflected in our modified Order.

Dated at Madison, Wisconsin this 31st day of July, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian, Commissioner

Marshall L. Gratz, Commissioner