

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondents.

No. 14768-E

2. That Respondent Wisconsin Humane Society is an employer within the meaning of the Wisconsin Peace Act and an employer over which the National Labor Relations Board would not assert jurisdiction pursuant to its self-imposed standards therefor.

3. That at all relevant times prior to July 3, 1975,^{2/} Respondent employed Complainant as a driver; that at all relevant times prior to July 3 Respondent, including its agent, Albert P. Keller, knew Complainant had acted in concert with fellow employees as their elected representative for purposes of conferring with Respondent with respect to their wages, hours, working conditions and grievances.

4. That on July 3 Respondent by its agent Keller discharged Complainant; that Respondent's sole motivation therefor was Complainant's misconduct unrelated to his representation of fellow employees.

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

CONCLUSION OF LAW

That since Respondent was not unlawfully motivated when it discharged Complainant, it did not, and is not, thereby committing an unfair labor practice within the meaning of Section 111.06, Wis. Stats.

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

ORDER

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

Dated at Milwaukee, Wisconsin, this 27th day of October, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

^{2/} All dates are in 1975 unless otherwise noted.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

On July 6, 1976, Complainant filed the instant complaint alleging Respondent had discriminated against him within the meaning of Section 111.06(1)(c)1.a. when it discharged him on July 3. Respondent asserts the Commission is without jurisdiction because the National Labor Relations Board changed its prior general policy of not asserting jurisdiction over nonprofit employers in St. Aloysius Home, 224 NLRB No. 70, 92 LRRM 1355 (1976). Alternatively, while it concedes Respondent, including its agent Keller, had full knowledge of Complainant's admittedly protected concerted activity at the relevant times, it denies that the discharge was in any way motivated by Complainant's protected activity. Instead, it asserts its reason for the discharge was Complainant's misconduct unrelated to his protected concerted activity.

DISCUSSION

Jurisdiction

Respondent is a Wisconsin, nonprofit corporation organized to secure and enforce just laws for the prevention of cruelty to animals, to educate the public and otherwise participate in activities to the same end. In furtherance of its purpose, Respondent regularly enters into contracts of short duration with Milwaukee County, a political subdivision of the State of Wisconsin, under which Respondent performs the municipal pound function for the communities in Milwaukee County. Elected officials thereby exercise direct and immediate control over every aspect of Respondent's operation. Respondent also has a second contract with Milwaukee County by which it receives a grant under the Comprehensive Employment Training Act with which it hires and employs persons to perform work similar to the kind performed by other employees.

During 1975, Respondent's budget was \$590,000 of which \$28,000 was allocated to education, \$36,000 to the C.E.T.A. program, and the remainder used in the furnishing of services to Milwaukee County. Respondent's employees spend the vast majority of all of their time providing pound services for Milwaukee County. No services are performed outside Milwaukee County. Over the period of its existence supervisory and non supervisory employees have been "humane officers"

within the meaning of Section 58.07, Wis. Stats., both before and after its amendment of Chapter 133, Laws of 1973. In this function Respondent's personnel are governmentally appointed to the office and have independent authority to act as police officers with respect to, but not limited to, the enforcement of animal laws. Under the amended statute, local municipalities must first seek the recommendation of Respondent before appointing anyone as a humane officer. This is not an employer over which the National Labor Relations Board would assert jurisdiction pursuant to its self-imposed standards therefor.^{3/}

Merits

The sole issue on the merits is motivation. Complainant asserts Respondent's manager, Keller, conducted a program of harassment directed against him for his representation of fellow employees in conferences with, inter alia, Keller. Complainant has offered no evidence of improper animus or overt discrimination by any other agent of Respondent.

Well prior to the discharge, Keller had warned Complainant his refusal to accept a work assignment with a fellow employee was not an acceptable method of dealing with his problems at work. Keller had also previously warned Complainant about reporting to the proper supervisory personnel before leaving work early.

On July 2, Keller had reminded Complainant he was to work the July 4 holiday to make up for a holiday for which Complainant had been scheduled, but missed due to injury. At about the same time Complainant learned Keller had effectively refused him a free parking pass for Summerfest, an item of small economic value.^{4/} Immediately

^{3/} Petitioner correctly concedes the NLRB would not have asserted jurisdiction over this employer prior to St. Aloysius Home, supra; Ming Quong Children's Center 210 NLRB 899, 86 LRRM 1254 (1974); Massachusetts S.P.C.A., 203 NLRB No. 22, 83 LRRM 1017 (1973) issue avoided. Almost a year after the instant discharge, the NLRB abandoned its Ming Quong policy in St. Aloysius Home, supra. In any case the NLRB has yet to face the unique combination of factors involved in this narrow industry.

^{4/} I find no merit in Complainant's contention the foregoing actions were all part of the program of harassment. I specifically discredit Complainant's deliberately false testimony he was in fact made physically ill primarily as a result of the foregoing. His contradictory admissions made in Exhibit 8 leave no doubt he was in fact using his refusal to work as leverage to obtain his way.

thereafter Complainant left work purportedly "ill", but under circumstances in which Keller properly inferred he was doing so to defy his specific direction to work the holiday and to refuse to work because he was denied a benefit he felt he was entitled to have. Keller believed Complainant left without contacting the appropriate supervisor.

On the evening of July 2, Keller called Complainant at his home. Karen King's version of the telephone calls establish the two verbally disagreed about Complainant's conduct during the day. It is undisputed Complainant then hung up on Keller and Keller called back. The two then disagreed about Complainant's obligation to accept the telephone call at home.

While King's testimony about the July 3 discharge conversation omits much of what was said, he admits Keller was concerned about his attitude as manifested by his refusal to accept Keller's telephone call the previous evening. Keller's testimony that he also cited Complainant's other conduct of the previous day is credited as very likely under the circumstances. Complainant's testimony also tends to confirm Keller's with respect to Keller's having offered Complainant one last opportunity to avoid discharge.

Finally, Karen King testified Keller contacted her about communicating with Complainant, apparently sometime after Keller's final conversation with Complainant. The only likely purpose of the kind of message Keller wanted to communicate was an opportunity for Complainant to gain reinstatement. Upon the basis of the foregoing and the record as a whole, I conclude a clear and satisfactory preponderance of evidence demonstrates Respondent's motivation for the instant discharge was Complainant's misconduct unrelated to his protected concerted activities.

Dated at Milwaukee, Wisconsin, this 27th day of October, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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