

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48, AFSCME,
AFL-CIO, and NICK BALLAS, STAFF
REPRESENTATIVE,^{1/}

Complainants,

vs.

WISCONSIN HUMANE SOCIETY and
ALBERT P. KELLER,^{1/}

Respondents.

Case III
No. 21422 Ce-1720
Decision No. 15312-A

Appearances:

Podell & Ugent, Attorneys at Law, by Mr. Alvin R. Ugent, for
Complainant.

Foley & Lardner, Attorneys at Law, by Mr. Michael I. Paulson, for
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Milwaukee District Council 48, AFSCME, AFL-CIO, herein referred to as Complainant, and Nick Ballas having filed a complaint with the Wisconsin Employment Relations Commission, alleging that Albert P. Keller and Wisconsin Humane Society, the latter herein referred to as Respondent, have committed unfair labor practices within the meaning of Section 111.06, Wis. Stats., and the Commission having appointed Stanley H. Michelstetter II, a member of its staff, to act as Examiner and to make and issue findings of fact, conclusions of law and orders as provided in Section 111.07(5), Wis. Stats.; and hearing on said complaint having been held before the examiner at Milwaukee, Wisconsin, commencing on April 15, 1977 and concluding on June 13, 1977; and the examiner having considered the evidence and arguments of the parties, makes and files the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. That Complainant Milwaukee District Council 48, AFSCME, AFL-CIO, is a labor organization with offices located at 3427 West

^{1/} Complaint was withdrawn as to Nick Ballas and Albert P. Keller.

St. Paul Avenue, Milwaukee, Wisconsin; that Georgia C. Johnson is an agent of Complainant.

2. That Respondent Wisconsin Humane Society is an employer within the meaning of the Wisconsin Employment Peace Act and an employer over which the National Labor Relations Board would not assert jurisdiction pursuant to its self-imposed standards therefor; that at all relevant times Albert P. Keller and John McDowell were agents of Respondent.

3. That at all relevant times Respondent recognized Complainant as the representative of certain of its employees including, but not limited to, office and kennel employees; that at Complainant's request its certification was withdrawn January 30, 1978.

4. That prior to the occurrences stated in finding of fact 5, Respondent, Keller and McDowell were all aware of employee Theresa Olson's protected activity with Complainant.

5. That at the end of December, 1976, Respondent by its agent(s) Keller and, possibly, McDowell determined not to promote Theresa Olson to the then vacant position of full-time kennel person and, instead, selected another employee to fill said position. That by said decision not to promote Olson, Respondent intended to interfere with, restrain and coerce its employees in the exercise of their right to engage in concerted activities, and intended to discriminatorily discourage its employees' membership in, and activity on behalf of, Complainant.

6. That in December, 1976, Respondent selected William Loeffler and John McDowell to become humane officers because they were then in its supervisory classifications and not for the purpose of interfering with, restraining, or coercing its employees in the exercise of their right to engage in concerted activities, or for the purpose of discriminatorily discouraging any of its employees' membership in, and activity on behalf of, Complainant.

Upon the basis of the above and foregoing findings of fact, the examiner makes and enters the following

CONCLUSIONS OF LAW

1. That Respondent, by having discriminatorily denied Theresa Olson promotion to the full-time position of kennel person in order to interfere with, restrain and coerce its employees in the

exercise of their right to engage in concerted activities, and in order to discriminatorily discourage its employees' membership in, and activity on behalf of, Complainant, has engaged in, and is engaging in, unfair labor practices within the meaning of Sections 111.06(1)(a) and (c)1 of the Wisconsin Employment Peace Act.

2. That since Complainant's allegations with respect to Section 111.06(1)(d), Wis. Stats., involve conduct which is not susceptible to repetition, they are moot.

3. That Respondent, by having designated William Loeffler and John McDowell to become humane officers solely for lawful purposes, did not, and is not committing an unfair labor practice within the meaning of Section 111.06(1)(a) and (c)1 of the Wisconsin Employment Peace Act.

Upon the basis of the above and foregoing findings of fact and conclusions of law, the examiner makes and enters the following

ORDER

It is ordered that Respondent, Wisconsin Humane Society, its officers and agents shall immediately:

1. Cease and desist from discouraging membership and activity of its employees in, and on behalf, of Complainant Milwaukee District Council 48, AFSCME, AFL-CIO or any other labor organization by refusing to promote any of its employees or otherwise discriminating against any employees in regard to his or her hire, tenure of employment, or in regard to any other terms or conditions of employment.

2. Take the following affirmative action which the examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

- (a) Offer to Theresa Olson appointment to the position of full-time kennel person, and make her whole for any loss of pay or benefits which she may have suffered by reason of the discrimination against her, by payment to her of a sum of money equal to that which she would normally have earned or received in the position of full-time kennel person from the date she would have commenced employment in said position to the date of an unconditional offer or appointment thereto less any earnings which she may have received during said period.

- (b) Notify all of its employees by posting in conspicuous places on its premises, where notices to all of its employees are usually posted, a copy of the notice attached hereto and marked "Appendix A." Such copy shall be signed by Albert P. Keller 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 Respondent Wisconsin Humane Society to insure that said notice is not altered, defaced or covered by other material.
- (c) Notice the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this order of the steps which it has taken to comply herewith.

Dated at Milwaukee, Wisconsin, this 24th day of February, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to an order of an examiner appointed by the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Employment Peace Act, we hereby notify our employees that:

1. We will offer Theresa Olson immediate appointment to the position of full-time kennel person or a substantially equivalent position and make her whole for any losses of pay and/or benefits which she may have suffered by reason of our discriminatory refusal to promote her to said position.

2. We will not discourage membership of our employees in Milwaukee District Council 48, AFSCME, AFL-CIO or any other labor organization, either by refusing to promote or otherwise discriminating against any employee with regard to his or her hire, tenure of employment, or in regard to any other term or condition of employment.

3. We will not in any other manner interfere with, restrain or coerce our employees in the exercise of their right to self-organize, to form labor organizations, and to join or assist Milwaukee District Council 48, AFSCME, AFL-CIO or any other labor organization.

All of our employees are free to become, remain or refrain from becoming members of Milwaukee District Council 48, AFSCME, AFL-CIO or any other labor organization.

WISCONSIN HUMANE SOCIETY

By _____
Albert P. Keller

Dated _____

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Complainant^{2/} alleges that Respondent committed unfair labor practices in violation of Section 111.06(1)(c)1 and, derivatively, Section 111.06(1)(a) of the Wisconsin Employment Peace Act when it failed to promote Theresa Olson to the position of full-time kennel person and when it selected Loeffler and McDowell to be humane officers.^{3/} Respondent denies any discrimination. With respect to the selection of humane officers, it argues that each of the two were selected because they were supervisors and the function of humane officer is associated solely with supervisory status.

OLSON PROMOTION

The following facts are essentially undisputed. In late December, 1976, Olson and a non-unit employee were the sole employees to apply for a vacant position of full-time kennel person. Apparently, in the week between their requests to be considered and the time the other employee commenced the new position, supervisors Tenaglia, McDowell, Frey and Loeffler met to discuss who should be promoted. McDowell dominated this meeting with his adamant position that Olson not be selected. At about the time the newly promoted employee started in the instant position, Tenaglia approached Olson and told her the other employee had been promoted. In response to her objection, Tenaglia denied having made the instant determination and ushered her into Keller's office. With Tenaglia present, Keller told Olson her work did not satisfy him and that until he was satisfied she would not get promoted. At the end of the conversation, without Olson having in any way suggested she might seek assistance from Complainant, Keller stated to her that she could complain to the union all she wanted but it would not get her the job.

^{2/} Complainant also made various allegations of unilateral change in violation of Section 111.06(1)(c). At Complainant's own request the Commission has set aside Complainant's certification in the instant unit, Wisconsin Humane Society (14198-D), 1/78. Under the facts of this case, I conclude judgment on the issues would have no practical legal effect, and are moot. I have, therefore, dismissed same.

^{3/} It may be that Complainant alleges that the selection of Loeffler and McDowell to be supervisors was also discriminatory. This allegation, if made, is beyond the scope of the complaint and was, at best, inadequately litigated.

DISCUSSION--OLSON PROMOTION

The evidence demonstrates that at all relevant times Keller and McDowell had had a long history of cooperating in a campaign designed to dissuade union adherents with threats of reprisal and promises of benefit. For example, both had discussions with Jankowski in which they dangled appointment as a humane officer as an implied promise of benefit if he would abandon activity on behalf of Complainant, both repeatedly made implicit threats of reprisal to other employees, and Keller carried out a campaign of "terror" by arbitrarily disciplining pro-union employees and giving them the "cold shoulder."

Both Keller and McDowell attempted to minimize the extent of this campaign, and, more specifically, the extent of their cooperation. For example, McDowell attempted to imply by his testimony that Keller had never asked him to try to dissuade union adherents. Nonetheless, Jankowski testified that McDowell told him ". . . he [McDowell] had talked to Mr. Keller and he was going to be a go-between me [Jankowski] and Mr. Keller because apparently we were . . . not communicating right. . . ." ^{4/} Other testimony indicates Keller had directly tried to recruit Jankowski to persuade fellow employees to abandon Complainant. It is simply incredible that Keller would have approached Jankowski but not McDowell to do the same. Further, McDowell elsewhere minimized or omitted facts in his other testimony about the extent to which he had been opposed to the union, the degree to which past service with the employer was actually taken into account in promotions, the extent to which he had been promised an increase for becoming a humane officer, and many other matters. I am, therefore, satisfied on the basis of the foregoing and the record as a whole that at the relevant times Keller and McDowell had been engaged in a campaign against Complainant using persuasion, promises of benefit, and threats of reprisal.

By at least October or early November, 1976, Keller was fully aware of Olson's protected activity. It is at this time Complainant's agent Johnson contacted Keller about a "grievance" of Olson's. I attribute this knowledge to McDowell as well because of his association with Keller in the latter's campaigning against Complainant.

^{4/} Transcript, p. 49.

During the hearing on this complaint, McDowell and Keller gave contradictory testimony as to who made the decision not to promote Olson. McDowell denied the instant decision was made at the supervisory meeting. He alleged Tenaglia made the decision, Keller at first contradicted McDowell when he testified the supervisory meeting made the determination, but later confirmed him when he alleged Tenaglia made the decision. Keller adamantly denied having participated in the decision process in any way. Although Tenaglia did testify, he did not testify with respect to this issue. Olson testified without contradiction as to what Tenaglia said prior to their meeting with Keller, as well as what each said in the meeting. I discredit Keller's and McDowell's testimony with respect to who made the instant determination not to promote Olson. First, Tenaglia's and Keller's conduct surrounding their meeting with Olson demonstrates Tenaglia did not make this decision. Thus, only McDowell and/or Keller made the decision. Secondly, in view of Keller's conduct in the meeting with Olson, the size of the employer, and Keller's past involvement in other management decisions, it is highly unlikely that Keller would not have, at least, had independent knowledge of who made this decision and when. Finally, both Keller's and McDowell's testimony were characterized by minimization, omission and understatement. I conclude Keller acting alone, or in association with McDowell, made the instant determination not to promote Olson.

In view of the other evidence of the use of similar techniques against other employees, I find Keller's actions in deliberately prolonging the close of his investigation into a minor incident involving Olson, his cold demeanor toward her, and his gratuitous statement that Olson could complain to the union all she wanted, taken with the record as a whole, demonstrate Keller had targeted Olson for discrimination for having engaged in protected activity.

While it is unclear whether McDowell actually had a part in the decision, as opposed to merely providing a rationale for Keller's decision to other supervisors, McDowell's conduct demonstrates further existence of a plan of unlawful discrimination. First, McDowell was not the supervisor ordinarily responsible for making the instant selection, but was the person most closely associated with Keller's anti-union activities. Second, in the supervisory meeting McDowell omitted mentioning Olson's two weeks of experience on her own time in the kennels, while relying in part on a cat-bite incident in the same period. The latter demonstrates that at the time of the meeting, he

was interested primarily in persuasion and less in a reasoned decision by other supervisors. Finally, although McDowell apparently investigated some of the negative aspects surrounding Olson's "qualifications," the evidence indicates he made no effort to explore any of the positive aspects of Olson's background. Taken as a whole, I conclude McDowell's conduct was in furtherance of a plan to discriminate against Olson. Any purported economic reasons for not selecting Olson were thus mere pretext.

I, therefore, conclude that Respondent's motivation in making the instant selection for promotion was to penalize Olson for her protected concerted activity, in violation of Section 111.06(1)(c)1. I have found the remedy requested essentially appropriate and have entered same.

DISCRIMINATORY SELECTION OF HUMANE OFFICERS

Prior to approximately May, 1975, Respondent had two classes of humane officers: one directly appointed by government authority and the other solely designated by Respondent. The former category has always consisted of only supervisory and management people. In approximately May, 1975, Respondent eliminated the latter category. In late December, 1976, Respondent choose Loeffler and McDowell to become governmentally appointed humane officers because since at least November, 1975 each had been designated a supervisor as Respondent defined the term. Respondent chose to create more humane officers at that time because it perceived an increased demand for its services in enforcing animal laws, services which it believed could only be performed by a governmentally appointed and properly trained humane officer. There is simply none of the usual indicia of discrimination surrounding these specific designations. The complaint has, therefore, been dismissed in this regard.

Dated at Milwaukee, Wisconsin, this 24th day of February, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BY Stanley H. Michelstetter II
Stanley H. Michelstetter II, Examiner