STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO, Complainant, vs. WISCONSIN HUMANE SOCIETY, Respondent.	Case III No. 21422 Ce-1720 Decision No. 15312-C

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT, REVERSING EXAMINER'S CONCLUSION OF LAW AND ENTERING ORDER OF DISMISSAL

Examiner Stanley H. Michelstetter II having, on February 24, 1978, issued his Findings of Fact, Conclusions of Law and Order in the above-entitled matter wherein he found that the Respondent had committed unfair labor practices within the meaning of Section 111.06 of the Wisconsin Employment Peace Act (WEPA) and the Examiner having thereafter, on February 28, 1978, issued an Order Modifying his Findings of Fact; and the Respondent having, on March 20, 1978, filed a petition pursuant to Section 111.07(5) of the WEPA requesting that the Commission review the Examiner's decision; and the Respondent having, on May 5, 1978, filed a brief in support of its petition for review; and the Complainant, on July 7, 1978, having filed a statement wherein it supported the Examiner's decision and indicated it would rely on its arguments raised in its brief before the Examiner in support of its position in opposition to the petition; and the Commission having considered the evidence and arguments including the petition for review and briefs of the parties and being satisfied that the Examiner's Findings of Fact be modified and that his first Conclusion of Law be reversed and that the complaint be dismissed;

NOW, THEREFORE, it is

ORDERED

A. The Examiner's Findings of Fact Nos. 1, 2 and 3 are affirmed and that Nos. 4 and 5 are modified and renumbered 4, 5, 6 and 7 to read as follows:

4. Theresa Olson was at all times material herein a part-time office employe and included in the bargaining unit represented by the Complainant. In June, 1972, prior to becoming employed as a part-time office employe, Olson worked as a kennel person for the Respondent, but was unable to perform satisfactorily in that position and voluntarily left her employment after one week. Although the record does not establish the exact reasons why Olson was unable to satisfactorily perform the duties of a kennel person, the reasons had nothing to do

with her exercise of any rights protected under Section 111.04 of the WEPA. 1/ Agents of the Respondent, including McDowell, were aware of Olson's prior employment as a kennel person and believed that she was not qualified to work as a kennel person. In the Spring of 1976, Olson voluntarily worked in the kennel area on her own time for the purpose of learning the duties of a kennel person in furtherance of her expressed desire to obtain a position as a kennel person. During this period of time, Olson was bitten by a cat while assisting another employe in the task of placing a tag on the animal. Even though it is a fairly common occurrence for a kennel person to be bitten by a cat, Keller became upset with Olson as a result of this incident, which caused the Respondent to incur medical expenses. The evidence does not establish that Keller's anger toward Olson was in any way related to any protected activities which she may have engaged in prior to that time.

5. In the Fall of 1976, probably in October, 1976, a part-time kennel person position became available, and the Respondent's agents decided to hire Matthew Getts, a new employe, to fill the position. Before Getts had been formally notified of this decision, Olson learned that the Respondent intended to hire Getts. She advised her supervisor, Bob Frey, that she was interested in the position and the Respondent agreed not to notify Getts of the decision until the Respondent could consider Olson's application. Olson asked Johnson to represent her in further discussions with the Respondents' agents regarding her interest in this position. Thereafter, Johnson told Olson that the Respondent had decided to hire Getts and advised Olson of the person who made the decision and the reasons given for the decision. However, at the time of the hearing herein which was approximately six months later, Olson could not recall who made the decision or the reasons given.

6. Shortly after the Respondent hired Getts, a full-time kennel person position became available to be filled on or about January 1, 1977. Olson and a temporary employe who was working as a kennel person, Godfrey Reichman, applied for this position. Near the end of December, August Tenaglia, the supervisor to whom the new kennel person would report, advised Olson that she would not be given the position because she lacked experience and that the other person was deemed to be more qualified. When Olson protested on the ground that she had several years of related experience working for a veterinarian, Tenaglia denied making the decision himself and arranged for her to talk to Keller. Keller advised her that, in his opinion, she was not qualified for the position, and that he was displeased with her work because of the incident where she was bitten by a cat, and because of an incident where he believed she had been discourteous on the telephone to a woman and her neighbor who had each called seeking help in removing an opossum from their property. At the conclusion of this conversation, Keller volunteered the statement to Olson that she could complain about the decision to the Union if she wanted but that it wouldn't do any good.

7. Olson was a member of the Complainant Union when she applied for the position of part-time kennel person in October, 1976, but she: (1) was not a member at the time that other employes were sent home for wearing union buttons in November, 1975; (2) did not join the union until after a number of other employes had already joined; (3) did not wear a union button to work; and, (4) did not engage in any

---

1/ According to Olson, a fellow employe who worked closely with Olson at that time expressed the opinion that Olson was incapable of performing the duties of a kennel person. Olson contended that she was simply unable to get along with this other employe.

other protected activity prior to asking Johnson to represent her in her effort to obtain the part-time kennel person position in October, 1976. There is no evidence that Keller, McDowell, or any other agent of the Respondent was aware of Olson's union membership prior to the decision not to give her the part-time kennel person position. Keller and other agents of the Respondent did not become aware of Olson's exercise of the right to be represented by the Complainant's agent, Johnson, until after they had initially decided to hire Getts for the position of part-time kennel person in October, 1976. Although the Respondent Society's agents, including Keller, were aware of Olson's exercise of the right to be represented by the Complainant in seeking the part-time kennel person position at the time they refused to promote her to the full-time kennel person position, there is insufficient evidence in the record to establish that her exercise of that right played any part in the decision not to promote her to the full-time kennel person position. Instead, the record establishes that the decision not to award Olson the full-time kennel person position was based on the belief of agents of the Respondent Society that she was not qualified for the position and because of their dissatisfaction with her work.

B. That the Examiner's Finding of Fact No. 6 is renumbered Finding of Fact No. 8.

C. That the Examiner's second and third Conclusions of Law are affirmed and that his first Conclusion of Law is reversed to read as follows:

1. The Complainant has failed to establish by a clear and satisfactory preponderance of the evidence that the decision not to promote Olson to the full-time kennel person position was motivated, even in part, by a desire to discriminate against her because of her exercise of rights protected by Section 111.04 of the WEPA, and, therefore, the Respondent has not committed a prohibited practice within the meaning of Sections 111.06(1)(c)1 and 111.06(1)(a) of the WEPA.

D. That the Examiner's Order is set aside and that the Complaint herein be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 6th day of April, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Marshall L. Gratz
Marshall L. Gratz, Commissioner

MEMORANDUM ACCOMPANYING ORDER MODIFYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISMISSING COMPLAINT

In its petition for review the Respondent contends that:

(1) The Examiner's Finding of Fact No. 2, finding that the Respondent is "an Employer over which the National Labor Relations Board would assert jurisdiction pursuant to its self-imposed standards therefor", is clearly erroneous and not supported by either the credible evidence of record or applicable law and is prejudicial;

(2) The Examiner's Finding of Fact No. 5, finding that the Respondent's decision not to promote employe Olson and instead to promote temporary employe Reichman to the position of full-time kennel person was intended to interfere with, restrain and coerce its employes and discriminatorily discourage its employes' membership in and activity on behalf of Complainant, is clearly erroneous and that it is unsupported by credible evidence in the record and is prejudicial;

(3) The Examiner's Conclusion of Law No. 1, holding that its actions referred to in Finding of Fact No. 5 violated Section 111.06(1)(a) and c(1) of the WEPA, is clearly erroneous in that it is unsupported by credible evidence in the record and relevant principles of law and is prejudicial; and

(4) The Examiner's Order is unsupported by credible evidence in the record and relevant principles of law, is overbroad and unwarranted even if the Findings and Conclusions are accepted and amounts to an abuse of discretion and is prejudicial.

The Respondent requests that the Commission enter an Order reversing the Examiner's decision, vacating his Order, dismissing the Complaint and granting any other relief that may be just and equitable.

While the complaint herein alleged a number of violations of the WEPA, the only dispute on review, other than the question of the Commission's jurisdiction, is the question of whether the Respondent acted discriminatorily and interfered with employes' rights when, in December, 1976, it refused to promote Theresa Olson to a position of full-time kennel person and offered the position to Godfrey Reichman instead. At the time that the decision to offer the position to Reichman was made, Olson was working as a part-time office employe represented by the Complainant and Reichman was working as a temporary, full-time kennel person outside the bargaining unit.

RESPONDENT'S POSITION:

The Respondent filed a brief in support of its petition for review wherein it argues that the Complainant has failed to establish, by a clear and satisfactory preponderance of the evidence, that the decision not to offer the full-time kennel person position to Olson and to offer Reichman the position instead was for the purpose of encouraging or discouraging membership in a labor organization. On the contrary, the Respondent contends that the evidence establishes that the Respondent's motivation in this regard was proper.

Reichman had more experience than Olson as a kennel person and was doing the full range of the job at the time of his selection for the full-time position. Olson had only a few weeks experience as a kennel person, did not perform satisfactorily in the kennel person position and had quit her position as a kennel person several years before. Reichman on the other hand, was a qualified and capable kennel person. Furthermore the Respondent has reason to doubt Olson's ability to work as a kennel person and was dissatisfied with her work as an office employe. The record establishes that Reichman's qualifications and Olson's questionable qualifications served as the sole basis for Supervisor Tenaglia's choice of Reichman and the Examiner's finding that the decision was made at a meeting dominated by McDowell is unsupported by the record.

According to the Respondent, there is no evidence to support a finding that the stated reasons were pretextual. In this regard the Examiner's statement that McDowell and Keller engaged in a "campaign of terror" and his decision to discredit their testimony on that basis is unsupported and inconsistent with an earlier finding in another case. 2/ According to the Respondent, Keller and McDowell made no threats or promises in their exercise of free speech regarding the question of unionization. The alleged "cold shoulder" given Olson and other employes can hardly be characterized as a "campaign of terror" and in fact constituted nothing more than business-like behavior. There is no evidence of arbitrary discipline of pro-union employes. No suspensions or reprimands were issued; only a few verbal warnings were issued covering such things as Olson's handling of the switchboard.

With regard to the Examiner's conclusion that the selection of Reichman over Olson was intended to encourage or discourage membership in the union, the Respondent contends that it was not so intended and would not discourage membership and points out that:

(1) The fact that Olson was in the bargaining unit and Reichman was outside the bargaining unit would not necessarily discourage membership since Reichman's selection would make him eligible for union membership;

(2) There is no evidence that Reichman was opposed to the union and in fact it was the Respondent's belief at the time of the hearing that Reichman had joined the union;

(3) There is is no evidence other than the fact that Olson, who like many other employes may have worn a union botton, was unusually active in support of the union which would have caused her to be singled out for discriminatory treatment; and

(4) The Respondent's dissatisfaction with Olson as an employe predated the union's presence at the Society.

With regard to its claim that the Examiner's Order is overbroad, the Respondent contends that the Order that she receive backpay for the difference in pay between her position as a part-time office employe and the position of full-time kennel person is not supported by subsequent events. It is the Respondent's contention that although Olson testified at the hearing that she would probably seek any available kennel person position that arose, she has in fact shown no interest in any of the kennel person positions which arose before the hearing or since.

2/ Wisconsin Humane Society, Decision No. 14768-E (10/27/77).

COMPLAINANT'S POSITION:

The Complainants did not file a brief in opposition to the petition for review. Instead they rely on their arguments before the Examiner in support of their position that the Examiner's decision is well reasoned and should be affirmed.

In their brief before the Examiner the Complainants argued in relevant part;

(1) Olson was well qualified and interested in obtaining a position as a kennel person;

(2) It was the past practice of the Respondent to award jobs as kennel persons, after posting, to the employe who had the most seniority;

(3) Reichman, who was outside the unit and had nothing to do with the Union, was a temporary employe and had no demonstrated qualifications to be a kennel person;

(4) Olson, who had demonstrated qualifications to be a kennel person, was denied the job because of Keller's hate for the Union;

(5) The reasons given by Keller to Olson for not awarding her job were pretextual because

  (a) She did not receive a bad reference from her prior employer as claimed;

  (b) The cat bite she received while voluntarily attempting to learn the duties of a kennel person was a common occurrence even among experienced kennel persons; and

  (c) The claim that she was impolite to a caller is not supported by the record;

(6) Keller was not qualified to be director of the Respondent and it is reasonable to assume that he obtained his job for reasons other than his qualifications;

(7) Keller demonstrated a strong anti-union animus by:

  (a) Spending hours on the phone attempting to dissuade union backers;

  (b) Suspending all employes who wore union bottons on one occasion;

  (c) Ordering all union backers who were humane officers to turn in their humane officer credentials;

  (d) Offering management positions to employes who would agree to give up union talk;

  (e) Making himself a humane officer despite his lack of qualifications and the lack of evidence that such designation was required by the bylaws of the society; and

  (f) Persisting in his mistaken claim that humane officers were management employes despite a legal opinion from the union's attorney to the contrary.

DISCUSSION:

(1) Jurisdiction

The Respondent has made no record herein to support its claim, first asserted in its petition for review, that the Commission lacks jurisdiction in this case. In a prior case involving the Respondent the Examiner found that the Commission had jurisdiction over the Respondent. 3/ That finding was not challenged by the Respondent. In the absence of any persuasive evidence or argument herein to support a different finding, we proceed on the assumption that the Commission has jurisdiction over the Respondent or that the NLRB would cede jurisdiction to the Commission because of the Respondent's failure to timely raise the issue. 4/

(2) Alleged Violations

In his findings, as amended, the Examiner found in relevent part:

"4. That prior to the occurrences stated in finding of fact 5, Respondent, Keller and McDowell were all aware of employe Theresa Olson's activity in concert with fellow employes of having sought and obtained Complainant's representation in dealings with Respondent with respect to her grievance concerning having not received a previous promotion.

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 employe to fill said position. That by said decision not to promote Olson, Respondent intended to interfere with, restrain and coerce its employes in the exercise of their right to engage in concerted activities, and intended to discriminatorily discourage its employes' membership in, and activity on behalf of, Complainant."

In his rationale, the Examiner reasoned essentially as follows:

1. Keller and McDowell were engaged in a campaign to discourage union membership and employed threats and promises to that end.

2. Keller carried out a "campaign of terror" by arbitrarily disciplining pro-union employes such as Olson and giving her the "cold shoulder".

3. Keller and McDowell were not credible witnesses because:

   a. They attempted to minimize or hide their true anti-union feelings and,

   b. There were numerous contradictions in the testimony

3/ Id.

4/ See e.g. NLRB advisory opinion, Valley Sanitation Co. Inc. Case A O-132, 190 NLRB 649, 77 LRRM 1279 (1971).

of Keller and McDowell as to who made the decision not to give the full-time kennel person position to Olson, whereas the unrebutted (but hearsay) evidence was that Tenaglia told Olson that Keller had made the decision.

4. Keller deliberately prolonged the investigation of a "minor" incident (complaint of rudeness on telephone) involving Olson.

5. Keller gratuitously advised Olson that she could complain to the union but that it wouldn't do any good.

6. The degree of McDowell's participation in the decision was greater than it otherwise would have been, suggesting that it was the result of his anti-union animus.

7. Even if McDowell dominated the decision-making process, McDowell's opinion of Olson's alleged lack of qualifications was not objective.

We have revised the Examiner's findings to more clearly reflect the events leading up to the decision not to offer Olson the position of full-time kennel person and to offer the position to Reichman instead. For the reasons set out herein we have eliminated the Examiner's finding that the decision was intended to interfere with employes' rights and to discriminatorily discourage employes from membership in or activity on behalf of the Complainant and have substituted our finding that the Respondent's agents chose not to award the full-time kennel person position to Olson because of their belief that she was not qualified for the position and because of their dissatisfaction with her work. 5/

We have concluded that the record lacks sufficient evidence to support the Examiner's finding of unlawful motivation because, before the earliest time Respondent's agents have been shown to have known of Olson's exercise of WEPA rights, they decided to hire Getts from the outside to fill a part-time kennel person position rather than to offer that position to Olson whose desire for such a position was known to them. We are satisfied that Respondent's agents did so because of their belief that she was not qualified for the position and because of their dissatisfaction with her work -- business-related judgments which, whether just or not, were each grounded in fact. We are further convinced that the Complainants have failed to prove by a clear and satisfactory preponderance of the evidence that, following that original decision, unlawful motivation entered as a contributing factor when Respondent reached the same conclusion (not to promote) as regards the same employe (Olson) and the same type of work (kennel person), i.e., when it decided a few days later not to reverse its selection of Getts in favor of Olson and when it decided about one month later to hire Reichman instead of Olson.

In the Examiner's findings, as he amended them, the only knowledge of Olson's protected activities attributed to the Respondent was that Olson relied on a union representative to represent her in her effort to reverse the decision to hire Getts for the part-time kennel person position one month before the decision in question herein. In fact, the record disclosed that Olson was not theretofore a visible union adherent. According to Olson she joined the Union in

---

5/ We have consulted with the Examiner regarding his first hand impressions of the testimony of the witnesses and their credibility. Appleton v. ILHR Dept., 67 Wis 2d 162, 72, 226 N.W. 2d 497 (1975).

the "middle" of the joining by other employes; and while she had a union button, she did not wear it. She admitted that in her opinion Keller "never" liked her "even before the union", but she expressed the opinion that he found more fault with her work after the time at which she joined the union. That rather vague testimony is not a sufficient basis from which to conclude that the Respondent was aware of Olson's joining the union--the only protected activity of record that she engaged in before the Respondent's original decision to hire Getts for the part-time kennel person position.

The record reveals a basis in fact for Respondent's alleged belief that Olson was not qualified for kennel person work and its alleged dissatisfaction with her work for Respondent. Specifically, she had previously worked as a kennel person but was not able to satisfactorily perform the duties of that position and quit same; she was bitten by a cat when she voluntarily attempted to perform the duties a few months before the decision in question herein; and she had in Keller's view mishandled her office duties, e.g., by failing to properly handle the switchboard on one occasion and by failing to properly handle the telephone conversations with Mrs. Scheibel and her neighbor.

Like the Examiner, we do not find Keller's denial of anti-union feeling credible. Furthermore, the contradictions in Keller and McDowell's testimony cause us to have little confidence in their testimony with regard to how the decision not to give Olson the full-time kennel person position came to be made. Even so, these factors do not warrant the inference that her protected activity had any effect on the decision not to give her the full-time position. More compelling, based on the other evidence of record, is the inference that the decision related to their belief, right or wrong, that she was a poor office employe and unsuited for a position as a kennel person. This is certainly true of the decision not to to give her the part-time position one month earlier, and we believe it also was true with regard to the full-time position.

The one fact in the record which might support the Examiner's conclusion was Keller's gratuitous statement after denying her the full-time position that Olson could complain to the union but that it would not do any good. That statement, while it may have been coercive of Olson's exercise of protected activities in the context of Keller's unmasked anti-union attitudes, does not convince us that anti-union animus contributed to the decision to again deny Olson a position as a kennel person. Rather, as noted, the belief that Olson was not qualified for kennel person work and dissatisfaction with Olson's work, both of which were based on facts known to Respondent before the decision regarding the part-time position, appear to have been the operative reasons leading to the same decision one month later regarding the full-time opening. If the record had established that Respondent's agents knew or believed that Olson was active on behalf of the union, or if Respondent's agents' knowledge of Olson's protected activities had been shown to predate Respondent's original decision to hire Getts despite Olson's known interest in working with animals, or if the decision in question had not involved the same type of work that Respondent consciously avoided offering to Olson before

having proven knowledge of Olson's protected activities, we might have reached a different result herein.

For the above and foregoing reasons, we have modified the Examiner's Findings of Fact, reversed his first Conclusion of Law and dismissed the complaint.

Dated at Madison, Wisconsin this 6th day of April, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Marshall L. Gratz
Marshall L. Gratz, Commissioner