

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DUANE PETERSON,	:	
	:	
	:	Case II
Complainant,	:	No. 21691 MP-752
	:	Decision No. 15541-A
vs.	:	
	:	
VILLAGE OF UNION GROVE and	:	
LESTER WILLIAM BEHLING,	:	
	:	
Respondents.	:	
	:	

Appearances:

Mr. James D. MacDonald, Attorney at Law, for the Complainant.
Mr. Harrison W. Nichols, Attorney at Law, for the Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above-named Complainant having, on May 25, 1977, filed a complaint with the Wisconsin Employment Relations Commission alleging that the above-named Respondents had committed certain prohibited practices within the meaning of Section 111.70 of the Municipal Employment Relations Act (MERA); and the Commission having appointed Peter G. Davis, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and a hearing on said complaint having been held before the Examiner in Union Grove, Wisconsin on June 28, 1977 and July 29, 1977; 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 Duane Peterson, herein Complainant, was employed by the Village of Union Grove for approximately seventeen years prior to his discharge on May 12, 1977.
2. That the Village of Union Grove, Wisconsin, herein Respondent Union Grove, is a municipal employer; that Lester William Behling, herein Respondent Behling, is Respondent Union Grove's Director of Public Works and functions as its agent.
3. That from August 20, 1975 to December 31, 1975 Complainant served as Director of Public Works for Respondent Union Grove; that effective January 1, 1976 the duties and responsibilities of said position were split between Complainant and Respondent Behling, who had been employed by Respondent Union Grove since April 1, 1965; that their joint tenure was marred by clashes over use of manpower and methods of operation; that on May 11, 1976 Complainant informed James Steinhoff, Respondent Union Grove's Personnel Committee Chairman, that he was resigning from his supervisory position because he was being harrassed and spied upon by Respondent Behling and employes Hanson and Williams; that Respondent Behling denied Complainant's allegations; that Complainant remained as an employe and Respondent Behling became Director of Public Works effective May 11, 1976; that immediately after the meeting with Steinhoff, Complainant and Respondent Behling had an angry discussion during which Complainant called Respondent Behling a "stubby little cock-sucker" who would "screw his own mother to get ahead" and stated that he would do everything he could to prevent Respondent Behling from succeeding in his new position.

4. That on May 12, 1976 Respondent Behling established a personnel file on Complainant and began to record various incidents and discussions which involved Complainant; that on May 13, 1976 Respondent Behling asked Complainant to quit talking about him in the presence of citizens and other employes and that Complainant responded by denying that he was making any such statements; that on or about May 14, 1976 Respondent Behling observed Complainant stop a riding lawnmower by putting it in reverse and asked him not to do it again and that Complainant did not respond; that on or about June 7, 1976 employe Barnhardt told Respondent Behling that Complainant had been criticizing Behling in the presence of other employes and had told Barnhardt that he should not report this to Behling or Complainant would try to see to it that Barnhardt, a CETA employe, lost his job; that Complainant called Barnhardt a liar when confronted by Respondent Behling; that on or about July 2, 1976 employe Williams told Behling that when he and Complainant had been assigned to repair a broken water main, Complainant had completely ignored him and performed all the work; that Behling had assigned Williams to the job to get experience; that when Behling asked Complainant about the situation Complainant responded by indicating that Williams had been employed long enough to know how to repair a water main without being instructed; that on or about July 2, 1976 Respondent Behling asked Complainant if they couldn't discuss the improvement of their relationship and Complainant refused; that on July 7, 1976 Respondent Behling again asked Complainant if they couldn't talk about the problems which were developing and Complainant responded by indicating that after the Williams incident, he wasn't going to talk to anyone; and that after each of these incidents and discussions, Respondent Behling placed a memo recording same in Complainant's personnel file.

5. That in the fall of 1976 a member of Respondent Union Grove's Personnel Committee asked Respondent Behling how long the problems with Complainant were going to continue.

6. That on October 15, 1976 employe Barnhardt asked to be relieved of any assignments with Complainant due to Complainant's lack of cooperation; that on October 22, 1976 Respondent Behling was told by employe Hanson that there was some damage to the street sweeper; that Behling asked Complainant, the prior operator, if he knew anything about the damage and, although Complainant indicated no knowledge, Respondent Behling concluded that Complainant was in fact responsible for the damage; that on November 16, 1976 Complainant told Respondent Behling that he felt that employe Barnhardt was getting preferential treatment vis-a-vis weekend duty; that on or about December 5, 1976 Respondent Behling asked Complainant about his sideswiping a fence with an old van when flushing a hydrant and Complainant subsequently admitted that he had brushed the fence with the van in question; that on December 17, 1976 Respondent Behling initiated another inconclusive discussion with Complainant about his attitude toward work; that on January 3, 1977 Respondent Behling asked Complainant to plow snow with him that evening and Complainant refused because he believed Behling's plowing was taking overtime from the employes; that on January 11, 1977 employes Hanson and Williams complained to Respondent Behling about Complainant's uncooperative work attitude with Hanson stating that if Behling didn't do something about it, he was going to take the matter up with the Personnel Committee; and that after each of these incidents and discussions, Respondent Behling placed a memo recording same in Complainant's personnel file.

7. That on January 12, 1977 employe Hanson's frustrations over working with Complainant erupted as he and the Complainant prepared to pick up garbage; that although unprovoked by any specific action of Complainant, Hanson called Complainant a "son of a bitch" and attempted to push him; that Complainant stopped Hanson by putting his arm across Hanson's upper chest and neck and told him never to call him that again or he would "deck" him; that Respondent Behling then arrived on the scene, separated Complainant and Hanson, and told Complainant that he felt the situation was the result of Complainant's attitude; that

later in the day Respondent Behling gave Complainant a letter which stated:

"Because of your extended poor attitude toward your job and also the people you work with and because it is my feeling that this attitude and behavior is hampering to your own job performance and that of the other men, I hereby give you this warning.

If your behavior and attitude does not change immediately you will be subject to a 3 day suspension without pay."

that Complainant was angered by said letter and told Respondent Behling that he would voluntarily be absent the next three work days in order to cool off; and that Complainant was absent without pay for the next three work days.

8. That during the four or five years preceding Complainant's May 1977 discharge, the employes in the Department of Public Works, including Complainant, had sporadically discussed the possibility of forming a union; that beginning in the summer of 1976 said discussions, in which Complainant was an active participant, became more frequent; that said discussions sometimes occurred during coffee breaks in Respondent Union Grove's garage; that Respondent Behling and Respondent Union Grove's Village Clerk were sometimes present during coffee breaks; that in February 1977 Complainant contacted Attorney James MacDonald to discuss the possibility of organizing a union; that shortly thereafter Complainant arranged for a meeting between MacDonald and the entire Department of Public Works crew, which consisted of Complainant, Gary Hanson, John Williams and Elmer Holtdorf, to discuss the organization of a union; that at said meeting all employes expressed support for the establishment of a labor organization; and that on or about March 16, 1977 MacDonald presented representatives of Respondent Union Grove with the following letter:

"The employees of the Village of Union Grove Department of Public Works, Duane Peterson, John Williams, Elmer Holtdorf, and Gary Hanson, have contacted the undersigned and requested me to assist them in formulating an employees association with an end to obtaining recognition of that association as a bargaining unit with the municipal corporation.

This letter is directed to your attention merely to express the employees' intent to organize and unify, and to bring this intent to your awareness."

9. That on March 1, 1977 Respondent Behling and Complainant discussed what Behling perceived to be Complainant's continued failure to cooperate with or speak to fellow employes; that Complainant indicated that he would not speak unless he absolutely had to because Behling was favoring the younger employes; that Complainant stated that he knew that Behling was trying to fire him and that Behling disputed this by indicating that if he had wanted to fire Complainant, he could have done so long ago; that Respondent Behling told Complainant that the situation was becoming serious; that Complainant responded by indicating that he was doing his job to the best of his ability; and that Respondent Behling recorded this discussion by placing a memo in Complainant's personnel file.

10. That on March 30, 1977 Respondent Behling told Complainant that he had seen an improvement in Complainant's attitude; that Complainant responded by indicating that any change in attitude was not for Behling's benefit; that since approximately January 1, 1977 Complainant and employe Williams had been assigned an increased amount of the less desirable work such as garbage pick up and street patching;

that Behling indicated that he would like to take Complainant off the garbage truck and assign him to operate a new end loader in the landfill site; that Behling had previously not allowed Complainant to operate the end loader; and that Complainant refused the end loader assignment stating that he would rather stay on the garbage truck; that Complainant's decision was primarily based upon a belief that employe Hanson had already damaged the machine; that on April 1, 1977 Respondent Behling was dissatisfied with the manner in which Complainant flushed a hydrant inasmuch as some damage was done to the shoulder of a highway; that when Respondent Behling asked Complainant about the incident Complainant indicated that he didn't care about Behling's concerns; that Respondent Behling responded by telling Complainant that if he didn't "straighten out" soon, he might lose his job; and that Respondent Behling recorded these incidents and discussions by placing a memo in Complainant's personnel file.

11. That on April 15, 1977 Department of Public Works employe John Williams terminated his employment with Respondent Union Grove; and that what Williams perceived to be Complainant's uncooperative attitude toward his fellow employes was one of the factors which contributed to his resignation decision.

12. That on April 20, 1977, Ronald Ferguson became Chairman of Respondent Union Grove's personnel committee; that shortly thereafter Ferguson reviewed all personnel files maintained by Respondent Union Grove; and that after reviewing Complainant's file and several of the numerous memos contained therein, Ferguson told Respondent Behling that there appeared to be a problem with Complainant.

13. That on April 22, 1977 the Wisconsin Employment Relations Commission received a petition from the Union Grove Municipal Employees Association requesting that the Commission conduct an election under the Municipal Employment Relations Act to determine whether certain employes of Respondent Union Grove wished to be represented by said organization for the purposes of collective bargaining; that on May 11, 1977 a representative of the Wisconsin Employment Relations Commission met with representatives of Respondent Union Grove and the Union Grove Municipal Employees Association regarding the election petition; and that during said meeting Complainant, at Attorney MacDonald's request, introduced the employes who were present.

14. That on May 12, 1977 Complainant and a new employe, Steve Thorton, were picking up garbage; that at approximately 11:50 a.m., while Complainant and Thorton were washing their hands prior to lunch, Respondent Behling approached and asked Complainant why it was taking so long to pick up the garbage; Complainant responded by stating that there was a lot of garbage to pick up; that Respondent Behling countered by indicating that it seemed to take Complainant longer than anyone else and that Thorton and Hanson had picked up more garbage on May 10 than Thorton and Complainant had on May 11; that Complainant angrily responded that he was working as hard as he could and that he didn't care what anyone else was doing; that the argument between Complainant and Respondent Behling continued to escalate until it concluded with Respondent Behling firing Complainant; that on May 10, 1977 Thorton and Hanson had been picking up garbage at approximately the same rate as Thorton and Complainant did on May 11, 1977; and that Complainant subsequently received the following letter of termination:

"Mr. Duane Peterson:

This letter is to inform you of the reason or reasons for your being discharged from the employ of the Village of Union Grove. In addition to the incident this morning when you were asked about the length of time required to pick up

a load of trash and you replied "as long as I get three loads a day I'm not doing any more", which reflects an intolerable attitude toward one's job, there are many other incidents on record.

You have received numerous verbal warnings in addition to a written warning and resulting suspension, regarding the same subject etc. poor attitude and its effect on your performance and that of the people working with you, without any visible results.

It is upon these happenings that I based my decision to terminate your employment with the Village of Union Grove, effective May 13, 1977."

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

CONCLUSION OF LAW

That Respondents Union Grove and William F. Behling, by discharging Complainant Duane Peterson, did not commit prohibited practices within the meaning of Sections 111.70(3)(a)1, 2 or 3 of the Municipal Employment Relations Act.

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

ORDER

That the complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 16th day of February, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

In his complaint, filed May 25, 1977, the Complainant alleged that Respondents discharged him because of his efforts to establish a labor organization and thus committed prohibited practices within the meaning of Sections 111.70(3)(a)1, 2 and 3 of MERA. Respondents filed an answer on June 13, 1977, which substantially denied Complainant's allegations and affirmatively asserted that Complainant was discharged because of certain misconduct as an employe.

Initially, it must be noted that the Complainant has the burden of proving the allegedly discriminatory nature of the discharge. To meet this burden with respect to the alleged violation of Section 111.70(3)(a)3 of MERA, Complainant must prove by a clear and satisfactory preponderance of the evidence that Complainant was engaged in concerted activity which is protected by MERA; that Respondents were aware of Complainant's protected concerted activity; that Respondents were hostile toward said activity; and that the discharge was motivated, at least in part, by Respondents' opposition to said activity. 1/

With respect to the question of whether Complainant was engaged in statutorily protected concerted activity, it is clear that Complainant was an active participant in an effort to organize a union which would represent employes in Respondent Union Grove's Department of Public Works. Such activity is at the core of employe rights protected by MERA. Turning to the question of Respondent's knowledge of Complainant's protected concerted activity, the record reveals that on or about March 16, 1977 Respondents received a letter from Attorney MacDonald indicating that certain of Respondent Union Grove's employes, including the Complainant, had contacted him and asked that he aid them in the organization of an "employee association". It is concluded that after the receipt of said letter, Respondent Union Grove and Respondent Behling were aware of Complainant's protected concerted activity on the behalf of an employe organization. Complainant has alleged that Respondents were aware of his protected concerted activity well before the receipt of the March 16, 1977 letter. While the record does reveal that employes, including Complainant, did occasionally discuss the organization of a union during coffee breaks and that Respondent Behling and Respondent Union Grove's Clerk were sometimes present during coffee breaks, there is no substantial basis for concluding that Respondent Behling or other representatives of Respondent Union Grove were present during coffee breaks at which the organization of a union was discussed. Similarly no substantial evidence was presented to support Complainant's belief that employe Hanson was keeping Respondent Behling apprised of such conversations. Thus Complainant's assertion that Respondents' knowledge of his protected concerted activity pre-dated the March 16 letter is rejected.

The evidence with respect to Respondents' hostility toward Complainant's protected concerted activity is limited but highly revealing. During the hearing, Harold Smart, a Village Trustee of Respondent Union Grove for thirteen years, was asked whether employes would discuss the organization of a union and replied in the following manner:

"Well, they would certainly discuss it among themselves.
Now, whether they would bring it out into the open to create

1/ St. Joseph's Hospital (8787-A, B) 10/69; Earl Wetenkamp d/b/a Wetenkamp Transfer and Storage (9781-A, B, C) 3/71, 4/71, 7/71; and A.C. Trucking Co., Inc. (11731-A) 11/73.

problems or jeopardize their jobs, I don't know. I would say that they would remain quiet."

Several minutes later Smart was asked whether the Respondents knew who was leading the organizational effort and he testified in the following manner:

"A Yes. A new fellow was just hired and you couldn't blame a new fellow or say anything to him.

Q Blame?

A That is a bad term.

Q That is one of the most forthright statements that came out.

A I am sorry about that one.

Q I imagine."

This testimony from a Village Trustee requires the conclusion that Respondent Union Grove was hostile toward the organization of a union. It can also reasonably be concluded that this generalized hostility was extended to employes such as the Complainant who were involved in the organization effort. While there is no direct evidence that this hostility was shared by Respondent Behling, it would be unrealistic to conclude that the animus of Respondent Union Grove was not communicated to and shared by Behling who was directly responsible to the Village fathers for the operation of the Department of Public Works. ^{2/} It is therefore concluded that Complainant has met his burden of proof with respect to the issue of Respondents' hostility toward his protected concerted activity.

The final question before the Examiner is whether the record demonstrates, by a clear and satisfactory preponderance of the evidence, that Complainant's discharge was motivated, at least in part, by Respondents' hostility toward Complainant's protected concerted activity on the behalf of the employe association. The record clearly documents that a significant ongoing conflict between Complainant and Respondent Behling existed at least from the January 1, 1976 start of their joint tenure as Director of Public Works until Complainant's discharge. The Complainant argues that at some early point in this conflict Respondent Behling learned of Complainant's protected concerted activity and proceeded to set up a pretextual basis for Complainant's discharge by recording a series of petty incidents involving his conduct as an employe. In light of the undersigned's conclusion that Respondent Behling did not become aware of Complainant's protected activity until March 16, 1977, the major thrust of this theory must be rejected. It should be noted that by March 1977 the rift between Complainant and Respondent Behling was firmly and deeply established. In addition the record does not support a conclusion that, after becoming aware

^{2/} The record does reveal that beginning approximately January 1, 1977, Complainant and employe Williams began to receive a greater share of the less desirable work assignments. Complainant appears to argue that this change reflected Respondent Behling's knowledge of and hostility toward Complainant's protected concerted activity. However, in light of the Examiner's determination that Respondent Behling was not aware of Complainant's activity on behalf of the "employee association" until approximately March 16, 1977, it must be concluded that the change in work assignments was not motivated by knowledge of or animus toward said activity.

of Complainant's activity, Respondent Behling then began to set Complainant up for a pretextual discharge. The quality of their relationship between mid-March 1977 and Complainant's May 12, 1977 discharge appears to have remained consistent with its pre-March 1977 character.

In the alternative, Complainant attempts to meet his burden of proof by focusing upon the timing of the discharge in relation to the election hearing and the allegedly minor incident which triggered the termination. There can be no doubt that the inference of discriminatory discharge is raised when an employe who has supported the organization of a union and who is present at a Wisconsin Employment Relations Commission hearing regarding the election petition filed by said union is terminated the day after said hearing. Some support for this inference can be drawn from the discharge incident which was precipitated by Respondent Behling's inaccurate assertion that Complainant had been slow picking up garbage. However it is the Examiner's conclusion that the strength of this inference is not sufficient to meet Complainant's burden of proof when viewed against the history of Complainant's relationship with Respondent Behling. The record reveals that a significant conflict had existed between these individuals since January 1976. This conflict triggered numerous incidents, some minor and some significant, which involved variations on the constant theme of Complainant's unwillingness to cooperate with Respondent Behling and Behling's resultant willingness to find fault with Complainant's conduct even when no criticism was warranted. It is the undersigned's finding that the Complainant's discharge was the almost inevitable result of the struggle between these two individuals and that the discharge decision on May 12, 1977 was one made in anger after a heated argument had developed over an unwarranted accusation.

It is not the Examiner's function in the instant matter to decide whether the discharge was for "cause" but rather to determine whether the Respondents' animus toward Complainant's protected concerted activity played a part in his dismissal. Having determined that it did not, the Examiner must conclude that Respondents did not commit a prohibited practice within the meaning of Section 111.70(3)(a)3. This determination regarding the lack of a discriminatory basis for Complainant's discharge also requires that the related allegations regarding violations of Section 111.70(3)(a)1 and 2 be dismissed.

Dated at Madison, Wisconsin this 16th day of February, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Peter G. Davis, Examiner