STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RETAIL STORE EMPLOYEES UNION LOCAL 444, Complainant, vs. RADIANT CARPET CLEANERS, INC., Respondent.	Case II No. 21724 Ce-1735 Decision No. 15584-C

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Stanley H. Michelstetter II having, on June 7, 1978 issued his Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled matter, wherein he concluded that the Respondent had committed unfair labor practices within the meaning of Section 111.06(1) of the Wisconsin Employment Peace Act (WEPA) and ordered the Respondent to take certain remedial actions with respect thereto; and the Respondent having on June 27, 1978 filed a petition for Commission review of said decision pursuant to Section 111.07(5), Stats.; and neither party having filed a brief in support of or in opposition to said petition; and the Commission having considered the matter, reviewed the record, and being satisfied that the decision of the Examiner be affirmed;

NOW, THEREFORE, it is

ORDERED

That the Examiner's Findings of Fact, Conclusions of Law and Order in the above-entitled matter be, and the same hereby are, affirmed, and therefore the Respondent, Radiant Carpet Cleaners, Inc., by James Hlavachek, is hereby requested to notify the Wisconsin Employment Relations Commission, within ten (10) days from the date of this Order, as to what steps it has taken to comply with the Order of the Examiner.

Given under our hands and seal at the City of Madison, Wisconsin this 12th day of December, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian, Commissioner

Marshall L. Gratz, Commissioner

RADIANT CARPET CLEANERS, INC., Case II, Decision No. 15584-C

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND:

In their complaint, the Complainants allege that the Respondent discharged employes Ken Cieslewicz, Gary Couillard, Guy Dean Larscheidt, Ron Pollich and Randy Scharhag for reasons which were discriminatory, and also interfered with the rights of said employes to self-organization, to bargain collectively through representatives of their own choosing, and to engage in lawful concerted activities for the purpose of collective bargaining, and that Respondent thereby committed unfair labor practices within the meaning of Sections 111.06(1)(a) and (c)1 of WEPA. The Respondent did not file an answer to the complaint, but claimed on the record, during the hearing, that Couillard was discharged, that Scharhag and Pollich were laid off for reasons unrelated to union activity, and that Cieslewicz and Larscheidt voluntarily quit their employment and therefore were not discharged or induced to resign.

The Examiner found that the five aforementioned employes constituted the entire staff of regular employes in the Respondent's carpet cleaning department, consisting of the classifications of drivers and helpers, and that such department performed distinct functions under distinct locations from that of the Respondent's other employes. He also found that during the latter part of May 1977, the Complainant engaged in an organizational campaign, during which four of the five drivers and helpers employed by the Respondent, executed cards authorizing the Complainant to represent them for purposes of collective bargaining, and that on May 25, 1977 the Complainant thereupon requested the Respondent to recognize it as the bargaining representative of such employes. The Examiner also found that in response to said request, James Hlavachek, Respondent's President, formulated a plan to actively or constructively discharge all employes in the carpet cleaning department, that such plan was motivated by anti-union animus and that, within a few weeks, none of the five employes remained employed by the Respondent. The Examiner explained those findings in his accompanying memorandum as follows:

> "...I conclude that after learning of the letter demanding recognition, Hlavachek adopted a plan to (constructively or directly) discharge or lay off those persons who had attempted to organize with, or aid, Complainant. Thereafter, he communicated this plan to Larscheidt and Pollich in the above-discussed May 27 conversation. Taken with the timing of the terminations, the lack of contemporaneous precipitating circumstances other than union activities, the credited versions of the facts and the record as a whole, I conclude Respondent's, at least, primary motivation for the terminations of Cieslewicz, Pollich, Couillard and Scharhag* was each such employee's union activities. [*Footnote omitted.]
>
> Larscheidt admittedly quit after he learned the other signers, Scharhag, Couillard and Cieslewicz,** had been discharged. On the basis of the above-mentioned May 27 conversation, the discharges and the record as a whole, I conclude Larscheidt properly inferred his unlawfully motivated discharge was imminent. I, therefore, conclude Respondent constructively discharged him for his union activities." [**Footnote omitted.]

Based on these findings, the Examiner concluded that the Respondent violated Section 111.06(1)(a) and (1)(c)1 of the WPEA in its actions

towards Cieslewicz, Couillard, Larscheidt, Pollich and Scharhag by discharging them for the purpose of discouraging their membership in, and their activity on behalf of, Complainant. The Examiner ordered the Respondent to offer said employes reinstatement with full backpay, less interim earnings and benefits received; to notify the Complainant of its willingness to confer with it as exclusive representative of its regular full-time and regular part-time drivers and helpers; and to enter into collective bargaining with the Complainant with respect to wages, hours and working conditions of said drivers and helpers. The Examiner also ordered the Respondent to post notices setting forth the actions which it had been ordered to take and reciting that it would refrain from discouraging its employes from membership in, or activity on behalf of, the Complainant or any other labor organization.

On June 27, 1978, the Respondent filed a petition for review, wherein it requested the Commission to review de novo the Examiner's Findings of Fact, Conclusions of Law, Order and accompanying Memorandum, and to dismiss the complaint in its entirety. Said petition took exception to several of the Findings of Fact, to each of the Conclusions of Law, to the Order, and to several portions of the accompanying Memorandum, contending that they were "clearly erroneous and/or unsupported by any evidence, and/or contrary to the evidence, and/or were determined without a hearing; that they prejudicially affect the rights of the Petitioner;...and that the conduct of the hearing, the preparation of the Findings of Fact, Conclusions of Law and Order involved several prejudicial errors, complained of in the record." The petition also alleged that the Examiner failed to give adequate consideration to the defenses raised by the Respondent, to the evidence supporting such defenses, and to various purported admissions against interest made by individual witnesses on behalf of the Complainant. No briefs were filed with respect to Respondent's petition, either by the Complainant or by Respondent.

RESPONDENT'S ARGUMENTS IN SUPPORT OF ITS PETITION

The Respondent made no additional argument in support of its petition aside from the assertions contained in the petition itself and arguments made on the record during the hearings. Briefly, the Respondent's position is that the five affected employes were terminated, or were laid off, or voluntarily quit, for reasons unrelated to union activity, more particularly as follows:

1. Cieslewicz failed to report for work on June 17, 1977 and in response to a telephone call that day from Mr. Jerry Vines, his field supervisor, stated that he was quitting, Therefore, he was not discharged from employment.

2. Couillard was discharged on May 27, 1977 for inability to perform his work in a satisfactory manner, as evidenced by a large volume of customer complaints received by the Respondent relative to jobs to which Couillard had been assigned. The Respondent additionally testified as to a number of specific errors and omissions committed by Couillard which accounted for his allegedly poor quality of work.

3. Larscheidt voluntarily quit his employment on June 1, 1977 and was not discharged at any time.

4. Pollich was laid off on or about June 11, 1977 for inability to perform his work due to various personal problems, was offered reinstatement in August 1977, which offer he refused, and was not discharged at any time.

5. Scharhag, whom the Respondent contends was merely a "reserve" or intermittent employe, was laid off on or about May 26, 1977 for inability to perform his work satisfactorily and for failure to report his availability for work.

The Respondent also contended that it was not determined to oppose the organizational activity of the carpet cleaning personnel in its employ, and that it had not interrogated its employes as to union activity, or issued any threats against them in an effort to forestall their concerted activity. Hlavachek, Respondent's President, stated that the Complainant's organizational activity was of relatively little concern to him and might even assist him in facilitating the sale of the company to his wife as part of a contemplated settlement of a divorce proceeding in which he was then involved.

COMPLAINANT'S ARGUMENTS IN OPPOSITION TO THE PETITION

The Complainant, in opposing the petition for review, relies upon its position as stated in the pleadings filed in this matter, in the testimony during the hearings and in its brief, filed with the Examiner. Its position is that the record contains ample evidence to establish that:

1. The Respondent discharged, directly or constructively, its entire staff of carpet cleaning employes within a period of a few weeks following the date upon which it first became aware of the Complainant's organizational activity among said employes, and that such activity was the only unusual event occuring at the Respondent during this period.

2. The discharge of said employes was motivated by the Respondent's anti-union animus, which was evidenced by their timing (which serves as a presumption of unlawful motivation) and by various acts and statements made by officials of the Respondent shortly after learning of the Complainant's organizational activity, thus indicating an intention to take action against employes participating in, or supporting, the organization of the Respondent's carpet cleaning department.

3. The Respondent's alleged "legitimate" reasons for discharging or laying off certain of the affected employes merely served as pretexts for their terminations for union activity.

4. Even if certain of the affected employes were performing at a substandard level, such performance had been condoned by the Respondent for a considerable period prior to the commencement of organizational activity without instances of layoffs or discharges having occurred during that period. Therefore, substandard performance could not have served as the true motivation for their terminations.

DISCUSSION

The record amply supports the Examiner's conclusion that the Respondent was motivated by its employes' union activity when it made the decision to terminate them. The Examiner was also correct in concluding that Cieslewicz and Larscheidt were constructively discharged, and that the alleged layoffs of Pollich and Scharhag were tantamount to their discharge.

A review of the record reveals that no major personnel action was contemplated with regard to the Respondent's carpet cleaning employes prior to the Respondent's receipt of the Complainant's letter dated May 25, 1977, demanding recognition as the exclusive bargaining representative of such employes. According to the testimony of Schiebe (Respondent's office manager), and that of employes Pollich and Larscheidt, Hlavachek became quite upset upon learning of the Complainant's organizational drive and determined that he desired to have nothing to do with the Complainant. Hlavachek instructed Schiebe to refuse any further communication with the Complainant, and in fact when the Complainant attempted a subsequent

letter communication with the Respondent dated June 2, 1977, Hlavachek ordered Schiebe to refuse delivery of the letter.

The Examiner properly found that, once he was apprised of union activity, Hlavachek formulated a plan whereby he would replace his entire carpet cleaning department with new personnel in an effort to rid the Respondent of union adherents. The best evidence for the existence of such a plan is its apparent success, as demonstrated by the events of the subsequent few weeks. Within one month of the Respondent's receipt of the Complainant's letter demanding recognition, all of the incumbent carpet cleaning employes were no longer employed, and a new staff had been trained to replace them. Such a high turnover in such a short period of time, in the absence of a history of such turnover 1/ , or of contemporaneous activating circumstances other than that of union activity, provides strong evidence that the terminations at issue were prompted by such activity. 2/

The events of May 26 and 27, 1977, and especially the testimony concerning conversations between Hlavachek and Schiebe, Larscheidt and Pollich on those dates, lend further support to the view that the discharges at issue were unlawfully motivated. 3/ Schiebe testified that Hlavachek told him that he wanted to have nothing to do with the union, that unionization would cost him considerably more money and that the employes had "gone behind his back" in attempting to organize. Further, according to Schiebe, Hlavachek also told him that there had occurred a similar organizational campaign at a similar business, which Hlavachek had previously operated in the Detroit area, that said campaign had been unsuccessful, and that Hlavachek would clearly prefer to see the same result with respect to the campaign at hand. Pollich and Larscheidt confirmed Schiebe's recollection of the events of those two days. Both noted that Hlavachek had been angry and upset over the prospect of unionization of the Respondent's carpet cleaning employes, and that he felt that the employes had "stabbed him in the back." Hlavachek had told them that he had blocked a Teamster organizational drive at his former operation in the Detroit area and that he was not about to be "pushed around" by the Complainant. Hlavachek also interrogated Pollich and Larscheidt as to the extent of their support of, and involvement in, said union activity, their acquaintance with officials of the Complainant, and their knowledge of the identities of those employes who had expressed support for the Complainant, or had executed cards authorizing the Complainant to represent

---

1/ The Respondent failed to adduce any evidence to show that high turnover occured among its carpet cleaning employes in the normal course of business, and in fact the record indicates that prior to May 1977, the rate of resignations and terminations among the Respondent's carpet cleaning employes was rather low.

2/ See e.g., Ramelli Building Maintenance, 224 NLRB No. 107, 93 LRRM 1014 (1976), Wisco Hardware Inc. (2154) 7/49 aff'd Dane Co. Cir. Ct. 12/49

3/ Hlavachek gave a markedly different version of these conversations from that given by Schiebe, Pollich and Larscheidt, in which he denied many of the important elements of the conversations. The Examiner discredited Hlavachek's testimony in this regard. In view of the fact that Schiebe, Pollich and Larscheidt corroborated each other's recollections--even so far as to repeat in virtually identical fashion certain phrases used in these conversations--and that Schiebe did so inspite of the fact that his interests were aligned with those of the Respondent, we share the Examiner's view crediting the version of these conversations as set forth by Schiebe, Pollich and Larscheidt.

them for purposes of collective bargaining. 4/ He informed them of his intention to discharge Couillard. Larscheidt testified that Hlavachek had told him "3 more were going," which implicitly referred to supporters of the Complainant, and must be regarded as a threat to discharge all employes expressing such support. Pollich testified that Vines, field supervisor for the Respondent, had made similar statements indicating Hlavachek's intention to discharge all employes who signed, or would vote for the Complainant, and his own (Vines') willingness to take vigorous actions to oppose organizational activity. It is clear from the record that these conversations took place in an atmosphere designed to coerce and intimidate Pollich and Larscheidt--and indirectly, the Respondent's remaining carpet cleaning employes--with the aim of forestalling their further involvement in protected activity. It is equally clear that Hlavachek communicated to Pollich and Larscheidt, in no uncertain terms, his plan to discharge all union supporters, a plan which he methodically implemented during the ensuing weeks.

We find no merit in Respondent's contention that the five affected employes either voluntarily quit, or were discharged, or laid off for reasons unconnected with union activity. For, no disciplinary action was taken against any employe until after Hlavachek was made aware of the impending organization of the Respondent's carpet cleaning department, and of the identities of the union supporters within that department. The record contains considerable testimony, as well as, documentary evidence as to the purported inability of certain of the affected employes, particularly Pollich and Couillard, to perform their work satisfactorily, but we find that their allegedly substandard performance was not the motivation for their discharge. The basis for the Respondent's claim centered upon the large number of customer complaints received by its office concerning the work performed in the field by these employes. However, the record indicates that customer complaints were not uncommon, that most were easily resolved, and that it had been quite unusual for the Respondent to discharge or lay off a carpet cleaning employe as a result of such complaints. Even if certain of its employes had been performing poorly, the Respondent had tolerated such poor performance for a considerable period of time prior to their having been discharged and discharged them only after learning of their activity on behalf of the Complainant. 5/ Hlavachek stated at one point that Scharhag was discharged for having been an "unsatisfactory employe" but did not substantiate this claim, and in light of testimony as to Scharhag's union activity, we find that such activity constituted the motivation for his discharge.

We also agree with the Examiner that Cieslewicz and Larscheidt did not voluntarily quit their employment, but rather were constructively discharged. The Respondent switched Cieslewicz from a regular to an intermittent and unpredictable schedule in response to having been informed of Cieslewicz's activity on behalf of the Complainant. We conclude that such was designed to induce Cieslewicz to quit, an effort which eventually proved successful. Larscheidt failed to report for work on June 1, 1977 for the reason that he

---

4/ Interrogation by employers concerning their union activity has in itself been held to constitute interference with the right of self-organization and a violation of Section 111.06(1)(a) Stats. Tony's Pizza Pit (8405-A, B) 10/68, aff'd Dane Co. Cir. Ct. 7/70, Merrill Motor Service (10844-A, B) 12/72.

5/ A discharge for alleged poor work performance or misconduct has been held unlawful where the employer previously tolerated the misconduct or poor performance and subsequently discharged the employe only after learning of his or her union activity. Graceland Cemetery (11607) 2/73, Western Exterminators 223 NLRB No. 81, 92 LRRM (1976), Houston Distribution Services Inc. 227 NLRB No. 152, 95 LRRM 1100 (1977)

supposed himself to be slated for imminent discharge as a result of his protected activity. Based upon the facts that Larscheidt knew that Couillard and Scharhag had been discharged, and that Cieslewicz had been laid off, and that he had been present at the conversations during which Hlavachek had threatened union adherents with discharge, we find that Larscheidt's expectation of discharge was well-founded.

It has been repeatedly held that an employe may not be lawfully discharged when one of the motivating factors is his or her protected activities regardless of how many other valid reasons exist for upholding the discharge. Thus, if the Complainant was able to prove by a clear and satisfactory preponderance of the evidence that the discharge of the five employes at issue was at least partially motivated by the Respondent's anti-union animus, those discharges must be held unlawful. 6/ The record indicates that the Complainant has amply sustained its burden of proof.

The Respondent's remaining allegations as set forth in its petition for review are not supported by the record.

Vines, as Respondent's field supervisor, clearly possessed supervisory authority over the carpet cleaning department, and was relied upon to a great extent by Hlavachek with regard to personnel matters, including employe discipline.

Clearly, a distinction existed between the carpet cleaning employes and the Respondent's other employes that is sufficient to support the Examiner's conclusion that the carpet cleaning employes constituted a separate department, and therefore, a separate and appropriate unit under Sec. 111.05 of WEPA. Carpet cleaning employes worked in the field, rather than on the Respondent's premises, performed a series of cleaning jobs each day, were not under close supervision while in the field, and on occasion worked irregular and longer hours, which differed from the conditions under which the Respondent's office staff worked. Their tasks differed markedly from those performed by the office staff, and drivers were paid partly on a commission basis which contrasted with the straight salary paid to office employes. In fact, at one point, Hlavachek testified that the carpet cleaning employes constituted a separate department. As a separate department, the carpet cleaning employes would have been given the opportunity, upon request, to determine whether such department would constitute the appropriate unit. As noted below, however, Respondent's conduct made the conduct of such vote quite unlikely to be a fair and impartial measure of employe sentiment.

We hold without merit the Respondent's exception to the Examiner's finding that on May 26, 1977 Hlavachek learned the contents of the Complainant's letter requesting recognition and that the Respondent shortly thereafter became aware of the identity of those of its employes who had executed authorization cards on behalf of the Complainant. The record indicates that on May 26, Schiebe read the Complainant's demand letter to Hlavachek over the telephone and on Hlavachek's instructions left

6/ Muskego-Norway Consol. Jt. Sch. Dist. No. 9 v. W.E.R.B. 35 Wis. 2d 540, 151 N.W. 2d 617 (1967), Century Bldg. Co. v. W.E.R.B. 235 Wis. 376, 291 N.W. 305 (1940), Harry Viner Inc. (13828-A) 4/76, St. Joseph Hospital (8181-A, B) 10/69, Earl Wetenkamp d/b/a Wetenkamp Transfer & Storage (2781-A, B, C) 3/71, 4/71, 5/71, N.L.R.B. v. Eagle Material Handling Inc. 95 LRRM 2935 (3 Cir., 1977), Wonder State Mfg. Co. v. N.L.R.B. 331 F.2d 737 (6 Cir., 1964), N.L.R.B. v. Symons Mfg. Co. 328 F.2d 835 (7 Cir., 1964), N.L.R.B. v. Great Eastern Color Lith. Corp. 309 F.2d 352 (2 Cir., 1962).

the letter on his desk. Hlavachek took a great interest in the names of the card-signers and questioned both Pollich and Larscheidt on this point. Both Pollich and Larscheidt told Hlavachek that Cieslewicz, Couillard, Larscheidt and Scharhag had signed authorization cards. The record supports the conclusion that Hlavachek was quite agitated over the possibilty that the employes would select the Complainant as their bargaining representative, and that he was determined to vigorously oppose such organization. The Examiner's conclusion that Hlavachek was unable to explain the reason he believed unionization would assist him in the pending divorce settlement with his wife is also supported by the record.

There is no error in the Examiner's failure to grant the Respondent's motion to dismiss the allegations of the complaint as to Cieslewicz and Scharhag. Sufficient evidence was adduced to support a finding that both employes were unlawfully discharged for union activity, even in the absence of their direct testimony. We note particularly that both employes executed authorization cards, and that the record established that Scharhag initiated the Complainant's organizational campaign, served as the point of contact between his fellow employes and the Complainant's representatives and in large measure, carried it through to its conclusion. The Respondent has failed to produce any persuasive evidence to contradict the evidence demonstrating that the discharges of Cieslewicz and Scharhag were unlawfully motivated.

We hold that the remedy as set forth in the Examiner's Order will properly serve to effectuate the purposes of the Wisconsin Employment Peace Act. The record is clear that a majority of the carpet cleaning employes (constituting a separate department) desired to be represented by the Complainant for the purposes of collective bargaining; that the Complainant advised the Respondent of its claim of majority status; and that the Complainant made a demand upon the Respondent to bargain. Since the Respondent's conduct, in response to the Complainant's organizational campaign created an atmosphere wherein it would be extremely unlikely that either a fair unit determination or a fair representation vote could be conducted, we deem the Examiner's bargaining order to be appropriate.

The petition for review also challenges the Examiner's Finding of Fact No. 2, specifically, "that Respondent operates a carpet cleaning business with offices located at 11935 West Blue Mound Road, Milwaukee, Wisconsin." In that regard the Respondent claims, and offers to prove, that Respondent "no longer operates" same. However, that assertion, if true, would not affect the validity of the finding of fact involved, since the Examiner's decision is based on facts which occurred while the Respondent was in business. If Respondent has ceased business, such fact is material, if at all, only in establishing the nature of the compliance required under the Examiner's order as affirmed herein.

Based on the above and foregoing, we affirm the Examiner's decision in its entirety.

Given under our hands and seal at the City of Madison, Wisconsin this 12th day of December, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian, Commissioner

Marshall L. Gratz
Marshall L. Gratz, Commissioner