

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROOFERS LOCAL NO. 212, UNITED SLATE,
TILE AND COMPOSITION DAMP AND
WATERPROOF WORKERS ASSOCIATION,
APL-CIO and JOHN MEZERA,

Complainants,

vs.

TILSEN ROOFING COMPANY, INC.,

Respondent.

Case II
No. 23284 Ce-1782
Decision No. 16473-B

ORDER REVISING EXAMINER'S FINDINGS OF FACT,
AFFIRMING CONCLUSION OF LAW AND ORDER

Examiner Douglas V. Knudson, on March 29, 1979, issued Findings of Fact, Conclusion of Law and Order, with Accompanying Memorandum in the above-entitled matter, wherein said Examiner concluded that the above-named Employer did not violate the collective bargaining agreement when it laid off, but did not recall Complainant Mezera, and therefore, did not commit an unfair labor practice in violation of Section 111.06(1)(f) ^{1/} of the Wisconsin Employment Peace Act, and wherein the Examiner ordered the complaint be dismissed; and thereafter said Complainants having timely filed a Petition with the Wisconsin Employment Relations Commission requesting that the Commission review the Examiner's decision pursuant to Section 111.07(5) of the Wisconsin Employment Peace Act; ^{2/} and the Commission having reviewed the evidence and arguments presented before the Examiner, the Examiner's decision and the Petition for Review, makes and issues the following:

ORDER

IT IS HEREBY ORDERED:

A. That the Examiner's Finding of Fact No. 5 is hereby modified to read as follows:

5. The Contract does not contain a provision to provide for the accumulation of seniority, or a procedure for the layoff of employes or a provision for the recall of laid off employes.

^{1/} The Examiner, as well as the Complainants in their complaint, incorrectly referred to sec. 111.06(f) instead of sec. 111.06(1)(f).

^{2/} On June 26, 1979, the Complainants and Respondent were notified that since the Complainants had not elected to file a brief in support of the Petition, the Commission would review the record on the basis of evidence and arguments of record, since the Respondent had previously indicated that it did not desire to file any additional argument if the Complainants elected not to do so.

B. That the Examiner's Finding of Fact No. 6 is hereby modified to read as follows:

6. Article 17 of the contract, which contains a just cause standard for discharge, did not apply to Respondent's layoff of Mezera or Respondent's failure to recall Mezera from layoff in March, 1978.

C. That the Examiner's Finding of Fact No. 7 is hereby modified to read as follows:

7. An employe has no contractual recall rights. Therefore, a layoff, without subsequent recall, is not a discharge within the context of the contractual just cause for discharge provision.

D. That the Examiner's Finding of Fact No. 8 is hereby modified to read as follows:

8. Mezera's layoff in January, 1978 resulted from the seasonal lack of work customarily experienced by Respondent

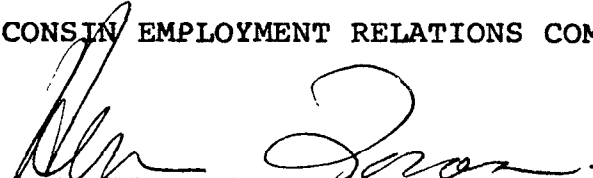
E. That the Examiner's Findings of Fact Nos. 1, 2, 3, 4 and 9 are hereby affirmed.

F. That the Examiner's Conclusion of Law and Order are hereby affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 2nd day of November, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BY



Herman Torosian, Commissioner



Gary L. Covelli, Commissioner

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

In its complaint initiating the instant proceeding, the Union alleged that the Employer, in March 1978, committed an unfair labor practice in violation of sec. 111.06(1)(f) of the Wisconsin Employment Peace Act by violating the parties' collective bargaining agreement by not recalling Mezera who had been laid off in January, 1978. The Union further alleged that the Employer's true motivation in not recalling Mezera was his Union activity.

THE EXAMINER'S DECISION:

In his decision the Examiner concluded that since the collective bargaining agreement did not have a recall provision, the layoff of Mezera was the equivalent of a discharge and therefore subject to the contractual standard of just cause; that Mezera's layoff resulted from the seasonal lack of work and was therefore for just cause; and that the Respondent was not motivated by anti-Union animus in laying off Mezera.

THE PETITION FOR REVIEW:

In support of its Petition for Review, the Union relies on its arguments advanced before the Examiner. The Union claims that the reasons given by the Employer for not recalling Mezera do not constitute just cause for discharge and that the Employer's real reason for not recalling Mezera was Mezera's activities as a Union steward. The Union contends that the Employer's actions in this regard constitute a violation of Articles VIII and XVII of the agreement, and therefore a violation of sec. 111.06(1)(f) of the Wisconsin Employment Peace Act.

The Employer did not file a brief on review. In its brief filed with the Examiner the Employer argued that Mezera was laid off and not discharged, as alleged by the Union; that pursuant to the collective bargaining agreement, Mezera had no recall rights; and that there is no evidence in the record of any anti-Union animus on the part of the Employer.

DISCUSSION:

We have affirmed the Examiner's Conclusion of Law, but have modified his Findings of Fact to reflect the Commission's findings that Mezera's layoff was not the equivalent to a discharge. Accordingly, the Examiner's Memorandum Accompanying the Findings of Fact, Conclusion of Law and Order is modified consistent with the following discussion.

The determinative issue is whether the just cause for discharge provision of the agreement applies to the layoff and recall of employees. The Examiner found that since an employee has no contractual recall rights, a layoff is tantamount to a discharge. We disagree.

Here, it is undisputed that Mezera was not discharged but was laid off due to seasonal lack of work. Whatever rights Mezera had, once laid off, were rights provided by the collective bargaining agreement. In this regard, the agreement only states that employees, immediately after being laid off, were required to report their availability for employment to the Union so they can be referred to other roofing contractors. While the parties in negotiating the current agreement recognized the possibility of layoff, they, nonetheless, did not negotiate a layoff procedure or a recall provision protecting employees on layoff status. Thus, Mezera, once properly laid off had no contractual right to recall.

Under such circumstances where the Employer has the right to layoff employes and no contractual obligation to recall laid off employes, the Commission cannot reasonably conclude that the Employer's decision to layoff or its refusal to recall Mezera in March of 1978 constituted a constructive discharge as argued by the Union. To conclude otherwise and apply the discharge for just cause provision to layoffs and recalls would in essence add to the agreement a recall right requirement when no such right was negotiated by the parties. Such an interpretation would, in our view, be particularly inappropriate in the construction industry, where the absence of job security in the form of layoff or recall by seniority is relatively commonplace. When considering the absence of a recall provision in the context of the construction industry, it seems abundantly clear to the Commission that had the parties intended to deviate from the normal construction practice, they would have specifically and clearly provided same by incorporating a recall rights provision.

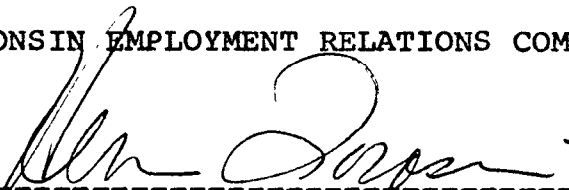
In conclusion, the Commission finds that the just cause for discharge provision was intended and only applies to the typical discharge situation where an employe is discharged for misconduct and cannot be reasonably extended to apply to the layoff and recall of employes. The Employer, of course, cannot disguise a discharge by laying off an employe. This, however, is clearly not the case here. Here, the record establishes, as found by the Examiner, that Mezera's layoff was due to seasonal lack of work.

The Commission therefore concludes that since the layoff of Mezera was proper, he had no contractual right to recall and that the Employer's refusal to recall Mezera in March, 1978 does not constitute a discharge within the context of the just cause for discharge provision of the collective bargaining agreement.

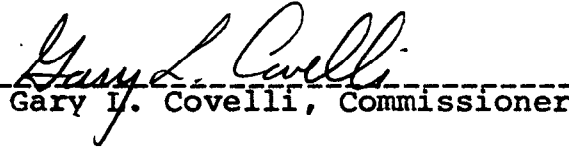
Dated at Madison, Wisconsin this 2nd day of November, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By



Herman Torosian, Commissioner



Gary I. Covelli, Commissioner