STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES EMPLOYEES UNION, LOCAL 2228, AFSCME, AFL-CIO, Complainant, vs. WINNEBAGO COUNTY (DEPARTMENT OF SOCIAL SERVICES), Respondent.	Case LXXXIV No. 24309 MP-960 Decision No. 16930-A

Appearances:
Ms. Lenore J. Hamrick, Business Representative, WCCME, AFSCME, AFL-CIO, for the Complainant.
Mr. Gerald L. Engeldinger, Corporation Counsel, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above named Complainant having filed a complaint with the Wisconsin Employment Relations Commission on March 20, 1979 alleging that the above named Respondent had committed certain prohibited practices within the meaning of Sections 111.70(3)(a)1, 2, and 3 of the Municiapl Employment Relations Act (MERA); and the Commission having appointed Peter G. Davis, a member of the 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), Stats.; and hearing on said complaint having been held before the Examiner in Oshkosh, Wisconsin on May 14, 1979; and the parties having filed briefs until June 11, 1979; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Winnebago County Department of Social Services Employees Union, Local 2228, AFSCME, AFL-CIO, herein Complainant, is a labor organization which functions as the exclusive collective bargaining representative of "all those professional and non-professional employees of the Winnebago County Health and Social Services Department."

2. That Winnebago County (Department of Social Services), herein Respondent, is a municipal employer.

3. That commencing in 1975, Respondent began to employ individuals under the Comprehensive Employment and Training Act, herein CETA, pursuant to a subcontracting arrangement with the United States Department of Labor under which certain positions within the Department of Social Services were federally funded.

4. That the parties' 1978-1979 collective bargaining agreement contained a fair share clause obligating the Respondent to deduct from the monthly earnings of all employes in the bargaining unit an amount equal to the monthly dues paid by members of Complainant; that on November 5, 1979, pursuant to the terms of the 1978-1979 agreement, Complainant grieved Respondent's failure to to make fair share deductions for certain CETA employes; that on November 16, 1978 Res-

pondent's Director of Personnel, Gerald E. Lang, made the following response to the grievance:

> On November 5, 1978, a grievance was filed in the Personnel Office at the third step of the grievance procedure.
>
> A review of the statement of grievance indicates that Local 2228, the Union, is filing the grievance. The grievance procedure in the current labor agreement is a procedure for employee grievance and is not grievance machinery that is open to groups or to all complaints, and therefore I am denying the grievance on that basis.
>
> In response to the question of why aren't union dues being deducted from Elsie Bartels, Pam Rich, and Terry Spanbauer; the only employee in the collective bargaining unit, of the three, is Terry Spanbauer, who began her duties as a Clerk I on October 2, 1978. She will have dues deducted six months from that date.
>
> As you know, the three people referred to are or have been under the C.E.T.A. Program in temporary capacities and not a part of the permanent Table of Organization. While they receive similar base pay as regular employees, they do not receive Social Security and Wisconsin Retirement Fund benefits, have no job status, no job posting status, no right to grieve, and if hired as a permanent employee must serve a probationary period. We have been involved with the C.E.T.A. Program for several years and have never had C.E.T.A. employes pay union dues. If it came to pass that C.E.T.A. employees were forced to pay union dues, the County would seriously consider no longer participating in the C.E.T.A. Program.
>
> If you have further questions on this subject, please contact me.

that on November 21, 1978, Complainant's Business Representative, Lenore J. Hamrick, sent Lang the following statement:

> Your Step 3 response to the above-named grievance was received November 17, 1978.
>
> This response states that the grievance has been denied on procedural grounds. Local 2228 takes issue with your statement that the grievance procedure does not allow for group grievances or all complaints. However, this is not the basis of the grievance nor is it the heart of the dispute at hand. Therefore, the Union will not proceed in this area until such time as it has or may have a direct impact on the resolution of a grievance dispute. Also, be advised that the Union's lack of further challenge to this statement at this time should not be construed as a mutual understanding or agreement as to the proper interpretation of the usage of the grievance machinery.
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> Clearly, the issue at hand is recognition and status of CETA employees. Also clear from your letter is the fact that the Employer recognizes the necessity of deducting Union dues from employees who have been covered by the

labor agreement for six (6) months or longer. Therefore, it is apparent that if the Employer recognized CETA employees as included in the bargaining unit represented by Local 2228, AFSCME, AFL-CIO there would be no dispute over the question of union dues deduction.

Since this issue involves recognition rather than application of the fair share provision the Union is hereby withdrawing this grievance and will make a decision at its next regular membership meeting regarding the filing of a petition to clarify to existing bargaining unit to include CETA employees. It is anticipated that such decision will be in the affirmative.

As you are well-aware, several decisions have been issued by the Wisconsin Employment Relations Commission in which the Commission has ruled that it in (sic) the nature of the work being performed, not the source of funding for a position which determines inclusion of a position in a bargaining unit. Kenosha VTAE District (14381) 3/1/76, City of Beloit (15112) 12/29/76, City of St. Francis (7825-A) 6/14/77, City of Platteville (Police Dept.) (15535) 5/27/77, and City of Appleton (14503) 4/12/76 are examples of cases where the Commission has made this determination.

Based upon the clear policy established by the Commission on this issue, the Union requests the Employer to voluntarily recognize the inclusion of CETA and other state or federally funded employees as a means of avoiding the unnecessary time and expense of a hearing.

Should such voluntary recognition not be forthcoming, you may anticipate the filing of a clarification petition shortly after December 20, 1978.

4. That on February 7, 1979 Complainant filed two Petitions for Clarification of Bargaining Unit with the Wisconsin Employment Relations Commission requesting the inclusion of certain CETA positions in its Department of Social Services professional and non-professional bargaining units; that the CETA positions in question included the Clerk Typist I position held by Verna Tomaschefski, the Social Worker I position held by Jo Anne Juettner, the Case Aide I, Job Counselor position held by Betty Welton, and the Clerk I position held by Pearl Novotney; that the CETA funding of said positions was to expire March 31, 1979; and that by a Notice of Hearing dated February 19, 1979, Douglas V. Knudson, a member of the Commission's staff, scheduled a hearing on the petitions for March 14, 1979.

5. That on or about March 1, 1979 the individuals administering the CETA program in the Winnebago County, Wisconsin area learned that funding extensions of 6 months were available for certain CETA positions including those in Respondent's Department of Social Services; that shortly thereafter Respondent became aware of the availability of the funding extension; that on March 8, 1979 Tomaschefski, Juettner, Welton and Novotney were informed by representatives of Respondent that the Personnel and Finance Committee of Respondent's Board of Supervisors had voted to eliminate their positions effective March 31, 1979 because Respondent did not want said positions to be potentially included in the bargaining units represented by Complainant as a result of Complainant's Petitions for Clarification of Bargaining Unit and thus to be covered by

the job posting and layoff/recall provisions of the labor agreement between Complainant and Respondent; that the minutes of the March 13, 1979 meeting of the Personnel and Finance Committee of Respondent's Board of Supervisors contain the following entry:

> EXTENSION OF CETA POSITIONS - The Personnel and Finance Committee requests that all CETA positions in Winnebago County be reviewed by the committee of jurisdiction prior to continuation beyond March, 1979. These recommendations should be passed on to the Personnel & Finance Committee.
>
> A motion was made by Terri Aarons to eliminate the 5 CETA positions in the Social Services Department effective March 31, 1979. The Social Services Union has petitioned the W.E.R.C. to include these positions in the bargaining unit. The Personnel & Finance Committee has determined that it is not in the best interest of the County to have CETA positions in a union setting. Seconded. Carried 4-0.

6. That on March 19, 1979 Tomaschefski terminated her employment with Respondent because of the pending elimination of her position; that Juettner continued her employment with Respondent under CETA until the March 31, 1979 elimination of her position at which time she became employed by Respondent as a Social Worker I on a six month limited term basis; that Welton's employment by Respondent ended with the March 31, 1979 elimination of her position; and that Novotney voluntarily terminated her employment with Respondent sometime after March 8, 1979 for reasons unrelated to the pending elimination of her position.

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

CONCLUSIONS OF LAW

1. That Respondent Winnebago County (Department of Social Services) by its March 1979 termination of the CETA positions held by Welton, Novotney, Juettner and Tomaschefski, interferred with employes in the exercise of their right to engage in concerted activity protected by Section 111.70(2), Stats.; and thus committed prohibited practices within the meaning of Section 111.70(3)(a)1, Stats.

2. That Respondent Winnebago County (Department of Social Services), by its March 1979 termination of the CETA positions held by Welton, Novotney, Juettner and Tomaschefski, did not initiate, create, dominate or interfere with the formation or administration of any labor or employee organization and thus did not commit a prohibited practice within the meaning of Section 111.70(3)(a)2, Stats.

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of their rights under Section 111.70(2), Stats.

2. Take the following affirmative action which the Examiner finds appropriate under the Municipal Employment Relations Act:

(a) Immediately offer to reinstate Verna Tomaschefski, Jo Anne Juettner and Betty Welton to their former or substantially equivalent positions without prejudice to any benefits, rights or privileges previously enjoyed and make each of them whole for any loss of pay or benefits suffered by paying them a sum of money equal to that which but for their termination they would have earned from the date they left Respondent's employ to the date of said proffer, less any amount of money they earned or received which they would not have earned or received had their positions not been terminated. If any of the three employes received unemployment compensation benefits from the date they left Respondent's employ to the date reinstatement is offered, Respondent shall reimburse the Unemployment Compensation Division of the Wisconsin Department of Industry, Labor and Human Relation in such amount.

(b) Should the proffer of reinstatement be accepted by any of the foregoing individuals, Respondent shall employ said individuals for the same period and under the same terms and conditions as would be applicable to them if they were under the CETA program.

IT IS FURTHER ORDERED that all remaining portions of the complaint shall be, and hereby are, dismissed.

Dated at Madison, Wisconsin this 30th day of August, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Peter G. Davis, Examiner

WINNEBAGO COUNTY (DEPARTMENT OF SOCIAL SERVICES), Case LXXXIV, Decision No. 16930-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The record clearly reveals that Respondent eliminated four CETA positions to insure that said positions could not be placed within the confines of Complainant's bargaining unit via a Commission unit clarification proceeding. Complainant alleges and Respondent denies that said action violated Section 111.70(3)(a)1, 2 and 3, Stats.

INTERFERENCE

Section 111.70(2), Stats., states:

> RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Section 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer "to interefere with, restrain or coerce" municipal employes in the exercise of the foregoing rights. It is noteworthy that an employer need not intend to interfere with protected rights for a violation of Section 111.70(3)(a)1, Stats., to occur. Nor is it necessary that the employer conduct actually interfere or coerce employes. Rather the question raised when interference is alleged is whether the employer's conduct had a reasonable tendency to interfere with employe rights protected by Section 111.70(2), Stats. 1/

Turning to the application of the foregoing principles to the instant dispute, there can be no doubt that one of the rights protected by Section 111.70(2), Stats., is the ability of municipal employes to pursue the expansion and/or clarification of their bargaining unit through the procedures of the Wisconsin Employment Relations Commission. When the Respondent attempted to render the exercise of this right a nullity by simply eliminating the disputed CETA positions, it engaged in conduct which at the very least had a "reasonable tendency" to interfere with bargaining unit employes' exercise of this Section 111.70(2) right. Clearly employes would "tend" to be less likely to engage in such protected concerted activity if it could result in loss of employment for four individuals. Thus the Examiner must find Respondent's action to be violative of Section 111.70(3)(a)1, Stats.

A second finding of illegal interference is warranted by the Respondent's action. Although the CETA employes' bargaining unit status is as yet unresolved, they are clearly "municipal employes" within the meaning of Section 111.70(1)(b), Stats., and as such enjoy the protection afforded by Section 111.70(3)(a)1, Stats. Although the CETA employes did not themselves engage in any protected concerted activity, it is concluded that their awareness of the linkage of unit members protected concerted activity with

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1/ Juneau County 12593-B (1/77); Racine Unified School District No. 1 15915-B (12/77).

their loss of employment had a reasonable tendency to make said employes less likely to engage concerted activity protected by Section 111.70(2), Stats., and thus it is found that Respondent's action constituted interference with said employes' rights in violation of Section 111.70(3)(a)1, Stats.

DOMINATION

Section 111.70(3)(a)2, Stats., states that "It is a prohibited practice for a municipal employer individually or in concert with others to initiate, create, dominate, or interfere with the formation or administration of any labor or employe organization or to contribute financial support to it...." The undersigned is persuaded that the foregoing statutory provision is aimed at prohibiting varying degrees of employer aid to a labor organization which might tend to render said organization a mere tool of the employer and thus threated the independence of the organization as the representative of employes' interests. 2/ Inasmuch as the Respondent's conduct herein, while violative of Section 111.70(3)(a)1, does not represent an attempt by Respondent to dominate Complainant or threaten its independence as an employe representative, no violation of Section 111.70(3)(a)2 has been found.

DISCRIMINATION

Section 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer "To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment;..." Conventional analysis regarding alleged violations of the foregoing provision revolves around the question of whether the employer's animus toward an employe's protected concerted activity motivated it to take discriminatory action against such employe. 3/ Such an analysis is not readily applicable to the instant dispute inasmuch as the record does not reveal that the CETA employes who lost their jobs engaged in any protected concerted activity or that the Respondent acted in a mistaken belief that they had engaged in such activity. Thus one is left with the somewhat unique situation of having the employes who engaged in the concerted activity of filing a unit clarification petition not being the recipients of the adverse consequences which flowed therefrom. 4/ Nevertheless, the undersigned is persuated that a finding of discrimination is warranted if it is shown that the municipal employer's action was motivated by a purpose to chill the exercise of protected rights among the remaining unit employes and if the employer may reasonably have foreseen that its elimination of positions will likely have that effect. 5/ Examination of the instant record leads the undersigned to conclude that the Respondent's

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2/ Racine Unified School District No. 1, supra.

3/ Juneau County, supra.

4/ The undersigned has concluded that this rare situation also renders a Great Dane Trailer analysis inapposite. See NLRB v. Great Dane Trailer Inc. 388 U.S. 26, 65 LRRM 2465 (1967); Fennimore Joint School District No. 5, 14305-B (12/78).

5/ Textile Workers v. Darlington Mfg. Co. 380 US 263, 58 LRRM 2657 (1965).

decision to eliminate the CETA positions was not motivated by a desire to chill the exercise of 111.70(2) rights among remaining employes. Rather, the Respondent, as evidenced by its statements during the March 8 meeting, appears to have acted upon concern over what it perceived to be the adverse consequences of having CETA employes subject to the job posting and layoff/recall provisions of the bargaining agreement. Thus no violation of Section 111.70(3)(a)3. has been found.

REMEDY

It has been concluded that a make whole remedy for Respondent's 111.70(3)(a)1 violations is appropriate and thus Respondent has been ordered to proffer immediate reinstatement to Tomaschefski, Juetther and Welton 6/ and to make them whole for any monetary losses suffered from the date on which they left Respondent's employ to the date that they accept or reject the offer of reinstatement. However, inasmuch as the purpose of a make whole remedy is to restore the individual to the status they would have been in had their position not been eliminated, the terms of their employment, like the terms of their "pre-elimination" employment, are subject to existing CETA regulations even though Respondent may be unable to place the individuals back in the CETA program and thus acquire CETA funding to cover the expense of employment. Thus, although it is the Examiner's intent that Respondent's make whole and reinstatement liability should stretch at least until the expiration of the six month funding extension which the record reveals was available to Respondent, it is possible that CETA regulations, including those which may limit the period of an individual's employment under CETA or the amount a CETA employe may earn may extinguish or modify the Respondent's make whole and reinstatement obligation prior to the expiration of the 6 month period. Respondent may legitimately consider said regulations when complying with this decision inasmuch as the CETA regulations would have been operative vis-a-vis the three individuals if Respondent had not eliminated their positions on March 31. However, it should be clear, as noted above, that Respondent possesses the actual financial liability for compliance herewith irrespective of whether or not it is able to actually place the individuals back in the CETA program.

Dated at Madison, Wisconsin this 30th day of August, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Peter G. Davis, Examiner