STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ERVIN KAPALCZYNSKI,

Complainant,

: Case I

vs.

No. 25584 MP-1067 Decision No. 17570-A

TOWN OF STEPHENSON, ALVIN TONN, CHAIRMAN,

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:

Respondent.

Appearances:

Mr. Ervin Kapalczynski, and Mr. Jerry Kapalczynski, for the Complainant.

Mr. David J. Herrick, Attorney at Law, for the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above named Complainant having filed a complaint with the Wisconsin Employment Relations Commission on January 9, 1980 alleging that the above named Respondent had committed certain prohibited practices within the meaning 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), Stats.; and hearing on said complaint having been held before the Examiner in Crivitz, Wisconsin, on March 5, 1980; and a transcript of said hearing having been received by the Examiner on March 31, 1980; and the parties having elected not to file briefs; and the Examiner having considered the evidence and the arguments of the parties, makes the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

- 1. Ervin Kapalczynski, herein Complainant, began working for the Town of Stephenson as a public works employe on July 16, 1979. He was hired with the understanding that he would serve a six months probationary period with a wage rate of \$4.35 per hour for the first three months of employment, \$4.63 for the second three months, and \$4.89 thereafter. Prior to his employment with the Town of Stephenson, Complainant had worked in Milwaukee as a heavy equipment operator at a wage rate of at least \$10.29 per hour. Complainant left his Milwaukee employment and moved to the Town of Stephenson because he wished to spend more time with his family and wanted to move them away from an undesirable urban environment.
- 2. Town of Stephenson, herein Respondent, is a municipal employer located in Marinette County, Wisconsin. Alvin Tonn is chairman of Respondent's Board of Supervisors.
- 3. On or about September 1, 1979, Complainant unsuccessfully sought a wage increase from Respondent. Complainant's request for said increase was based upon his feeling, as well as that of his fellow employes, that the skills which he had exhibited while operating some road building equipment warranted a wage adjustment.
- 4. In mid-October, 1979, Complainant and several of his fellow employes met with Respondent's Board of Supervisors to discuss the

employes' interest in receiving a general wage increase. On or about October 29, 1979, Complainant appeared alone before Respondent's Board of Supervisors as the representative of his fellow employes to present their collective views on the subject of a general wage increase.

- 5. On November 15, 1979, Respondent informed Complainant that it was discharging him effective November 16, 1979. When Complainant asked the reason for his discharge, he was informed by representatives of Respondent that he had been discharged because he was "negotiating wages."
- 6. Respondent's decision to discharge Complainant was based, at least in part, upon Complainant's having acted as the representative of his fellow employes during the October 29, 1979 meeting with Respondent's Board of Supervisors.

Based upon the foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

Respondent Town of Stephenson, by discharging Complainant Ervin Kapalczynski in part for his exercise of his right under Section 111.70(2), Stats. to engage in lawful concerted activity for the purpose of collective bargaining or other mutual aid or protection, committed prohibited practices within the meaning of Section 111.70(3)(a)1 and 3, Stats.

Based upon the foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

IT IS ORDERED that Respondent Town of Stephenson, its officers and agents, shall immediately:

- 1. Cease and desist from:
 - (a) Discharging or otherwise discriminating against any employes with regard to their terms and conditions of employment because of an employe's exercise of rights guaranteed by the Municipal Employment Relations Act.
 - (b) In any other manner interfering with, restraining or coercing employes in the exercise of rights guaranteed by the Municipal Employment Relations Act.
- 2. Take the following affirmative action which the undersigned finds will effectuate the purposes of the Municipal Employment Relations Act.
 - (a) Immediately offer to reinstate Ervin Kapalczynski to his former or a substantially equivalent position and make him whole by paying him a sum of money equal to that which he would have earned between the date of his discharge and the date of the proffer of reinstatement, less any amount of money that he earned or received during said period which, but for the discharge, he would not otherwise have earned or received.

Dated at Madison, Wisconsin this 30th day of April, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By M

Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Resolution of the instant dispute turns upon the question of whether Complainant was discharged, at least in part, 1/ for having presented Respondent with the views of his fellow employes on the subject of a general wage increase. If said question is answered affirmatively, as Complainant contends it must be, Respondent's action would be violative of Sections 111.70(3)(a)1 and 3, Stats, 2/ which prohibit retaliation against an employe for having engaged in Tawful concerted activity which is protected by Section 111.70(2), Stats. 3/ Respondent denies Complainant's allegations and asserts that Complainant was discharged for having sought a personal wage increase during his probationary period. Respondent raises no issue regarding Complainant's job performance.

2/ Sections 111.70(3)(a)1 and 3, Stats., provide:

It is a prohibited practice for a municipal employer individually or in concert with others:

- 1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).
- 3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; but the prohibition shall not apply to a fair-share agreement.

Although Section 111.70(3)(a)3, Stats., bans encouragement or discouragement of membership in a labor organization and no labor organization is involved in the instant dispute, the Commission in Juneau County 12593-B (1/77) held that said provision prohibited discrimination against an employe for the exercise of any right protected by Section 111.70(2), Stats. When functioning as the representative of his fellow employes on a subject intimately related to their wages, hours and working conditions, Complainant was exercising a 111.70(2) right.

- 3/ Section 111.70(2), Stats. provides in pertinent part:
 - (2) 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, . . .

^{1/} In Muskego-Norway C.S.J.S.C. No. 9 v. W.E.R.B., 35 Wis. 2d 540 (1967) the Wisconsin Supreme Court held that the Municipal Employment Relations Act was violated when one of the motivating factors for the employer's action was the employe's concerted activity, no matter how many other arguably valid reasons existed.

While testimony from representatives of Respondent that Complainant was discharged for "negotiating wages" would normally constitute an admission of guilt, the record herein reveals that all parties utilized said phrase to describe both Complainant's September 1 request for a personal wage increase as well as his October 29 appearance before Respondent's Board of Supervisors. Thus the question of what motivated Respondent to discharge Complainant must be answered by an examination of the facts and circumstances surrounding the discharge itself. record reveals that on September 1, 1979, Complainant unsuccessfully sought a personal wage increase; that on October 29, 1979, Complainant presented Respondent with the employes' collective position on a general increase; and that on November 15, 1979, Complainant was discharged. Complainant persuasively argues that if Respondent's discharge decision had been based upon his September 1, 1979, request for a personal wage increase, it seems reasonable that the discharge would have occurred shortly thereafter and not hard on the heels of his October 29 appearance before Respondent as the representative of its employes. Respondent has failed to provide any explanation for the delayed timing of the discharge, it must be concluded that the chronology of events provides powerful support for Complainant's position. While the record contains testimony which makes it appear probable that Respondent was indeed disenchanted with Complainant for having sought a personal wage increase, the timing of the discharge precludes a finding that said displeasure was the exclusive basis for the discharge. 4/ In light of the foregoing the undersigned concludes that Respondent's discharge decision was based at least in part upon Complainant's protected concerted activity as an employe representative. Respondent has thus been found to have violated Sections 111.70(3)(a)1 and 3, Stats., and has therefore been ordered to take appropriate remedial action.

Dated at Madison, Wisconsin this 30th day of April, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis, Examiner

It could be argued that as Complainant's co-workers urged him to seek a personal wage increase, their involvement might have converted individual action into concerted activity, also protected by Section 111.70(2), Stats. See Interborough Contractors, Inc., 157 NLRB 1295, 61 LRRM 1537 (1966), enf'd 388 F 2d 492, 67 LRRM 2083 (CA 2, 1967) and Alleluia Cushion Co., 221 NLRB 999, 91 LRRM 1131 (1975). However in light of the findings made above, the Examiner finds it unnecessary to definitively resolve said issue.