

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondent.

No. 17570-A

employees' 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 employees 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 employees 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 employees with regard to their terms and conditions of employment because of an employee's exercise of rights guaranteed by the Municipal Employment Relations Act.
  - (b) In any other manner interfering with, restraining or coercing employees 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

  
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 lawful 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.

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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.

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, . . .

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. The record reveals that on September 1, 1979, Complainant unsuccessfully sought a personal wage increase; that on October 29, 1979, Complainant presented Respondent with the employees' 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 employees. As 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 employee 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

By

  
Peter G. Davis, Examiner

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4/ 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.