

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondent.

Case XI
No. 25722 MP-1072
Decision No. 17684-A

Thompson & Coates, Attorneys at Law, by Kenneth F. Hostak,
840 Lake Avenue, P.O. Box 516, Racine, Wisconsin 53401,
appeared on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Caledonia Firefighters Protective Association, Local 2740, (Complainant) filed a complaint on February 4, 1980 with the Wisconsin Employment Relations Commission, alleging that the Town of Caledonia (Respondent) had committed certain practices prohibited by the Municipal Employment Relations Act. The Commission appointed Ellen J. Henningsen, a member of its staff, to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in sections 111.70(4)(a) and 111.07(5) of the Wisconsin Statutes. Hearing on the complaint was held in Caledonia, Wisconsin on March 14, 1980. The Complaint was amended orally at the hearing. The verbatim transcript was received on March 27, 1980. The briefing schedule closed on June 9, 1980.

The Examiner, having considered the evidence and arguments presented by the parties, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Respondent Town of Caledonia is a municipal corporation which operates, among other departments, a Fire Department and a Highway Department. The two members of Respondent's Personnel Committee, who are also members of Respondent's Board of Supervisors, serve as Respondent's bargaining representatives. James Delagrave served on this committee in 1979. Delagrave, as well as all other members of Respondent's Board of Supervisors, acted as agents of Respondent.

2. Complainant Caledonia Firefighters Protective Association, Local 2740, is a labor organization which represents for collective bargaining purposes the firefighters, including Ronald Blaszczyk, employed by Respondent.

3. Ronald Blaszczyk was employed by Respondent as a full-time firefighter from October 3, 1974 until his death on February 16, 1980. Blaszczyk was represented for collective bargaining purposes by Complainant. Blaszczyk served as secretary-treasurer of Complainant for an unknown period of time which included 1979. He also served on Complainant's negotiating team during 1979. Respondent's elected officials knew of Blaszczyk's activities as a bargaining representative, but were not aware that he held an elected office. Blaszczyk did not reside within the boundaries of the Township of Caledonia.

4. Blaszczyk was also employed by Respondent as a part-time employee of the Highway Department from September 19, 1979 until his part-time employment was terminated on December 10, 1979. He had not completed his probationary period as a Highway Department employee. His last day of work for the Highway Department was December 5, 1979. He continued to work for Respondent as a firefighter after his employment with the Highway Department was ended.

5. All part-time employees of the Highway Department, including Blaszczyk, were hired by the Highway Foreman, who headed that department, without the participation of Respondent's Board of Supervisors. Neither Blaszczyk nor any other part-time employee filed a written application prior to their initial employment with the Highway Department. The foreman did not believe that the collective bargaining agreement covering Highway Department employees applied to part-time employees. Applicants for full-time jobs with Respondent must file a written application form which is ultimately submitted to Respondent's Board for approval.

6. Employees of the Highway Department are represented for collective bargaining purposes but not by a named labor organization. Respondent and the Highway Department employees were parties to a collective bargaining agreement in effect from April 1, 1979 through December 31, 1979. Said agreement was signed on May 30, 1979 and included the following sections:

ARTICLE 15

SENIORITY

1. A new regular employee in the department shall be considered on probation until he has accumulated one (1) year of service.

. . . .

ARTICLE 19

RESIDENCY

1. The availability of Highway Department Employees to respond to calls, particularly in emergency situations, directly affects the safety and welfare of Caledonia citizens and property. Therefore, it is agreed that all Highway Department Employees shall maintain legal, primary and practical residency within the boundaries of the Town.

2. The residency requirement provided for herein shall not apply to a non-probationary employee who occupied a primary residence outside the Town as of the date of this agreement, but only so long as he continues to occupy such residence.

7. Complainant and Respondent were parties to a collective bargaining agreement which expired in April, 1978. Bargaining for a successor agreement began prior to April, 1978 and continued until February 21, 1980 when the bargaining impasse was finally resolved. On May 14, 1979 Complainant filed a petition for Municipal Interest Arbitration (MIA) pursuant to section 111.77 of the Municipal Employment Relations Act with the Wisconsin Employment Relations Commission. Prior to the filing of the petition Blaszczyk attended only one bargaining session. Thereafter but prior to February 21, 1980, the bargaining representatives of both parties met on only two occasions, July 6, 1979 and October 24, 1979, both of which were investigations conducted by a WERC staff member pursuant to the MIA petition. Blaszczyk attended the July 6 session, but not the October 24 session, and served as one of Complainant's bargaining representatives. Tentative agreements on a successor agreement were reached at both the July and October sessions but were never incorporated into a formal, signed collective bargaining agreement. After July 6, 1979 Blaszczyk had no contact with Respondent as a representative of Complainant.

8. In early November, 1979, Delagrave, a member of Respondent's Personnel Committee and Board of Supervisors observed Blaszczyk working at the Highway Department. Up to this time, Delagrave did not know that Blaszczyk was so employed, although Delagrave knew that Blaszczyk was employed as a firefighter. Shortly thereafter, Delagrave suggested to the other member of Respondent's Personnel Committee -- and the other member agreed -- that all part-time employees should have an employment application on file. A memo to that effect was posted on November 6, 1979. Blaszczyk thereafter filed an application. During the same time, Respondent advertised in local newspapers for part-time employees. The advertisement stated that applicants must be residents of the Town.

9. On December 4, 1979 an article appeared in the local daily newspaper which stated in part that:

Caledonia firefighters have asked for state arbitration in their 20-month contract dispute with the Caledonia Town Board.

Ronald Turner, vice president of Firefighters Local 2740 which represents 14 full-time firemen, said members rejected the latest town proposal.

The Town Board two weeks ago turned down a contract submitted by the union, contending it included three changes in an agreement reached with a mediator October 24.

The board said then it would go to the Wisconsin Employment Relations Commission if the firemen didn't agree to what it said was the Oct. 24 agreement.

The dispute has been on since before the old contract ran out in April of 1978. Agreement has been reached on a wage package and the dispute hinges now on language and other questions.

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Turner said a negotiated agreement was reached with a mediator at a July 6 session, but the final draft submitted by the town included several language changes and left out other portions of the contract agreed to in mediation.

The Oct. 24 mediation, he charged, 'was used as a ploy by the town to introduce even more changes in the tentative agreement.'

. . . .

Turner said the town changes in the July 6 mediated agreement involved a grievance procedure, residency requirement, status quo language on training, guaranteed minimum seven consecutive day vacation week, clothing allowance and insurance plan for retirees.

10. On December 8, 1979 Respondent's attorney received a copy of a letter from Complainant's attorney to the Commission investigator stating that the October tentative agreement had been rejected by Complainant's membership and requesting that a bargaining impasse be certified and that the arbitration hearing be scheduled. Respondent's attorney forwarded this letter to Delagrave on December 11, 1979. Delagrave presumably received this letter after December 11.

11. On December 10, 1979 the Respondent's Board of Supervisors met to review the applications for part-time employment filed due to the November 6, 1979 memo and the employment advertisements. The Board rejected Blaszczyk's application to continue working as a part-time employe of the Highway Department because he was a non-resident. All applications from non-residents were rejected. Applications approved included that of Leland Ulcek, a full-time firefighter and a negotiator for Complainant.

12. Blaszczyk, as a member of Complainant's bargaining team and as an officer of Complainant, was engaged in protected, concerted activities. Respondent's Board members were aware of Blaszczyk's activities as a bargaining team member. Respondent's Board members felt no animus toward Blaszczyk because of this activity and their action to terminate his employment was therefore not due, in any part, to any animus toward him.

Based on the above Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Complainant is a labor organization within the meaning of section 111.70(1)(j) of the Municipal Employment Relations Act.

2. Respondent is a municipal employer within the meaning of section 111.70(1)(a) of the Municipal Employment Relations Act.

3. Ronald Blaszczyk is a municipal employe within the meaning of section 111.70(1)(b) of the Municipal Employment Relations Act.

4. Respondent, by terminating Ronald Blaszczyk's part-time employment with the Highway Department, did not discriminate against him in violation of section 111.70(3)(a) 3 and 1 of the Municipal Employment Relations Act.

Based on the above Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

IT IS ORDERED that the complaint, as amended, filed herein, be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 25th day of September, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Ellen J. Henningsen

Ellen J. Henningsen, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF
FACT, CONCLUSIONS OF LAW AND ORDER

Complainant is the collective bargaining representative of the firefighters employed by Respondent. Ronald Blaszczyk was employed by Respondent as a full-time firefighter, and served as Complainant's secretary-treasurer and as a member of Complainant's bargaining team. Blaszczyk also worked part-time for Respondent as a Highway Department employee. Respondent terminated Blaszczyk's part-time employment on December 10, 1979. Blaszczyk died on February 16, 1980. Respondent's stated reason for terminating Blaszczyk's part-time employment was that Highway Department employees were required by the applicable collective bargaining agreement to be residents of the Town of Caledonia and Blaszczyk was not a resident. Additional facts are set forth in the attached Findings of Fact.

POSITION OF COMPLAINANT

Complainant alleges that Respondent has committed a violation of section 111.70(3)(a)3 of the Municipal Employment Relations Act (MERA) 1/ and, derivatively, section 111.70(3)(a)1 of MERA 2/ by terminating Ronald Blaszczyk's part-time employment with Respondent's Highway Department in retaliation for his activities on behalf of Complainant.

The history of negotiations between Complainant and Respondent leading to the present collective bargaining agreement has been stormy. In December, 1979, when Blaszczyk's part-time employment was terminated, the parties had been without a collective bargaining agreement for 20 months, the last agreement having expired in April, 1978. On May 14, 1979 the Complainant had filed a petition with the Wisconsin Employment Relations Commission, initiating municipal interest arbitration. The parties had met with a Wisconsin Employment Relations Commission staff investigator on July 6, 1979 and October 24, 1979

1/ Section 111.70(3)(a)3 states:

It is a prohibited practice for a municipal employer individually or in concert with others . . . [t]o 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.

2/ Section 111.70(3)(a)1 states:

It is a prohibited practice for a municipal employer individually or in concert with others . . . [t]o interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2).

Conduct which violates Section 111.70(3)(a)3 of MERA automatically violates section 111.70(3)(a)1 of MERA Green Lake County, 6061 (7/62). The complaint originally alleged only a violation of section 111.70(3)(a)1. The complaint was amended at the hearing to include the additional allegation of a violation of section 111.70(3)(a)3. Complainant's brief addressed the discrimination issue ((3)(a)3) but not the interference issue ((3)(a)1). Therefore, the Examiner believes Complainant's argument to be as mentioned above in the text.

but no agreement was reached. Blaszczyk participated in both these sessions as one of Complainant's bargaining representatives. Supervisor Delagrave also participated in these meetings. On December 4, 1979 Complainant wrote Respondent and the Wisconsin Employment Relations Commission requesting that a bargaining impasse be certified and an article appeared on that date in a local daily newspaper announcing that information. Shortly thereafter Blaszczyk's part-time employment was terminated.

Supervisor Delagrave learned in early November that Blaszczyk worked part-time at the Highway Department, in addition to his full-time employment with the Fire Department. As a result of this knowledge, Delagrave, as well as other members of the Personnel Committee, ordered all present part-time employees to file applications for employment. Blaszczyk filed an application form and on December 10, 1979 his application was turned down. The stated reason was that the collective bargaining agreement with the Highway Department required all employees to be town residents. The part-time employment of Blaszczyk, a non-resident, according to Respondent, violated that agreement. Blaszczyk was the only employee who lost his job. Respondent employs part-time non-resident police officers despite a residency provision in the Police Department collective bargaining agreement.

In Muskego-Norway Consolidated Schools Joint School Dist. No. 9 v. WERB, 35 Wis. 2d 540, 151 N.W. 2d 617 (1967), the Wisconsin Supreme Court interpreted section 111.70(3)(a)3 of MERA and held that a violation occurs even if lawful reasons exist for an employer's otherwise unlawful act and that the timing of events can be relied on to establish a violation. In the instant case, discrimination can be inferred from the timing of events. During the course of difficult negotiations, it came to the attention of a member of the personnel committee, also a negotiator for Respondent, that Blaszczyk, a member of Complainant's negotiating team, was also a part-time employee of the Highway Department. Respondent's stated reason for the termination was pretextual. It was the discovery of Blaszczyk's part-time employment that initiated the application program; his employment was not incidentally discovered as a result of the application process. His termination occurred immediately after Respondent and the public were notified that further Commission action was being requested concerning the parties' negotiations dispute. The timing of Respondent's action shows that Blaszczyk, because of his protected activities, was the target of the application process.

Complainant requests that the Examiner award Blaszczyk's estate the amount of pay that he would have earned from December 10, 1979 to February 16, 1980, the day of his death. Complainant asserts that this would be \$298.80, based on Blaszczyk's scheduled work and the average number of hours worked by other part-time employees on an on-call basis from December 15, 1979 to February 16, 1980.

POSITION OF RESPONDENT

Respondent denies that its termination of Blaszczyk's part-time employment with the Highway Department violated sections 111.70(3)(a)3 and 1 of MERA. The sole reason for his termination was his status as a non-resident which violated the collective bargaining agreement with the Highway Department employees.

Blaszczyk was hired by the Highway Foreman after the residency clause went into effect. The Foreman believed the Highway Department collective bargaining agreement applied only to full-time employees. He believed he could hire part-time employees without the Board's approval. Respondent had a loose procedure relative to employment of part-time highway employees which resulted in persons being employed without the knowledge or approval of the Respondent's Board and in possible violation of the Highway Department contract. When this was discovered, immediate steps were taken to resolve the matter by introducing the same basic procedure used for full-time employees, i.e., requiring the filing and approval of employment applications with and by the Board. In the normal course of the procedure, the applications came before the Board. Applications of all non-residents, including Blaszczyk, were not approved because of the residency requirement of the Highway Department collective bargaining agreement.

Complainant places too much emphasis on the newspaper article. The newspaper article contained nothing new or of great concern to Respondent. In any event, the record does not establish that any of Respondent's agents saw the article or, if they had, that they paid any attention to it. Actual notice of the request by Complainant's attorney to the Wisconsin Employment Relations Commission staff member to certify impasse was received by Respondent's attorney on December 8, 1979; that letter was not forwarded to Delagrave until December 11, 1979. The meeting where the decision to terminate Blaszczyk was reached was held on December 10, 1979. Furthermore, it is clear that action by the Board to insure compliance with the Highway collective bargaining agreement had been initiated long before the December 4 news article.

Nothing in the record reveals that Respondent sought to punish or retaliate against Blaszczyk for his activities on behalf of Complainant. Blaszczyk had very little to do with negotiations following the July 6, 1979 meeting. He did not appear at any subsequent meetings. He was understood to be only an alternate on the bargaining team when he did attend. It was not known that he was an officer until the instant complaint proceeding was commenced. Application of resident fire-fighters were approved for part-time employment. Those included Leland Ulcek who was a negotiator for Complainant. Ulcek had a reputation as a fiery and aggressive negotiator, unlike Blaszczyk who was generally considered a quiet and reasonable person.

The sole reason for Blaszczyk's termination was to comply with the residency requirement in the Highway Department contract. This requirement was obtained after lengthy bargaining with the Highway Department employees. The preceding Highway Department contract had expired on March 31, 1978 and the bargaining on the present contract was not concluded until May 30, 1979; the residency clause appeared for the first time in the present contract. Respondent had also pushed for a residency clause in the contract with Complainant and was successful in including a modified residency requirement. ^{3/} Even if Respondent misunderstood the applicability of the Highway Department

^{3/} The residency clause of the firefighters' collective bargaining agreement exempts firefighters who owned a home outside the Town on the date of execution of the collective bargaining agreement; Blaszczyk fell within this exemption.

contract to Blaszczyk's part-time employment, the fact remains that their action was still motivated by their belief that the contract required Blaszczyk's dismissal.

Should a prohibited practice be found, Respondent argues that the proper remedy is the payment of \$144.00 in back wages which covers the time Blaszczyk was actually scheduled to work. There is no showing that he would have been called in for emergencies or that he would have been available to work.

DISCUSSION

Complainant must prove by a clear and satisfactory preponderance of the evidence 4/ that Blaszczyk was engaged in protected concerted activity; that Respondent's agents had knowledge of such activities; that Respondent's agents felt animus toward such activities; and that their termination of Blaszczyk's part-time employment was motivated, at least in part, by Respondent's animus toward such activity. 5/

In this case it is not disputed that Blaszczyk was engaged in protected concerted activity, i.e., that he was a member of Complainant's bargaining team and an officer of Complainant. The record also establishes that James Delagrave, a member of Respondent's Board and Personnel committee and one of Respondent's two bargaining representatives, knew that Blaszczyk was on Complainant's bargaining team although Delagrave was not aware that Blaszczyk was an officer. The record also establishes that other members of Respondent's Board knew of Blaszczyk's negotiating activity. The case turns on whether Respondent's agents felt animus towards Blaszczyk because of his participation on the bargaining team and whether his termination was motivated, at least in part, by this animus.

Upon a review of the record, the Examiner must conclude that there is insufficient evidence to support a finding of animus toward Blaszczyk or of improper motivation. Therefore, the complaint, as amended, must be dismissed.

The record reflects that the parties' bargaining was protracted and difficult. This alone, however, does not establish that union animus existed. There is nothing in the record to indicate actual hostility by the Board to the collective bargaining process, to Complainant, or to Blaszczyk; for instance, no threats -- implied or express -- were made, no name - calling occurred; no harsh words were spoken. Blaszczyk himself was not particularly active in his capacity as a bargaining team member. He attended few bargaining sessions and there is no evidence that he dealt with Respondent's agents as Complainant's representative at any time after the July 6, 1979 investigation session. Another bargaining team member -- a town resident -- did have his application for part-time employment approved.

4/ Sections 111.70(4)(a) and 111.07(3), Wis. Stats.

5/ CESA No. 4, et. al, 13100-E, 13100-G (12/77; 5/79); app'd to Cir. Ct.

It is true that the discovery of Blaszczyk's part-time employment by Delagrave prompted Respondent to initiate the application process for part-time employment which resulted in Blaszczyk's termination due to his non-residency. The Examiner finds this relationship insufficient to raise an inference of animus or improper motivation. There is nothing to suggest that Blaszczyk's activities on behalf of Complainant influenced Delagrave's initiation of the application process. Legitimate business records existed for the initiation of the process; Delagrave realized that, unlike the situation with full-time employees, he did not know who worked part-time for the Town and that, therefore, non-residents might be employed by the Highway Department in violation of the collective bargaining agreement residency requirement obtained after prolonged negotiations with that unit. 6/ In addition, the initiation of the process -- sometime during the first few days of November, 1979 -- occurred shortly after the October 24, 1979 investigation session. That session produced a tentative agreement and it is hard to imagine that Delagrave would have been interested in retaliating against Blaszczyk when it appeared that the long bargaining process was nearing completion.

Complainant alleges that animus can be inferred from the timing of Blaszczyk's termination which occurred shortly after Complainant announced in the press that its members had rejected the October 24 tentative agreement and were requesting that a bargaining impasse be certified. There is, however, no evidence that any of Respondent's agents who were involved in the decision to terminate Blaszczyk's part-time employment had knowledge of these facts at the time of their decision, e.g., that any of them read the newspaper article relied upon by Complainant. Moreover, Delagrave did not receive a copy of the letter from Complainant's attorney notifying the WERC investigator and Respondent's attorney of the above developments until after the decision was made regarding Blaszczyk. Also, the process which led to the termination of Blaszczyk's part-time employment had been initiated long before the appearance of the news article. Thus, the timing of Blaszczyk's termination in relation to the status of bargaining was coincidental.

For the above reasons, the Examiner has determined that the record does not support a conclusion that animus toward Blaszczyk existed due to his protected concerted activities or that his termination was motivated, in any way, by any such animus. Accordingly the complaint, as amended, is dismissed. Because Complainant is not entitled to any affirmative relief, the Examiner has not considered the parties' arguments concerning the extent of Respondent's back pay liability.

Dated at Madison, Wisconsin this 25th day of September, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Ellen J. Henningsen
Ellen J. Henningsen, Examiner

6/ Respondent employs non-residents as part-time officers despite a residency requirement in the Police Department collective bargaining agreement. Respondent has been unable to recruit a sufficient number of qualified residents and thus must hire non-residents. Respondent has been able to recruit a sufficient number of qualified residents for Highway Department employment.