STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CHARLES R. DELANEY, Complainant, vs. UNION HIGH SCHOOL DISTRICT, CITY OF LAKE GENEVA, et al, Respondent.	:	Case III No. 26474 MP-1128 Decision No. 17939-A

Appearances

Mulcahy & Wherry, Attorneys at Law, by Diana L. Waterman, 815 East Mason Street, Suite 1600, Milwaukee, WI 53202, appearing on behalf of the Respondent.

Bruce Meredith, Staff Counsel, Wisconsin Education Association Council, 101 West Beltline Highway, P.O. Box 8003, Madison, WI 53708, appearing on behalf of the Complainant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Charles R. Delaney, an individual, having, on July 1, 1980, filed a complaint with the Wisconsin Employment Relations Commission, alleging that the Union High School District, City of Lake Geneva has committed prohibited practices within the meaning of the Municipal Employment Relations Act; and the Commission having appointed William C. Houlihan, a member of its staff, to act as Examiner, and to make and issue Findings of Fact, Conclusions of Law and Orders, as provided for in Section 111.07(5), Wis. Stats.; and a hearing on said complaint having been held before the Examiner in Lake Geneva, Wisconsin, on September 10, 1980; and a transcript of said hearing having been prepared; and the Complainant having submitted a brief on December 18, 1980 and a Reply brief on January 6, 1981; and the Respondent having submitted a brief on November 28, 1980, and a Reply brief on December 30, 1980; and the Examiner being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

(1) That Charles R. Delaney is an individual who was employed as a custodian by the Union High School District, City of Lake Geneva from January, 1975 to June of 1980, and who resides at Route 4, Box 5768, Elkhorn, Wisconsin.

(2) That the Union High School District, City of Lake Geneva, is a school district operating within the State of Wisconsin, which engages the services of numerous employes, and maintains an office at 818 Geneva Street, Lake Geneva, Wisconsin 53147.

(3) That Charles R. Delaney was hired by the Union High School District, in January 1975, and worked for the District as a custodian until June 13, 1980, the date upon which Mr. Delaney was discharged.

(4) That beginning in 1976 and thereafter throughout the course of his employment, Delaney was an aggressive, outspoken participant on the custodial committee which discussed wages, hours, terms and conditions of employment with representatives of the District.

(5) That the terms and conditions of custodial employment were reduced to writing in a document entitled Employment Policies of Custodians; which document at the urging of Charles Delaney was dated and signed by Karl Reinke, Superintendent of Schools, and by Delaney and custodian Chuck Laudie as custodian representatives; that the document contains the following provisions:

ARTICLE I

. . .

C. Probationary Employees. New employees to the school district shall work a sixty (60) working day period as a trial period during which time he may be discharged without further recourse. After Sixty

(60) days the employee shall be placed on the regular seniority list. The probationary rate of pay shall be twenty cents (20¢) per hour below the established rate, after which they shall receive the current rate for their classification.

IV C. Vacation Procedure

1. The employer will post a vacation schedule by April 1st, and remain posted until May 1st. One (1) employee may take a week of his vacation at Thanksgiving, Christmas or Easter. Selection by seniority and worked out by the custodial staff.

2. Any employee who does not select his vacation by the deadline set forth above shall lose the right to pick by seniority and shall be assigned a vacation on any weeks left vacant after all others have picked.

3. Employees will select their vacation on the basis of their seniority. Employees shall make their choice by signing for the desired period on or before May 1st, at which time the schedule will be finalized.

4. Employees who have earned more than one week of vacation shall be permitted to take all such vacation at once, or to split the vacation in weekly intervals. All such periods must be selected at the time the vacation schedule is posted, and in line with seniority as stated above.

5. The employer shall permit two (2) regular employees to be on vacation at one time, except as set forth in Paragraph (1) above.

6. Upon termination, vacation earned and not used will be pro-rated on the following basis:

. . .

V

. . .

K. When differences in interpretation of policy or irreconcilable problems arise between the Business Manager and a Union High School District employee, the employee may appeal to the Superintendent and then to the President of the Board of Education, stating his reasons for the appeal and the position of the employee on the point in dispute. A copy of this letter shall be sent at the same time to the Superintendent. The Board shall hear the appeal at the next regular meeting, provided (10) days has elapsed since submittal of the letter, or at a meeting mutually acceptable to the employee, Business Manager, Superintendent and the Board.

(6) That Delaney was instrumental, in the early months of 1977, in causing Council 26, Southern Lakes United Educators, to seek recognition as a collective bargaining representative for District custodians; that Council 26 never achieved collective bargaining representative status; and that there is not, nor has there ever been a certified or formally recognized collective bargaining representative representing custodial employes of the District.

(7) That throughout the course of his employment with the District Delaney openly and persistently urged his co-workers to bring a union into their shop and to take a more aggressive stand in dealing with the employer.

(8) That, in March of 1979 Delaney was instrumental in bringing about a meeting, involving himself, custodians Charles Laudie and Lester Krueger, District Business Manager John Roth, and District Superintendent Karl Reinke; that Delaney's purpose in requesting the meeting was to bring about a redistribution of work so as to reduce his assigned work; that during the course of the meeting Delaney and Reinke became angry with one another over whether or not the District would distribute the salary of an employe who had resigned, but had not been replaced, among the remaining employes; that a heated exchange between the two men then transpired.

(9) That shortly after this meeting Delaney requested and was granted two days (March 16 and 17, 1979) off to attend a basketball tournament in Madison,

Wisconsin; that in his absence John Roth performed Delaney's work and did so in a period of four hours per day.

(10) That approximately one week later John Roth called for a meeting which was attended by employe Reedie Austin, Krueger, Delaney and himself where he (Roth) indicated that he believed Delaney was not being assigned enough work, and thereafter increased Delaney's work assignment; that during the course of this meeting Roth threatened Delaney with discharge should he fail to clean any room assigned him and also was critical of Delaney for a variety of matters including his attitude which Roth characterized as irritating to the staff.

(11) That during the 1978-79 school year High School Principal Dean A. Dare raised concern over Delaney's cleaning of the carpeting and the main office area; that the main office area was removed from Delaney's area of responsibility in approximately March of 1979; that during the 1980 school year similar concerns were raised relative to Delaney's cleaning of lockers; that Dare left Delaney several notes relative to cleaning the lockers and that Delaney responded to the notes by cleaning the lockers.

(12) That during the late Spring of 1980 Delaney, and all other custodians of the District, signed up for vacations; that Business Manager Roth denied Delaney's vacation request despite the fact that Delaney had requested a time to which he was entitled; and that just before he was discharged Delaney grieved Roth's action in that regard.

(13) That John Roth usually represented the District in its discussions with the custodians; that the custodians had formally notified the District, on at least two occasions, that Delaney was their negotiations representative; that Roth and Reinke were aware of Delaney's activities described in paragraphs 4, 5, 6, 7, 8 and 12 above.

(14) That throughout the course of his employment with the District Delaney complained frequently to and about his co-workers, his work, and the administration; that he often did so in an irritating fashion; that his mannerisms and behavior created tension in the work place; and that his conduct in this regard was resented by his co-workers.

(15) That, on May 14, 1980 seven custodians sent the following letter to Karl Reinke:

> Badger High School
> Custodial Dept.
> Lake Geneva, Wis.
>
> TO WHOM IT MAY CONCERN:
>
> MR. KARL REINKE:
>
> We the duly authorized members of the Badger High School custodial staff beg your attention to the problems between the administration and Charles Robert Delaney.
>
> This uneasness of the working conditions out here at Badger High has gone long enough. Now is the time to straighten it out, so we can work together like brothers and sisters.
>
> We as members of the custodial staff have heard for years that Charles Delaney is a problem cause.
>
> We as members of the staff want this problem taken care of immediately between the administration and Charles Delaney.
>
> If this matter cannot be worked out we recommend that it be taken before the Badger High School Board.
>
> The following members want immediate action.

(16) That, upon receipt of the letter, Reinke called upon John Roth to investigate the custodial concerns leading to its issuance.

(17) That Roth discussed the petition with the custodians individually and that during the course of these conversations the custodians advised Roth that Delaney's constant griping and complaining had created tension and an uneasiness in working conditions which had reached the breaking point.

(18) That Roth communicated this message back to Reinke and that Roth and Reinke determined to discharge Delaney.

(19) That on June 30, 1980 Delaney was issued the following letter terminating his employment with the District.

> Due to irreconcilable differences between the administration and yourself and the custodial staff and yourself, I am hereby terminating your employment with the Badger High School District.
>
> Please consider this as two (2) weeks notice of termination. Your last day of employment will be June 13, 1980.
>
> You will be paid 80% of your 2 weeks vacation, unless you choose to take them at this time.

(20) That Delaney filed a grievance over his discharge, which grievance led to a hearing before the District School Board on July 14, 1980; that a number of custodians attended the hearing; that a member of the School Board indicated that the District was interpreting the May 14 letter as a custodial request to terminate Delaney; that Delaney's representative, Esther Thronson, denied that this was the letter's intent; that John Roth and Esther Thronson then invited the custodians to comment on the letters' meaning; and that no custodian spoke.

(21) That John Roth and Karl Reinke were motivated by the concern of the custodians, and not by Delaney's protected concerted activities, in discharging Delaney; that the School Board was motivated by a belief that Delaney's co-workers sought his discharge in deferring to the judgment of the administrators.

CONCLUSIONS OF LAW

(1) That Charles Delaney is a municipal employe within the meaning of Section 111.70(1)(b), Wis. Stats.

(2) That the Union High School District, City of Lake Geneva, is a municipal employer within the meaning of Section 111.70(1)(a), Wis. Stats.

(3) That the discharge of Charles Delaney was not motivated by his exercise of rights contained in Section 111.70(2), Wis. Stats.; and therefore did not constitute a violation of Section 111.70(3)(a)(3) Wis. Stats.

(4) That the discharge of Charles Delaney did not violate any applicable collective bargaining agreement and therefore did not violate Section 111.70(3)(a)(5), Wis. Stats.

(5) That the discharge of Charles Delaney was not in retaliation to the employe petition of May 14, 1980 and therefore did not violate Sections 111.70(3)(a)(3) or (1) Wis. Stats.

ORDER

That the complaint be, and the same hereby is dismissed.

Dated at Madison, Wisconsin this 8th day of April, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William C. Houlihan
William C. Houlihan, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Charles Delaney was employed, as a custodian, by the Union High School District of the City of Lake Geneva between January 1975 and the date of his discharge, June 30, 1980. Throughout his employment with the District, Delaney was an outspoken and energetic proponent of unionism and of improved wages and working conditions.

While there is no certified or formally recognized union representing the District custodians, they have engaged in regular discussions with the District over wages, hours, and conditions of employment. Annually a committee designated by the custodians meets with representatives of the District. During those meetings, the employe designates air their views on appropriate wage increases, and on other matters of concern to the workers. Administration representatives, typically including Business Manager John Roth, in response to the expressed concerns of the workers, formulate and recommend a wage package for consideration by the School Board. The Board determines the level of wages to be paid, which is communicated back to the custodians, and implemented. This determination has never been rejected by the custodial group, nor have the custodians ever responded with formal counterproposals. The results of the discussions have been reduced to writing in a document titled "Employment Policies for Custodians." At Delaney's urging the 1979-80 version of that document was dated and signed by Charles Delaney and Chuck Laudie, acting as custodian representatives and by Karl Reinke, Superintendent.

Delaney became a participant in the negotiating proceedure in 1976. At that time he began to urge his co-workers to bring a union into the shop. Despite the reluctance of his co-workers to do so, Delaney was instrumental in securing the assistance of Mr. James Guckenberg, a Representative of Council 26 of the Southern Lakes United Educators. Guckenberg, by letter of January 4, 1977 requested voluntary recognition of S.L.U.E. as bargaining representative for the custodial employes. The District refused to extend such recognition, prompting Council 26 to file an Election Petition with the Wisconsin Employment Relations Commission. While that petition was pending Delaney and two co-workers, Donald Friske and Bill Skinner sent a letter, dated April 6, 1977 to the School Board President, John Raup requesting the commencement of bargaining and identifying Delaney as the workers contact person. On May 10, 1977, Superintendent Karl Reinke sent Delaney a responsive letter declining to "enter into collective bargaining" while the Council 26 petition was pending.

Approximately two weeks later, Mr. Guckenberg withdrew the petition. During the pendency of the petition Delaney talked with his co-workers during their breaks, pointed out what he believed to be the advantages of unionization and tried to enlist their following. When it became evident to Delaney that there existed no support for the union he had the petition withdrawn.

During the 1978-79 school year High School Princial Dean A. Dare became somewhat dissatisfied with Mr. Delaney's work performance. Dare believed that the lockers were not being cleaned properly and wrote a series of notes to that effect. He was also dissatisfied with the manner in which the carpet was being cleaned. This latter concern was brought to the attention of Ed Quincannon, the Building and Grounds Supervisor, and to Reedie Austin who functions as a lead worker. These concerns were not brought to the attention of John Roth, the District's Business Manager. As a result of Dare's complaint, carpet cleaning responsibility was removed from Delaney.

In approximately March of 1979, Delaney engaged in efforts to bring about a redistribution of the work load. At the time, Delaney believed that he was being assigned too much work, and he and co-workers Charles Laudie and Lester Krueger met with John Roth and Karl Reinke. At that meeting Delaney presented a color coded diagram of the school floor plan and attempted to demonstrate that his own work assignment was too large. His feelings in that regard were not shared by his co-workers. Had the District gone along with the work redistribution suggested by Delaney's chart, the effect would have been to take work from Delaney and assign it to employes Reedie Austin and Ed Schwandt. It was also during that meeting that Delaney queried Superintendent Reinke as to what was to happen to the monies saved by the District in not filling the vacancy created by the resignation of custodial employe Bill Skinner. The conversation became somewhat heated with Delaney, Reinke, and Roth all feeling, and expressing a good deal of anger, and

Reinke telling Delaney that it was none of his business.

Shortly after this meeting Delaney requested, and was granted, two days off so that he might attend a basketball tournament in Madison. In his absence, on March 16 and 17 John Roth performed the work normally assigned to Delaney, and did so in approximately four hours per night. A week later Roth called for a meeting, attended by Krueger, Austin, and Delaney where he indicated that he believed that Delaney was not being assigned enough work. Roth then increased Delaney's work assignment, and asked if he understood his new assignment. When Delaney responded that he did, Roth informed Delaney that he would be discharged if he failed to clean even one of his assigned rooms. At that meeting Roth offered Delaney a reference if he would quit. At this time Delaney was directed to stop his practice of coming to work well before the start of his shift, which allegedly annoyed others, and to stop using the telephone for personal calls. He was also advised that his work attitude was irritating to the staff and that he would have to be more thorough in his cleaning of the hall lockers, an item that had been brought to his attention in the past.

It was during this same period that Roth deleted the main office area from Delaney's responsibilities and added additional classrooms to his assignment. This was done because of administrative concern that Delaney wasn't doing an adequate job cleaning the main office.

Custodians traditionally sign a posting in order to select time periods for vacation. As in the past this posting went up in the Spring. Delaney, a senior employe, signed up for the last week in August and Christmas vacation week. Roth, upon receipt of the employe selections placed a "no" next to Delaney's selection and returned the document to Reedie Austin with the following note:

> Reedie: No vacations during the last week in August when the teachers return. No vacations during Christmas without special permission from me and I'm not giving it. Please get this corrected and return to me. J.R.

Shortly before his discharge, Delaney formally grieved this action of Roths', which violated the Employment Policies document.

As the period for discussions over the terms and conditions of employment for the 1980-81 school year approached, Mr. Roth requested a letter of authorization from the custodians indicating who would represent them. Pursuant to his request on April 22, 1980 he was provided with a letter signed by a number of custodians, designating Delaney and Lester Krueger as bargaining representatives. Upon hearing that Delaney was to be the custodian's representative, Roth commented to Laudie that the custodians "are cutting your throats" by allowing Delaney to represent them. Negotiations did not proceed smoothly, and on May 7 Delaney and Krueger sent a letter to the School Board requesting that a Board member be present for the bargaining. Nothing came of this letter.

Concerned that negotiations were not proceeding smoothly Delaney drafted a petition to be sent to Karl Reinke. Charles Laudie revised the petition, made some additions and circulated it for signatures. On May 14, 1980 the petition, set forth in finding of fact 15 was sent to Karl Reinke. Delaney was not among the signatories, though the record establishes that he was aware of the document ultimately sent. Upon receipt of the letter, Reinke directed Roth to investigate the circumstances that led to the document being sent. Roth talked with the custodians individually and concluded that the underlying problem was Delaney's inability to get along with his co-workers or his supervision.

This information was communicated back to Reinke, who advised Roth to discuss the matter with Delaney. Roth met with Delaney and related the concerns relative to Delaney's attitude. Delaney's response was that he wanted to keep his job and not be fired. Roth, reporting back to Reinke, indicated that Delaney was not going to change. On June 30, 1980 Delaney was issued the termination letter set forth in Finding of Fact 19.

Delaney filed a grievance over his discharge. He and his representative, Esther Thronson, met with Reinke and later appeared before the School Board. At the July 14, 1980 School board meeting a member of the Board indicated that the District was interpreting the May 14 letter as a custodial request to terminate Delaney. Esther Thronson denied that that was the letters intent, indicating that Delaney was aware of the letter. John Roth then invited the custodians, many of whom were in attendance at the meeting, to comment on the letters' meaning. Though Thronson joined in the request, no custodian spoke.

POSITIONS OF THE PARTIES

Complainant

Complainant cites Village of Union Grove, 15541-A (2/78) for the proposition that it must demonstrate, by a clear and satisfactory preponderance of the evidence that the Complainant was engaged in protected concerted activity; that Respondents were aware of Complainant's protected concerted activity; that Respondents were hostile toward said activity, and that the discharge was motivated, at least in part, by Respondents' opposition to said activity. Complainant goes on to cite Muskego-Norway v. W.E.R.B., 35 Wis. 2d 540 for the proposition that "(a)n employe may not be fired when one of the motivating factors is his union activities, no matter how many other valid reasons exist for firing him."

Complainant alleges that the record demonstrates that Delaney engaged in formal organizing, traditional negotiations, enforcement of his own contractual rights on the vacation matter, and informal or incipient concerted activities. This latter form of activity includes the prodding of management and attempts to influence his co-workers to take a more aggressive stance vis a vis the employer. The fact that much of this activity was unpopular with co-workers does nothing to modify its protected status.

Much of the activity referenced above was conducted in the open and in the presence of District representatives. The negotiation sessions and March, 1979 meeting are examples of this. Complainant argues that Roth's interview of custodians, Supervisor Quincannon's close relationship with the custodians, and the "small plant" doctrine are sufficient to impute knowledge of Delaney's activities to the Respondent.

Complainant contends that Respondent's hostility toward Delaney's protected activity is demonstrated by Roth's remark to Laudie that the custodians were cutting their own throats by having Delaney negotiate, by Roth's handling of Delaney's vacation request, and by Reinke's reaction to Delaney's March, 1979 interrogation of Reinke relative to the distribution of the departed Skinner's wages. Complainant also points to the study of Delaney's work load which followed the March meeting and characterizes the results of that study as punitive. Finally, the Complainant points to the testimony of employe Laudie who testified that his work performance had been criticised while he was actively engaged in negotiations.

Complainant contends that the timing of the discharge, following in the wake of several significant acts of protected activity, creates a strong inference that the discharge was a response to those activities. The "irreconcilable difference" basis of discharge is nothing more than a thinly veiled expression of the employer's hostility toward one who dared confront the District.

The discharge letter contains no mention of the alleged work deficiencies, one of two grounds advanced in support of the discharge. Work performance was not an expressed area of concern during the processing of the grievance filed over Delaney's discharge. Testimony submitted as to Delaney's work performance is alleged to be incredible, insubstantial, and belated.

The second basis of discharge, irreconcilable differences, is also alleged to be without merit. Complainant acknowledges supervisory and co-worker testimony relative to Delaney's complaining, lack of receptivity to suggestion, and disagreements with co-workers, but dismisses the testimony as inconsistent and not interfering with Respondent's operation.

The Employe petition of May 14 was the catalyst for Roth's investigation which ultimately led to Delaney's discharge. Complainant attacks the District's reliance upon the petition in its decision to discharge on two separate grounds. First, it was the testimony of numerous custodians that they intended the petition to straighten out the strained relationship between Delaney and Roth, and not as a plea for Delaney's termination. By assigning Roth to investigate the matter the District invited a preordained result, since the difficulties complained of existed between Roth and Delaney. Roth's conclusion that Delaney was at fault and had irreconcilable differences with those around him is neither surprising nor factually supported.

The only real irreconcilable difference Delaney had with the management was his determination to form a union and improve working conditions and the District's opposition.

The Complainant alleges that the District's reliance upon the employe petition as a basis for discharge is a per se violation of Section 111.70(3)(a)1 and 3, Stats. The petition was a concerted request to have the dispute between Delaney and the administration brought into the open and resolved. Custodians testified that it was not their intention that Delaney be fired. By discharging Delaney in response to the petition, a form of protected concerted acitivity, the employer has engaged in unlawful retaliation.

Complainant argues that the document "Employment Policies of Custodian" is a collective bargaining agreement. The document which is both written and signed sets forth the relationship between the employer and the employes. The document contains provisions dealing with wages and benefits and a dispute resolution procedure. It was developed as a result of a number of meetings between representatives of the District and its custodial employes. The nature of concessions made or not made goes to the effectiveness, and not the existence, of bargaining.

Complainant reads Section I(c) of the contract to contain, by implication, a just cause standard for discharge. The discharge is alleged to violate the just cause standard.

Respondent

It is the Respondent's position that Delaney was discharged because of his inability to work effectively and cooperatively with other custodial employes and his poor attitude with regard to his work. Absent some improper motive, the District is free to discharge for any reason or no reason at all. Furthermore, it is the Complainant who has the burden of proving the allegedly discriminatory nature of the discharge.

The Respondent takes issue with the existence of each of the elements as set forth in Muskego-Norway. Respondent contends that the single effort to organize occurred in 1977. According to the Respondent, the record is void with respect to Delaney having participated in that organizing drive. Assuming that Delaney was involved in that affair, the record nowhere demonstrates that the District was aware of that fact. Assuming that Delaney did, then and subsequently, openly converse with fellow employes relative to organizing, the record is silent with respect to administration or school board knowledge of that fact.

Respondent contends that there has never existed collective bargaining for Delaney to participate in. The custodians have never been formally recognized or certified as a bargaining unit. Annual conversations over working conditions do transpire; however these meetings lack the give and take of collective bargaining and end with unilateral employer determinations. Indications of collective bargaining, i.e. counterproposals, ratification, mediation-arbitration, are no where in evidence.

Delaney's efforts to work toward improved working conditions are alleged to be no more than an individual working to enhance his own personal interests. Respondent denies the existence of any element of mutuality or concert in Delaney's actions. The March 1979 meeting witnessed an attempt on Delaney's part to have others assume a part of his workload. The color coordinated work chart was a device fashioned to benefit Delaney at the expense of his co-workers rather than one calculated to promote an equalization of the work.

Respondent contends that should the Examiner find the existence of protected activity, and knowledge of said activity on the part of the Respondent, there is no showing of hostility toward the activity. Respondent contends that Business Manager Roth explained his "cutting your throats" remarks in his testimony at hearing. At hearing, Roth testified that his remark was borne of his personal attitude as to how well Delaney represented his co-workers. The year before, 1979, Delaney had suggested that the Board provide second shift custodians (of which he was one) with an extra five cents instead of providing all employes with a five cent increase. Roth believed that Delaney was out for himself, even at the potential expense of his co-workers.

Shortly following the March, 1979, blowup between Delaney and Reinke, the District granted Delaney leave to attend the state basketball tournament. The District was under no oligation to do so, and its action in this regard was one of accomodation. In his absence, John Roth took the time and expended the energy to actually perform Delaney's work in order to explore the legitimacy of Delaney's complaints. These actions are hardly indicative of a hostile employer attitude.

The motive for discharge is alleged to be entirely related to Delaney's work deficiencies and attitude, and not at all a function of his exercise of protected rights. Respondent cites the dusting and carpet cleaning concerns of the District in 1979, ultimately leading to certain tasks being removed from Delaney. Respondent also notes Delaney's constant griping, criticism of co-workers, coming in early and disrupting staff, and personal use of the telephone during both working and non-working hours.

The District points to the May 14, 1980 custodial memo as the incident precipitating discharge. Custodial testimony outlining individual reasons for signing the petition was uniform in identifying Delaney as the problem. When Delaney refused to recognize that he had a problem Roth recommended discharge.

The District argues that the interference allegations must also fall since there is no demonstration that Delaney's discharge operated to adversely impact upon other employes in the exercise of protected rights. Evidence to the contrary was adduced at hearing.

The District argues that there is no collective bargaining transpiring, and therefore no collective bargaining agreement in place for the District to have violated.

In its reply brief, Respondent urges this Examiner to abandon the Muskego-Norway test as the applicable standard. In so arguing, the Respondent cites Wright Line, Inc., Wright Line Division, 1980 CCH NLRB 17, 356. According to the Respondent, Wright Line represents the National Labor Relations Board's abandonment of the "in part" test and the substitution of the "dominant motive" or "motivating factor" test. Respondent argues that Muskego-Norway was premised on the federal interpretation of Section 8(a)(3) of the Labor Management Relations Act. The N.L.R.B.'s abandonmemt of the in part test operates to remove the underlying basis for Muskego-Norway which should therefore be reconsidered.

Respondent argues that Delaney was not so much engaged in concerted activity as he was in chronic complaining, and attempts to improve his own working conditions. Discharge, even if motivated by an employes' chronic complaining and unilateral attempts to improve his own working conditions, is lawful. (NLRB v. Slotkowski Sausage Co. 104 LRRM 2402 7th Cir. 1980), Indiana Gear Works v. NLRB 371 F. 2d 273, 64 LRRM 2253 (7th Cir. 1967), NLRB v. Northern Metal Co. 440 F 2d 881, 76LRRM 2958 (3rd Cir. 1971), NLRB v. Buddies Supermarkets Inc. 481 F. 2d 714, 83 LRRM 2625 (5th Cir. 1973), Aro, Inc. v NLRB, 596 F 2d 713, 101 LRRM 2153 (6th Cir. 1979), NLRB v. Office Towel Supply Co. 31 LRRM 2242, Hilton Hotels Corp. 50 LRRM 1556

Discussion of Legal Test for Finding a Violation

Respondent, citing Wright-Line, has urged this Examiner to reconsider the Muskego-Norway 1/ test. Under the standard advanced by the Respondent, it would be the Complainant's task to make a prima facie showing sufficient to support a finding that protected conduct was a motivating factor in the Employer's decision. Once this is established, the burden would shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. If successful in so doing, the employer would be operating within its right.

Muskego-Norway was decided in 1967, and the "in part" test articulated therein has been applied consistently since that date. Green Bay Jt. School District No. 1 (9095-E) 9/71; City of Waukesha (11386) 12/72; City of Wisconsin Dells (11646) 3/73; City of Oak Creek (12105-A,B), 7/74; St. Croix County (12753-A,B) 12/74; City of Superior (11560-B,C) 5/74; City of Boscobel (10618-A,B) 5/72; Holmen Jt. School District No. 1 (10218-A,B,C) 12/71; Two Rivers Municipal Hospital (11507-A,B) 1/74; City of Marinette (11674-A,B) 9/74; City of Milwaukeee (13093) 10/74; City of Cornell (15243-A) 8/77; Village of Union Grove (15541-A) 2/78; Fennimore Jt. School Dist. (12790-A, 14305-A) 1/78; Mercer Common School District (14597-D) 3/78; Beloit Jt. School District (14702-B) 3/77; LaCrosse County (14704-A) 6/77; Town of Mercer (14783-A) 3/77; Stanley-Boyd Area Schools (12504-B) 1/76; CESA #4 (13100-E) 12/77; New Auburn School District (15534-A) 2/78; Waterloo Jt. School District (15009-A 10/78; Town of Stephenson (17570-A) 4/80; Chippewa County (17528-B) 5/80; Town of Caledonia (17684-A) 9/80; Dunn County (17035-B, 17049-B) 2/81; City of Racine (17605-B) 2/81.

1/ Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis. (2d) 540; C.E.S.A. No. 4, Decision No. 1310-E, 12/29/77.

In Muskego-Norway, the Wisconsin Supreme Court considered the standard advanced by the Respondent, and expressly rejected it.

In ultimately articulating the "in part" test, the court in Muskego-Norway cited St. Joseph Hospital v. W.E.R.B., 264 Wis. 396, 59 N.W. (2d) 448 (1953), a case dealing with a violation of then Chapter 111, Wis. Stats., administered by the Wisconsin Employment Relations Board, as authority for the standard. The court also cited a number of Federal District Court decisions 2/ though all cases cited arose after St. Joseph Hospital. The context in which the court made reference to federal cases was simply to point out that the lower court, which was being reversed, had mis-cited existing federal law.

The Commission has previously been invited to abandon Muskego-Norway in favor of tests similar to that found in Wright Line. In consistently and forcefully rejecting those urgings the Commission has concluded that the state supreme court construction of the Municipal Employment Relations Act became "engrafted into the act as though expressly stated therein, and neither the court itself nor the Commission can come to a contrary conclusion absent authorization from the legislature." 3/

For the foregoing reasons I regard the "in part" test as the definitive state court construction of a state statute. Accordingly I lack the authority to consider or apply a standard of proof other than that articulated in Muskego-Norway.

It is the Complainant's burden to demonstrate, by a clear and satisfactory preponderance of the evidence, that Delaney was engaged in protected concerted activity; that the Respondent was aware of such activity; that the Respondent felt animus toward such activity; and that Delaney's discharge was motivated, at least in part, by Respondent's animus toward such activity.

Protected Activity

The law grants to employes the "right of self organization", the right "to bargain collectively through representatives of their own choosing", the right to file grievances. Nothing in the statute requires the presence of a formally certified or recognized labor organization.

The record clearly establishes that, virtually from the time he began work with the District, Delaney was engaged in various forms of protected concerted activity. His role in attempting to secure Council 26 as a bargaining representative; 4/ his participation on the negotiations committee; 5/ his persistent attempts to urge his co-workers to unionize and to be more aggressive in dealing with the employer 6/; his grilling of Reinke relative to what would become of the salary formally paid Skinner 7/; his filing of a grievance over his vacation 8/ are all protected by Section 2 of the Municipal Employment Relations Act.

2/ N.L.R.B. v. Great Eastern Color Lithographic Corp. (Id Cir. 1962), 309 Fed. (Id) 352; Warder State Mfg. Co. v. NLRB (6th Cir. 1964) 331 Fed (id) 737, NLRB v. Syumars Mfg. Co. (7th Cir. 1964) 328 fed (2d) 835; Marshfield Steel Co. v. NLRB (8th Cir. 1963), 324 Fed. (2d) 333.

3/ School District of Marinette 17897-B 11/81; Waunakee Public Schools, Joint District No. 4 (14749-B) 2/78.

4/ White Lake Jt. School District No. 2 12623-A, B, 11/75; City of Milwaukee 14394-A, (9/77); City of Milwaukee 13558-B, (1/76); City of Waukesha, 11486 (12/72).

5/ City of Milwaukee 11463-A, (8/73); Stanley-Boyd Area Schools 12504-A,B, (11/74).

6/ Fennimore Jt. School Dist., 12790-A, 14305-A (1/78); City of Superior 11560-B (4/74).

7/ Village of Menomonee Falls, 15650-C, 2/79.

8/ Village of West Milwaukee (9845-B) 10/71; Milwaukee County 12153-A,B (3/75); Milwaukee County, 13479-A,B, (12/75); Waunakee Jt. School Dist., 14749-A (2/77).

Knowledge

Both Roth and Reinke were unquestionably aware of Delaney's activities. Negotiations were conducted by Roth, who can hardly disclaim knowledge of Delaney's aggressive, outspoken role as a representative of the custodians. The March 1979 meeting in which Delaney triggered fireworks by inquiring as to the whereabouts of the monies formerly paid to Skinner transpired in the presence of, and with the participation of, both Roth and Reinke. The May 7, 1980 letter to the School Board was brought to the attention of the Administration. Delaney submitted a formal grievance over the vacation issue.

While there is no hard evidence in the record to establish administrative awareness of Delaney's role in attempting to formally organize the custodial staff, it is difficult to believe that Roth and Reinke were unaware of such activities. Delaney's activity on the negotiations committee began in 1976. In January, 1977 Council 26 requested voluntary recognition from the District, and later filed an election petition. During the pendency of the petition, Delaney was openly promoting and talking up the Union. He was also identified as the individual to be contacted as representative of the custodians. It is inconceivable that the Administration could not be aware of the activities of the very outspoken Charles Delaney during this period of time. Under the circumstances, and given the small (7 to 10 custodians) size of the work force, the Administration must be considered to have been aware of the fact that Delaney was promoting unionism, if not the details of his efforts.

Animus

There was little evidence of animus adduced at the hearing. Employe Laudie testified that his tenure as negotiator for the custodians was marked by frequent complaints about his work. The complaints, which had never occurred prior to his participation in negotiations, stopped when Laudie was through bargaining. However, the complaints came from leadman Reedie Austin, and there has been no connection made between the complaints and any member of the administration. The March, 1979, meeting resulted in an angry exchange between Delaney and Reinke. Certainly the two men experienced a degree of hostility toward one another at the time. While this incident is certainly noteworthy, its significance should not be exaggerated. The men were engaged in a very blunt discussion over what would become of the money formerly earned by Skinner. It is neither surprising nor uncommon that tempers would flare. Typically such anger is short-lived, gradually subsides, and is ultimately forgotton. There was a rather substantial time lapse between the incident and the discharge, with no evidence of lingering ill will.

Roth's explanation of his "cutting your throats" comment is plausible. Delaney's blind selfishness regarding the 5¢ the previous year had potentially adverse consequences for a number of custodians. The comment is quite unflattering, but appears to be no more than an expression of Roth's opinion as to the quality of representation Delaney was providing.

Motive For Discharge

The District offered two reasons justifying its discharge of Delaney; (1) the quality of his work; and (2) his inability to work harmoniously with co-workers and supervision. While the record supports a finding that Delaney was less than an optimally proficient worker, it also demonstrates that his work performance had little to do with his discharge. The letter of discharge makes no mention of Delaney's work. The incident precipitating Roth's investigation was the custodial petition which refers to uneasy working conditons, but makes no mention of Delaney's work. Roth's testimony relative to what the custodians indicated during his investigation makes mention of irritation, complaining, and aggravation but contains no reference to work habits or productivity. 9/ It was this investigation that led to the decision to discharge.

Esther Thronson, a representative of Council 26, represented Delaney in the processing of a grievance over his discharge. Thronson credibly testified that she met with Reinke over the matter, and during that meeting Reinke told her that the administration was not indicating that Chuck (Delaney) was not doing a good job.

9/ Tr. 140.

Considered together, these facts lead me to conclude that Delaney's work performance played little, if any, role in the decision to discharge.

The second reason advanced in support of the discharge was Delaney's alleged inability to work harmoniously with co-workers and supervision. There exists a factual basis for this contention.

A number of co-workers testified about Delaney's irritating mannerisms. Employe Laudie characterized Delaney as a chronic complainer who complained about his own workload and about his fellow workers and their failure to do their share of work, or to do it right. According to Laudie, Delaney picked on everybody. Employe Schwandt testified that Delaney would always "howl that somebody was picking on him", that he was irritating, and that he promoted bickering among employes. Employe Krueger testified that he believed that Delaney needed to change his ways. Working supervisor Quincannon testified to the terrible work atmosphere surrounding Delaney. According to Quincannon there was constant griping and aggravation whose source was Delaney. The complaints covered everything including co-workers and personal work load. Each of these men signed the May 14 letter.

It was concern over tension in the work place that caused the custodians to send the somewhat vague May 14 letter to Reinke. Each of the co-worker witnesses indicated that, on signing the letter, they hoped to bring about a change; and Delaney was the one who would have to change. It was Roth's testimony that his investigation revealed that the workers were upset over the irritating conduct of Delaney. Roth testified that he was told that the work environment was not good. The essence of Roth's testimony in this area is substantiated by the testimony of those custodians called to testify.

I believe the silence of the custodians at the Board hearing to be damning to Delaney. The Board had indicated an unwillingness to reinstate Delaney. The one aspect of the termination of concern, or at least interest, to the Board was the custodial petition, which they indicated they were interpreting as a custodial request for Delaney's discharge. Roth, who had talked privately with the custodians called upon them to provide input. Based upon his private conversations with the custodians he certainly had expectations of what that input would consist of. As for the custodians themselves, they remained silent in the face of an invitation to disspell the School Board members belief that they were seeking Delaney's discharge.

Taking the testimony of the custodians and that of John Roth together with the silence of the custodians at the school board proceeding I believe that the custodians, as a group and for the most part individually, had reached a breaking point in their relationship with Delaney. Each of the custodians found working with Delaney difficult and expressed this fact by signing the petition. When contacted by Roth relative to their intent in signing the petition, each man indicated a need for Delaney to stop complaining about everything and everyone.

For their part, I believe that the custodians were satisfied with the discharge. While I do not believe that any of the custodians had it within himself to come forth and ask that a co-worker be fired I do believe that many, if not all of them welcomed Delaney's departure. This sentiment was undoubtly conveyed to Roth in the course of his private talks, if only by implication. By remaining silent during the school board proceedings, the custodians effectively expressed their will.

I entertain no doubt that much of what Delaney said and urged falls squarely within the protections of the Act. The fact that his co-workers disagreed with his pro-union tendencies and relatively militant attitude toward the employer does nothing to strip away the protected nature of the conduct. I do not believe that the petition was motivated by Delaney's desire to unionize or by his aggressive stance. He had repeatedly been selected to represent the custodial group in dealing with the employer. What the evidence reveals is that co-workers could no longer tolerate Delaney's harrassment of them. Much of the complaining was self centered, self-serving, and critical of co-workers. The resultant tension and friction ultimately caused the custodians to seize upon the opportunity presented by the petition.

Reinke directed Roth to investigate the petition. Aside from the heated argument which transpired between Reinke and Delaney over Skinner's wages there is no evidence that Reinke harbored hostility or animus toward Delaney. The incident occurred a year earlier and there is no indication that Reinke had emerged bearing Delaney ill will. The Complainant attacks Reinke's assignment of Roth to the

investigation as unfair and leading to a predictable result. However the record establishes that custodial supervision and direction constitute a major portion of Roth's job.

Roth conducted the actual investigation into the custodial petition. His testimony relative to what he was told was consistent with the testifying custodians, and is therefore credited. Roth passed the information obtained to Reinke, apparently accurately.

Roth recommended discharge, alleging that Delaney was the source of a good deal of friction and uneasiness. His representations to this effect were substantiated in large part by custodial witnesses. He further advised Reinke that Delaney was unlikely to change in this regard. No doubt Roth had had it with Delaney. He had threatened the latter man with discharge a year earlier following Delaney's attempt to have his work load reduced. At the time Delaney was warned about his irritating behavior. The passage of time had not cured the problem but rather had brought on a demand by co-workers for a change.

The District had endured Delaney's activism for a period of years. During this time Delaney had been instrumental in bringing about a union demand for recognition and petition for representation election. No adverse consequences resulted from this most threatening conduct. Despite his highly visible and aggressive activites which continued over a period of years Delaney was subjected to relatively little adverse attention. Only his discharge and the threat to discharge him a year earlier are particularly noteworthy. The earlier incident occurred after Delaney had complained of being over worked, attempted to have some of his work redistributed, 10/ and Business Manager Roth discovered that he (Roth) could perform Delaney's work in four hours. Following this sequence of events Roth not only chastised Delaney, but increased his workload and threatened him with discharge should he fail to perform. I believe that the increase in workload and accompanying tonguelashing were simply the product of Roth's discovery that Delaney was hardly overworked and his anger over the man's attempt to divest himself of a portion of what he was doing.

I do not find the timing of the discharge to be particularly suspect. The record establishes that Delaney was engaged in protected conduct consistently over a period of years. In this context there was nothing particularly noteworthy about the events immediately preceeding the discharge. Certainly his pre-discharge actions were far less threatening than his former attempt to secure representative status for Council 26.

Similarly, I do not regard the use of the term "irreconcilable differences" to be either suspect or noteworthy. The term is borrowed from the grievance paragraph of the Employment Policies of Custodians document.

I believe that the record establishes that Roth and ultimately Reinke, relied upon the expressed concerns of the custodians in discharging Delaney. In light of these long festering concerns the District was under no obligation to retain

---

10/ I do not believe that Delaney's complaints about being overworked or his attempt, by use of the color coded chart, to bring about a redistribution of work constitute activity protected by the act. A single employe acting alone may well be engaged in protected concerted activity when he acts on behalf of others, to the benefit of others, in support of others, or in preparation or encouragement of future collective action. Salt River Valley Water Users Association 99 NLRB 849; NLRB v. Wallick et al. 198 F2d 477 (C.A.3); Alleluia Cushion Co.,Inc. 221 NLRB 999; Mushroom Transportation Co. v. NLRB 330 f2d 683 (CA 6). Mere griping about a condition of employment is not protected unless the griping coalesces with expression inclined to produce group or representative action. Hugh H. Wilson Corporation v. NLRB 414 F2d 1345 (CA 3); Aro, Inc. v. NLRB 596 F2d 173 (CA 6). Delaney simply wanted to be assigned less work. He stood alone in advocating this position. In light of the feelings of his co-workers there was no object sought or likelihood of group activity or benefit. Dreis & Krump Manufacturing Co., Inc. v. NLRB 544 F2d at 327 (CA 7). The fact that co-workers were brought to witness the request does not operate to alter its selfish nature.

Delaney. His open participation in protected activities raises no affirmative obligation on the part of the District to retain an employe otherwise destined for discharge. 11/ The fact that his bothersome behavior was freqently exhibited in the context of protected speech does not clothe the behavior with the protection accorded the speech. 12/

Complainant alleges that a per se violation of the act occurred when Respondent discharged Delaney in reaction to the employe petition, which is alleged to be a protected activity. The contention is without merit. While the petition was certainly a protected form of conduct 13/ Delaney was not a signatory and therefore not a participant in the activity. Furthermore, as noted, I believe that the District discharged Delaney pursuant to its understanding of the collective wishes of the petitioners.

An issue has been raised relative to the contractual status and interpretation of the Employment Policies of Custodians document. The Complainant would have Article I, par. c read to contain a just cause standard of job security applicable to Delaney. The article in question provides as follows:

> C. Probationary Employees. New employees to the school district shall work a sixty (60) working day period as a trial period during which time he may be discharged without further recourse. After sixty (60) days the employee shall be placed on the regular seniority list. The probationary rate of pay shall be twenty cents (20¢) per hour below the established rate, after which they shall receive the current rate for their classification.

The article, on its face, has no just cause standard expressed. Complainant argues that just cause is implied in the first sentence, since the sentence is otherwise illogical. Following probation the employe achieves some non-probationary status. The employer's right to discharge without recourse is limited to probationary employes. The Complainant asserts that non-probationary employes must logically be considered to have recourse, and that recourse is to a determination as to the existence of just cause. The Complainant goes on to cite arbitral procedent implying a just cause standard into collective bargaining agreements silent on the subject.

Assuming, for purposes of discussion, that the document is a collective bargaining agreement, I cannot agree with the assertions of the Complainant.

The first sentence does strongly imply that non-probationary employes have recourse if discharged. Respondent argues that recourse is to the grievance procedure (Article V, Par K) contained in the Employment Policies document. I find the Respondent's construction of the language more persuasive.

Under the common law an employe may be discharged for any reason, or for no reason at all. 14/ A just cause standard of job security is possibly the most consequential language provision in a collective bargaining agreement, in that it vests a worker with a certain right to his job, and restricts the circumstances under which an employer may discharge an employe.

11/ Joint School District No. 1, village of Holmen, 10218-A, 12/71; Spalding, A Division of Questor Corp., 225 NLRB No. 133 (1976); NLRB v. Ace Comb Co. and Ace Bowling Co, Division of Amerance Corp. 342 F2d 841 (CA 8) 1965.

12/ Kowasaki Motor Corp. 107 LRRM 1541, 257 NLRB No. 69 (1981); I.E.E./Shadow, Inc., 226 NLRB 704, 93 LRRM 1429, (1976); Didde Glaser, Inc., 233 NLRB 765, 97 LRRM 1089 (1977); Hotel St. Moritz, Inc., 251 NLRB No. 15, 105 LRRM 1116, (1980).

13/ Juneau Co., 12593-B, (1/77); Sheraton Puerto Rico Corp. d/b/a Luis R. Montanez, 103 LRRM 1547 248 NLRB 867 (1980).

14/ Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis (2d) 540.

When included as part of a collective bargaining agreement it substantially redefines the relationship between employe and employer.

I do not believe it appropriate to inferentially bring about a change of this magnitude.

Dated at Madison, Wisconsin this 8th day of April, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William C Houlihan
William C. Houlihan, Examiner