STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CHRISTA INGE LEMKE, Complainant,	:	Case LVI No. 26612 MP-1133 Decision No. 18096-A
vs.	:	
CITY OF LA CROSSE, Respondent.	:	

Appearances:

Johns, Flaherty & Gillette, S.C., Attorneys at Law, by Mr. James G. Birnbaum, 621 Exchange Building, 205 Fifth Avenue South, La Crosse, Wisconsin 54601, for Complainant.

Mr. Patrick J. Houlihan, City Attorney, 505 North 6th Street, La Crosse, Wisconsin 54601, for Respondent City.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

A complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission on July 31, 1980, alleging that the Respondent had committed certain prohibited practices within the meaning of Sec. 111.70(3)(a)(1) and (3), Wis. Stats.; and the Commission having appointed Robert McCormick, a member of its staff, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Sec. 111.70(5), Wis. Stats.; and hearing on said complaint having been held in La Crosse, Wisconsin, on October 1, 1980; and the matter having been held in abeyance at the instance of the parties, pending the disposition of a complaint filed in a collateral proceeding by the Complainant, before the Equal Rights Division of the Department of Industry, Labor and Human Relations; and that on or near October 27, 1982, at the request of the parties, the Examiner having mailed a copy of the transcript of hearing to the parties; and on January 6, 1983 the parties' written briefs, according to post hearing agreement were exchanged by the Examiner; that by May 16, 1983, the parties failed to reach agreement; that disposition of the aforementioned collateral proceeding by the Equal Rights Division of DILHR would resolve the instant complaint; and the Examiner having considered the evidence and arguments of the parties; makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. The Complainant on February 18, 1980, was hired as a clerical employe by the City of La Crosse and was employed in the City Clerk's Office, a position in the bargaining unit represented by La Crosse City Employees Local 180, S.E.I.U. AFL-CIO, a labor organization which is the exclusive bargaining representative for clerical/and other non-supervisory employes of the City, and which is a party to a collective bargaining agreement covering clerical employes of the City, including the Complainant.

employer which employs, among other employes, secretaries in the City Hall. At

4. At all times material herein, the Complainant was a probationary employe, as that term is defined by the practice of the parties, in administering the grievance and seniority provisions of the labor agreement. Kroner was the Complainant's immediate supervisory, who had the authority to terminate the Complainant's employment, as a probationary employe, sans the application of the just cause provision of the labor agreement.

5. The City also employed Joyce Giles in the City Clerk's office as a part-time elections worker with a hiring date at least back to November 1979. Gilles was excluded from the bargaining unit. While the Complainant had been specifically hired to operate the word processing machine, she was untrained on how to operate it. Gilles had been trained to operate the word processor and was to train the Complainant in the operation of the machine. During March and April a conflict developed between Gilles and the Complainant over who was to operate the machine. Both complained to Kroner on numerous occasions about the situation. The Complainant also complained to Rusch. The dispute between the two became common knowledge in City Hall.

6. On or before May 7, the Complainant talked to John Thorsen, the City Hall Union Steward, about the dispute between Gilles and herself over use of the machine. Thorsen and the Union's Grievance Committe conferred with Rusch on May 7 about several matters. At that meeting it was determined that Complainant should work on the machine permanently. Rusch agreed to inform Kroner of this determination.

7. On Friday, May 9, Kroner met with Complainant. Kroner told the Complainant she was being terminated. Kroner did not set a date for termiantion, that assumed two weeks notice, but told Complainant that she should look for another job. Kroner advised Complainant that the reason for her termination was Complainant's attitude and inability to get along with her co-workers. After further discussion, Kroner told the Complainant they would talk again on Monday, May 12.

8. On May 11, Complainant contacted the Union Steward and it was decided that he would accompany the Complainant to the May 12 meeting.

9. On May 12, Thorsen and the Complainant met with Kroner. When Kroner first observed Thorsen, she stated:

> Gee, I'm sorry you (meaning Complainant) had to resort to bringing the Union in - I thought we had an understanding Friday night that we were going to work it out ourselves. I'm sorry you had to go to the Union. I thought we were going to get this worked out.

At this point Kroner first became aware that the Complainant had involved the Union. Both Gilles and Rusch attended the meeting at some point. Kroner first became aware that the Complainant had involved the Union, in the course of the May 12 meeting. Also during this meeting Rusch, for the first time, informed Kroner, Gilles and Complainant, that Complainant was to operate the machine.

10. During the next eight weeks Complainant bid and interviewed on other jobs in City Hall, including secretarial positions in the Health Department and at the City auditorium. Kroner gave the Complainant time off to interview for these positions. On or about July 7, Kroner informed Complainant that her last day of work with the City Clerk's office would be July 18. The Complainant filled in for someone in another department from July 19 to July 25, at which time she was terminated from City employment.

11. City Clerk Kroner did not have knowledge, as of the May 9 termination meeting, that Complainant had sought the assistance of the Union to resolve the machine assignment controversy. Kroner, on May 9, gave an effective notice of termination to Complainant, a probationary employe within the meaning of the labor agreement; and that Kroner's failure to establish a date certain until mid-July, did not negate her discretion to terminate a probationer under the labor agreement, though said act may have constituted more favorable treatment to a part-time, non-bargaining unit employe and reflected Kroner's dislike for Complainant. That Kroner's disparate treatment of Complainant in permitting

Gilles to control the operation of the word processor, though an arbitrary act and a pretexual one, as to the reasons assigned, is not such conduct tantamount to Kroner having acquired knowledge of Complainant's protected concerted activity before the May 9 termination; and that Kroner's conduct in that regard, does not establish any hostility of Kroner against Complainant because of Complaint's concerted activity to seek the assistance of the Union.

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

CONCLUSION OF LAW

That there exists an insufficient quantum of evidence within the meaning of Sec. 111.07(3), Stats., namely, the lack of a "clear and satisfactory preponderance of the evidence" to establish that the Respondent-City of La Crosse discharged the Complainant because of her protected concerted activity of seeking Union assitance in securing a job assignment to the word processor. That therefore, the City of La Crosse did not commit, and is not now committing, any violation of Secs. 111.70(3)(a)(3 or (3)(a)1 of the Municipal Employment Relations Act.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER 2/

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

Dated at Madison, Wisconsin this 31st day of August, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M. McCormick
Robert M. McCormick, Examiner

2/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In a complaint that an employer has discouraged membership in a labor organization by discrimination in regard to terms and conditions of employment, a practice prohibited by Sec. 111.70(3)(a)3 of the Municipal Employment Relations Act (MERA), the Complainant bears the burden of proving, by a clear and satisfactory preponderance of the evidence, (1) that the Complainant was engaged in protected concerted activity; (2) that the City had knowledge of said activity; (3) that the City was hostile toward said activity; and (4) that the City was motivated to discharge the Complainant, at least in part, because of hostility toward Complainant's engaging in the protected concerted activity. 3/ All four elements must be present for a finding of a prohibited practice under MERA. The City of course includes its agents, Kroner and Rusch.

As to the first factor, the Complainant asserts that she was engaged in protected concerted activity when she contacted the Union on and before May 7 regarding the problem she was having in getting access to the word-processor, which she was hired to operate. The Complainant also asserts that she was engaged in protected concerted activity when she chose to be accompanied by a Union steward to a May 12 meeting with the City Clerk and Personnel Director, called by Kroner to deal with her termination notice.

An employe is involved in protected concerted activity when she, or he, seeks the assistance of collective bargaining representative in regard to a dispute as to the terms and conditions of employment. The testimony and evidence in the record shows that the Complainant met the burden of proof by establishing that she was engaged in protected concerted activity.

As to the second factor, the Complainant asserts that Personnel Director Rusch learned that the Complainant was engaged in protected concerted activity when he met with a Union committee on May 7. While it is true that the Union did discuss the question of who would operate the machine in question, the record does not show that Rusch was aware that the problem was brought to the Union's attention by the Complainant. The May 7 meeting involving several staffing issues, only one of which involved the question as to who would operate the machine. The record is clear that it was common knowledge throughout the City Hall that there was a controversy over the operation of the machine. This would put the Union on notice of this issue without any input by the Complainant. The record does not clearly indicate that either Rusch, or City Clerk Kroner, had knowledge from the May 7 meeting that Complainant had sought the assistance of the Union, at that point, to resolve the dispute over the job assignment to the word processors.

The Complainant also asserts that Personnel Director Rusch told the Union committee that he would inform City Clerk-Kroner of the results of the May 7 meeting with the Union, which reflected an understanding that Complainant was to operate the machine in question. Though the record is clear as to such an accord, it is also clear that Rusch did not do so until the May 12 meeting. Complainant suggests that Rusch may have told Kroner of the Union's involvement prior to the May 12 meeting and maybe as early as May 8. However, sans clear record evidence for said proposition, Kroner cannot be said to have had notice, prior to May 9, that Complainant had in fact sought the assistance of the Union steward on May 7, to resolve the problem of access to the machine. it is understandable that the Union should offer such conjecture because of the chain of events from May 7 to May 12. However, the undersigned cannot treat conjecture as "clear and convincing evidence" that the City's agents had the requisite knowledge of Complainant's concerted acticity (protected by statute) prior to Kroner's "sacking" the Complainant at the May 9th meeting. As noted above, there existed a dispute of some notoriety between Complainant and Gilles, before May 9 over use of the

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3/ Milwaukee Board of School Directors (Riley Elementary School-II), (17651-A), 2/81.

machine. The Union's role was to confirm that the operator of the machine was a bargaining unit member, and not to process any grievance or complaint of the Complainant. In any case the testimony and evidence in the record does not show by a clear and satisfactory preponderance of the evidence tht Kroner had knowledge of Complainant's engaging in protected concerted activity before the meeting of May 9.

Obviously the record shows that Rusch and Kroner were aware of the Complainant's engaging in protected concerted activity when she was accompanied by the Union Steward to the May 12 meeting. In fact Kroner's reaction to the Union Steward's presence indicates a surprise that the Union was involved, suggesting she had no foreknowledge that the Complainant had engaged in protected concerted activity by seeking assistance from the Union on or before May 9.

As to the third factor, the Complainant points to Kroner's reaction to the Union Steward's presence at the May 12, 1980 meeting as sufficient, in and of itself, to establish that Kroner felt animus toward Complainant's activity in seeking out the Union. The record evidence is clear that Kroner did not mention the Complainant's concerted protected activity following the May 7 meeting between the Union and the Personnel Director, or at her meeting with the Complainant on May 9 leading to termination. There is no connecting link to suggest that Kroner was aware of Complainant's Union activity prior to the May 12 meeting. Kroner expressed chagrin or surprise, made at the May 12 meeting, that Complainant had brought in the Union, does not establish the anti-union animus of Kroner in terminating Complainant on May 9. At most, it indicates Kroner's stupidity and dislike of Complainant. The timing is important. Kroner had discharged Complainant on May 9, three days before she is shown to have known of Complainant's protected concerted activity.

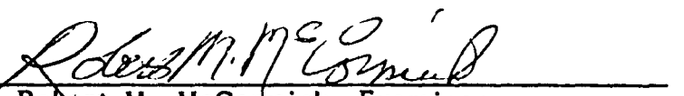
The Complainant avers that the City did not give her two week notice on May 9, but that Complainant did not receive two weeks notice until July 7. Complainant suggests that this indicates that Kroner acted on her anti-union animus. However, Kroner had such discretion under the parties' labor agreement to terminate a probationary employe such as Complainant. Kroner's act of giving Complainant more lead-time to find other employment (and thus-more weeks of gainful employment) does not constitute an act of hostility toward Complainant, based upon anti-union animus, or as a reprisal for Complainant's concerted activity. Kroner established the July termination date in time to train someone new for the fall elections.

Complainant alleges that the City had no legitimate reason to terminate the Complainant. The Complainant alleges that the only reasons stated by Kroner were that a non-unit employe, Gilles did not like Complainant; and that other City employes were snubbing the employes in the City Clerk's office because of the dispute over the machine. The record raises the strong inference that Kroner disliked Complainant and favored Gilles. Kroner said she terminated the Complainant because she did not get along with co-workers. The undersigned is convinced from the record evidence that Complainant's personality clashed with the City Clerk's. Though Kroner's reasons for making the discharge would never pass muster in the face of a "just cause" contractual test, said reasons do not constitute a discriminatory discharge under Sec. 111.70(3)(a), Stats., absent proof of the "crucial knowledge" which Kroner had on May 9, and Complainant's failure to prove anti-union animus on the part of City agents. Complainant failed to establish a Sec. 111.70(3)(a)3 violation under MERA, which would otherwise support Complainant's derivative 111.70(3)(a)1, "interference" charge. There is no evidence in the record to support an independent 111.70(3)(a)1 violation by the City because of its termination of Complainant.

For the reasons and discussion recited above, the Examiner has dismissed Complainant's complaint filed herein, in its entirety.

Dated at Madison, Wisconsin this 31st day of August, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Robert M. McCormick, Examiner