

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MICHAEL KAROLZAK,	:	
	:	
Complainant,	:	
	:	Case LXV
vs.	:	No. 27125 MP-1172
	:	Decision No. 18298-A
WAUKESHA COUNTY,	:	
	:	
Respondent.	:	
	:	

Appearances:

Mr. Gary M. Williams, Attorney at Law, 12065 W. Janesville Road, P. O. Box 421, Hales Corners, Wisconsin, appearing on behalf of the Complainant.

Michael, Best & Friedrich, Attorneys at Law, 250 East Wisconsin Avenue, Milwaukee, Wisconsin, by Mr. Marshall R. Berkoff, appearing for the Respondent.

FINDINGS OF FACT, CONCLUSION
OF LAW AND ORDER

Michael Karolzak, an individual, having, on November 24, 1980, filed a complaint with the Wisconsin Employment Relations Commission alleging that Waukesha County had committed prohibited practices within the meaning of Section 111.70(3)(a)(1) and (3), Wis. Stats.; and the Commission having appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Section 111.07(5), Wis. Stats.; and hearing on the complaint having been held before the Examiner on January 26, 1980 in Waukesha, Wisconsin; and briefs having been filed by both parties, the last of which was received on April 20, 1981; the Examiner, having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Waukesha County, herein referred to as the Respondent or County, is a municipal employer which, among other facilities, operates an Exposition Center and Northview Home and Hospital.
2. That certain of Respondent's employes are represented by Local 2490, American Federation of State, County and Municipal Employees, AFL-CIO, herein referred to as the Union.
3. That Michael Karolzak, herein referred to as the Complainant, was employed by Respondent from May, 1978 to October, 1979 as a temporary employe at the Northview Home and Hospital; that about August, 1979 the Complainant caused a grievance to be filed on his behalf by Hope Vermaas, President of Local 2490, AFSCME, which grievance alleged that the Complainant was not a temporary employe and was performing the functions of a Maintenance Mechanic and should be reclassified and paid as such; that in the course of discussion concerning said grievance with Local 2490 and the Complainant the County offered the Complainant a full-time, regular position as a Building Service Worker I; that the Complainant declined said offer; that about September, 1979 the County advised the Complainant that his temporary position would be abolished and the Complainant laid off in October, 1979; and that the Complainant resigned from said position on October 2, 1979.

4. That sometime in early 1980, the Complainant applied for a position at the University of Wisconsin - Waukesha; and that Complainant was not hired for said position.

5. That about June, 1980 Greg Karolzak, father of the Complainant, called Vern Metcalfe, a member of Respondent's Board of Supervisors and Chairman of said Board's Personnel Committee, and requested his assistance in securing a County job for Complainant.

6. That about late June, 1980 Metcalfe called Greg Karolzak, mentioned the possibility of a job at the County's Exposition Center, and directed Complainant to John Graham, Manager of the Exposition Center.

7. That on June 27, 1980 the Complainant filed an application for a position as a part-time, on-call Expo Aide at the County's Exposition Center; that the Complainant was not hired for said position; and that the County's refusal to rehire the Complainant was not related to the Complainant's prior filing of a grievance.

Upon the basis of the foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSION OF LAW

That Respondent, by refusing to rehire the Complainant in or about July, 1980, did not commit a prohibited practice within the meaning of Section 111.70(3)(a)(1) or (3), Wis. Stats.

Upon the basis of the foregoing Findings of Fact and Conclusion of Law, the Examiner makes and renders the following

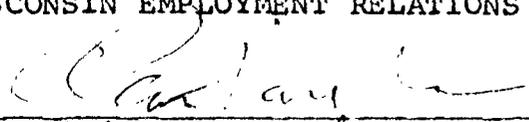
ORDER

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

Dated at Madison, Wisconsin this 22nd day of June, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Christopher Honeyman, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION
OF LAW AND ORDER

The complaint alleges that the County refused to rehire the Complainant in July, 1980 because of his prior union activity in filing and prosecuting a grievance, while employed by the County as a temporary employe, between August and October, 1979.

BACKGROUND:

In May, 1978, the Complainant was hired by the County as a temporary employe at its Northview Home and Hospital. In the summer of 1979, he was still employed in that capacity and was performing work which he considered to be similar to work performed by maintenance mechanics at that facility. In August, 1979 he contacted Hope Vermaas, President of Local 2490, AFSCME, and Vermaas filed a grievance seeking that the Complainant be reclassified from his temporary position (which was not subject to the collective bargaining agreement) to Maintenance Mechanic and paid back wages and benefits.

The County denied the grievance at each of several steps in the contractual grievance procedure, and the Union did not process the case to arbitration. In the course of the grievance meetings, however, the County offered the Complainant a full-time regular position as a Building Service Worker I, which position would have carried with it a higher pay rate than the Complainant was then receiving and also fringe benefits to which he was not, as a temporary employe, entitled. The Complainant refused this offer, apparently in the belief that a new Maintenance Mechanic position was to be created and that he would then be hired into that classification, which was paid substantially more than the Building Service Worker I pay rate.

On September 11, 1979 Vernon Metcalfe, Chairman of the County Personnel Committee, advised the Complainant (by copy of a letter sent to the Union's District Representative) that the County could not agree to create a new permanent position as a "Maintenance Worker" for the Complainant, noted that the grievance had protested his long-term employment as a temporary employe and that he had declined the offer of an alternative job, and informed him that the County would accede to the Union's position in the sense that he would be terminated as a temporary employe. Prior to the date of the anticipated termination, the Complainant resigned, on October 2, 1979.

THE COMPLAINANT'S APPLICATION FOR REHIRE:

In early 1980, the Complainant applied for a job as a janitor at the University of Wisconsin - Waukesha, for which he was not hired. This event is not the subject of any part of the Complaint, but it was immediately after the Complainant was rejected for this job that the Complainant's father, Greg Karolzak, contacted Metcalfe by phone. According to Greg Karolzak's testimony, he told Metcalfe (whom he had not met) that he was wondering why his son had not received the University job, and that Michael had previously worked for the County and "had had some difficulty because of a Union grievance". Greg Karolzak stated that Metcalfe "seemed quite sympathetic" and said he would do what he could, and also that "had Michael come to him instead of going to the Union he wouldn't have all these troubles now".

Metcalfe subsequently, according to uncontradicted testimony, called Greg Karolzak and told him that there was a possibility of a job at the Expo Center. On June 26 the Complainant went to see

John Graham, Manager of the Expo Center, and was told that a job was indeed open. Testimony differed, however, as to what job this was said to be. The Complainant testified that he was told the job was as an Expo Worker, that it was as a replacement for a man transferring to the Highway Department, and that the job was full-time but with varying shift times. Graham, however, testified that he told the Complainant the job available was as an Expo Aide, an on-call, part-time position not subject to the collective bargaining agreement and which paid no fringe benefits. Graham admitted on cross-examination that at approximately the time involved an employee in the Expo Center, classified as a Building Service Worker I, had considered transferring to the Highway Department, but had later changed his mind. But the job application filed by the Complainant the day after his June 26 interview with Graham shows that the position involved was Expo Aide, part-time. According to the Complainant, this notation was added after he submitted the form; according to Graham, it was made by him in the Complainant's presence on June 27. There is no dispute, however, that at the time of the June 26 meeting Graham had already checked with the Complainant's former supervisor, had been told his work performance was good, and that he indicated at the meeting that the Complainant could expect to be hired. (According to Graham, the job had to be posted for County employes for one week first and he told the Complainant this, but it is apparent from his testimony that at that date he expected the Complainant to be hired.)

Were the Examiner to find that the County had committed a violation of the statute in refusing to rehire the Complainant, the discrepancy over which job he had in fact been refused would, of course, assume considerable importance. As no violation is found to have occurred, however, this puzzling aspect of the dispute is of questionable relevance. The Examiner credits Graham's version despite the corroborative evidence that a Building Service Worker was then considering transfer, however, principally on the basis of the job application itself, the County having no apparent motive to have forged the wrong job title on the document.

At the time the application was filed, it is undisputed that Graham gave the Complainant to understand that he could expect to start work on July 14, but on July 2 he called the Complainant's house and left word that the Complainant was to start work on July 9, the day the County Fair was to begin. On July 7, Graham (according to testimony by Mary Karolzak, the Complainant's mother) or Graham's secretary (according to Graham's testimony) called and told Mary Karolzak that the Complainant should not come in on July 9 because Graham would be too busy to show him his job. On July 11, according to the Complainant's testimony, he received a call from a woman who identified herself as Graham's secretary and who told him that "the Personnel Board decided against me and I would not receive a position . . .". The Complainant himself had no further contact with any County representative.

Not so the Complainant's father, however. On or about July 14 he went to the Expo Center and there had a conversation with Graham, almost every detail of which is disputed. Greg Karolzak testified concerning this meeting in the following terms:

A Well, Mr. Graham was cordial and invited me in and asked me to sit down and I said, "How come -- you know, Michael didn't get this job. He should have been already, first on the 9th -- he's hired and then he's fired and now it's the 14th and it's passing by and he still doesn't have his job." I said "Something's wrong somewhere," and he said "Well," I'd like to say it as close as I can -- he said, "There was a committee meeting at the Courthouse of which Mr. Walsch was the head of the committee and he was not hired because of, well..." and then he said, "You know why," he says, "...on the hill, the hotbed of

Union activity and he was not hired because Mr. Walsch... and I said, "Is Mr. Walsch the only one adverse to Michael?" He says, "Oh, no. There are others on the committee that didn't want Michael rehired either." And that was it. And I said, "Well, can't you give the kid a break?" I said, "He's only a young fella. Why hold this against him because he had a grievance?" And then he retorted and said, "Well, I can't do anything about it." He says, "I have to abide by the decisions." He said, "I was trying to do Mr. Metcalfe a favor."

According to Greg Karolzak, a second meeting between himself and Graham occurred on or about August 4th, after Greg Karolzak had, on July 26, noticed an advertisement for the Expo Aide job placed by the County in a local newspaper and his son had allegedly filed a second job application with the County. 1/

I went to see Mr. Graham -- well, let's see, the 26th had gone and Michael had put in his application for this job and nothing came of it. So then about August 4th I figured, well, it's time to go see Mr. Graham again, and see what happened to this application, okay? So, I talked to Mr. Graham and he said Michael was number seventeen on the list -- something like that.

Q (by Mr. Williams) Are you referring now to the application for the position which was listed in the Waukesha Freeman?

A Yes, and I said something to the extent that, well, couldn't he get him on the job and then Graham said specifically, "I don't know about this job," he said, "because Michael was supposed to be hired for a full-time job and I doubt very much if Michael would want this part-time job." And, I said, "At this time Michael would take a part-time job gladly," I said, "since he could not get the original full-time job." And this is a fact.

According to Graham and another County witness, Personnel Administrator Allan Walsch, the entire sequence of events was different. Graham testified that when he initially forwarded the Complainant's application to the County's Personnel Department, he requested authorization to hire the Complainant as an Expo Aide not at the minimum hourly rate of \$3.10, which was customary, but at Step 4 of the position's pay scale, or some 45¢ more. 2/ This, he testified, was because the position had great turnover, was generally filled by high school students and the Complainant had added value, being older and, more importantly, free to work at any time. Graham testified that he had authority to make a final decision concerning hiring but that hiring above the minimum rate had to be approved by the County's Personnel Committee. Graham testified also that about July 6th, shortly after he made this request (to a junior member of the Personnel Department) he received a telephone call from Walsch, who asked why he was requesting a higher rate for the Complainant and was told the reasons noted above, and that the request was made, in addition, in view of Michael Karolzak's previous pay rate at the County. Walsch and Graham then discussed the manner in which Graham had heard of Michael Karolzak and his references, and then Walsch asked if Graham knew of the grievance

1/ Only one job application is in the record and that one is date-stamped June 27, 1980.

2/ Michael Karolzak did not testify as to what pay rate was discussed for the Expo Center position.

that had been filed in the Complainant's behalf and said, in Graham's words, "to be sure that I knew that this could not be used in any determination of whether or not we hired Mike". Walsch then added that it was the County's "philosophy" not to rehire people who had quit, that in his opinion "Mike was probably not the type of person who could stand on his own two feet" and that he would like Graham to delay the hiring so that Walsch could bring the fourth-step request, and the matter of the rehire of a former County employe, to the Personnel Committee. Graham agreed to this.

According to Graham, he attended a heated meeting of the Personnel Committee on July 21, at which Metcalfe asked him to explain that Metcalfe had not attempted to influence hiring in any improper manner and at which Walsch, Metcalfe and others became embroiled in argument concerning the merits of rehire and County Supervisors' involvement in hiring. This was apparently the only meeting of the Personnel Committee which Graham attended at which this subject was discussed, but Walsch testified that the matter was raised at several such meetings in July, inconclusively on each occasion. (Metcalfe did not testify.) But according to Graham, he decided not to hire the Complainant prior to the July 21 meeting, shortly after his meetings with Greg Karolzak, the first of which he described in the following terms:

He came into the office. The receptionist announced him. I took him down to my office. He said he was just there to find out what the problem was that Mike was hired and then fired and I proceeded to explain to him that the problem was it had been taken to the Personnel Committee, that there was a philosophy about rehiring which I wasn't aware of at the time I talked to Mike and the problem of his starting salary had to be resolved by the Personnel Committee and that I was holding off until some decision there was reached.

In Graham's version of events, he told Greg Karolzak at their first meeting that no decision had been made and subsequently decided not to hire Michael Karolzak largely because of the Complainant's father's involvement. He did not testify as to the substance of his second conversation with Greg Karolzak, but described Karolzak on that occasion as having shown "rather a complete change over the first meeting. He was very congenial on the first visit. This one was kind of belligerent, you know, why is all this happening and so forth attitude. That was his attitude on the second visit." Graham explained his decision not to hire Michael Karolzak in these terms:

I just felt that if I hired Mike and if I had any sort of a problem or something, that I might have to deal with the father again -- I felt that perhaps Mike should have come in and found out why he was not considered for the job or why he was told to come in and I never heard from Mike again at all. It was always the father and this added to the conflict with the Personnel Committee and everything else, I just didn't want to become involved in something that I thought was a very minor thing to start with.

Graham testified that on the morning after the July 21 Personnel Committee meeting, Walsch called him to apologize for his having been enmeshed in a "personality conflict" and that he then told Walsch he had decided not to hire Michael Karolzak, a decision he had allegedly reached prior to July 21. Walsch then allegedly reiterated his concern that the Complainant's prior grievance activity should not have been considered in reaching this decision, and Graham assured him it had not been.

A further encounter concerning the Complainant's application is again disputed as to the facts. Greg Karolzak visited Walsch at his office (as with his meetings with Graham, he made no appointment) and in testimony described the essential part of the conversation in these words:

I said, "I'm Michael Karolzak's father and I'd like to see you about why he wasn't employed," and the crux of the matter was Mr. Walsch said that Michael was offered a job before and he refused it. . .

And I said, "Michael is a young fellow. He doesn't understand all these things -- grievances and all these things. Could you give him another chance. I said "Just because he made a grievance," I said, "that shouldn't be held against him," and then Mr. Walsch responded and he said, "Well, Michael will not be rehired, that's all." He said, "Because he knew what he was doing at the meeting. He got up and he was sure of himself." And I said, "Well, why hold this against Michael?" He said, "Well, he caused us trouble at the grievance meeting and we are adverse to pressure," and this is the God's honest truth -- "We are adverse to pressure and, therefore, Michael should go get another job some other place and I'm busy," and he took off and I walked out of the place. That was all that was said.

Walsch's testimony concerning this conversation paints a different picture, as follows:

. . . he approached me rather strangely. He said he came to me because I was the real power in the County and that they had approached the Northview Administration and they had filed a grievance and this had not gotten his son a permanent position with the County and I, apparently, was the person who could make this decision and he asked me to reconsider the decision, saying that Mike did not know what he was doing. He was very young and immature and needed another chance.

. . . I indicated to him that I did not have the authority to hire Mike or not and if I did have the authority I would not recommend such a hire because I did not respond well to that type of pressure and I suggested that Mike get a job someplace else.

There is no question that if Graham - whose testimony was that he alone made the decision not to hire the Complainant - was impelled directly or indirectly by hostility toward the Complainant's prior union activity, that decision violated the statute. Graham testified without contradiction that he knew of the Complainant's grievance, as a result of his conversation with Michael Karolzak's former supervisor, even before the Complainant applied for the Expo Center job, and nowhere in the record is it even suggested that Graham personally harbored any animus toward the Complainant for his activity. Yet if Graham was influenced in his decision by other County officials who were for that reason hostile toward the Complainant, the County's liability would of course be the same as if Graham himself was motivated by anti-union animus. The question of which, if any, of the witnesses is to be believed as to the disputed conversations between Greg Karolzak and, respectively, Graham and Walsch, is therefore of paramount importance, for, if Greg Karolzak is credited throughout, the implication is clearly that Walsch, and perhaps others active in the County's personnel matters, resented the Complainant's temerity in challenging their long-term employment of him as a temporary employe and arranged to discourage his rehire by Graham. If Graham and Walsch are credited, however, no conversations suggesting such a motivation ever took place.

In this tangle of conflicting evidence, the Examiner is hampered by indications that not one of the principal witnesses is wholly reliable. Michael Karolzak, as noted above, has been found less credible than Graham as to the question of which job he applied for. The Complainant's credibility is also undermined by the conflict between his testimony concerning the July 11 phone call - which in his words shows that the County's Personnel "Board" had made a final decision not to hire him - and his father's testimony: for Greg Karolzak, in explaining why he went to see Graham about July 14, stated that Michael had told him "that he wasn't supposed to report on the 14th which was the original date that he had been hired for. . . ." Greg Karolzak's testimony, of course, is consistent with that of Graham as to the substance of this conversation.

Graham's version of events is coherent and logical except for his testimony as to the date of his decision not to hire the Complainant, which he places as shortly after he was visited for the second time by Greg Karolzak. If this is true, the sole motivation for his decision must have been irritation with Greg Karolzak's persistent intervention in his son's affairs - which, as will be discussed below, is not a totally improbable motivation - for there is no evidence that, prior to July 21, he knew that this rehire was the subject of controversy in the Personnel Committee. ^{3/} But that fails to explain why, at the July 21 meeting, Graham would have suffered through at least part of a raucous debate on what he would then have known to be a dead issue; the obvious response to others' questions and arguments concerning the rehire would have been to announce his decision there and then to the Personnel Committee, instead of waiting a day to tell Walsch privately.

Walsch, meanwhile, is the sole witness who claimed independent knowledge of the County's alleged "philosophy" against rehires, which was at least part of the alleged reason for submission of this routine hire to the Personnel Committee. The actual existence of such a "philosophy" is cast into doubt by a number of factors: the lack, admitted by Walsch, of any written policy embodying this "philosophy"; Graham's admission that he had never heard of it prior to Walsch's telephone call of about July 6, and Local 2490 President Hope Vermaas' uncontradicted testimony that she was unaware of any such "philosophy" and that if it existed it had been repeatedly violated in a number of hires, both inside and outside an exception (for hard-to-find nurses) which Walsch acknowledged. Furthermore, such a "philosophy" is inherently illogical; employers routinely welcome the chance to make some hires from among the "known quantities" of former employes, and Walsch's explanation in testimony of the reasoning behind the "philosophy" - which, ironically, he ascribed to Metcalfe's influence-smacks of a vision of County employment as a favor granted to the deserving rather than as necessary work which the County must ensure is performed.

Walsch's July 6 statement to Graham that "Mike was probably not the type of person who could stand on his own two feet" could be taken as an indication of anti-union animus dating from the grievance, or as a reference to the fact that Greg Karolzak and Metcalfe had already been, to some extent, active in Michael Karolzak's behalf - though the most obtrusive involvement by Greg Karolzak did not come

^{3/} Graham testified that sometime between July 8 and 21 he was visited by Metcalfe, who asked what was happening with the Complainant's application, but there is nothing in this testimony, or in Greg Karolzak's testimony of a mid-July discussion between himself and Metcalfe, to indicate that Graham knew of dissension in the Personnel Committee prior to July 21.

till later. But the Examiner is inclined to doubt the assertions, by Walsch and Graham, of Walsch's alleged concern lest Graham take into account the Complainant's grievance filing, and of Graham's reply; both witnesses' testimony, both in demeanor and on review, seems pat and self-serving.

But if Michael Karolzak, Allan Walsch and, to a lesser extent, John Graham each inspired mistrust as a witness, so too did Greg Karolzak. In demeanor he seemed resentful and verbose, and his testimony in places showed a readiness to jump to conclusions, all of which make his reliability suspect; on cross-examination Greg Karolzak gave testimony concerning the functions of the County's Personnel Committee and Personnel Administrator, for example, which showed him to be opinionated and quite willing to express unshakable convictions concerning factual matters of which he then admitted near-total ignorance. Greg Karolzak firmly characterized Graham as having told him that Walsch was "the head" of the Personnel Committee and Chairman of a meeting of the Personnel Committee, even while he admitted knowledge that Metcalfe was Chairman of the Personnel Committee, and then explained this discrepancy by expressing a belief that there are two Chairmen. This testimony was denied, credibly, by Graham, and is but one example among others equally difficult to credit. Also, Greg Karolzak's version of his second meeting with Graham is made suspect by unrebutted testimony by Graham that no new full-time Building Service Worker or related classification had been hired in the two years preceding the hearing herein - testimony which could easily be challenged if inaccurate. Moreover, Greg Karolzak's reliability is called into question not only by his demeanor as a witness but by his deep involvement and commitment to the cause of obtaining County employment for his son - a commitment which visibly exceeded that of the Complainant. His repeated calls and visits to County officials show a fervor which may itself render his objectivity questionable, while his demeanor as a witness lends support to Graham's otherwise-odd claim that the essential reason for his decision not to hire the son was the incessant interference by the father. Furthermore, not only does Greg Karolzak's propensity to make firm statements, concerning minor matters where he is plainly wrong, undermine his allegations of damaging statements made by Graham and Walsch, but the phrases he imputes to them, particularly to Graham in their conversation of July 14, are stilted and incoherent and seem improbable utterances for Graham to have made.

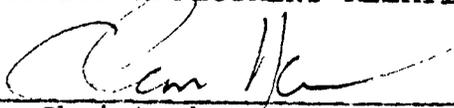
Significantly, it must be observed that the objective facts - that is to say, those that can be ascertained without reference to the various disputed items - do not favor the Complainant's case. When the Complainant's grievance was resolved, it is true that the upshot was that he would have been terminated had he not quit; but far from this being evidence of retribution, it was a logical outcome of a grievance which protested the too-long employment of a temporary employe, and the County had shown good faith by previously offering the Complainant a full-time job at a considerable improvement in his overall compensation. The Chairman of the Personnel Committee who signed the letter of termination was the same Chairman, who, in 1980, aided the Complainant in seeking County employment, at least to the extent of inquiring as to whether an Expo Center job was open and referring him there. The Expo Center manager who ultimately decided not to hire the Complainant was the same one who, with knowledge of the Complainant's prior grievance, encouraged him to apply and indicated that he could expect to be hired. These facts are uncontroverted and for the complaint to have merit it would therefore have to be shown that Walsch and/or other County officials not identified in the record both harbored animus toward the Complainant on account of his grievance activity and possessed sufficient influence to have persuaded Graham to alter his decision. Yet Graham's explanation, in view of Greg Karolzak's observed character, is generally plausible, and, as noted above, Greg Karolzak, on whose testimony the evidence of animus absolutely depends, cannot be considered a reliable witness.

Despite less-than-complete satisfaction with the Respondent's witnesses, therefore, the Examiner must in this Rashomon-like case apply the statutory rule that it is for the Complainant to prove, by "a clear and satisfactory preponderance of the evidence", 4/ that the County's failure to rehire Michael Karolzak was for reasons related to his union activity, and must find that the Complainant has not met this burden.

Dated at Madison, Wisconsin this 22nd day of June, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Christopher Honeyman, Examiner

4/ Sec. 111.07(3).