STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,	:	
Complainant,	:	
vs.	:	Case II No. 28855 Ce-1936 Decision No. 19212-B
WEST SIDE COMMUNITY CENTER, INC.,	:	
Respondent.	:	

Appearances:

Podell, Ugent & Cross, S.C., Attorneys at Law, by Mr. Alvin R. Ugent, 207 East Michigan Street, Milwaukee, Wisconsin 53202, for the Complainant.

Ropella & Van Horne, Attorneys at Law, by Mr. Dennis J. Weden, 411 East Mason Street, Milwaukee, Wisconsin 53202, for the Respondent.

ORDER AFFIRMING EXAMINER'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND MODIFYING IN PART EXAMINER'S PROPOSED ORDER

Examiner David E. Shaw having on April 25, 1983 issued his Proposed Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled proceeding wherein he concluded that the Respondent had not committed certain alleged unfair labor practices and that it had committed certain other unfair labor practices within the meaning of Sections 111.07(1)(a) and 111.06(1)(a), (b) and (c)1 of the Wisconsin Employment Peace Act (WEPA); and the Respondent having, on May 16, 1983, timely filed a petition for Commission review of said decision; and the Commission, having reviewed the record in this matter and the written arguments submitted, and being satisfied that the Examiner's Proposed Findings and Conclusions of Law should be affirmed in their entirety and that his Proposed Order should be modified as provided for below;

NOW, THEREFORE, it is

ORDERED 1/

1. That the Commission affirms and adopts as its own the Examiner's Proposed Findings of Fact 1 - 29 and his proposed Conclusions of Law 1 - 6.

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats. 227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(Continued on Page 2)

2. That the Commission affirms the balance of the Examiner's Proposed Order and modifies said Order to also provide that in addition to the remedy ordered by the Examiner, the Respondent, its officers and agents, shall also pay interest at a rate of 12% per year 2/ on the monetary amount due and owing to Mark Meiling from the date of Respondent's unlawful October 7, 1981, termination of Meiling until Respondent complies with the Order as modified. 3/

Given under our hands and seal at the City of Madison, Wisconsin this 5th day of March, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner

1/ (Continued)

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.)

2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was filed on December 1, 1982. At that time, the rate in effect was 12% per year. Sec. 814.04(4), Wis. Stats. Ann. (1983). See, Wilmot Union High School, Dec. No. 18820-B (12/83) citing Anderson v. LIRC, 111 Wis. 2d 245 (1983) and Madison Teachers v. WERC, 115 Wis. 2d 623 (Ct. App., 1983).

3/ In the absence of any exceptions filed in respect thereto, the Commission adopts without consideration or modification the Examiner's recommended dismissal of certain complaint allegations.

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND MODIFYING EXAMINER'S PROPOSED ORDER

BACKGROUND:

The issues herein arose during the course of the representation campaign which preceded the holding of the Commission's October 11, 1981, representation election among Respondent's professional and non-professional units. The Union's complaint alleged that the Respondent had unlawfully laid off Richard March; that it unlawfully suspended and terminated Stephen Michalski and Michael Meiling; and that it unlawfully discriminated against its employes by promulgating certain work rules and procedures and by also forcing them to cooperate in the Respondent's discriminatory actions against Meiling and Michalski. The Examiner dismissed all of these complaint allegations, except for those relating to Meiling's discharge. As to him, the Examiner found that Meiling was not a supervisor and that Respondent discharged him in part because of his Union activities in violation of Section 111.06(1)(c)1 of WEPA.

RESPONDENT'S EXCEPTIONS:

Respondent has excepted to the Examiner's decision, arguing that the Examiner erred in finding that Meiling was not a supervisor and that he also erred in relying upon the decision of the Wisconsin Supreme Court in Muskego-Norway 4/ for his conclusion that Respondent unlawfully fired Meiling.

DISCUSSION:

Dispute Concerning Meiling's Status as an Employe

Turning first to the question of Meiling's employment status, the Respondent contends that Meiling was a supervisor because he assigned, directed and scheduled employes; purchased materials for the Respondent's home building program, and prepared reports and cost comparisons for said programs; and signed documents which listed him as a supervisor, and hired and fired employes.

In considering this issue, the Commission notes that the record is somewhat unclear regarding the exact demarcations of Respondent's supervisory structure, with Respondent's own Executive Director William Meunier acknowledging at the hearing that Respondent's operations had "a real confused chain of command." Despite this confusion, the Commission nonetheless affirms the Examiner's conclusion that Meiling was not a supervisor because the record fails to establish Respondent's contention that Meiling performed sufficient supervisory duties to be considered a supervisor.

While Respondent argues that Meiling several years ago fired an employe named "Joe", Respondent has failed to adduce any persuasive evidence pertaining to the circumstances of that discharge and/or Meiling's exact role in it. Accordingly, and because Meiling flatly denied ever having fired any employe, there is insufficient evidence to warrant finding that Meiling in fact effectively recommended the discharge of that employe. Respondent also argues that Meiling helped hire at least three employes, as reflected by the fact that the hiring forms for those employes listed Meiling as a supervisor. Again, Respondent at the hearing offered no specific evidence regarding Meiling's alleged role in those hires and Meiling denied that he ever hired employes. Moreover, while those hiring forms identify Meiling as a supervisor, one of those forms also identifies employe Jim Mueller as a supervisor. In fact, however, it is undisputed that

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4/ 35 Wis. 2d 540 (1967).

Mueller is not a supervisor, as Respondent in the underlying representation election stipulated that Mueller was within the bargaining unit. That being so, there is no basis for finding that Meiling was a supervisor merely because his name, like Mueller's, appears on those hiring forms.

In this same connection, Respondent notes that Meiling was identified as a supervisor in numerous personnel related documents, including a May 18, 1981, letter from Housing Coordinator Stephen Michalski to the Community Correctional Center which stated that Meiling was the immediate supervisor for newly hired employe Edward Basley. However, that same letter also stated that "Gene Archer is the head of the CHIP Rehabilitation program and he will be ultimately responsible . . ." for supervising that new hire. Again, since Respondent in the underlying representation case stipulated that Archer was not a supervisor and that he was eligible to vote in the election, we give no weight to the fact that such documents identify Meiling as a supervisor.

Furthermore, while some of the employes herein viewed Meiling as their supervisor, such views cannot be given much weight because the record further reveals that at least one employe thought that Meiling was only a painter's helper, thereby indicating that employes were also confused over Respondent's chain of command.

Nevertheless, it is true, as Respondent correctly points out, that Meiling prepared cost estimates and other business-related documents pertaining to Respondent's home building program. But, contrary to Respondent's claim, such factors do not constitute supervisory duties but, rather, go to the question of whether Meiling was an "executive" employe within the meaning of Sec. 111.02(3), Stats. To establish executive status under WEPA, the person in question would, at a minimum, need to be shown to either participate in a significant manner in the formulation, determination and implementation of management policy, or have the effective authority to commit the employer's resources. 5/ The record fails to establish that Meiling performed any of the foregoing functions. Accordingly, there is no basis to find that Meiling was an executive employe.

It is true that Meiling routinely assigned work and scheduled employes. Those factors by themselves are insufficient to establish Meiling's supervisory status, however, because, as correctly noted by the Examiner, the exercise of these limited duties is insufficient to establish Meiling's supervisory status. Especially so where, as here, the record contains no evidence showing that Respondent ever told Meiling that he was part of its supervisory structure. Accordingly, we find that Meiling was an "employe" as that term is defined in Section 111.02(3) of WEPA, and that he therefore is entitled to the protections spelled out in WEPA, including the basic right to either support or not support a union without employer interference or discrimination.

Alleged Interference and Discrimination

The Examiner found that Respondent in part fired Meiling because of his Union activities and that said firing was unlawful under the Wisconsin Supreme Court's decision in Muskego-Norway. There, the Court, on rehearing, held that an employe could not be fired for union activities, irrespective of whether an employer had other valid reasons for the discharge. In doing so, the Court reversed the earlier ruling of a trial court which had found the termination to be lawful because the employer also had reason to fire the employe because of his teaching deficiencies. The Court reversed the trial court, ruling that that was "not the law", and it quoted with approval N.L.R.B. v. Great Eastern Color Lithographic Corp., 6/ where that federal court stated:

> "The issue before us is not, of course, whether or not there existed grounds for discharge of these employees apart from their union activities. The fact that the employer had ample reason for discharging them is of no moment. It was free to discharge them for any reason good or bad, so long as it did

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5/ See, Holy Family Hospital, 11535 (1/73).

6/ 309 F. 2d 352, 355 (CA2, 1962).

> not discharge them for their union activity. And even though the discharges may have been based upon other reasons as well, if the employer were partly motivated by union activity, the discharges were violative of the Act."

Going on, the Court in Muskego-Norway noted that "Several other federal cases are in accord" with Great Eastern and it cited St. Joseph's Hospital v. Wisconsin E. R. Board because that case, in the Court's words, adopted the legal conclusions of these federal cases "that an 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." 7/

In the aftermath of Muskego-Norway, the Commission has consistently applied this significant principle of law to the three labor relations statutes which it administers - WEPA, the Municipal Employment Relations Act (MERA), and the State Employment Relations Act (SELRA). For, although Muskego-Norway arose under MERA, the rule of law established therein relating to discriminatory discharges must also be applied to WEPA and SELRA because the language of the statutes is parallel and the policy considerations giving rise to Muskego-Norway are likewise applicable to these other statutes. Indeed, the Court itself in Muskego-Norway noted the interplay between MERA and WEPA in considering the issue before it when it relied upon St. Joseph's Hospital which arose under WEPA. As a result, the Examiner here correctly held that Muskego-Norway was applicable to discriminatory discharges under WEPA.

Nevertheless, Respondent argues that the Commission should now reverse Muskego-Norway and rule that an employer does not act unlawfully when it fires an employe in part because of his/her union activities when other valid non-discriminatory considerations also support the discharge. In support of its position, Respondent relies upon Wright Line 8/ where the National Labor Relations Board (NLRB) ruled that it would no longer find a discriminatory discharge to be unlawful if an employer could prove by a preponderance of the evidence that it had other valid grounds to discharge the alleged discriminatee and that it would have fired the employe even in the absence of any such anti-union considerations. The U.S. Supreme Court in 1983 subsequently affirmed that principle in NLRB v. Transportation Management Corp., _____ U.S. _____, 113 LRRM 2857 (1983) where it agreed with the holding that "The shifting burden merely requires the employer to make out what is actually an affirmative defense. . ." Elaborating on the nature of this affirmative defense, the Court added:

> "The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activities but his own wrongdoing."

It is within this context that the Respondent asks us to ignore Muskego-Norway and to dismiss the complaint allegation herein because Respondent had valid reasons to fire Meiling which were unrelated to his union activities.

As correctly noted by the Respondent, the record here indeed reveals, as found by the Examiner, that Meiling was guilty of numerous work-related deficiencies and that he also committed several acts of misconduct which in other circumstances may well have warranted his dismissal. Nevertheless, and for the reasons set forth in the Examiner's decision, we adopt the Examiner's recommendation that Respondent also fired Meiling in part because of his Union activities and that such a termination under Muskego-Norway was violative of Section 111.06(1)(a) and (1)(c) of WEPA.

In doing so, we reject Respondent's claim that the Commission must disregard Muskego-Norway in favor of the dual motivation test set out in Wright-Line and

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7/ 264 Wis. 396, 59 N.W. 2d 448 (1953).

8/ 251 NLRB 150, 105 LRRM 1169 (1980), enforced 662 F. 2d. 899, 108 LRRM 2513 (1st Cir. 1981), cert. denied 455 U.S. 989, 109 LRRM 2779 (1982).

Transportation Management Corp. First of all, the Wisconsin State Legislature has tacitly adopted the Supreme Court's Muskego-Norway holding when it subsequently enacted labor law legislation over the years which did not attempt to either modify or repeal the Court's holding in that case. Thus, the Legislature enacted substantial modifications to MERA in both 1971 and 1977 and it enacted SELRA in 1967 to cover collective bargaining for many state employes. Since it is to be presumed that the Legislature throughout that time was aware of Muskego-Norway, its failure to disturb that significant holding suggests that it would not be inconsistent with the legislative intent to carry forward the rule of that case to the various state labor relations statutes. Secondly, even if we were to disregard this legislative history, the Commission as an administrative agency could not on its own reverse a decision of the Wisconsin Supreme Court. Accordingly, the Commission concludes that it is required to adhere to Muskego-Norway in reviewing the instant matter.

In addition, even assuming arguendo that Muskego-Norway should not be followed, we nonetheless would find that Respondent's discharge of Meiling was unlawful. For, the record establishes that Meunier had a chance meeting in a bar in October, 1981, with George Woywod, where Meunier told Woywod that he was having trouble with the Union, that he had had to fire two people because of their Union activities, that he did not have much respect for those two employes, and that he did not believe that Respondent should have a Union because it was too small and provided social services. These facts establish that Meunier's decision to recommend Meiling's discharge was primarily based on unlawful anti-union considerations. Moreover, at least some parts of Respondent's Board of Directors, which actually fired Meiling on October 7, 1981, bore a like anti-union hostility, as shown by the admission of Director Peter I. Slaby who testified at the instant hearing that he "could not work with the arrogance that was being exhibited by . . ." Meiling and Steve Michalski and that such arrogance was demonstrated by their support for the Union.

At a minimum, then, the foregoing shows that Respondent's decision to fire Meiling was motivated by anti-union considerations inextricably interwoven with whatever other valid grounds it may have had for firing Meiling. Inasmuch as Respondent under Wright Line would have the burden of proving that it would have fired an employe independently of anti-union considerations, we would necessarily have concluded that Respondent failed to prove such an affirmative defense if it were available in Wisconsin law.

Interest on Monetary Relief Ordered

We have modified the Examiner's Order to provide pre-and post-decision interest on the monetary amounts found herein to be due, to conform the order to our policy concerning interest as most recently articulated in Wilmot Union High School 9/. As we noted in Wilmot Union High School, in both Anderson v. LIRC 10/ and Madison Teachers v. WERC, 11/ the appellate Courts held, inter alia that the administrative agency involved had erred by not ordering interest as regards a period including the time from the beginning of the back pay period to the date of the initial decision holding that the back pay involved was due and owing. Each Court held that the agency involved had improperly failed to apply the general rule in Wisconsin that pre-judgment interest is available as a matter of law on fixed and determinable claims, such as employment related backpay. Furthermore, in Madison Teachers v. WERC, the Court of Appeals held

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9/ Wilmot Union High School District, 18820-B (12/83) citing, Madison Teachers v. WERC, 115 Wis. 2d 623 (Ct. App. IV No. 82-579, 10/25/83) and Anderson v. LIRC, 111 Wis. 2d 245 (1983).

10/ See note 9, above.

11/ See note 9, above.

that "the fact that interest was not demanded in the complaint is of no consequence." Slip op. p. 8., citing, Bugley v. Brandau, 57 Wis. 2d 198, 208 (1973). Accordingly, we have included the payment of interest as part of the remedy ordered in this matter. In the absence of any exceptions filed to the Examiner's recommendation that no bargaining order be issued to remedy Respondent's unfair labor practices, we adopted that recommendation.

Dated at Madison, Wisconsin this 5th day of March, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner