

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48,
AFSCME, AFL-CIO,

Complainant,

vs.

WEST END COMMUNITY
ASSOCIATION, INC. (f/k/a
WEST SIDE COMMUNITY
CENTER, INC.),

Respondent.

Case 2
No. 37794 Ce-2055
Decision No. 19212-C

Appearances:

Podell, Ugent & Cross, S.C., Attorneys at Law, by Mr. Alvin R. Ugent,
Suite 315, 207 East Michigan Street, Milwaukee, Wisconsin 53202,
appearing on behalf of the Complainant.

Mr. Dennis J. Weden, Attorney at Law, 1216 North Prospect Avenue,
Milwaukee, Wisconsin 53202, appearing on behalf of the Respondent.

FINDINGS OF FACT AND ORDER DENYING
MOTION FOR RELIEF FROM PRIOR ORDER AND
DETERMINING AMOUNT OF BACK PAY

On April 25, 1983, Examiner David E. Shaw issued proposed Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum wherein he concluded that the above-named Respondent had committed certain unfair labor practices within the meaning of Secs. 111.07(1)(a) and Sec. 111.06(1)(c) of the Wisconsin Employment Peace Act by suspending and discharging Mark Meiling due in part to his protected activities on behalf of Complainant, and the Examiner ordered that the Respondent immediately reinstate Meiling and make him whole for lost wages and benefits.

On May 16, 1983, the Respondent timely filed a petition for Commission review of the Examiner's decision pursuant to Sec. 111.07(5), Stats., and on March 5, 1984, the Commission affirmed the Examiner's Proposed Findings of Fact and Conclusions of Law and Modified the Examiner's Proposed Order to include interest at the statutory rate on the remedy ordered by the Examiner.

On April 2, 1984, the Respondent filed a petition to review the Commission's decision in the Circuit Court of Milwaukee County. On May 5, 1986, Circuit Judge Clarence R. Parrish, issued an Order wherein he affirmed the Commission's Order and remanded the matter to the Commission to determine the specific amount of back pay, if any, which should be awarded to Mark Meiling. On June 24, 1986, the Respondent filed an appeal of the Circuit Court decision to the Court of Appeals, and on August 26, 1986, the Court of Appeals dismissed the Respondent's appeal of the Circuit Court decision.

On December 30, 1986, Lionel L. Crowley, a member of the Commission's staff, held a hearing in Milwaukee, Wisconsin, to determine the amount of back pay, if any, which should be awarded Mark Meiling. On March 3, 1987, the Respondent filed a Motion For Relief From An Order requesting the Commission to set aside its original decision on the basis that Meiling's testimony on December 30, 1986, constituted perjury. The parties submitted briefs, the last of which was received on March 3, 1987, and certain exhibits were received on March 6, 1987, whereupon the record was closed.

Having considered the record, Judge Parrish's decision and Order, and the arguments of the parties and being fully advised in the premises the Commission makes and issues the following Findings of Fact and Order.

FINDINGS OF FACT

1. That Mark Meiling was discharged by Respondent on October 7, 1981; that the Respondent offered Meiling reinstatement in March or April, 1986; and that Meiling subsequently turned down the Respondent's offer of reinstatement.

2. That at the time of his discharge on October 7, 1981, Meiling was paid at the rate of \$5.40 per hour; that after his discharge, Meiling earned the sum of \$198.82 for the balance of the calendar year 1981; that if Meiling had worked the entire calendar year in 1981, his earnings would have been \$11,232; and that Meiling was paid \$8,646.36 by Respondent up to October 7, 1981 and when added to the \$198.82 other earnings, Meiling's total earnings were \$8,845.18, and therefore Meiling lost \$2,386.82 in wages for calendar year 1981. 1/

3. That for calendar year 1982, Meiling would have worked 2088 hours at \$5.40 for total wages of \$11,275.20; that Meiling actually earned \$8,174.10 in calendar year 1982, thereby incurring a wage loss of \$3,101.10; that in addition to this wage loss, Meiling had to pay the cost of his health insurance which was a fringe benefit previously provided by Respondent; that Meiling paid \$1002.69 in 1982 for health insurance from the date of his discharge through October 31, 1982; and that his total losses in wages and benefits for 1982 were \$4,103.79.

4. That Meiling earned more in 1983 than he would have earned had he worked for Respondent and has claimed no loss for 1983.

5. That in 1984, Meiling was laid off from his employment; that with unemployment compensation and other earnings, Meiling's income was \$9,607.53 but would have been \$11,275.20 had he worked for Respondent for a wage loss of \$1,667.67; that Meiling had to pay for his health insurance during his layoff which amounted to the sum of \$1,407.33; and that Meiling's total loss in wages and benefits for 1984 was \$3,075.00.

6. That after 1984 and up to the time the Respondent made its offer of reinstatement, Meiling's earnings were greater than what the Respondent would have paid him and he has claimed no loss for years subsequent to 1984.

On the basis of the above and foregoing Findings of Fact, the Commission makes and issues the following

ORDER 2/

1. That Respondent's Motion For Relief From An Order is Denied.

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- 1/ The \$5.40 figure is used for all years and is not disputed by the Complainant. Additionally, the number of hours used to calculate the possible wages in 1981 was set at 2080 and was not disputed.
- 2/ Pursuant to Sec. 227.48(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. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 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

(Footnote 2 continued on Page 3)

(Footnote 2 continued)

court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

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. That Respondent shall immediately make Mark Meiling whole by paying him the following amounts plus interest at the rate of 12% per year 3/ on said back pay until Respondent complies with this Order:

<u>Year</u>	<u>Amount</u>	<u>Interest</u>
1981 (October 7, 1981- December 31, 1981)	\$2,386.82	+ 12% from 1981 through compliance.
1982	4,103.79	+ 12% from 1982 through compliance.
1984	3,075.00	+ 12% from 1984 through compliance.

Given under our hands and seal at the City of
Madison, Wisconsin this 18th day of May, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

Danae Davis Gordon
Danae Davis Gordon, Commissioner

3/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. The instant complaint was filed on November 20, 1981, at a time when the Sec. 814.04(4) rate was "12 percent per year." Section 814.04(4), Wis. Stats. ann. (1983) See generally, Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83), citing, Anderson v. LIRC, 111 Wis2d 245, 258-9 (1983) and Madison Teachers Inc. v. WERC, 115 Wis2d 623 (CtApp IV, 1983).

WEST SIDE COMMUNITY CENTER, INC.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT AND ORDER DENYING
MOTION FOR RELIEF FROM PRIOR ORDER
AND DETERMINING AMOUNT OF BACK PAY

BACKGROUND

The procedural posture of this case has been set forth in the preface above and need not be repeated here. Essentially we are presented with two issues: Respondent's Motion for Relief and the calculation of the amount of back pay for Meiling.

RESPONDENT'S MOTION

We have denied Respondent's Motion For Relief From An Order because the Respondent is attempting to collaterally attack the original Order in this matter in addition to having pursued a direct appeal as prescribed by law. Our original Order was affirmed by the Circuit Court and that judgment is not subject to contradiction or impeachment in any collateral action or proceeding. 4/ The Respondent's assertion that the Commission has jurisdiction to reopen the matter because of the back pay proceeding is without merit. The Circuit Court affirmed our prior decision in this matter in all respects and remanded the matter simply to determine the amount of back pay, if any, to be awarded to Meiling. We note Respondent's appeal from the Circuit Court's order and judgment was dismissed by the Court of Appeals, District IV as having been untimely filed. Thus, our jurisdiction in this matter is solely limited to determining the amount of back pay and the Circuit Court's decision is res judicata as to all other issues. Therefore, we deny Respondent's Motion for Relief.

BACK PAY DETERMINATION

The documentary evidence presented in this matter including Meiling's tax returns, W-2 forms and cancelled checks for health insurance clearly support our findings with respect to the amount of lost wages and fringes for years 1981, 1982, and 1984. The Respondent contends that Meiling's testimony at the hearing herein should be disregarded because he testified that he did not have certain tax returns with him but on cross-examination admitted that he had the returns with him. The best evidence of Meiling's loss was the documentary evidence supporting that loss. Meiling's testimony with respect to his losses was not the best evidence and we find it unnecessary to consider his testimony or the truth or falsity of it in determining the amount of difference between what he earned since his termination and what he might have earned had he not been terminated. The record without considering Meiling's testimony establishes his loss. Inasmuch as this proceeding only deals with the calculation of back pay and the documentary evidence establishes the correct amount due and owing, we decline to deny back pay solely on the basis of Meiling's testimony at the hearing.

The parties dispute the date that Meiling was offered reinstatement. The Complainant contends a letter dated June 9, 1984 addressed to Mr. Nick Ballas from Respondent offering Meiling reinstatement was not received by Ballas until March 19, 1986. The Respondent contends that the June 9, 1984 date should be used as the cutoff date for back pay purposes. Having considered all the record evidence we conclude that the Respondent first offered to reinstate Meiling in March or April, 1986. The June 9, 1984 letter was admitted into evidence as an attachment to the March 18, 1986 letter to Ballas. 5/ No evidence was presented that the June 9, 1984 letter had been mailed to Ballas around that date, no evidence was presented that a receipt was requested or received for the letter and no evidence was presented concerning any telephone conversations with Ballas on or about June 9, 1984 with respect to an offer of reinstatement. Ballas testified that he did not receive the June 9, 1984 letter until on or after March 18,

4/ In re Estate of Boots, 73 Wis.2d 207 (1976); Kriesel v. Kriesel, 35 Wis. 2d 134 (1967).

5/ Exh.-5.

1986. 6/ In fact in a letter dated April 1, 1986, Ballas contended neither he nor Meiling had received a written offer of reinstatement as of April 1, 1986. 7/ The evidence fails to establish that the June 9, 1984 letter was sent and received by Ballas or Meiling on or about that date. Thus, we conclude that the offer of reinstatement was not made until March or April, 1986.

We note that since Meiling has claimed no loss for any years after 1984, the particular month in 1986 that an offer of reinstatement was made is inconsequential.

The Respondent also contends that Meiling's position was eliminated in March, 1982. The position was eliminated several months after Meiling's termination. The record failed to establish the circumstances surrounding the elimination of the position. The job title may have changed without any change in the duties. There was no evidence that anyone was laid off as a result of the elimination of this job. There was no showing of a reorganization where duties of this position were assigned to existing employees. The evidence is insufficient to show that the grievant would have been laid off because of the elimination of the job. Thus, we find the evidence insufficient to establish that Meiling would have been laid off in March, 1982 and we do not consider the March, 1982 date as having any bearing on the amount of back pay due and owing Meiling.

The Respondent also argues that based on the Wisconsin Supreme Court's decision in Employment Relations Department v. WERC, 8/ no back pay should be awarded Meiling based on his conduct which constituted legitimate reasons contributing to his discharge. In our previous decision in this matter 9/ which was decided prior to Employment Relations Department v. WERC, supra, we stated:

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 to fire two people because of their Union activities, that he did not have much respect for those two employees, 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 consideration. 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 employee 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.

6/ Tr.- 37.

7/ Exh.-7. See also, Exh. 9 (Respondent's April 7, 1986 certified letter responding to Ballas' April 1 letter, wherein Respondent reiterates its position offer) and Exh. 12 (wherein Ballas, on behalf of Meiling, declines said offer).

8/ 122 Wis.2d 132 (1985).

9/ Dec. No. 19212-B (3/84).

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Subsequently, the Wisconsin Supreme Court upheld our decision in Employment Relations Department v. WERC, supra. The Court affirmed the principle that an employer's decision to terminate an employee which is in part motivated by hostility towards that employee having engaged in protected concerted activity commits unfair labor practices. While it is true the Examiner in that case fashioned a remedy which did not credit the employee with time on lay off status towards the remaining training period -- because he found the employee violated certain work rules -- he did order reinstatement with back pay. In essence, Respondent would have us fashion a remedy herein that would exclude back pay because of alleged improper conduct by Meiling. However, in our previous decision we affirmed the Examiner and concluded that the Examiner fashioned the appropriate remedy -- reinstatement, back pay and fringe benefits, plus interest on any amounts due and owing -- and our decision was affirmed by the Circuit Court. We find no basis for changing our conclusion as to the appropriateness of that remedy. The Circuit Court remanded this case for our determination of the amount of back pay, if any due Meiling, not to reconsider the remedy itself. The "if any" requires us to determine if Meiling's earnings offset his losses, and we have done so herein. Even if the Court expected us to reevaluate the appropriateness of the remedy, we find, for the reasons stated in our previous decision above, that the appropriate remedy in this case is full back pay and benefits, plus interest as noted in our Order.

The Complainant has requested that we grant attorney fees. However, because we do not find the Respondent's conduct so frivolous, in bad faith or wholly devoid of merit so as to warrant the imposition of attorneys fees, 10/ the Complainant's request for attorneys fees is denied.

Dated at Madison, Wisconsin this 18th day of May, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

Danae Davis Gordon
Danae Davis Gordon, Commissioner