STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MIKE SCHEIWE, et al., Complainants, vs. JAMEY POTTER and WISCONSIN'S ENVIRONMENTAL DECADE, Respondents.	:	Case I No. 30131 Ce-1951 Decision No. 19962-A

Appearances:

Mr. Michael Scheiwe, 1620 Pershing Street, Appleton, WI 54911, for Complainants.

Mr. Peter Anderson, Co-Director, Wisconsin's Environmental Decade, Room 208, 114 North Carroll Street, Madison, WI 53702, for Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Mike Scheiwe, et al., having filed a complaint with the Wisconsin Employment Relations Commission on July 20, 1982, alleging that Jamey Potter and Wisconsin's Environmental Decade, had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act, herein WEPA; and the Commission having appointed Robert M. McCormick, a member of its staff, to act as Examiner and to make Findings of Fact, Conclusions of Law and Order pursuant to Section 111.07(5) Wis. Stats.; and hearing on said complaint having been conducted by the Examiner in Madison, Wisconsin on December 13, 1982; and the parties having filed briefs by April 14, 1983; and the Examner, having considered the evidence and arguments of the parties, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Mike Scheiwe, Mike Acord, Gordon L. Dain, LeRoy Richter, Jill Kline and Kyle Clark, hereinafter Complainants, were employes in the Appleton office of Wisconsin's Environmental Decade.

2. That Wisconsin's Environmental Decade, hereinafter Respondent, is an employer with offices at Suite 208, 114 North Carroll Street, Madison, Wisconsin; that for the time period of approximately March 22 through September 17, 1982 1/ Respondent operated a regional office at 1221 North Law Street, Appleton, Wisconsin, for the purpose of conducting a door-to-door education and fund solicitation campaign in the northeast section of Wisconsin; and that Jamey Potter is Respondent's Education Drive Associate, in which capacity he managed and directed the Appleton campaign.

3. That in April a petition was filed with the National Labor Relations Board seeking an election among certain employes of Respondent; and that on or

commenced Potter entered the room and spoke to the five or six employes in attendance; that Potter advised the employes they had a right to form a union and that it was Respondent's policy not to stand in the way of unionization; but that Potter stated his personal opinion that there were four possible disadvantages to the formation of a union if it were done in the wrong way, namely, the development of adverse relations, negative publicity, increased costs, and loss of staff time; that Potter made no other representations and thereupon left the meeting; that between June 8 and 23 the employes held additional meetings in the vacant office space adjacent to Respondent's offices to discuss formation of a union and other concerns; and that Scheiwe requested and received from Potter, permission to announce such meetings at the beginning of the work day, at a time when Respondent regularly made other announcements to the staff.

5. That on June 23 four employes, Scheiwe, Clark, Richter and Kline met with Potter to determine if the Employer had any liability insurance covering employes during the hours they were in the field working for Respondent; that Potter was not sure if there was any such insurance and said that the employes did not have to return to work until the insurance question was answered; and that either later in the afternoon on June 23, or on June 24, Potter informed Scheiwe that the employes were covered by the Worker's Compensation program of the State of Wisconsin for any on-the-job injuries.

6. That on June 25 Scheiwe and certain other employes again met with Potter, at which meeting, inter alia, Scheiwe questioned the extent of coverage and benefits under the Worker's Compensation program; that Scheiwe accompanied Potter to his office while he called Respondent's Madison office to gain information about the benefits of the Worker's Compensation program; that during the absence of Potter and Scheiwe, the other individuals at the meeting, i.e., Michael Acord, Gordon Dain, Lee Richter and Tony Jennings, the Field Manager, began shouting at each other after Jennings directed some obscene language at the other three individuals; that Dain and Richter left the meeting and went downstairs; that subsequently Richter, without advising Potter of his departure, left the office and did not work on June 25; that Dain did accompany Jennings and the other members of the canvassing crew to Nekoosa on June 25 and that outside a restaurant in Nekoosa, Jennings apologized to Dain for what had occurred earlier at the office; that during his canvassing on June 25, Dain finished the canvass of houses in his assigned area approximately one and one half or two hours prior to the time that the crew was to meet to return to Appleton; and that Dain did not canvass certain apartment buildings in his area because Jennings had previously told him to leave them until Monday; that Dain spent the remainder of his time on June 25 examining maps to determine if there were other houses which he could cover that evening; that Respondent's general policy is to avoid canvassing apartment buildings on Fridays for the reason that many apartment tenants are not home that evening; that upon returning to the Appleton office on June 25, Jennings informed Potter of the results of Dain's canvassing for that day; that Potter then called Dain into his office and terminated him for failing to raise sufficient contributions of money; that for the week ending on June 25, Dain had raised $346 in contributions; that Dain had been given secondary training approximately two weeks prior to his termination; that in the first week following his secondary training Dain raised $442 in contributions; and that on June 23 Potter told Dain he needed to raise $199 in the next two days in order to meet the minimum expectation of $400 for that week, and further admonished Dain that failure to raise said amount would cause Dain to be terminated.

7. That with respect to contributions raised by canvassers, the Employer's employment guidelines specify the following:

> MINIMUM EXPECTATIONS - Canvassers are expected to raise $80 per night enforced on a weekly basis. If a canvasser works less than 5 days, his/her total is divided by the number of days worked. Canvassers should raise an average of $80 per day on a weekly basis for the first two weeks of employment in order to stay on the staff, (weeks including training days are excluded.) After two weeks of satisfactory performance (excluding the training period) a canvasser will receive additional training if his/her average drops below $80 per night. The canvasser then has 5 days after the secondary training is given to once again average $80 per night on a weekly basis. If the cavasser does not retain an $80 average after secondary training, the canvasser will be terminated,

but if the canvasser has been on the staff for more than 3 months, he/she will be eligible for rehire after 2 weeks, subject to the Canvass Director's discretion;

and that said minimum expectation anticipates an average of four and one-half to five hours of canvassing time per workday; that under said guidelines the time available for canvassing may fluctuate as a result of varying travel times to the canvassing areas.

8. That the canvass experience for said Appleton campaign, with respect to employes who were deficient in their canvass under said policy, reflects the following daily canvass averages and week ending termination dates, i.e.: on May 4, Melissa Bieritts - $61.70; on May 14, John Zarnick - $65.50; on June 3, John Mazca - $74.10; on June 17, Daryl Hines - $60.00; on June 25, Mike Acord - $74.40; and on June 25, Gordon Dain - $69.20; that subsequent to June 25, two other unidentified employes were terminated for falling below the minimum expectations; and that for the week ending July 30, Jill Kline, a union activist, raised $398, but that Kline was not terminated for falling $2.00 short of the minimum expectation.

9. That at approximately 8:45 a.m. on June 28, Potter telephonically advised Richter that he, Richter, had been terminated for his failure, on June 25, to notify supervision for leaving work before the completion of said workday; that prior to his termination the Employer's supervision had verbally reprimanded Richter for previous tardiness and, in addition, did effectuate a one day suspension for Richter's absence from work without providing notification to his Employer.

10. That on June 28, at 10:00 a.m., a meeting was scheduled between Potter, Richter, Kline and Scheiwe, for the purpose of discussing employment guidelines; that upon being asked by Potter to leave the meeting because he was no longer an employe, Richter went to one of the adjacent vacant offices; that Potter followed Richter and told him to leave the work site, which he did; that Potter advised Kline and Scheiwe that such meetings would be limited to current employes, and further advised that the adjacent vacant offices could be used for union organizing meetings, only if such meetings were confined to current employes; that at the meeting on June 28, Scheiwe informed Potter that Kyle Clark was sick and was unable to attend the meeting; that Potter advised Scheiwe that Clark had not called the office to report his absence and that Clark should do so to avoid termination; and that shortly thereafter, on June 28, Potter and Scheiwe both learned that Clark had in fact called to report his absence.

Based on the above and foregoing Findings of Fact, the Examiner issues the following

CONCLUSIONS OF LAW

1. That Respondent, through Jamey Potter's presence and his comments made at organizational meetings of Respondent's employes on June 8 and June 28, 1982, did not interfere with, restrain or coerce its employes in the exercise of their rights under Section 111.04 of the Wisconsin Employment Peace Act, and therefore, Respondent did not commit an unfair labor practice within the meaning of Sections 111.06(1)(a), (b) or (c) of the Wisconsin Employment Peace Act.

2. That Respondent terminated Complainant Lee Richter, for Richter's failure to notify supervision before leaving work on June 25, 1982; that Respondent terminated employes Mike Acord and Gordon Dain for their failure to achieve their canvassing quotas for the week ending June 25, 1982; and that Respondent's conduct in making the aforementioned terminations of the named Complainants did not constitute discrimination with regard to the tenure or other conditions of employment of said employes, and therefore, Respondent did not commit any violation of Sections 111.06(1)(a), (b) or (c) of the Wisconsin Employment Peace Act.

3. That Respondent, through supervisor Potter's comments to Mike Scheiwe concerning Kyle Clark's possible termination, if he, Clark, failed to provide notification of absence on June 28, 1982, did not commit any violation of Sections 111.06(1)(a), (b) or (c) of the Wisconsin Employment Peace Act.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 2/

IT IS ORDERED that the complaint filed herein be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 1st day of March, 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.

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(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, CONCLUSIONS OF LAW AND ORDER

POSITION OF COMPLAINANT:

On July 20, Complainants filed an unfair labor practice complaint alleging that Respondent violated the Wisconsin Employment Peace Act by attempting to frustrate the formation of a union through the discharge of three employes and certain other actions.

The Complainant avers that on June 8, Jamey Potter, Manager of the Appleton office, entered a union organizing meeting and, without permission, spoke to the employes about possible disadvantages resulting from the formation of a union. Said action was an attempt to frustrate the employes' right to form a union.

The Complainant urges that Potter, at a meeting on June 23, advised certain employes that until the issue of liability insurance was settled to the satisfaction of all concerned, no employe had to work and none would be punished for failing to report. In addition, Supervisor Jennings, on June 25, swore at certain assembled employes including Richter, prompting Richter to leave the office in order to avoid a confrontation with him.

The Complainant asserts that Dain was deliberately given a poor territory in which to canvass on June 25, so that he would fail to reach the minimum expectation. Respondent had previously told employes not to canvass apartments on Fridays. Additionally, Dain should have been credited for a donation received through the mail on June 28, which amount would have placed Dain at his quota.

The Complainant argues that Potter refused to allow former employes who had been terminated, to associate with other employes. Potter's threat to terminate Clark for his failure to report his absence, which proved erroneous, would have been contrary to Respondent's own guidelines concerning discipline for such offenses. The Respondent's termination of Richter was opposite to Potter's instructions concerning excused absences until the liability insurance problem was resolved, and in addition, was contrary to Employer policy governing absences without leave.

The Complainant urges that Acord and Dain were not allowed to donate their own funds toward the minimum expectations, so as to avoid termination, even though other employes had been permitted to make such donations. Moreover, other employes fell below the minimum expectation without being terminated.

Complainant seeks the reinstatement with back pay of Dain and Richter and the reinstatement of Acord, and in addition, an order directing Respondent to cease and desist from interfering with union organization.

POSITION OF RESPONDENT:

The Respondent asserts that Potter requested and received permission to speak at the employe meeting on June 8. He prefaced his remarks with the statement that the Respondent did not oppose the right of the employes to form a union. Further, Potter's comments were not of the type which either would intimidate employes or would discourage union activity, but rather constituted responsible free speech.

avers that the reason Potter had granted permission to employes to leave work on June 23 had been resolved by June 25. Employes were advised that Worker's Compensation insurance covered the employes. Potter had not given any blanket permission for employe absences. Therefore, Richter's termination conformed to Respondent's policy of progressive discipline for tardiness and absences; and that it did not run afoul of any alleged waiver of work attendance by management, which the Complainant furtively trys to tag to the one day liability insurance question.

The Respondent contends that Potter's restriction of the use of the vacant offices to Respondent's current employes was a reasonable one, effectuated in order to avoid confrontations such as occurred on June 25.

Respondent asserts that its conduct did not constitute anti-union activity and therefore it requests that the complaint of unfair labor practices be dismissed in its entirety.

DISCUSSION:

Alleged Discriminatory Discharges

Complainant must prove by a clear and satisfactory preponderance of the evidence that Respondent was hostile toward the concerted activities of the Complainants and that Respondent's treatment of the Complainants was motivated, at least in part, by Respondent's animus toward such activity. 3/

Respondent discharged Acord and Dain on June 25 for failing to meet the minimum expectation for weekly canvass. For the five day period including June 25, Acord raised a daily average of $74.40 in funds and Dain raised a daily average of $69.20 in funds. Six other Appleton employes were discharged for the same reasons, four prior to June 25, including Mazca who had a daily average of $74.10, and two employes subsequent to June 25. There is nothing in the record to show that either Acord or Dain attempted, and were denied the opportunity, to make donations of their own funds toward the minimum expectations. Although Complainant alleged that other employes who failed to meet the minimum expectation were not discharged, the only specific evidence in the record to support such a claim concerns Kline, a union activist, who was $2 short in one week. Respondent's decision not to discharge Kline for said shortage is reasonable on its face. Respondent's forbearance with respect to Jill Kline's de minimis shortfall fails to support a finding of a discriminatory enforcement of the minimum canvass expectation violative of the Wisconsin Employment Peace Act. The undersigned concludes that said disparate application of the minimum expectation which inured to the benefit of another union activist, Kline does not, per se, establish discriminatory discharges of Acord and Dain for their failure to achieve the canvassing goal. The record discloses that the Respondent was aware of the activities of all three aforementioned employes in their promotion of union activities.

Complainants also allege that Dain was given a poor canvassing area and received insufficient canvassing time on June 25. Dain testified that Jennings made known his belief that Dain would not finish canvassing the houses in his area, and still get to the apartments on June 25; and further that Jennings told him to leave the apartments for the following Monday. Scheiwe testified that the practice was to canvass other residences first and thereafter, canvass apartments last on Fridays. It is not clear from the record that Jennings would have objected if Dain had canvassed the apartments after he had finished canvassing the houses in his territory on Friday, June 25. Moreover, based on Dain's hourly average of funds raised during that week, there is no certainty he would have met the minimum expectation with two additional hours of canvassing time. Similarily, even if Dain was credited with a $15 contribution received in the mail at the office on June 28, he would have failed to meet the minimum expectation. The record further disclosed that Dain had been warned on June 23 that he would be terminated if he failed to meet the minimum expectation for that week. The record disclosed in Finding of Fact, paragraph 8, supra, that other employes were separated for deficient weekly canvass averages.

3/ Drummond Integrated School District, (15909-A), 3/78; Layton School of Art, (12231-B) 5/75; Tony's Pizza Pit, (8405-B), 10/68 (Aff'd Dane County Cir. Court, 7/70).

The Examiner concludes that the discharges of Acord and Dain were not motivated in any way by Respondent's animus toward employes for their participation in union organizing activities.

Respondent premised Richter's discharge on his failure to notify Potter of his departure from work on June 25. The Examiner is persuaded that Potter's statement on June 23, which allowed employes not to work until the liability question for on-the-job injury had been answered, was no longer effective on June 25.

Scheiwe testified that by June 25, the employes knew they were covered by Worker's Compensation, but that they still did not know the extent of such coverage. The Examiner is further persuaded that Potter's statement on June 23 was in response to the employes' concern over whether they were covered by any insurance, rather than the extent or adequacy of coverage. Even if Richter was upset because of Jenning's use of profanity and over the liability insurance situation, he should have notified Potter that he was leaving work and that he would not be working on June 25. Respondent's expectation of receiving such notification from Richter was reasonable. Richter knew, or should have known, from his previous discipline for absences without leave that notification of absence from work was expected. In that context it was not for Richter to opt for ignoring the notification policy under the color of the liability insurance question, as Complaiant argues, for that would in effect give Richter an open-ended option to remain away from work until he was persuaded that there was sufficient liability insurance. Accordingly, the Examiner has determined that Richter's discharge was not motivated by any Respondent animus toward Richter for his active participation in union organizing activities.

On June 28 Potter advised Scheiwe that Clark would be terminated for being absent without notification unless he called to report his absence. Potter's tacit assumption was erroneous and such predicted action did not occur because Clark had already notified Respondent's office personnel of his absence. Even if termination would not have been the appropriate discipline in that situation, as alleged by Complainants, that fact standing alone, does not establish union animus on the part of Respondent.

Alleged Acts of Interference

Potter's act on June 28 of restricting attendance of meetings in the adjacent vacant office to Respondent's then current employes was not a contrived deviation from Respondent's prior use of said offices. The record failed to establish that Respondent had ever used those offices for meetings which included individuals who were not its employes. There was no record evidence that the landlord had approved a less restricted usage of the premises. If Respondent had intended to frustrate the employes' attempts to organize a union, it could have ceased allowing its employes to use any rooms for meetings. There is no record evidence that Respondent permitted other after work meetings on the premises, open to non-employes. The Examiner is not persuaded that Potter's aforementioned restriction constituted interference with the employes' rights to form, join and assist in unionization.

The importance of Potter's comments on June 8 to the meeting of employes rests not on whether he requested permission to address the group, but rather, on whether the comments contained threats of reprisals or promises of benefits. 4/

Potter testified that he secured permission to attend the meeting. At least one of Complainant's witnesses testified that he could not recall making such a request. The meeting was arranged by the employes and five or six were in attendance when Potter entered the room. There is insufficient evidence that Potter barged into the meeting uninvited by the employes. The record is clearly devoid of any evidence that any employes in attendance objected to Potter's presence. The undersigned concludes that Potter merely expressed an opinion with respect to the possible disadvantages resulting from union representation. The Examiner finds nothing from the record evidence to indicate that Potter's statements constituted either threat of reprisals for unionization, or promise of benefits if unionization failed.

4/ Menomonie Joint School District No. 1, (14811-C) 3/78; Prophet Food Co. (9855) 8/70.

The Complainant appears to argue that Potter's mere presence at the meeting caused intimidation and interference with the employes' Section 111.04 rights. However, the record is devoid of any interrogation of employes by Potter concerning the employes' efforts toward unionization, and there is no evidence to indicate that Potter engaged in any furtive surveillance. 5/

For the foregoing findings, reasons and discussion thereon, the Examiner dismisses the instant complaint in its entirety.

Dated at Madison, Wisconsin this 1st day of March, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M. McCormick
Robert M. McCormick, Examiner

5/ Tony's Pizza Pit, Ibid. #2.