STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 97, AFSCME, AFL-CIO, PRAIRIE HOME CEMETERY EMPLOYEES,	:	
Complainant,	:	Case 5 No. 35595 MP- 1760
vs.	:	Decision No. 22958-A
PRAIRIE HOME CEMETERY,	:	
Respondent.	:	

Appearances:

Mr. Richard Abelson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 2216 Allen Lane, Waukesha, Wisconsin 53186, appearing on behalf of Local 97.

Michael, Best & Friedrich, Attorneys at Law, 250 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, by Mr. Jose Olivieri, on behalf of Prairie Home Cemetery.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Local 97, AFSCME, AFL-CIO, Prairie Home Cemetery Employees, having, on September 9, 1985, filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that the Prairie Home Cemetery had committed prohibited practices in violation of Section 111.70(3)(a)3 and 4 of the Municipal Employment Relations Act; and the Commission having appointed Deborah A. Ford, a member of its staff to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter; and the hearing on said complaint having been held at Waukesha, Wisconsin on October 22, 1985; and the parties having filed briefs by January 28, 1986; and the Examiner having considered the evidence and the 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 Local 97, AFSCME, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization having its principal offices at 2216 Allen Lane, Waukesha, Wisconsin.

2. That Prairie Home Cemetery, hereinafter referred to as the Respondent, is a municipal employer with offices at 605 Prairie Avenue, Waukesha, Wisconsin; and that Harold Schultz, hereinafter referred to as the administrator, has held the position of Administrator for Respondent for the last thirty-one (31) years and continues to hold such position.

3. That Respondent employes both year round employes and seasonal employes in its cemetery operation; that the Respondent normally hires five to seven seasonal employes each year; that the Respondent has a practice of giving preference to those seasonal applicants who have previously worked for Respondent as seasonals; and that before they will be rehired such employes must file a new application and have performed their past seasonal work in a satisfactory manner.

4. That the Complainant was certified in March, 1984 as the exclusive bargaining representative for the certified bargaining unit consisting of all regular full-time and regular part-time employes of the Respondent; that seasonal employes are included within the bargaining unit; and that the Complainant and the Respondent have been engaged in negotiations for an initial collective bargaining agreement.

5. That in March, 1984, Charles Schultz 1/ called Respondent to inquire about seasonal employment and was told by the administrator that he should check back later because it was the policy of the Respondent to hire back people who had previously worked for the Respondent; that Schultz checked back approximately one week later and was hired as a seasonal for the 1984 season; that Schultz's duties as caretaker included mowing, weeding, cultivating, painting, general maintenance and occasional assistance on funerals; that Schultz worked from approximately April, 1984 to November 21, 1984; that he was the last seasonal worker to be laid off during the 1984 season; that on his last day of work Schultz asked the administrator whether he would be hired back and the administrator indicated that he didn't know; and that Schultz did not pursue the matter further at that time.

6. That at the end of a seasonal's tenure, the administrator generally queries the employe about his or her intentions regarding future seasonal employment, but that he made no such inquiries of Schultz.

7. That in March, 1985, Schultz applied for work for the 1985 season and continued to check on his application regularly until mid-April, 1985 but was not hired; that Schultz questioned the administrator as to why he was not hired for the 1985 season, and was told by the administrator that although he did not have any complaints about the quality of Schultz's work, he had observed Schultz breathing hard while working on a funeral and was afraid something would happen to him; that after this conversation Schultz did not make any further efforts to secure employment as a seasonal for 1985; and that Respondent hired five seasonal employes in 1985, of which two had been previously employed as seasonal employes.

8. That the administrator based his decision not rehire to Schultz on his observations of Schultz taking a number of rest breaks while trimming weeds; that he also observed Schultz having to take a number of rest breaks when shoveling a grave on one occasion and while filling up a wheelbarrow on another occasion; and that the administrator also observed Schultz take a rest break after moving a plank out of the cemetery.

9. That although Schultz admitted to being out of shape when he began his employment with the Respondent, the evidence failed to demonstrate that Schultz had any major health problems.

10. That during the period of time he was employed by the Respondent, Schultz did not receive any complaints about his work from the Respondent.

11. That in the past the Respondent has not rehired those seasonals who had poor attendance records or who had not performed their work to the Respondent's satisfaction and that prior to the instant case a former seasonal employe was not informed of the Respondent's dissatisfaction with his work performance until he reapplied for work the following season and was not rehired.

12. That the Respondent did not discriminate against Charles Schultz on the basis of his protected activity when it did not rehire him as a seasonal employe in 1985.

13. That the Respondent's failure to rehire Schultz was in accordance with its past practice on rehiring seasonal employes and thus it did not violate its duty to bargain with the Complainant when it did not rehire Charles Schultz for the 1985 season.

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

ORDER

The complaint filed by Local 97, AFSCME, AFL-CIO, Prairie Home Cemetery Employees on September 9, 1985, is dismissed in its entirety.

Dated at Madison, Wisconsin this 28th day of May, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Deborah A. Ford
Deborah A. Ford, Examiner

PRAIRIE HOME CEMETERY

MEMORANDUM ACCOMPAYING FINDING OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITION OF THE PARTIES

Complainant

The Complainant contends that the Respondent discriminated against Charles Schultz when it refused to rehire him for the 1985 season. This refusal, argues the Complainant, could only have been motivated by Schultz's membership in the Complainant given that he had never been disciplined nor had he received complaints about his work while employed by Respondent during the 1984 season. As further support for its allegations, the Complainant points to the fact that Schultz was never asked to provide medical documentation for his health despite alleged concern about his health on the part of the Respondent. Moreover, Respondent had history of rehiring those employes who had previously worked as seasonals for Respondent. As evidence of animus, the Complainant points to the length of time that the parties have been engaged in negotiations for an initial collective bargaining agreement.

The Complainant also alleges that given Respondent's past practice of rehiring seasonals, its refusal to rehire Schultz constituted a unilateral change in the status quo and a violation of its duty to bargain with the Complainant.

Respondent

The Respondent, on the other hand, argues that the decision not to rehire Schultz was based on the administrator's observations regarding Schultz's health and concern about his continued ability to do the work in an efficient manner. Respondent maintains that Schultz engaged in no significant protected activity and that the Respondent was not aware that Schultz was a member of the Complainant.

As to the allegation of a failure to bargain, the Respondent maintains that it has continued to follow its practice of rehiring seasonal who have worked out satisfactorily in the past, as evidenced by its hiring during the 1985 season of two persons who had been previously employed as seasonal workers. Moreover, contends the Respondent, there had been at least two instances in the past wherein past seasonal employes were denied employment the following season. Finally, the Respondent contends that any suggestion that the Respondent was under an obligation to apply a just cause standard to its decision not rehire Schultz, is misplaced in the absence of a collective bargaining agreement mandating application of the higher standard.

DISCUSSION

Discriminatory Refusal to Rehire

Section 111.70(3)(a)3 prohibits municipal employers from discriminating against persons with regard to hiring, tenure, or other terms or conditions of employment in order to encourage or discourage membership in a labor organization. In order for the Complainant to prevail on a charge of discrimination, it must show by a clear and satisfactory prepondence of the evidence that (1) the employe had engaged in protected activity; (2) that the employer had knowledge of such protected activity; (3) that the employer bore animus toward the employe because of such activity; and (4) that the employer took action against the employe, motivated at least in part by the protected activity. The absence of any one of these elements precludes a finding of a violation. 2/ In analyzing the facts of the instant case, each element will be discussed separately.

2/ City of La Crosse, Dec. No. 18096-A, (McCormick, 8/84), aff'd by operation of law, Dec. No. 18096-B (WERC, 9/84)

Section 111.70(2), Stats., guarantees, among other things, that municipal employes shall have the right to form, join or assist labor organizations. Although examination of the evidence reveals that Schultz's protected activity was not extensive, it is clear that by becoming a member of the Complainant during the 1985 season, Schultz satisfied the first element of foregoing test.

Turning to the second requirement, that of knowledge by the Respondent of Schultz's protected activity, there appears to be little evidence to support such a finding. At the hearing, the administrator denied having any knowledge of Schultz having joined the Union and the Complainant did not present any testimony to the contrary. Moreover, there is no evidence which would support a finding of implied knowledge, such as that which would accompany a dues-check-off system. The Complainant, however, contends that such knowledge should be imputed under the small plant doctrine. 3/ Generally that doctrine has been used to impute knowledge to an employer where no direct evidence of knowledge existed, but where the union activities of the alleged discriminatee were carried on in such a manner that they could not have gone unnoticed by the employer. In this instance, the limited nature of Schultz's protected activity, together with fact that there is no showing that he engaged in any protected activity on the premises of the Respondent, makes application of the small plant doctrine under these circumstances inappropriate.

Therefore I conclude that the Complainant has failed to show that the Respondent had any knowledge of Schultz's protected activity.

Although the Complainant points to the continuing negotiations for an initial contract as evidence of union animus on the part of the Respondent, this is not persuasive in the absence of additional indicia of animus. While protracted negotiations, under certain circumstances, could arguably be viewed as an indicia of animus, they may also be the result of either a large number of complex issues or hard bargaining by both parties. Given the various reasons which could conceivably give rise to extensive negotiations, this examiner is unwilling to conclude that animus is present simply on the basis of the length of negotiations. Secondly, although not specifically argued by the Complainant, there was testimony regarding a statement alleged to have been made by the administrator to the effect that Schultz's health was not the real reason he was not rehired. While I find the statement troublesome if true, standing alone, I do not find that it rises to the level necessary to support a finding of union animus.

Having concluded that the Respondent did not have knowledge of Schultz's membership in Complainant, thus eliminating the motivation to single out Schultz as a target of discrimination, and also having concluded that there is insufficient evidence of animus on the part of the Respondent, I find it unnecessary to reach the question of whether the Respondent took unlawfully motivated action toward Schultz. In the absence of sufficient evidence to establish all the necessary elements for a finding of discrimination, I conclude that the Respondent did not discriminate against employe Schultz on the basis of his protected activity when it refused to hire him for the 1985 season.

Failure to Bargain

The Complainant also alleges that the failure, by the Respondent, to rehire Schultz for the 1985 season, constituted a violation of the duty to bargain under Section 111.70(3)(a)4, Wis. Stats., in that the Respondent unilaterally changed a past practice. It is axiomatic that upon the certification of the Complainant as the bargaining representative of Respondent's employes, the Respondent was obligated to maintain the status quo until such time as a change was agreed upon by the parties or impasse resolution completed. 4/ In this instance, it is undisputed that the Respondent has a past practice of rehiring former seasonals

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3/ Friendly Markets, Inc., 224 NLRB No. 145, 92 LRRM 1585 (1976); Town of Salem, Dec. No. 18812-A (Crowley, 2/83).

4/ Wisconsin Rapids Board of Education, Dec. No. 19084-C (WERC, 3/85); City of Brookfield, Dec. No. 19822-C (WERC, 11/84).

who had performed their work in a satisfactory manner and who applied for another season of employment. The administrator testified that it was his practice at the end of each season to approach those seasonals who had performed satisfactorily and inquire of them as to whether they intended to return the following year.

In Schultz's case, the administrator did not question Schultz about future employment with the Respondent, nor did he give a definite response to similar inquiries from Schultz. Moreover, his observations of Schultz during the trimming and shoveling incidents, in particular, the numerous rest breaks taken by Schultz, had raised concerns in the administrator's mind about Schultz's health and his ability to do the work to the Respondent's satisfaction. The standard by which the Respondent's action is to be examined is not a just cause one in the absence of a collective bargaining agreement. Rather, it is whether the Respondent's action were reasonably consistent with its past practice. In this case, Respondent's past practice with respect to the hiring of seasonals included not rehiring those seasonals whose previous work performance had not been at a level satisfactory to the Respondent. Although it is clear that Respondent's conclusions as to Schultz are fairly subjective and such that reasonable persons might differ, the undersigned concludes that they are not wholly unreasonable and without some basis in fact. The administrator had observed Schultz taking frequent rest breaks. Moreover, the fact that Schultz had not received complaints about his work or been disciplined does not automatically lead to the conclusion that his work performance was up to the Respondent's standards, as evidenced by the prior instances of former seasonals not being rehired despite not having received complaints or discipline from the Respondent. Finally, the Respondent continues to rehire former seasonals as illustrated by the presence of two former seasonals in the 1985 work force. Based on the foregoing, this examiner does not find that the Respondent unilaterally changed its past practice regarding the hiring of former seasonals, and finds that no violation of Section 111.70(3)(a)4 was committed when the Respondent did not rehire Schultz for the 1985 season.

Dated at Madison, Wisconsin this 28th day of May, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Deborah A. Ford
Deborah A. Ford, Examiner