

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 97, AFSCME,	:	
AFL-CIO, PRAIRIE HOME	:	
CEMETERY EMPLOYEES,	:	
	:	Complainant,
	:	
vs.	:	
	:	
PRAIRIE HOME CEMETERY,	:	
	:	
	:	Respondent.
	:	

Case 5
 No. 35595 MP-1760
 Decision No. 22958-B

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.

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

On May 28, 1986, Examiner Deborah A. Ford, a member of the Commission's staff, issued Findings of Fact, Conclusions of Law and Order in the above-entitled matter wherein she dismissed a complaint filed by Local 97, AFSCME, AFL-CIO, Prairie Home Cemetery Employees which alleged that Prairie Home Cemetery had engaged in prohibited practices in violation of Sec. 111.70(3)(a) 3 and 4, Stats., by refusing to rehire employe Charles Schultz; and Complainant having on June 17, 1986, timely filed a petition with the Commission pursuant to Sec. 111.07(5), Stats., seeking review of the Examiner's decision; and Respondent having filed a brief in opposition to the petition for review on August 6, 1986, and Complainant having chosen not to supplement its petition with a brief in support thereof; and the Commission having reviewed the record, the Examiner's decision, the Petition for review, and the arguments, and being satisfied that the Examiner's Findings of Fact should be modified and her Conclusions of Law and Order affirmed;

NOW, THEREFORE it is

ORDERED 1/

A. That the Examiner's Findings of Fact numbers 1 through 11 are affirmed.

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties 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.

227.16 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

(Footnote 1 continued from Page 1.)

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); 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.

B. That the Examiner's Finding of Fact twelve is modified as follows and adopted as the Commission's:

12. That the record does not demonstrate that Schultz was a member of the Union or otherwise engaged in union or protected concerted activity; that the record does not demonstrate that Respondent knew or believed that Schultz had engaged in union or protected concerted activity; that the record does not demonstrate that Respondent harbored animus toward Complainant; that the record does not demonstrate that Respondent treated Schultz differently than other employees with whose performance it was not satisfied; and that Respondent has therefore not been shown by a clear and satisfactory preponderance of the evidence to have discriminated against Schultz on the basis of his union or protected concerted activity when it refused to rehire him as a seasonal employee in 1985.

C. That the Examiner's Finding of Fact thirteen is modified as follows and adopted as the Commission's:

13. That Respondent's refusal to rehire Schultz was in accordance with its past practice concerning the rehiring of seasonal employees; that the status quo regarding rehiring of seasonal employees was therefore maintained; and that the record does not demonstrate by a clear and satisfactory preponderance of the evidence that Respondent unilaterally altered a term or condition of employment following the representation election by refusing to rehire Schultz in 1985.

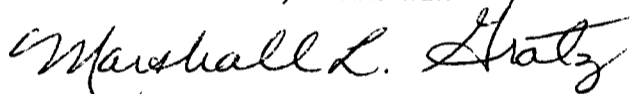
D. That the Examiner's Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of
Madison, Wisconsin this 19th day of November, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 

Herman Torosian, Chairman



Marshall L. Gratz, Commissioner



Danae Davis Gordon, Commissioner

PRAIRIE HOME CEMETERY

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

The complaint alleges in essence that Charles Schultz, a seasonal employe of Respondent during the summer and fall of 1984, was refused rehire in 1985, contrary to the status quo policy of Respondent prevailing before employes selected Complainant to represent them as exclusive bargaining representative, and in retaliation for Schultz's action in becoming a member of Complainant. The answer denied that Schultz was a member of Complainant or that Respondent had been motivated by such membership, or that Respondent had in any way changed its prior practice concerning rehiring of seasonal employes in its refusal to rehire Schultz.

THE EXAMINER'S DECISION

The Examiner found that Schultz had difficulty performing strenuous physical labor involved in the work and that Respondent determined not to rehire him based on the number of rest breaks he took while performing such work in 1984. The Examiner found that there was no evidence that Respondent knew of Schultz's union membership or that Respondent harbored animus towards Schultz based on Schultz's alleged membership in Complainant and that therefore unlawful discrimination had not been proven. With respect to the allegation of refusal to bargain by unilateral change in prior policy concerning rehiring of seasonal employes, the Examiner found that Respondent's defense that Schultz was not performing in a satisfactory manner was supported by the record, that the record also showed that Respondent had a prior practice of not rehiring seasonal employes whose work record was not satisfactory, and that Respondent had therefore not unilaterally altered the status quo by refusing to rehire Schultz. The Examiner accordingly dismissed the complaint.

THE PETITION FOR REVIEW

The substance of the Complainant's petition for review, in its entirety, reads as follows:

Pursuant to ERB 12.09, Wisconsin Administrative Code, the Union, Local 97, AFSCME, AFL-CIO, is dissatisfied with the Findings of Fact, Conclusions of Law, and Order, issued on May 28 and May 30, 1986, because the Findings of Fact are clearly erroneous and contrary to the preponderance of evidence, that they prejudicially affect the rights of the petitioning union, and further, that substantial questions of law and administrative policy are involved.

Complainant did not choose to add to this statement any brief amplifying the causes of its dissatisfaction. Respondent filed a brief supporting the Examiner's decision and specifically objecting to consideration of a petition which failed to identify any particular alleged error by the Examiner.

DISCUSSION

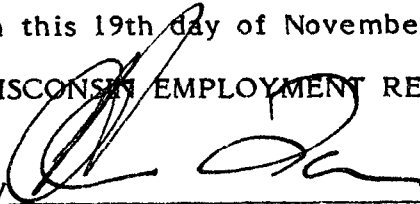
Upon review of the record, we conclude that the Examiner correctly noted that there was no evidence of knowledge by the Employer of Schultz's alleged activity in becoming a member of Complainant and that there was also no evidence that Respondent harbored animus toward Complainant or Schultz. We note, however, that the record also fails to identify any actual activity on behalf of Complainant by Schultz, including membership; the complaint alleged that he was a member, the answer denied this allegation, and the testimony adduced at hearing did not include any information relevant to this question. We have modified the

Examiner's Findings of Fact to state these record deficiencies more clearly, but as we otherwise find no error on the part of the Examiner and agree with her Findings, Conclusion and Order no further comment is necessary.

Dated at Madison, Wisconsin this 19th day of November, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

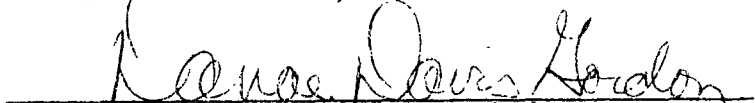
By



Herman Torosian, Chairman



Marshall L. Gratz, Commissioner



Danae Davis Gordon, Commissioner