

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 150, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO,

Complainant,

vs.

MUSKEGO-NORWAY SCHOOL DISTRICT,

Respondent.

Case 35
No. 38696 MP-1964
Decision No. 24539-A

Appearances:

Mr. Thadd M. Hryniewiecki, Union Representative, Local 150, Service Employees International Union, AFL-CIO, CLC, 6427 West Capitol Drive, Milwaukee, Wisconsin 53216, appearing on behalf of the Complainant.
Quarles & Brady, by Mr. Laurence E. Gooding, Jr., 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4497, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Local 150, Service Employees International Union, AFL-CIO, CLC, having, on April 23, 1987, filed a complaint with the Wisconsin Employment Relations Commission alleging that Muskego-Norway School District had committed prohibited practices within the meaning of Sec. 111.70(2) and (3)(a)1, 2 and 3, Stats., by suspending and discharging an employee for unjustifiable reasons and interfering with the rights of employees to join and/or form a labor organization; and the Commission having, on June 2, 1987, appointed Edmond J. Bielarczyk, Jr., a member of the Commission's staff, to act as Examiner to make and issue Findings of Fact, Conclusion of Law and Order, as provided in Secs. 111.70(4)(a) and 111.07, Stats.; and a hearing in the matter having been held on June 23, 1987, in Muskego, Wisconsin; and a stenographic transcript of the proceedings having been prepared and received by the Examiner on July 3, 1987; and the parties having filed briefs and reply briefs with the Examiner by August 24, 1987; and the Examiner having considered the evidence and arguments of the parties and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Local 150, Service Employees International Union, AFL-CIO, CLC, hereinafter referred to as the Complainant, is a labor organization maintaining its offices at 6427 West Capitol Drive, Milwaukee, Wisconsin.

2. That Muskego-Norway School District, hereinafter referred to as the Respondent, is a municipal employer maintaining its offices at S75 W16399 Hilltop Drive, Muskego, Wisconsin, and, that prior to January 29, 1987 the Respondent bargained with four (4) bargaining units.

3. That on January 29, 1987 the Complainant filed a petition with the Commission requesting the Commission to conduct an election in a bargaining unit consisting of all regular full-time and regular part-time food service employees of the Muskego-Norway School District, excluding supervisory, managerial, confidential, professional and all other employees; that prior to any action by the Commission the Respondent and Complainant stipulated to an election in said bargaining unit; that on March 26, 1987 the Commission conducted an election in said bargaining unit; and, that on April 16, 1987 the Commission certified the Complainant as the exclusive bargaining representative of all employees in said bargaining unit.

4. That since 1983 the Respondent has employed Dennis Birkley as a food service courier; that Birkley's duties included driving and delivering food and interoffice mail, serving lunches, and fixing and repairing equipment; that when school was not in session Birkley was permitted to make himself lunch from

Respondent's food supplies and has in the past, when school is not in session, sold food he has made and prepared foods, milk and snacks to other employees of the Respondent; that Birkley received annual performance evaluations on June 7, 1985, and June 12, 1986; that the June 12, 1986 evaluation contained several below average areas and one (1) unsatisfactory area of work performance and informed Birkley he would receive upon his return for the 1986-87 school year periodic evaluations on his job attitudes and performance; that on September 30, 1986 Birkley received a special personnel evaluation which contained the following comments of his supervisor Harley Schriver: "Mr. Birkley has shown noticeable improvement in his work performance. He has improved in attitude and job performance but more time is needed for a fair evaluation. We will conduct a follow-up evaluation by the end of November 1986."; that on December 3, 1986 Birkley received a special performance evaluation which contained no below average or unsatisfactory areas of work performance; that on March 3, 1987 Birkley received the following letter of suspension:

March 3, 1987

Dennis Birkley
High School, Food Service

Dear Dennis:

This letter will serve as a summary of a conference with you, Harley Shriver and myself, March 2nd 1987.

This conference was held to discuss two specific job related incidents that occurred Friday, February (sic) 20th, 1987 and Monday (sic) February 23, 1987.

In the first instance you were found accidentally (sic) by a secretary in the little used telephone equipment room at the High School at approximately 1:45 P.M.

The discussion centered on the reasons you would be locked up in this little room. You said you were on break and my contention is you were in there wasting time.

For this particular incident I am suspending you from work without pay for two days. The specific days are March 9th & 10th, 1987.

The second incident discussed was that of taking a box of breaded shrimp from the Muskego Elementary School the morning of February 23rd, 1987 and taking the box of shrimp back to the High School. At the High School you decided to make lunch for yourself and two custodians. The shrimp served as the entree' of the lunch.

The record showed that you turned in two adult lunch tickets to Mr. Shriver on Wednesday (sic) February 25th. In this regard it should also be pointed out that Mrs. Papke had talked to you February 24th regarding the missing shrimp.

Your judgement in this last instance was the focus of our discussion.

As I view the entire matter it is apparent that your attitude is such that you think you can do just as you please. This same thinking on your part comes through time and time again in correspondence and evaluations with the food service director.

For this second incident you are suspended without pay for three days. The specific days are March 11, 12 & 13th, 1987

Your return date for work will be March 16th, 1987.

In the event there would be further serious incidents regarding your work performance you will be terminated.

Let us hope it doesn't reach that point.

Yours Truly,

John E. Egan /s/
John E. Egan
Adm. Assistant

JJE:LK

c: Matheson
Shriver

that during the conference on March 2, 1987, Egan informed Birkley he was not to make and sell food to Respondents' employees; that Birkley did not consider Egan's directive a prohibition against the selling of prepared foods, snacks and milk to Respondent's employees; that on April 7, 1987 Schriver sent the following memorandum to School District Superintendent Donald Matheson:

TO: Donald Matheson

FROM: Harley Schriver

DATE: April 7, 1987

RE: April 2, 1987, Incident at High School

At about 8:00 A.M. on Thursday, April 2, I went into the High School kitchen. Because that Thursday was a parent conference day for the High School, no lunches were going to be served at the school and no kitchen employees were on duty that day, other than Dennis Birkeley. (sic) When I walked into the kitchen, Dennis seemed very surprised. He was sitting at the counter and one of the custodians was sitting in Elsie Stolz's (sic) office. Dennis jumped up and said, "I didn't expect you to be here."

I went into my office. Ken Lau was the custodian who was in Elsie's office. I don't know why he was sitting in there. That office should not be open when Elsie is not in.

Dennis followed me into my office. Shortly after that, one of the other custodians came into the kitchen. That was Frank (Bieniewski). Frank yelled to Dennis that he wanted something for breakfast. At that time, Dennis turned around, walked into the kitchen and told Frank that I was there. Dennis then came back into my office. Frank came over and said that he hadn't had anything to eat that morning, that he needed something to eat and that he would even pay for it. That was when Dennis told me that there would be money on Elsie's desk to pay for something that he had sold to George. I did not check Elsie's desk.

Frank then took some snack products and, apparently, Dennis took money from him. Subsequently, I asked Elsie if, on Friday, there was money on her desk. She told me that there was, that Dennis had put money there for some snack products and some milk. I don't know exactly the amount of money.

The point of the matter is that Dennis had specifically been told previously that he had no authority to take money nor should he give food items to the custodians. This was very clearly pointed out to Dennis at a recent disciplinary meeting with John Egan and me.

Under the circumstances, my recommendation would be that Mr. Birkeley (sic) should not be allowed in any school kitchen without supervision.

I see this as a direct violation of the conditions of his employment. A flagrant violation. His action in this instance is the same as what he was recently suspended for. He should not allow the custodians (sic) come in and help themselves.

that Matheson investigated the matter and determined to terminate Birkley; and, that on April 13, 1987 Egan sent the following letter of termination to Birkley:

April 13, 1987

Mr. Dennis Birkley
5860 South 116th Street #6
Hales Corners, WI 53130

Dear Mr. Birkley:

This letter will confirm my phone conversation with your attorney on Friday, April 10, 1987.

At that time I informed Mr. Zaffiro of our decision to terminate your employment with the school district effective after the workday April 19, 1987.

The reason for the termination is unacceptable work performance that is substantiated by the record and discussed with you on numerous occasions. You will be able to pick up your check for ten full workdays on Thursday, April 16, 1987.

You inquired about withdrawing your vested money in the Wisconsin Retirement System. This is the number to call for the specific instructions for this kind of procedure - 224-4238.

You also inquired about continuing in the medical insurance program. You may continue in the health and dental programs provided you pay the premiums. The medical is \$189.10 and the dental is \$37.04 for the family plans per month. It will be necessary to see Judy Adams in the district office to make these arrangements. You are covered through April 30, 1987. If you wish to continue in either plan you can do so for eighteen (18) months.

In the event you have any other questions please call.

Very truly yours,

John E. Egan, Adm. Assistant
Muskego-Norway School District

... 5/1/87

6. That the Respondent alleges its agents involved in the termination decision had no knowledge of Birkley's alleged union organizing activities, that Birkley's termination was justified; and that Respondent's decision to terminate Birkley did not violate any of the employee's statutory rights.

7. That Birkley was in the telephone equipment room at 1:45 p.m. on February 20 1987; that custodians had used said room for lunch breaks; that Birkley on February 23, 1987 took a box of breaded shrimp from one building to another where Birkley prepared lunch for himself and two custodians; that Birkley did not turn in two (2) lunch tickets until after he was questioned about the missing shrimp; that Birkley was informed by Administrative Assistant Egan not to prepare and sell food to employees on March 2, 1987; that on April 2, 1987, Birkley sold food to two (2) of Respondent's employees.

8. That the Respondent did not conduct any campaign against the Complainant prior to said elections; that the Respondent had no knowledge that Birkley had engaged in any protected activity; that the Respondent was not hostile towards Birkley's protected activity; and, that the Respondent's decision to suspend and discharge Birkley was not motivated at least in part by Birkley's protected activity.

Upon the basis of the above and foregoing Findings of Fact, The Examiner makes and issues the following

CONCLUSION OF LAW

That the Respondent, by suspending and terminating the employment of Dennis Birkley, did not commit any prohibited practice within the meaning of Sec. 111.70(3)(a)1, 2 and 3, Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

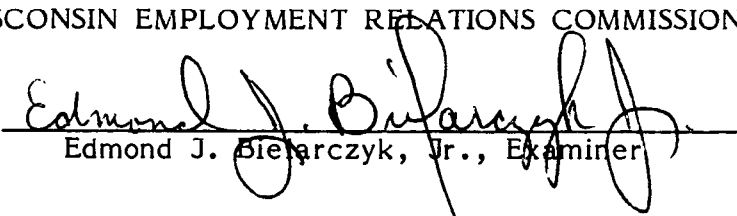
ORDER

That the complaint filed in the instant matter be, and the same hereby is, dismissed.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Edmond J. Bielarczyk, Jr., Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(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

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(Footnote 1 Continued)

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.

MUSKEGO-NORWAY SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Complainant has alleged that the suspension and termination of Birkley's employment was for unjustifiable reasons and interfered with the rights of an employee to join and/or form a labor organization free of harassment, coercion and intimidation. The Complainant further alleged that Birkley was engaged in a protected activity and that the Respondent attempted to disrupt the bargaining unit by its suspension and termination of Birkley. Section 111.70(3)(a)1, Stats. makes it a prohibited practice for a municipal employer to interfere with, restrain or coerce municipal employees in the exercise of their rights of self organization, to form, join or assist labor organizations, to bargain collectively and to engage in lawful activities for the purposes of collective bargaining. Section 111.70(3)(a)2, Stats. makes it a prohibited practice for a municipal employer to initiate, create, dominate or interfere with the formation of administration of any labor organization. Section 111.70(3)(a)3, Stats. makes it a prohibited practice for a municipal employer to encourage or discourage membership in any labor organization by discriminating in regard to hiring, tenure, or other terms and conditions of employment.

A finding of discrimination is warranted if it is demonstrated that a municipal employer's action was motivated by a purpose to chill the exercise of protected rights and if the municipal employer may have reasonably foreseen that its action will likely have that effect. 2/ In order for the Complainant to prevail on a charge of discrimination, the Complainant must show by a clear and satisfactory preponderance of the evidence the following: (1) the employee had engaged in a protected activity; (2) the municipal employer had knowledge of such protected activity; (3) the municipal employer bore animus towards the employee because of such activity; and (4) the action against the employee taken by the municipal employer was motivated, at least in part, by the protected activity. The absence of any one of these elements precludes a finding of a violation 3/ Although the Respondent did not dispute that Birkley may have been involved in a protected activity, all three (3) of Respondent's agents (Schriver, Egan and Matheson) denied any knowledge of Birkley's activity. It is reasonable to conclude that some rebuttal of Respondent's agents would have been made by the Complainant to demonstrate they had, in fact, knowledge that Birkley had engaged in a protected activity. However, no rebuttal evidence was presented. Therefore the Examiner concludes the Respondent and Respondent's agents had no knowledge Birkley had engaged in protected activities. Having so found the Examiner also concludes that the Respondent bore no animus towards Birkley because of his protected activity and that Respondent was not motivated to suspend and then terminate Birkley's employment, at least in part, because of the protected activity. Because the Complainant has failed to demonstrate sufficient evidence to establish all the necessary criteria for a finding of discrimination, the Examiner concludes the Respondent did not violate Sec. 111.70(3)(a)3, Stats., when it suspended and terminated Birkley's employment.

The Complainant acknowledged in its reply brief that there was no concerted effort by the Respondent to engage in an anti-union campaign except for the suspension and termination of Birkley's employment during the certification of the Complainant as bargaining representative. The suspension and termination of a bargaining unit employee in and of itself does not demonstrate on its face that the Respondent was attempting to interfere with the formulation of a labor organization. Particularly herein where the record demonstrates the following:

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- 2/ Winnebago County (Department of Social Services), Dec. No. 16930-A (Davis, 8/79).
- 3/ Prairie Home Cemetery, Dec. No. 22958-A (Ford, 5/86), aff'd. Dec. No. 22958-B (WERC, 11/86).

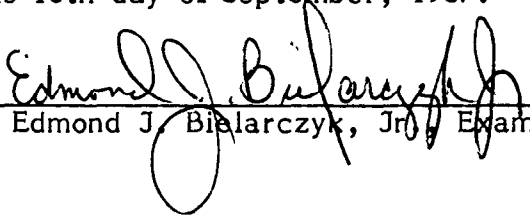
(1) the Respondent stipulated to an election, (2) the Respondent did not conduct an anti-union campaign, and (3) the Respondent was unaware that the employee it took action against had engaged in protected activities. Further, the record demonstrates Birkley was, at 1:45 p.m. on February 20, 1987 in a little used telephone equipment room for which he received a two (2) day suspension. That on February 23, 1987 Birkley did take a box of breaded shrimp from one building to another where he prepared the shrimp for himself and two (2) custodians and he did not turn in two (2) lunch tickets until February 25, 1987, for which he received a three (3) day suspension. That on April 2, 1987 Birkley did sell food items to two (2) custodians even though he had been ordered by Administrative Assistant Egan not to prepare and sell food, for which his employment was terminated. Even though the Complainant presented evidence concerning rational for Birkley's actions, there is no evidence that any of Respondent's actions against Birkley was an attempt to influence the outcome of the representation election. Therefore the Examiner concludes the Respondent did not violate Sec. 111.70(3)(a)2, Stats. when it suspended and terminated Birkley's employment.

Similarly, the Examiner finds no violation of Sec. 111.70(3)(a)(1). As noted above, there is no evidence the Respondent was aware of Birkley had engaged in protected activities. There is no evidence that the Respondent's actions of suspending and terminating Birkley's employment was an attempt to influence the outcome of the representation election. Even though the Complainant presented evidence as to why Birkley was in the telephone equipment room, why Birkley cooked and sold shrimp, and why Birkley sold food, after being ordered not to prepare and sell food, there is no evidence that Respondent's failure to accept Birkley's rational for these events was an attempt to interfere, restrain or coerce Birkley in exercising his protected rights.

Having found the Respondent did not violate Sec. 111.70(3)(a)1, 2, or 3, the Examiner has dismissed the complaint.

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

By


Edmond J. Bialarczyk, Jr., Examiner