

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DANE COUNTY, WISCONSIN MUNICIPAL :
EMPLOYEES, LOCAL 60, AFSCME, AFL-CIO, :
 :
Complainant, : Case 3
 : No. 40838 MP-2118
vs. : Decision No. 25718-A
 :
VILLAGE OF MAPLE BLUFF, :
 :
Respondent. :
 :

Appearances:

Mr. Darold Lowe, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719, appearing for the Union.
Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, Suite 600, Insurance Building, 119 Martin Luther King Jr. Boulevard, P.O. Box 1664, Madison, Wisconsin 53701-1664, by Mr. James K. Ruhly, appearing for the Village.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

Dane County, Wisconsin Municipal Employees, Local 60, AFSCME, AFL-CIO filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission on July 7, 1988 in which it alleged the Village of Maple Bluff had committed prohibited practices in violation of Sec. 111.70, Stats. The matter was held in abeyance pending the parties' efforts to resolve the matter voluntarily. After those efforts proved unsuccessful, the Commission appointed Jane B. Buffett, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Sec. 111.07(5), Stats. Hearing was held on December 13, 1988. A transcript was prepared and received December 20, 1988. The parties exchanged briefs, the last of which was received February 6, 1989. 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, Conclusions of Law and Order.

FINDINGS OF FACT

1. Dane County, Wisconsin Municipal Employees, Local 60, AFSCME, AFL-CIO, hereinafter the Union, is a labor organization with offices at 5 Odana Court, Madison, Wisconsin 53719.
2. The Village of Maple Bluff, hereinafter the Village, is a municipal employer with offices at 18 Oxford Place, Madison, Wisconsin 53704.
3. On July 27, 1987 the Union filed with the Wisconsin Employment Relations Commission a petition for a representation election among a bargaining unit of employees of the Village Police Department. Prior to the September 23, 1987 hearing on the matter, the Village sent to employees, the following letter:

Dear _____

Local 60 of the American Federation of State, County, and Municipal Employees Union has filed two election petitions with the Wisconsin Employment Relations Commission. A hearing will be held on these petitions on September 23, 1987.

The Union seeks to represent a unit of Village employees other than police and fire employees.

These petitions were not filed with supporting authorization cards. In municipal elections, unions are not required to file supporting authorization from the employees. They can file these election petitions even if the employees oppose the Union.

The Village Board is opposed to having a union

represent its employees. We are a small community and we want to work with our employees. We don't want the typical adversarial relationship that comes with unionization.

We have an excellent record of improved wages and improved benefits -- all of which was accomplished without a union.

Even though we have a good and consistent record of improvement, we now hear that someone has been spreading rumors that the Village Board is planning on cutting wages and benefits. We don't know how those rumors got started. But we do know the Union is trying to capitalize on these rumors, whoever started them.

I want each and every employee to know that those rumors are untrue! The Village Board has no intention of cutting wages or benefits. We are interested in the welfare of our employees -- as we have been over these many years.

I hope you reject the idea that an outsider be brought into the Village. It can lead to distrust -- just as the wage and benefit cut rumor does. And it can interfere with our efforts to work in harmony with you for the mutual benefit of our employees and the Village residents.

Sincerely,
Nancy Harper /s/

4. On November 19, 1987 the Commission issued a Direction of Election. Said election took place January 6, 1988 and Harper was the observer for the Village. The Union was certified as the exclusive bargaining representative on January 21, 1988.

5. Hugh Morrison has been employed by the Village as a police officer for 23 years. Soon after Richard Hons became Village Chief of Police on May 1, 1987, he established a requirement that officers qualify in marksmanship four times a year by passing a performance test. In Morrison's first performance test, on September 2, and again on October 28, 1987, he failed to qualify. Sometime in late October, Chief Hons informed Village Administrator Joe Szyper of Morrison's two failures to qualify. Pursuant to a decision made by the Village Police and Fire Committee, Morrison took a leave of absence, during which time Morrison received medical evaluations and took other remedial steps to improve his marksmanship. Morrison then took the performance test, qualified, and returned to work. He was paid for the ten days' leave. On January 13, 1988, Morrison again took the performance test and failed to qualify. On February 1, 1988 he was suspended for the failure to qualify. Subsequently, he took the test again, qualified, and returned to work, having lost three days of work. On February 9, 1988, the Village determined to not reimburse him for the lost pay, but did give him the option to use vacation pay for the lost days, which option he declined.

6. Dennis Schmelzkopf was employed by the Village as a police officer from January 1977 to November 4, 1988. On July 14, 1987 he was promoted to Sergeant with a probationary period scheduled to last through December 31, 1987. On July 30, 1987, responding to an emergency call to a citizen's home, Schmelzkopf conducted himself in such a manner that the citizen wrote the Village a letter of complaint. After considering other options, the Village Police and Fire Committee determined Schmelzkopf should meet with the citizen to apologize for the incident. The meeting was arranged, but for reasons not relevant, it did not take place. On September 22, 1987, Schmelzkopf had a performance evaluation with Szyper. The July 30 incident was discussed as a major area of concern to the Village. Szyper told Schmelzkopf that at that time he would not recommend him for permanent appointment as a Sergeant.

7. On November 4, 1987, on his day off, Schmelzkopf came to a staff meeting, at which Chief Hons and Szyper and others were present, for which he was paid. Immediately preceding the meeting he had some beers with his lunch. Chief Hons wrote a letter of reprimand to Schmelzkopf regarding the consumption of alcohol prior to the staff meeting.

8. At its December 8, 1987 meeting the Village Board discussed Schmelzkopf's conduct at the July 30 incident and November 4 staff meeting. The Board also discussed its concern that both the Chief and Schmelzkopf, the only sergeant, had taken vacation during the same 10-day period in the summer. The Board believed their simultaneous absence reflected a general lack of leadership. The Board voted to extend Schmelzkopf's probationary period through March 31, 1988. On February 11, 1988 Harper informed Schmelzkopf that

his probationary status as Sergeant would be terminated and he would be returned to patrol officer status as of April 1, 1988. In explaining the Village's decision, Harper enumerated the July 30 incident, the staff meeting incident, and the summer vacation taken simultaneously with the Chief as reasons for terminating Schmelzkopf's probationary Sergeant status.

9. The Village's imposition on Morrison of a three-day suspension was not motivated by hostility toward any exercise of his rights to engage in lawful concerted activities.

10. The Village's action in returning Schmelzkopf to his position as Patrol Officer was not motivated by hostility toward any exercise of his rights to engage in lawful, concerted activities.

11. The Village's imposition of a three-day suspension on Morrison did not coerce, interfere or restrain the Village's employees in the exercise of their statutory rights to self-organize.

12. The Village's action in returning Schmelzkopf to his position as Patrol Officer did not interfere, coerce or restrain the Village's employees in the exercise of the statutory rights to self-organize.

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

CONCLUSIONS OF LAW

1. The Village of Maple Bluff, by imposing a three-day suspension on Hugh Morrison, and by returning Dennis Schmelzkopf to his former position of Patrol Officer did not discourage membership in a labor organization by discrimination against them in regard to hiring, tenure and other terms of conditions of employment and, therefore, did not violate Sec. 111.70(3)(a)3 of the Municipal Employment Relations Act.

2. The Village of Maple Bluff, by imposing a three-day suspension on Hugh Morrison and by returning Dennis Schmelzkopf to his former position of Patrol Officer did not interfere, restrain or coerce employees in their exercise of rights protected by Sec. 111.70(2), Stats., and therefore did not violate Sec. 111.70(3)(a)1 of the Municipal Employment Relations Act.

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

ORDER 1/

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

Dated at Madison, Wisconsin this 7th day of April, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Jane B. Buffett, 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 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.

VILLAGE OF MAPLE BLUFF

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Union filed, on July 27, 1987, a petition for a representation election. The petition ultimately resulted in the Union's being certified as the exclusive bargaining representative on January 21, 1988. In February, 1988 the Village imposed a three-day suspension on Hugh Morrison. On April 1, 1988, the Village terminated Dennis Schmelzkopf's probationary period as Sergeant and returned him to his former position as Patrol Officer. On July 7, 1988 the Union filed the instant complaint alleging the Village had violated the employees' rights. This background is detailed in the Findings of Facts Nos. 3-8.

POSITIONS OF THE PARTIES

The Union asserts the Village, through its written communication and its discipline of Morrison and Schmelzkopf, attempted to coerce and intimidate the police officers who had supported the Union in the organizing campaign. The Union points out that the Village had never required officers to qualify on the pistol range prior to the time period involved in this case. It also asserts Schmelzkopf was unaware that his appointment as Sergeant was probationary. It believes Morrison's three-day's leave without pay and the return of Schmelzkopf to his former position were retaliatory.

The Village views the protected activities involved in this case as the filing of the election petition and voting or refraining from voting in the election. It concedes the Village President was aware of these activities, but it denies the Village's September, 1987 letter to its employees reflected hostility toward the Union. It argues the decision to require qualification at the firing range and the decision to condition Schmelzkopf's promotion on a probationary basis both predated the filing of the election petition. Finally, it argues the two disputed actions were based on unprotected activity, that is, the employees' job performance.

DISCUSSION

Section 111.70(3)(a)3, Stats.: Discrimination

Section 111.70(3)(a)3 provides:

. . .

It is a prohibited practice for a municipal employer individually or in concert with others: To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment

. . .

In order to prevail on its complaint alleging a violation of this subsection, the Union must prove that:

- 1) The employe was engaged in lawful and concerted activities protected by the Municipal Employment Relations Act; and
- 2) The employer had knowledge of those activities; and
- 3) The employer was hostile toward those activities; and
- 4) The employer's action was based, at least in part, on hostility toward those activities. 2/

2/ Employment Relations Department v. WERC, 122 Wis.2d 132, 140 (1985).

The Union does not specify what protected activities engaged in by Morrison and Schmelzkopf were the object of the Village's hostility and retaliation. It is, however, self-evident that the filing of a petition for a representation election, a major step in attaining certification as an exclusive bargaining representative, goes to the heart of protected collective bargaining rights. Nevertheless, the Union does not argue, and there is no evidence to support a finding, that Morrison and Schmelzkopf were involved in the initiation of the petition and support of the organizational campaign. Nor is there evidence that the Village believed Morrison and Schmelzkopf were so involved. The only evidence of union activity on the part of these employes was their exercise of their right to vote in the representation election on January 6, 1988. 3/ The Village, through its President Nancy Harper, who was a poll watcher, was aware that Morrison and Schmelzkopf were on the list of eligible voters.

Regarding hostility toward protected activity, the only evidence the Union presented was the Village's letter mailed to employes during the early stages of the certification process. In that letter, the Village candidly stated it was opposed to having the employes represented by the Union and therefore requested the employes to reject an "outsider." This letter, however, was not coercive, as it made no predictions of consequences should the Union win, nor did it promise rewards should the Union lose. 4/ The Village's mere opposition, during an organizational campaign, expressed in a single written communication of this nature, is not evidence of hostility toward the Union. 5/

Even assuming, for the purposes of complete analysis, that the letter did prove the Village was hostile toward the Union and toward Morrison and Schmelzkopf's protected activity, there is no evidence that any hostility was any part of the motivation for the Village's action toward them.

The only support the Union offers for its claim of unlawful motivation is the timing of the events. It implies the timing of the establishment of the firing range qualification was retaliation for the organizational campaign. To the contrary, the record shows the requirement was established by Chief Hons "several days" after he was appointed to his position on May 1, 1987. It is logical to infer the impetus was similar to that of any new manager seeking to establish higher quality standards for an organization. Moreover, this Examiner concludes that "several days" after May 1 is something less than the twelve weeks that elapsed before the representation petition was filed on July 27. Therefore, the qualification requirement predated the filing of the petition and it cannot be seen as retaliation for it.

As to Schmelzkopf, although he claimed to be unaware that his promotion to Sergeant was on a probationary status, the publicly-posted minutes of the Village Board's July 14, 1987 meeting clearly show the decision for a probationary period was made at that time. Since the representational petition was filed July 27, after that meeting, Schmelzkopf's probationary status cannot be found to be retaliatory.

Not only does the timing of the Village's action fail to prove unlawful motivation, but the Union does not point to any direct evidence of such unlawful motivation, and this Examiner can find none. Finally, the Village can credibly enumerate legitimate business reasons for its actions. That is, although other employers might have taken other actions, the Village's actions were based on business considerations.

3/ As it happened, for reasons irrelevant to this case, Schmelzkopf was unable to vote in the election. That fact, however, does not have impact on the legal conclusions reached herein.

4/ Ashwaubenon School District, Dec. No. 14774-A (WERC, 1/77).

5/ Western Wisconsin Technical Institute, Dec. No. 12355-B (WERC, 8/74).

Morrison's leave without pay resulted from his failure to pass the marksmanship test. It is easy to understand the Village's desire to remove its employe, a law enforcement officer, from duty until he was able to pass the test involving firearms. The Village's decision to withhold pay for these three days must be viewed in the light of the fact that only two-and-a-half months earlier the Village had paid Morrison for ten days' leave while he took remedial steps resulting from his earlier failure to qualify. The decision to deny compensation for the three days off from duty in February, then is found to be based on a legitimate business reason.

A similar conclusion is reached when scrutinizing Village's action in terminating Schmelzkopf's probationary status as Sergeant and returning him to the Patrol Officer rank. The Village gave as its reasons its dissatisfaction with his conduct at the July 30 incident, his coming to a staff meeting after drinking some beers with his lunch, and his taking a vacation at the same time as the Chief. It is unnecessary to determine the extent of the misconduct on July 30, and, indeed, no detailed evidence was presented regarding the July 30 incident, upon which such analysis could rest. It is sufficient to conclude, given the citizen's complaint, the Village Board's deliberations which culminated in arrangements for apology, and Schmelzkopf's willingness to make the apology, that the Village had some reason for its disapproval of Schmelzkopf's performance. Similarly, the Village's displeasure with its law enforcement officer who drank some beers with lunch before coming to a staff meeting is a credible reason for the Village's action. While it is true that Schmelzkopf had no other duty than attendance at the staff meeting, it is not necessary to make fine distinctions regarding drinking beer before a staff meeting or before duty dealing with the public, for there is at least some reason for the Village's dissatisfaction with Schmelzkopf's conduct. The remaining reason offered by the Village was the simultaneous absence with the Chief. Although on February 11, 1988, when Harper explained Schmelzkopf's return to patrol officer status to him, she also mentioned the issue of the simultaneous absence with the Chief, the Village did not argue that incident in its brief, and the conclusions reached herein does not rely on that event. Since the July 30 incident and the staff meeting incident could be a reasonable basis for the Village's dissatisfaction with his conduct and its decision that it did not want him to serve as Sergeant, the Village had a legitimate business reason for returning him to Patrol Officer rank.

In summary, since there is no basis for drawing an inference that the Village's employment actions regarding Morrison and Schmelzkopf were motivated, even in part, by any hostility toward protected activity, and since there is no direct evidence of unlawful motivation, it necessarily follows that the Village did not violate Sec. 111.70(3)(a)3, Stats.

Section 111.70(3)(a)1, Interference, Restraint or Coercion

Section 111.70(3)(a)1 Stats., provides that it is a prohibited practice for a municipal employer individually or in concert with others:

To interfere with, restrain or coerce employes in the exercise of their rights guaranteed in sub. (2).

Subsection (2) provides:

Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employes shall have the right to refrain from any and all such activities....

Under this section, it is not necessary to prove that the employer acted out of hostility to the union to establish such a violation, but merely to show that the employer's action would have a reasonable tendency to inhibit or limit employes in the exercise of their protected rights. 6/

In this case, the Village had made no promises of benefits if the Union were defeated in the election, nor had it made threats of reprisals if the Union should prevail. As discussed in the "Discrimination" section above, the Village's letter expressing its opposition to union representation is, without more, not coercive. In a similar vein, the Village made no statements connecting the two disputed employment actions with the Union's organizing efforts. Nor was there any other Village action that would give an employe reason to believe that Morrison's and Schmelzkopf's experiences were warnings that other employes would suffer adverse employment action as reprisal for supporting the Union. Morrison and Schmelzkopf's co-workers were also law enforcement officers, and could be reasonably expected to understand the institutional concerns regarding marksmanship, dealing with citizens, and alcohol discussed in the "Discrimination" section above. The co-workers may or may not reach the same conclusions as the Village regarding the appropriate consequences of those incidents, but they could be expected to understand the Village's rationale. Therefore, an employe considering Morrison's leave without pay and Schmelzkopf's return to patrol officer status would most reasonably attribute those outcomes to the Village's evaluation of those officers' job performances. Such an employe would not be chilled in his own support of the Union. In summary, the Village's actions are not found to interfere, restrain or coerce employes in the exercise of their protected rights, and did not violate Sec. 111.70(3)(a)1, Stats.

Dated at Madison, Wisconsin this 7th day of April, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Jane B. Buffett, Examiner

6/ Juneau County (Pleasant Acres Infirmary), Dec. No. 12593-B (WERC, 1/77).