

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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 MR. RICHARD G. MOLINARO, :  
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 Complainant, :  
 :  
 vs. : Case 127  
 : No. 43277 MP-2300  
 : Decision No. 26294-A  
 KENOSHA UNIFIED SCHOOL DISTRICT, :  
 :  
 Respondent. :  
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Appearances:

Frisch Dudek, Ltd., 825 North Jefferson Street, Milwaukee, Wisconsin 53202, by  
 Ms. Kaye K. Vance, appearing on behalf of the Respondent.  
 Mr. Richard G. Molinaro, 7801 88th Avenue, #93, Kenosha, Wisconsin 53142,  
 appearing Pro Se.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Richard G. Molinaro, hereinafter Complainant, having on December 5, 1989, filed a complaint with the Wisconsin Employment Relations Commission, hereinafter Commission, wherein it was alleged that Kenosha Unified School District, hereinafter Respondent, had committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA) by discriminating against the Complainant on the basis of age and union activity; and the Respondent having, on February 14, 1990, filed an Answer, wherein it denied that it committed any prohibited practices; and the Commission having appointed Coleen A. Burns, a member of its staff to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5) of the Wisconsin Statutes; and a hearing on said complaint having been held at Kenosha, Wisconsin on February 28, 1990; and the parties having filed posthearing briefs by April 13, 1990; and the Examiner, having considered the evidence and the arguments of the parties and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainant Richard G. Molinaro is a municipal employe within the meaning of Sec. 111.70(1)(i) of the Municipal Employment Relations Act and at all times material herein has resided at 7801 88th Avenue, #93, Kenosha, Wisconsin 53142.

2. That Respondent Kenosha Unified School District is a municipal employer within the meaning of Sec. 111.70(1)(j) of the Municipal Employment Relations Act and has principal offices located at 3600 52nd Street, Kenosha, Wisconsin 53142.

3. That Richard G. Molinaro, hereinafter the Complainant, commenced employment with the Respondent in July of 1988; that since this time, Complainant has worked as a substitute custodian for the Respondent; that at the time the Complainant commenced his employment with Respondent, the Respondent had a practice of hiring permanent custodial employes from the ranks of substitute custodians who had developed a good work record; that prior to January of 1989, Respondent's Facility Services Office was responsible for interviewing and hiring permanent custodial employes; that in January of 1989, the responsibility for interviewing and hiring permanent custodial employes was transferred to Respondent's Personnel Services Department; that at the time of this reorganization, Respondent changed its procedure for hiring permanent custodial employes; that under the new procedure, employes of the Personnel Services Department conduct an initial interview of all applicants for permanent support services positions, including custodial positions; that this initial interview a/k/a screener perceiver interview, is a structured interview which was developed by Selection Research Incorporated to identify personal characteristics which predict the likelihood of success in the support positions, including permanent custodial positions; that applicants who fail to meet the criteria established for the initial interview are not given any further consideration for employment in a permanent full-time support services position; that in January of 1989, the Respondent had approximately 300 applicants for permanent full-time custodial positions on file; that on or about February 15, 1989, Complainant received the following letter from Linda K. Nielson, Respondent's Director of Personnel Services:

The Personnel Office of the Kenosha Unified School District #1 will be conducting personal interviews for all applicants interested in custodial/maintenance positions. Although there are presently no openings for custodial/maintenance workers in our district, the

intent of these interviews is to gather information which will help identify the most qualified applicants for future placements.

Since custodial/maintenance applicants number in the hundreds, it is expected that this process will take several months. Persons interested in being a part of the interview process should contact Lanna at 656-6333 to schedule an appointment. If we do not hear from you by 3:00 p.m. on Friday, February 24, we will assume you are no longer interested in remaining a custodial/maintenance applicant for the Kenosha Unified School District.

Thank you for your interest and cooperation.

that a similar letter was sent to each of the individuals who had an application for custodial employment on file with Respondent; that the Complainant was one of the 202 applicants who accepted the invitation to interview; that of the 193 applicants who kept their interview appointments, 103 applicants met or exceeded the interview criteria; that 90 applicants did not meet the criteria; that the Complainant was one of these 90 applicants; that Nielson conducted each of the 193 interviews; that when Nielson conducted Complainant's interview, she asked the Complainant the same sixteen questions that were asked of each of the 193 individuals who participated in the interview; that Nielson was trained by Selection Research Incorporated to recognize "listen-fors," i.e., responses which indicate that the individual being interviewed possesses the characteristics which have been identified as indicators of future success in Respondent's support services position; that when Nielson conducted the interview, she read each question exactly the way it was written and repeated the question if requested to do so by the interviewee; that the screener perceiver interview does not contain any questions concerning the interviewee's union activity; that as each interviewee responded to the question, Nielson marked a plus if she heard the "listen-fors" and a zero if she did not hear the "listen-fors;" that following the interview, Nielson took the applicant's name, address, and asked if there was a specific kind of work in which they were interested; that Nielson also asked the applicants if they were presently employed; that after all of the 193 interviews were completed, Nielson met with the Director of Facility Services and two custodial supervisors to determine the minimum criteria to be considered for future permanent full-time employment; that this determination was based upon the number of "plus" responses that each interviewee had made during the interview, pursuant to criteria established by Selection Research Incorporated; that at the time that the minimum criteria were established, there was not any discussion concerning individual applicants; that following the determination of the minimum criteria, Nielson sorted through the interview results and determined which interviewees met the minimum criteria; that prior to the determination that Complainant had not met the interview criteria, Nielson did not have any knowledge of whether or not Complainant had participated in any union activities; that since Complainant participated in the screener perceiver interview, four substitute custodians who did meet the interview criteria were offered permanent positions; that prior to receiving these offers of full-time employment, each of the four substitute custodians was further interviewed by Respondent; that Respondent's decision not to consider Complainant for future full-time custodial positions was not based on any factor other than Complainant's performance on the screener perceiver interview; that since instituting the screener perceiver interview, Respondent has not considered anyone for permanent full-time employment who did not meet the minimum criteria established for the screener perceiver interview; that the two custodial supervisors who assisted in the determination of the interview criteria were Joel Blonshine and Mike Burditt; that the screener perceiver interviews of the 202 applicants began in February of 1989 and continued through July of 1989; that on or about November 15, 1989, Complainant received a letter from Nielson informing Complainant that he did not meet the minimum criteria on the screener perceiver interview and, therefore, would not be considered for full-time employment with the Respondent, but that Complainant could continue as a substitute custodian if he should so desire; that Nielson did not have any discussions with Tom Bielmeier regarding the Complainant prior to Respondent's determination that the Complainant did not meet the minimum criteria of the screener perceiver interview; that the screener perceiver interview is not used to evaluate permanent District employees who are seeking to change jobs within the system; and that the record does not demonstrate that Blonshine, Burditt or the Director of Facility Services had any knowledge of Complainant's union activity at the time that Respondent made the decision not to consider the Complainant for permanent full-time employment.

4. That at the time that the Complainant commenced his employment with the Respondent in July 1988, he was advised by Custodial Supervisor Mike Burditt that if he had a good work record that he would be considered for permanent full-time employment as a custodial employee; that the Complainant was active in union affairs at his previous place of employment; that Complainant has not been covered by a collective bargaining agreement during his employment with Respondent; that Complainant recalls that in April of 1989, he met with Tom Bielmeier and asked Bielmeier about obtaining full-time employment; that

Complainant recalls that Bielmeier responded that the Complainant shouldn't worry about full-time employment, that Bielmeier was having a "hell of a time" keeping the Complainant working on a part-time basis because people were asking Bielmeier why the Complainant was working at his age; that the Complainant recalls that Bielmeier referred to the fact that the Complainant was collecting a pension from a former employer and indicated that since the Complainant was an ex-union officer in another company, that the Complainant wasn't the kind of individual that they were looking for in the District; that the Complainant recalls that the conversation with Bielmeier was loud and was overheard by other District employees; that the Complainant recalls another occasion in the Fall of 1988, when Bielmeier came down the aisle where the Complainant was working and started to yell in a loud voice "you don't make any suggestions around here, no suggestions whatsoever, I'll make all the suggestions. Don't think. Leave your brains out in the truck;" that according to the Complainant, he responded "Tom, it'll never happen again, but what did I do?" and that Bielmeier indicated that he was talking about a suggestion that the Complainant had made to a receptionist; that the Complainant recalls that Bielmeier continued by saying that "in your other company, you may be able to make suggestions, but you're not in a union here, you're not a union officer and we just don't need your suggestions."; that according to the Complainant, in the Fall of 1988, Bielmeier told the Complainant that Bielmeier had received a complaint from another employe that Complainant had been using Respondent's truck for personal business; that according to the Complainant, he asked Bielmeier for the name of the complaining individual and Bielmeier responded by saying that the Complainant did not have a right to know, that he was not a union officer, that he didn't have any rights, that the Complainant may have been a union officer someplace else, but not here and that the Complainant's union outlook was going to get him in trouble; that the Complainant believes that Bielmeier had feelings of animosity towards the Complainant; that according to the Complainant, he was on guard not to mention the Union and "not to even look like Union" because it seemed to agitate Bielmeier; that the Complainant believes that he was denied full-time employment with the Respondent because of Bielmeier's opinion that the Complainant would be a rabble-rouser because of his union background; that in early November of 1989, after people began receiving letters regarding the results of the interview, officers in the custodial bargaining unit, which unit is represented by Local 168, approached the Complainant to ask if the Complainant would be interested in signing a petition to get the substitute custodians into the collective bargaining unit; that the Union officers told the Complainant that they were responding to concerns of another substitute custodian, Heidi Olson, who had received a letter indicating that she would not be considered for permanent employment; that the Complainant recalls that he responded "That's good for Heidi but what about Dick? and that the Union officers indicated that they would get back to him; that the Union officers did not get back to the Complainant about the petition; that the Complainant agrees that Nielson did not ask any questions concerning union activity during the screener perceiver interview; that Bielmeier was not present at the screener perceiver interview of the Complainant; that at various times between July of 1988 and July of 1989, Complainant worked at the warehouse; that during the times that the Complainant was working at the warehouse, Bielmeier was his immediate supervisor; and that at other times, the Complainant was supervised by Mike Burditt or Joel Blonshine.

5. That Thomas Bielmeier is Respondent's supervisor of Warehousing and Facilities Services and has occupied this position since 1970; that prior to July of 1988, Bielmeier's wife, who worked with the Complainant's wife, mentioned to Bielmeier that the Complainant was looking for work; that Bielmeier advised his wife as to procedure for applying for employment with the Respondent and indicated that when the Complainant complied with this procedure, that Bielmeier would talk to Mike Burditt regarding the Complainant's employment; that Burditt interviewed the Complainant and advised Bielmeier that the Complainant was available for warehouse work; that Bielmeier then requested the Complainant to work as a driver and part-time person in the warehouse to fill in for an absent employe; that when the regular employe returned to work, Bielmeier asked the Complainant if he would be available to work in Respondent's basketball program; that when the Complainant indicated that he was interested in working in the basketball program, Bielmeier asked Mike Burditt to consider hiring the Complainant for the basketball program; that while the Complainant was working in the basketball program, between November 1988 and April 1989, Bielmeier asked Burditt if the Complainant could return to the warehouse to work while an employe was out on a long term illness; that according to Bielmeier, the Complainant did not ever discuss any of his union activities with Bielmeier; that in July of 1989, a crew leader in the warehouse, asked Bielmeier if Bielmeier would be willing to sit down with Union officers to discuss the Complainant's work conduct; that when Bielmeier met with the Complainant and Union representatives, he was advised by the Union representatives that warehouse employes were not happy with the Complainant's work performance or his attitude; that Bielmeier discussed these complaints with the Complainant and that the Complainant agreed with Bielmeier's decision that the Complainant should be placed on the substitute custodial list and not perform any further work at the warehouse; that Bielmeier did not have any discussions with Linda K. Nielson concerning the Complainant at any time prior to November of 1989, when Complainant was advised that he had failed to meet the criteria for the screener perceiver interview; that as Bielmeier recalls

the conversation with Complainant in the warehouse, he was asked by his immediate supervisor to talk to the individual who delivered the mail because that individual had engaged in a discussion which had upset a receptionist; that according to Bielmeier, he did not tell the Complainant that the Complainant should leave his brains in the truck or anything to that effect; that Bielmeier recalls that he said "if you have suggestions to make, I'd appreciate it if you would come to me and make them because the receptionist doesn't know why the mailroom" is laid out the way it is and there are other things to be concerned about besides just the layout of the mailroom and "we're always open to suggestions and I don't mind listening to some suggestions, but I'd rather have you come in here and give me the suggestions. I'll be happy to hear them."; that Bielmeier did not recall making any statements about the Complainant's age, his pension, or any union activity; that according to Bielmeier, he did have one conversation with the Complainant in which the Complainant mentioned that it was difficult to find work at his age; that Bielmeier recalls that he responded "yeah, we're lucky that we got jobs. What the heck, that's the way life is;" that more hours were available to the Complainant when he was working at the warehouse, then when he returned to substitute custodial work; that Bielmeier could not remember any discussions with the Complainant where either the Complainant or Bielmeier brought up the subject of the Complainant's union background; that Bielmeier recalls having a conversation with the Complainant in which Bielmeier questioned the Complainant about driving Respondent's vehicle for personal business; that according to Bielmeier he said "Dick, somebody has mentioned that you were seen with your vehicle at your place of residence while you were supposed to be working? Is that true or not?"; that Bielmeier recalls that the Complainant responded "no, that isn't true."; that according to Bielmeier, he then stated "I don't think that we have to go into the conversation any further than that, the person isn't here to make the question himself and he is not willing to make the question himself, but I want you to know that the question has been asked and I want you to know that this is the end of the conversation."; that Bielmeier recalls that the Complainant did ask about a full-time position; that although Bielmeier could not recall exactly what he told the Complainant, he believes that he told the Complainant that there were no guarantees that the Complainant was going to get a full-time position from the custodial substitution list and that Bielmeier had no control over the hiring of permanent custodial positions because he was not involved in the process of hiring applicants for the full-time custodial positions; that Bielmeier denies that he made any reference to the Complainant's age or yelled at the Complainant regarding his inquiry about full-time employment; that according to Bielmeier he did not have any knowledge of the Complainant's union background or union activities at that time and did not make any reference to Complainant's union background or union activity during this conversation; that Bielmeier could not recall ever telling the Complainant to leave his brains out in the car or truck, that Bielmeier would do the thinking for the Complainant or making any reference to the Complainant's former employment when he was a union officer; that Bielmeier denies ever telling Complainant "well, you were a union officer; you know how these things go?"; that according to Bielmeier, he wasn't dissatisfied with the work that the Complainant was doing in the warehouse; and that according to Bielmeier, he did not have any knowledge of the Complainant's prior union activity until the Complainant disclosed it at hearing.

6. That Complainant recalls that during a meeting at the end of July, 1989, the Union President complained about the Complainant's work performance; that according to the Complainant, during this conversation, either the Union President or Bielmeier told the Complainant "well, you're an ex-union officer. That's the way these things go"; that Larry Humphries is employed by Respondent as a truck driver and is president of Local 168; that according to Humphries, the Complainant was not involved with the Union in any way; that according to Humphries, the meeting of July 1989, was precipitated by employee complaints about the amount of time that the Complainant was taking to perform his work; that according to Humphries, the meeting was attended by Bielmeier, the Complainant, Humphries, and Bruce Blankley; that Humphries could not recall that Bielmeier made any statement regarding the Complainant's union activity during this meeting or that there was any discussion concerning Complainant's union involvement; that as Humphries recalls the meeting, he explained to Bielmeier that there were problems at the warehouse concerning the Complainant's work performance, he asked Bielmeier if Bielmeier could correct the problems and if not, would Bielmeier place the Complainant on the custodial sub-list; that Humphries denies that he had ever discussed the Complainant's prior union involvement with the Complainant, but acknowledges that he had discussed his own Union with the Complainant; that Humphries was aware that the Complainant was an ex-union officer; and that Humphries was present during the entire meeting of July, 1989.

7. That according to Bruce Blankley, he, the Complainant, Bielmeier, and Humphries attended a meeting; that Blankley could not recall the date of the meeting, but agreed that it could have been in July of 1989; and that as Blankley recalls the meeting, he came in late and that the meeting involved a discussion of the Complainant's work habits.

8. That the record fails to demonstrate that, prior to Respondent's determination not to consider the Complainant for permanent full-time employment, that Bielmeier made any statements to Complainant which referenced Complainant's union activity or that Bielmeier had knowledge of any prior union activity upon the part of the Complainant.

9. That Respondent's determination not to consider Complainant for permanent full-time employment was based solely upon Complainant's responses to the screener perceiver interview and such responses did not provide the Respondent with any knowledge of Complainant's prior union activity.

10. That the record fails to demonstrate that Respondent's decision not to consider the Complainant for permanent full-time custodial employment was

motivated, in whole or in part, by hostility on the part of the Respondent toward Complainant for engaging in protected concerted activity.

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

CONCLUSIONS OF LAW

1. That the Commission does not have jurisdiction to decide the age discrimination claim set forth in the complaint.

2. That the Respondent has not been shown to have committed any prohibited practice within the meaning of the Municipal Employment Relations Act by its refusal to consider the Complainant for employment as a permanent full-time custodial employe.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 1/

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

Dated at Madison, Wisconsin this 8th day of June, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By \_\_\_\_\_  
Coleen A. Burns, Examiner

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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.

KENOSHA UNIFIED SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

BACKGROUND

In his complaint initiating the proceedings, Complainant has alleged that the Respondent has committed prohibited practices in violation of the Municipal Employment Relations Act by discriminating against the Complainant on the basis of his age and union activity in denying him permanent employment with the Respondent. The Respondent denies that it has discriminated against the Complainant in violation of the Municipal Employment Relations Act, alleges that the Commission lacks subject matter jurisdiction to determine the allegation of age discrimination and requests that the complaint be dismissed in its entirety.

Complainant's Position

Complainant maintains that he has an excellent work record in performing his duties as a substitute custodial employe for the Respondent. Complainant notes that, at hearing, Bielmeier made the statement "if he had his way, he would have hired me" and argues that Bielmeier had an opportunity from July 1988 to March 1989 to hire the Complainant as a full-time employe as there was openings for which the Complainant was qualified. The Complainant maintains that the Respondent's contention that the Complainant failed to meet the criteria of the screener perceiver interview is pretextual, because, as of the date of hearing, he was still employed as a substitute custodian and performing all of the duties of a custodial position. The Complainant maintains that Bielmeier denied the Complainant full-time employment because of the Complainant's age and union background. Complainant argues that Bielmeier elicited false testimony from Union President Larry Humphries. The Complainant argues that, contrary to the testimony of Bielmeier, Bielmeier did tell the Complainant on several occasions that the Complainant's age, union background and collecting a pension were preventing the Complainant from receiving full-time employment with the Respondent. Complainant argues that the Respondent's conduct in denying him permanent employment prevents the Complainant from collecting full-time benefits and also prevents the Complainant from being a candidate for any union position.

Respondent's Position

The Wisconsin Employment Relations Commission does not have subject matter jurisdiction to hear and decide Complainant's allegation of age discrimination. Exclusive remedies for such allegations are found under Sec. 111.31 et seq. Wis. Stats., and/or the Age Discrimination Employment Act. Complainant has not introduced any evidence to establish that he participated in any protected activity, or that he was subjected to an adverse employment decision because of such activity. Rather, the record demonstrates that the Complainant was screened out of the applicant pool for permanent employment based entirely and solely on his score in the screener perceiver interview.

In order for a complaint to fall within the jurisdiction of the Wisconsin Employment Relations Commission, there must be protected conduct. Protected activity involves participation in union activity or concerted activity which furthers the collective concerns regarding wages, hours and conditions of employment for other employes. The Complainant has failed to establish that there was protected activity within the meaning of Sec. 111.70(2). Nielson, who had the sole responsibility for identifying candidates to be considered for permanent employment, was completely unaware of any union background on the part of Complainant. Bielmeier, who the Complainant alleges was biased against him because of his union activity, also was unaware of the Complainant's prior union activity. Moreover, Bielmeier had no input into the decision to screen the Complainant from the applicant pool. As the record demonstrates, Bielmeier helped the Complainant get his job as a substitute custodian with the Respondent and continued to intervene for the Complainant despite the Complainant's difficulty in getting along with the fellow employes. As Bielmeier indicated at hearing, he had no problems with the Complainant's work performance and would have hired him if it had been his decision.

DISCUSSION

Allegation of Age Discrimination

With one exception, the Commission does not have jurisdiction to hear and decide an allegation that a municipal employer has discriminated against an individual on the basis of age. The one exception occurs when the age discrimination claim is brought as a Sec. 111.70(3)(a)5 claim, i.e., it is alleged that the complained of conduct is in violation of a collective bargaining agreement.

Complainant does not argue and the record does not demonstrate that his

allegation of age discrimination involves a Sec. 111.70(3)(a)5 claim. 2/ Under the circumstances presented herein, the Commission does not have jurisdiction to determine Complainant's age discrimination claim. Accordingly, the Examiner has dismissed that portion of the complaint which alleges that Respondent has violated the Municipal Employment Relations Act by discriminating against Complainant on the basis of his age.

Allegation of Discrimination on the Basis of Union Activity

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

3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment. . .

To establish that Respondent has engaged in discrimination in violation of Sec. 111.70(3)(a)3, Complainant must prove by a clear and satisfactory preponderance of the evidence each of the following factors:

- (1) That employees have engaged in protected, concerted activity.
- (2) That the employer was aware of such activity.
- (3) That the employer was hostile to such activity.
- (4) That the employer's complained of conduct was motivated at least in part upon such hostility. 3/

Complainant's Sec. 111.70(3)(a)3 claim rests upon the argument that Respondent denied Complainant employment as a permanent full-time custodial employe on the basis of Complainant's union activity with a prior employer.

Complainant commenced employment with Respondent as a substitute custodian in July of 1988. It is not evident that there were any vacancies in permanent full-time custodial positions at that time, or at anytime prior to January, 1989. In January of 1989, Respondent initiated a new procedure for hiring permanent full-time employes into support positions, including custodial positions. Under this new procedure, all applicants for permanent full-time employment in a support position were required to participate in a screener perceiver interview.

At hearing, Linda K. Nielson stated that she interviewed each applicant, including the Complainant, and determined the number of positive responses made by each interviewee. Nielson further stated that upon completion of all the interviews, she met with Joel Blonshine, Mike Burditt and the Director of Facility Services to determine the number of positive responses which would constitute the minimum criteria to be considered for permanent full-time employment. According to Nielson, there was not any discussion of individual applicants at the time that the minimum criteria was established. 4/ Nielson further stated that following the determination of the minimum criteria, she sorted through the interview results to determine the interviewees who met the minimum criteria and those that did not. According to Nielson, the Complainant did not have sufficient positive responses to meet the minimum criteria and that Complainant's performance on the screener perceiver interview was the only factor which eliminated the Complainant from consideration for employment as a permanent full-time employe. Upon consideration of Nielson's demeanor at hearing, as well as the record as a whole, the Examiner is persuaded that Nielson's testimony concerning the interview process is entitled to be credited herein.

At hearing Complainant acknowledged that his screener perceiver interview did not contain any questions concerning union activity. Complainant does not argue, and the record does not establish, that Complainant had any discussions with Nielson, Blonshine, Burditt, or the Director of Family Services concerning his union activity prior to the time that he was advised that he would not be considered for permanent full-time employment. Rather, Complainant argues that Respondent gained knowledge of Complainant's prior union activity through discussions which Complainant had with Thomas Bielmeier, Respondent's Supervisor of Warehousing and Facility Services.

According to Complainant, he had two conversations with Bielmeier which

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2/ Complainant has never been covered by any of Respondent's collective bargaining agreements.

3/ Barron County, Dec. No. 23391-A (Burns, 7/87) aff'd by operation of Law, Dec. No. 23391-B (WERC, 8/87).

4/ T. 22.



occurred on separate occasions in the fall of 1988. As Complainant recalls one of the conversations, Bielmeier advised the Complainant that Bielmeier had received a complaint from one of Complainant's fellow employes that Complainant had been using one of Respondent's vehicles for personal business. Complainant recalls that when he asked for the name of the complaining employe, Bielmeier responded that the Complainant did not have a right to know, that the Complainant was not a union officer, that the Complainant may have been a union officer someplace else, but not here, and that the Complainant's Union outlook was going to get the Complainant in trouble "around here." 5/ Complainant recalls that the other conversation occurred when Bielmeier confronted the Complainant in a warehouse aisle and yelled "you don't make any suggestions around here, no suggestions whatsoever, I'll make all the suggestions. Don't think. Leave your brains out in the truck." 6/ According to the Complainant, he responded "Tom, it'll never happen again, but what did I do?" and that Bielmeier indicated that he was talking about a suggestion that the Complainant had made to a receptionist. According to the Complainant, Bielmeier continued by saying that "in your other company, you may be able to make suggestions, but you're not in a union here, you're not a union officer and we just don't need your suggestions." 7/ The Complainant recalls that in April of 1989, he met with Bielmeier and asked about obtaining full-time employment. The Complainant further recalls that Bielmeier responded that the Complainant shouldn't worry about full-time employment and that Bielmeier was having a "hell of a time" keeping the Complainant working on a part-time basis because people were asking why the Complainant was working at his age. 8/ The Complainant further recalls that Bielmeier referred to the fact that the Complainant was collecting a pension from a former employer and that Bielmeier commented about the Complainant being an ex-union officer in another company and that, therefore, the Complainant wasn't the kind of individual that they were looking for in the District. 9/ According to Complainant, he was called into the warehouse office at the end of July, 1989 for a meeting with Bielmeier and Local 168 Union officers to discuss a complaint about the Complainant's work performance. According to the Complainant, during this meeting, either the Union President or Bielmeier told the Complainant "well, you're an ex-union officer. That's the way these things go." 10/

At hearing, Bielmeier acknowledged that he had had a conversation with Complainant concerning a complaint that the Complainant had used one of Respondent's trucks for personal business. As Bielmeier recalls the conversation he said "Dick, somebody has mentioned that you were seen with your vehicle at your place of residence while you were supposed to be working. Is that true or not?" to which the Complainant responded "no, that isn't true." 11/ According to Bielmeier, he responded "I don't think that we have to go into the conversation any further than that, the person isn't here to make the question himself and he is not willing to make the question himself, but I want you to know that the question has been asked and I want you to know that this is the end of the conversation." 12/ As Bielmeier recalls the conversation in the warehouse, he was asked by his immediate supervisor to talk to the individual who delivered the mail because that individual had engaged in a discussion which had upset a receptionist. According to Bielmeier, he did not tell the Complainant that the Complainant should leave his brains in the truck or anything to that effect, according to Bielmeier he said "if you have suggestions to make, I'd appreciate it if you would come to me and make them because the receptionist doesn't know why the mailroom is laid out the way it is and there are other things to be concerned about besides just the layout of the mailroom and "we're always open to suggestions and I don't mind listening to some suggestions, but I'd rather have you come in here and give me the suggestions. I'll be happy to hear them." 13/ Bielmeier recalls that he did have a conversation with Complainant in which the Complainant asked about a full-time position. Although Bielmeier could not recall exactly what he told the Complainant, he believed he told the Complainant that there were no guarantees that the Complainant was going to get a full-time position from the custodial substitution list and that Bielmeier had no control over hiring of permanent custodial positions because he was not involved in the process of

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5/ T. 71-72.

6/ T. 70-71.

7/ T. Id.

8/ T. 68.

9/ T. Id.

10/ T. 110, 118-119, and 127.

11/ T. 105.

12/ T. 105-106.

13/ T. 99-100.

hiring applicants for the full-time custodial positions. 14/ Bielmeier recalls that in July of 1989, he did meet with Union representatives and the Complainant to discuss the Complainant's work conduct. According to Bielmeier, he was advised that warehouse employees were not happy with the Complainant's work performance or his attitude. 15/ Bielmeier recalls that he discussed these complaints with the Complainant and that the Complainant agreed with Bielmeier's decision that the Complainant should be placed on the substitute custodial list and not perform any further work at the warehouse. 16/

As a review of the two accounts of the conversations reveals, Bielmeier's account, unlike the Complainant's account, is devoid of any reference to union activity. According to Bielmeier, Complainant had never discussed Complainant's union activities with Bielmeier 17/ and that, during the time of the conversations, Bielmeier was not aware that Complainant had engaged in union activities prior to his employment with Respondent. 18/

Bielmeier's demeanor at hearing, as well as the internal consistency of his testimony, supports a finding that Bielmeier is a credible witness. Moreover, Bielmeier's testimony, unlike that of Complainant was consistent with the testimony of Larry Humphries, the only other witness who was present during any of the disputed conversations. Humphries, President of Local 168, was present during the entire meeting of July, 1989. 19/ Humphries did not recall that there was any discussion concerning Complainant's union activity and did not remember that Bielmeier made any statement about Complainant's union activity. 20/ When Complainant specifically asked if Humphries or Bielmeier made the statement "well, you're an ex-Union officer, you know how these things go," Humphries responded that he did not recall such a remark. 21/

While Complainant argues that Respondent induced Humphries to provide false testimony, Complainant's argument is not persuasive. Given Humphries position as Union President, it is not likely that he would fail to recall that there was a reference to Complainant's prior union activity. Accordingly, Humphries failure to recall such remarks supports the conclusion that such remarks were not made.

While Complainant recalled conversations in which Bielmeier was alleged to have referred to Complainant's prior union activity, Complainant did not relate any conversations in which Complainant provided Bielmeier with any information concerning his prior union activity. Nor is there any other evidence which suggests a "source" for such information. The lack of any evidence that Bielmeier was privy to information concerning the Complainant's prior union activity militates against a finding that Bielmeier made any statements concerning the Complainant's prior union activity.

Upon consideration of the above and foregoing, as well as the record as a whole, the Examiner credits Bielmeier's account of the conversations. Accordingly, the Examiner is not persuaded that Bielmeier made any remark to Complainant concerning the Complainant's prior union activity, or any union activity on the part of Complainant.

Complainant has not demonstrated by a clear and satisfactory preponderance of the evidence that, at the time that Respondent made the determination that Complainant would not be considered for permanent full-time employment, that Bielmeier, or any agent of Respondent, had knowledge that the Complainant had engaged in union activity, that Bielmeier, or any agent of Respondent, was hostile to such activity, or that the decision not to consider Complainant for permanent full-time employment was motivated, in any part, upon hostility to Complainant's union activity. Accordingly, Respondent has not been shown to have violated Sec. 111.70(3)(a)3 of the Municipal Employment Relations Act.

Inasmuch as the Examiner has not found Respondent to have violated the Municipal Employment Relations Act, Complainant's complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 8th day of June, 1990.

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14/ T. 108.

15/ T. 96.

16/ T. 97.

17/ T. 95.

18/ T. 95, 109, 114.

19/ T. 128.

20/ T. 122.

21/ T. 127-128.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By \_\_\_\_\_  
Coleen A. Burns, Examiner