

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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WISCONSIN COUNCIL 40, AFSCME, AFL-CIO, :
  
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Complainant, : Case 60
  
: No. 45585 MP-2473
  
vs. : Decision No. 27052-A
  
:
  
TREMPEALEAU COUNTY, :
  
:
  
Respondent. :
  
:
  
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Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Route 1, Sparta, Wisconsin,  
Mr. LaVerne Michalak, Corporation Counsel, Trempealeau County Courthouse,  
1720 Main Street, P.O. Box 67, Whitehall, Wisconsin, 54773, on  
behalf of the County.

54656,

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

Amedeo Greco: Hearing Examiner: Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, herein the Union, filed a prohibited practices complaint with the Wisconsin Employment Relations Commission on April 5, 1991, alleging that Trempealeau County, herein the County, unlawfully fired Rosemary Symitczek and Harold Hibbard in violation of Section 111.70(3)(a)(1),(2), and (3) of the Municipal Employment Relations Act because of their protected, concerted activity on behalf of the Union.

The Commission thereafter appointed the undersigned to make and issue Findings of Fact, Conclusions of Law, and Order as provided for in Section 111.07(5), Wis. Stats. and hearing subsequently was held in Whitehall, Wisconsin, on December 2, 1991. The parties thereafter filed briefs which were received by February 7, 1992.

Having considered the arguments and the record, the Examiner makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Union has its principal office at 5 Odana Court, Madison, Wisconsin, 53719, and is a labor organization.
2. The County has its principal office in the Trempealeau County Courthouse, Whitehall, Wisconsin, and is a municipal employer.

No. 27052-A

3. The Union in 1989-1990 tried to organize the approximately 180 unrepresented employes of the County's Health Care Center, but without success. As a result, said employes are still unrepresented for collective bargaining purposes.

4. Nursing Assistants Harold Hibbard and Rosemary Symitczek were employed on third shift at the County's Health Care Center at the time of their terminations in April, 1990. They respectively had been employed from February, 1988 and August, 1988.

5. In July, 1989, a meeting was conducted at Hibbard's residence to discuss whether to join a union. About 5 employes attended said meeting and decided that they wanted union representation. Symitczek did not attend said meeting.

6. Thereafter, Hibbard spoke to Union representative Daniel R. Pfeifer about organizing a union at the health care facility. Pfeifer met with Hibbard and Symitczek along with several other employes in Symitczek's home in August, 1989.

7. Another organizing meeting was held in Symitczek's home in February, 1990 which was attended by about 5 employes.

8. On April 27, 1990, Symitczek - with Hibbard present for part of the time - attended to a patient who had a high temperature. Symitczek was required to immediately orally report that fact to the lone nursing supervisor on the third shift. She instead left a note at the nursing station stating that said patient had a high temperature, but she did not orally report it because she believed that another patient needed her help. Later that day, Symitczek was given a termination notice for failing to immediately bring said situation to the supervisor's attention. Prior thereto, Symitczek had received a written warning for childish behavior in the summer of 1989 when she engaged in a water fight with Hibbard.

9. On April 27, 1990, supervisor Mary Ann Goard asked Hibbard why said patient's temperature was not reported. He replied that he had not taken her temperature; that he would not call her over nothing; and he walked away from her. At that point, Goard said she would discuss the matter with Health Care Administrator Philip Borenson, and that she was sick of his letters and "stuff like that". Hibbard replied, "Fine, because I'd like to tell him how you run this place at night." Prior thereto, Goard and Hibbard had developed a personality conflict, one which resulted in Hibbard sending two anonymous notes to management claiming that Goard sometimes slept on the job. Said conflict was noted in Hibbard's earlier March 25, 1990 evaluation.

11. Later that day, Hibbard was given his termination notice by Borenson for gross insubordination. Prior thereto, Hibbard had been given a written warning for having a water fight and he was told on another occasion that he could not go out for pizza when he was on break.

12. Prior to his termination, Hibbard received three written evaluations pursuant to the County's policy of evaluating employes whenever they transferred to different jobs - as Hibbard did here. Said evaluations did not evidence any anti-union motivation.

13. Prior to Symitczek and Hibbard's terminations, the Health Care Center did not have a policy of suspending employes for misconduct and, within the last five years at least, it never suspended any employe before terminating him/her.

14. At the time of their terminations, County representatives did not know about Hibbard or Symitczek's union activities.

15. The County's termination of Hibbard and Symitczek was not based upon any union animus.

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

CONCLUSIONS OF LAW

The County has not violated Sec. 111.70(3)(a)(1), (2) or (3), Stats. in terminating Harold Hibbard.

The County has not violated Sec. 111.70(3)(a)(1), (2) or (3), Stats. in terminating Rosemary Symitczek.

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

ORDER 1/

It is ordered that the instant complaint be, and hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 26th day of March, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/  
Amedeo Greco, Examiner

(Footnote 1/ appears on the next page.)

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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 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.

TREMPEALEAU COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

The Union:

The Union claims that the County unlawfully terminated Hibbard and Symitczek because of their concerted, protected activities on behalf of the Union and their efforts to obtain a collective bargaining representative for the County's Health Care Center. It argues that other employes in the past were not disciplined when they failed to orally report a patient's high temperature; that the "ultimate responsibility" for taking care of patients rested with the supervising nurse rather than Symitczek; that the nurse herself did not check on the patient until near the end of her shift; and that Symitczek never received any serious disciplinary warnings before her termination. The Union also points out that Hibbard was not "even involved in the taking of the resident's temperature"; that said matter was the prime responsibility of the supervising nurse; that Hibbard in fact was not insubordinate; that he was not subject to progressive discipline prior to his termination; that the County's discriminatory treatment of him can be seen in its evaluations of his work; and that it questions the motives of the County's representatives. As a remedy, the Union requests a traditional make-whole order on behalf of Hibbard and Symitczek which includes their reinstatements and back pay.

The County:

The County maintains that the Union has failed to meet its burden of proof in this matter; that there is no evidence that any County representatives knew of Hibbard or Symitczek's Union activities; that there is no evidence that anti-union considerations played any part in their terminations; and that both employes were fired because of legitimate "job-related problems which followed earlier instances of misconduct."

DISCUSSION

The County is correct: the Union has failed to prove that the County either knew of Hibbard and Symitczek's pro-union activities or that it bore any animus against them because of such activities.

The Union nevertheless essentially argues that it is possible to draw such an inference because the County's reasons for their terminations are so utterly pretextual that one may infer an unlawful motive.

Here, though, the County has a well-established rule -- which Symitczek herself acknowledges -- requiring employes to immediately orally report a patient's high temperature. 2/ Symitczek admittedly failed to do that here. While the Union may believe that her subsequent termination was somewhat draconian for such an offense and her relatively good work record, the fact remains that that was the County's call to make, provided only that it was not based upon any unlawful considerations. Since none appear here, it must be concluded that the County's termination of Symitczek was not unlawful.

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2/ Hibbard contradicted Symitczek's testimony by asserting that employes in fact were not required to orally report such matters to supervision. I find the contrary because Symitczek herself admitted that such oral reports were mandatory - a point corroborated elsewhere in the record.

This is not to suggest, of course, that the County had just cause to fire her. Just cause has nothing to do with this case because the County was not required to follow it. It instead was only required to follow the progressive discipline spelled out in the employe handbook at the time - one which provided for a written warning and then discharge without any intervening suspension.

Hibbard's situation is slightly different. He was fired for insubordination after supposedly talking back to nursing supervisor Mary Ann Goard on April 26, 1991. Since Goard did not testify in this proceeding, any of Goard's representations to management about what transpired between the two of them thus constitute hearsay. 3/

We hence only have Hibbard's direct testimony in this matter. He testified that he told Goard that he did not take the patient's temperature; that he told her "I don't call you for nothing"; and that he walked away from her. Hibbard added that Goard then turned around and announced that she was going to tell Health Care Administrator Borenson that she was sick of his letters and "stuff like that". Hibbard replied, "Fine, because I'd like to tell him how you run this place at night."

This uncontradicted exchange is evidence of the personality conflict which Hibbard admitted having with Goard. Since this fact was also noted in one of his prior evaluations, there is in fact some support for the County's claim that Hibbard was insubordinate to Goard and that said insubordination - coming on the heels of his prior written warnings - warranted discharge. Hence, there is no basis for concluding that his termination was based on any union animus. 4/

In light of the above, all of the complaint allegations are therefore dismissed.

Dated at Madison, Wisconsin this 26th day of March, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/  
Amedeo Greco, Examiner

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3/ As a result, none of Goard's written comments about the incident can be accepted for the truth of what happened, as they are all hearsay.

4/ Again, it is immaterial as to whether the County had just cause to fire Hibbard, as that is not the focus of this dispute.