STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 139, AFL-CIO, Complainant,	:	Case 3 No. 50818 MP-2880 Decision No. 28038-A
vs.	:	
TOWN OF SPIDER LAKE, Respondent.	:	

Appearances:
Mr. Warren Kaston, Legal Counsel, International Union of Operating Engineers, Lo
Spears, Carlson, Lindsey and Anderson, by Mr. John P. Anderson, on behalf of the Town.

FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Amedeo Greco, Hearing Examiner: I.U.O.E., Local No. 139, herein "Union", filed a prohibited practices complaint with the Wisconsin Employment Relations Commission, herein "Commission", on March 29, 1994, alleging that the Town of Spider Lake, herein "Town", had committed prohibited practices within the meaning of the Municipal Employment Relations Act, herein "MERA", by unlawfully discharging a union adherent because of his union activities. The Commission on May 16, 1994, appointed me to make and issue Findings of Fact, Conclusion of Law and Order as provided for in Sec. 111.07(5), Wis. Stats. The Town filed its Answer on July 20, 1994, and hearing was held in Hayward, Wisconsin, on August 5, 1994. The parties thereafter filed post-hearing briefs which were received by October 26, 1994.

Having considered the arguments and the record, I make and file the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. The Union is a labor organization within the meaning of Section 111.70(1)(h), Wis. Stats., and maintains its principal office at P.O. Box 130, Pewaukee, Wisconsin, 53072. It represents for collective bargaining purposes certain employes employed by the Town in its Street Department.

2. The Town, a municipal employer within the meaning of Section 111.70(1)(j), Wis. Stats., maintains its principal office in Spider Lake, Wisconsin. It operates a Street Department which is under the direct supervision of Town Chair and Road Supervisor Eugene Krause. At all times material herein, Krause has acted on the Town's behalf.

3. In 1993-1994, the Union commenced an organizing drive to represent the theretofore unrepresented two road workers in the Town's Street Department, Robert Kellogg and Gerald E. Froemel. Both Kellogg and Froemel signed Union authorization cards stating that they wanted the Union to represent them and both met with a Union representative during the course of the Union's organizing drive.

4. During the course of that organizing drive, Krause (1), told others that employes would either be terminated, laid-off, or have their hours significantly reduced if the Union won the election; (2), told Dennis Raymond McAllister, a town resident and a former employe of the Street Department in December, 1993 that if the Union won, Kellogg and Froemel would either "go part-time or they're gone" and, "if they sign for the Union, they're not going to be working for the Town"; (3), stated at a public Town Board meeting in December, 1993, that if the employes unionized, their hours would be cut back to part-time because the Town could not afford to pay employes $37 or $36 an hour; and (4), repeated this same message directly to Kellogg.

5. The Union in January, 1994, filed a prohibited practices complaint with the Commission asserting that Krause had unlawfully threatened employes because of their Union activities.

6. By letter dated January 16, 1994, Krause informed Kellogg:

. . .

> On behalf of the Town of Spider Lake, I regret any comments made by myself or other members of the Town Board that might have been interpreted to mean that your hours would be cut in reprisal for voting to be represented by a union. Both the Town and I understand that both of you have a legal right to vote for or against union representation without the fear of retaliation from the Town as your employer.

. . .

As a result of that letter, the Union withdrew its prohibited practices complaint.

7. The Union won the representation election in February, 1994, by a 2-0 margin and was subsequently certified by the Commission as the exclusive collective bargaining representative of the Town's Street Department's employes. The parties thereafter engaged in collective bargaining negotiations for an initial collective bargaining agreement.

9. Kellogg has been employed by the Town since 1982. On February 22, 1990, he received a letter of reprimand from the Town's Board of Supervisors after he plowed certain Town roads supposedly contrary to Town policy. Said letter stated:

. . .

> Please regard this letter as a written reprimand from the Spider Lake Town Board for verbally threatening a Town Official, circulating a petition against the Town Board while an employee of the Town, and violating Town Board directive not to plow certain roads in the Township.
>
> A copy of this letter will be put into your personnel file as a permanent record.

. . .

In fact, it appears that Kellogg did not do anything wrong regarding that matter and he was never asked to give his side of the story.

10. In March, 1990, the Town Board adopted a resolution which stated that no Town property or equipment could be used outside of the Town without three members of the Board so agreeing. Said resolution was passed after Krause unilaterally authorized the use of Town equipment and personnel for a minor construction project located outside Town limits and it was passed to prevent that situation from recurring again. The resolution was not related to whether Town employees could take home Town equipment in the face of a pending snowstorm and no Town officials before 1994 ever told either Kellogg or Froemel that it covered taking home Town equipment under those circumstances.

11. In May, 1992, Kellogg and Froemel - who has been employed by the Town since 1990 - received oral reprimands from Krause after Froemel trimmed some tree branches while standing in a tractor bucket which Kellogg was operating.

12. In October, 1992, the Town Board voted to suspend Kellogg for three-days for riding on the back of moving equipment. Kellogg, in fact, never served that suspension because the Town had too much work for him to perform at that time.

13. Kellogg served as leadman over Froemel, but he lacked the independent power to effectively hire, fire, discipline, etc, and thus is not a supervisor under MERA. In addition, there are no written job descriptions spelling out Kellogg's precise duties and there were no Town-promulgated work rules. At all times material herein, the Town's Street Department was operated in a somewhat loose manner, caused in part by the fact that there was no full-time supervisor over Kellogg and Froemel.

14. Part of this laxness manifested itself in 1990 when Street

Department employes were ordered by Krause to perform work on private property outside the Town's limits. According to the Town Board's March 14, 1990, minutes, the Board then "agreed that in the future, no Town property, equipment, etc. to be used without 3 members of the Board agreeing." The Town Board at that time did not discipline Kellogg or Froemel over that matter since they were only following the orders given to them and since they were not blameworthy in any way. Moreover, the Town Board's decision was only related to the performance of work outside the Town's limits and it thus was not addressed to whether Street Department employes could bring the Town's snow equipment home with them after work so that they could get to work easier on the next day. In addition, no one ever told Kellogg or Froemel that said resolution applied to them and that they hence could not take Town property home with them unless they received the Town Board's express permission.

15. A practice developed over the years to the effect that Street Department employes could take such snow removal equipment home with them if they had to come to work early the following day. Employes sometimes did so at a Road Chairman's encouragement, even if they were not going to plow the snow on the roads leading from their homes to work. At no time prior to March, 1994, did any Town officials ever tell Kellogg or Froemel that they could not use Town equipment in that fashion and there were no Town rules which expressly banned that practice. No employes or leadmen prior to 1994 were ever disciplined for taking home Town equipment.

16. In December, 1993, after the Union was on the scene, Krause changed the procedures for determining whether Town roads should be plowed. Prior thereto, Krause had made that determination himself and then communicated that order to the Street Department employes, even if it meant waking them up at night. Krause changed that practice by telling Kellogg and Froemel that they would have to make this determination on their own and that they were responsible for clearing the Town roads by 6:30 a.m. As a result, Kellogg and Froemel set their alarm clocks to go off every couple of hours when they were sleeping so that they could get up and see whether sufficient snow had fallen so as to warrant immediate snow plowing before the start of their regularly scheduled work day which began at 7:30 a.m.

17. Believing that about 12-15 inches of snow would fall on March 23-24, 1994, because of a National Weather Service report and that he would have to come in to work early on the next day, Froemel, with Kellogg's knowledge, on March 23, 1994, took home a Town-owned four-wheel drive truck which did not have a snow plow. Froemel never asked Kellogg for permission to take the truck home and Kellogg never granted such permission. Froemel did not like taking home the truck because he had to pay for the electricity used to keep the truck engine warm during the night. On the next day, Froemel drove the truck from his house -- which is about 15 miles outside the Town limits -- to the Town's garage via roads which had not yet been plowed. In doing so, Froemel did not plow any of the roads between his house and the garage. Both Kellogg and Froemel started plowing snow that day by about 5:30 a.m.

18. Krause in the afternoon of March 23, 1994, saw Froemel drive the Town's truck right after work, but he did not say anything to either Kellogg or Froemel at that point. On the next day, Krause confronted Froemel at about

4:00 p.m. and told him that Town employes could not drive home Town equipment unless they used the equipment to plow the roads coming to work. Froemel replied that employes as a matter of long-standing practice had driven home City-owned trucks so that they could get to work during a snowstorm. Krause then found and suspended Kellogg indefinitely effective that day, purportedly because Kellogg allowed Froemel to take home the Town's truck. Krause never told Kellogg before that day that employees are not allowed to take home Town equipment in that fashion. Krause shortly thereafter recommended to the Town Board that Kellogg be fired.

19. The Town Board subsequently did so at a May 9, 1994, hearing which Krause initiated. Krause - who admits that he was the complaining party against Kellogg - spoke at said proceeding and testified against Kellogg, but did not vote on whether Kellogg - who was present and who also testified - should be discharged. Krause then told the Town Board that Kellogg had admitted to him earlier that he, Kellogg, had authorized Froemel to take the truck home. In fact, Kellogg never made such an admission since Froemel never sought such permission from Kellogg. There was no discussion of Kellogg's union activities at that meeting. The minutes of that meeting state that Kellogg was discharged for:

. . .

"1. Past insubordination and work habits.

2. Evidence of unsafe work practices and habits placing the Town and Town employes in liability problems.

3. Unauthorized use of Town property.

4. Reprimands in the past has [sic] not remedied the situation.

5. We feel that another reprimand wouldn't serve any purpose."

. . .

Kellogg was then terminated on that day.

20. Town Board member George Brandt, who formerly served as a Road Supervisor, voted against terminating Kellogg because, in his view, "that incident [letting Froemel take home the Town's pickup truck] was a very minor incident and it didn't warrant the firing", in part because "in the past they had taken equipment home to make sure that they would get to work."

21. Kellogg was suspended and fired in part because of his concerted, protected union activities.

Upon the basis of the foregoing Findings of Fact, I make the following

CONCLUSION OF LAW

Respondent Town of Spider Lake violated Section 111.70(3)(a)3 Stats., and derivatively, Section 111.70(3)(a)1, Stats. of the Municipal Employment Relations Act when it suspended and then terminated Robert Kellogg because of his union activities.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, I make and issue the following

ORDER 1/

IT IS ORDERED that the Town of Spider Lake, its officers, agents and officials immediately:

1. Cease and desist from discriminating against employes because of their union or other concerted, protected activities.

2. Cease and desist from interfering with its employe's rights to engage in concerted, protected activity.

3. Take the following affirmative action to rectify the Town's prohibited practice:

   a. Immediately reinstate Robert Kellogg to his former or substantially equivalent position and make him whole by paying to him a sum of money, including all benefits, that he would have received had he not been suspended and then terminated, less any interim earnings or other compensation that he would have received had he not been suspended and terminated.

   b. Expunge all references to Kellogg's termination from his personnel file.

   c. Notify all employes by posting in conspicuous places in its offices where employes are employed copies of the Notice attached hereto and marked "Appendix 'A'". That Notice shall be signed by the Town and shall be posted immediately upon receipt of a copy of the Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Town to ensure that said Notice is not altered, defaced, or covered by other material.

(Footnote 1/ appears on the next page.)

   d. Notify the Wisconsin Employment Relations

Commission in writing, within twenty (20) days following the date of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 30th day of December, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/
Amedeo Greco, 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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the practices of the Municipal Employment Relations Act, we hereby notify our employes that:

1. WE WILL NOT discriminate against Robert Kellogg or any other employes because of their union or other concerted, protected activities.

2. WE WILL immediately reinstate Robert Kellogg to his former or substantially equivalent position and make him whole by paying to him a sum of money, including all benefits, that he would have received had he not been suspended and then terminated, less any interim earnings or other compensation that he would not have received had he not been suspended and terminated.

Dated:

TOWN OF SPIDER LAKE

By _____

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

POSITIONS OF THE PARTIES

Both parties agree that a four-pronged test must be used in determining whether the Town unlawfully discharged Kellogg because of concerted, protected union activities; i.e., (1), whether Kellogg was engaged in such activities; (2), whether the Town knew of such activities; (3), whether the Town was hostile to such activities; and (4), whether Kellogg's discharge was in part motivated because of his union activities. 2/ They disagree, however, over whether all elements of the test have been met here.

The Union contends that "the first two elements cannot be reasonably said to be in dispute" because of the small size of the local community and because of the Town's open discussion of the Union's organizing drive at its December, 1993 monthly meeting. It also maintains "there can also be no doubt regarding the Town's anti-union hostility towards Kellogg" given Krause's earlier threats; that "Krause undoubtedly orchestrated Kellogg's termination based, at least in part, on his hostility towards Kellogg's protected activities"; and that such "in part" motivation was unlawful under well-established Commission precedent. The Union therefore asks for a traditional make-whole remedy which includes Kellogg's reinstatement and a back pay award.

The Town, in turn, points out that the Complainant here bears the burden of proof and it does not dispute: (1), that Kellogg was engaged in concerted, protected activities; and (2), that some Town officials were aware of it. The Town instead argues that "It is the last two elements that require the focus of this tribunal." As to them, the Town asserts that no Town officials bore any union animus against Kellogg and that Krause's earlier anti-union statements were made because the Town could not afford high union wage scales and that Krause's statements must be considered within that context. The Town further claims that "Kellogg had a long history of disciplinary and personal problems with the governing bodies and individuals of the Town of Spider Lake" and that he, in fact, was terminated because of those problems rather than his concerted, protected union activities.

DISCUSSION

The County is correct in stating that this case turns on the last two parts of the aforementioned test, as the record establishes that: (1), Kellogg was active on behalf of the Union; and (2), that the Town, through at least Krause, was well aware of that fact, particularly when it is remembered that

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2/ This test has been adopted in such cases as Muskego-Norway C.S.J.S.D. #9 v. WERB, 35 Wis. 2d. 540 (1967); City of Monroe (Water Department), Dec. No. 27015-B (WERC, 4/28/93); Milwaukee Board of School Directors (Riley Elementary School), Dec. No. 17104-A (Greco, 7/80), aff'd by operation of law, Dec. No. 17104-B (WERC, 8/80).

the two employes in the Town's Street Department voted for the Union in the representation election, thereby allowing Krause and the Town to learn that both Kellogg and Froemel voted for the Union. This case therefore turns on whether the Union has met its burden of proving that the Town, through Krause, was hostile to Kellogg and the Union and that such union animus played a role in the ultimate decision to discharge him.

Oftentimes, the search for an illicit motive is difficult because direct evidence is not always available. That is why self-serving denials regarding motivation must be viewed with caution. For, as stated in Shattuck Denn Mining Corp. v. NLRB, 362 F.2d. 466, 470 (9th Cir., 1966):

> "Actual motive, a state of mind being the question, it is seldom that direct evidence will be available that is not self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances provided. Otherwise, no person accused of unlawful motive, who took the stand and testified to a lawful motive, could be brought to book."

That in effect is what we have here since all Town officials who testified denied that Kellogg was fired because of his concerted, protected activities.

Those denials notwithstanding, the fact remains that Krause at least displayed union animus which was open and notorious. For as found in Finding of Fact 4, ante, Krause repeatedly told others - including Kellogg and Froemel whose testimony I credit - that employes would either be terminated, laid-off, or have their hours significantly reduced if the Union won the representation election. Krause also told Town resident Raymond McAllister - whose testimony I fully credit - that if the Union won the election, Kellogg and Froemel would either "go part-time or they're gone" and "if they sign for the Union, they're not going to be working for the Town." All of these statements reflect union animus, thereby satisfying the third part of the four-pronged test stated ante.

The Town nevertheless claims that these statements were devoid of real animus because Krause's statements were based on his legitimate concern that the Union's organizing drive would result in a collective bargaining agreement far exceeding the Town's already established annual budget. I disagree. These statements, either individually or collectively, reflect the very kind of union animus found by the Commission in other cases where employes have been unlawfully discriminated against because of their concerted, protected activities. 3/

The penultimate question here therefore turns on whether this animus played any role in Kellogg's subsequent termination. As to that, there is no direct evidence that any Town official - other than Krause - bore any union

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3/ Indeed, Krause himself in effect admitted to the impropriety of these statements, as could be seen in his January 16, 1994, letter of apology which is referenced in Finding of Fact 6, ante.

animus.

Nevertheless, the record does establish that Krause bore such animus and that his decision to indefinitely suspend Kellogg without pay on March 24 and his subsequent recommendation to the Town Board that Kellogg be terminated was based on a pretextual reason - i.e., that Kellogg somehow was at fault when Froemel drove home a Town truck on March 23 because of his concern over being able to report to work early on March 24.

For in order to find that Kellogg should have been fired over that incident, one would have to ignore (1), the well-established past practice to that effect which developed over the years; 4/ (2), the fact that the Town has no rules prohibiting such a practice; (3), the fact that neither Krause nor any other Town official ever told Kellogg before then that Town employes could not drive home Town equipment which did not have a mounted snow plow; and (4), the fact that Froemel - much more than Kellogg - was responsible for taking home the truck on March 23. In short, it is clear that Krause seized on this incident as a pretext so that Kellogg could be fired - just as Krause earlier predicted.

Krause nevertheless asserted that taking home a Town truck under these circumstances violated the Town's policy as set forth in a March, 1990, Town Board resolution which stated that, "no Town property, equipment, etc. to be used without 3 members of the Board agreeing." In fact, however, that resolution has no applicability to the situation here because it was aimed at preventing Town Board supervisors from directing Town employes to perform work outside Town limits, as Krause had done at that time. Hence, it never was meant to cover taking home Town equipment so that employes could get to work during, or following, a heavy snowfall. Moreover, no Town officials ever told either Kellogg or Froemel that the 1990 policy covered this latter situation. It therefore is clear that Krause seized upon Froemel's use of Town equipment on March 23-24 as a pretext for bringing about Kellogg's termination.

As a result, the Town's ultimate discharge decision was tainted by Krause who initially recommended it and who subsequently spoke against Kellogg as the complaining party at the Town's May 9 meeting. Thus, the Town Board on May 9 relied on Krause's representation to them that Kellogg earlier had admitted to him, Krause, that he had authorized Froemel to take home the Town truck with him on March 23, when in fact Kellogg - whose denial I credit - never made any such admission. Given Krause's deep involvement in the termination process and the Town Board's reliance on his May 9 testimony, 5/ it therefore must be

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4/ I credit the testimony of Kellogg, Froemel, and former Town employe Dennis Diem who all testified that employes regularly took home Town equipment even if they did not intend to use it for plowing when they came to work on the next day.

5/ The Town's own brief at pp. 4-5 admits that the Town Board on May 9 primarily focused "on the authorization and use of the pick up truck by Town road workers and Mr. Kellogg's responsibilities thereto, as well as Mr. Kellogg's past employment problems. . ." (Emphasis added). In addition, Town Board member John Ose testified here that he personally

concluded that Kellogg was suspended and then terminated, at least in part, because of his protected, concerted activities in violation of Sec. 111.70(3)(a)3 and, derivatively, Sec. 111.70(3)(a)1 of MERA. That is true irrespective of whether the Town had other non-discriminatory reasons to terminate Kellogg because of his past employment history and the disciplinary matters referenced in Findings of Fact Nos. 9, 11 and 12, ante, as it is well-established that a termination based, at least in part, on anti-union considerations is unlawful. See City of Monroe, supra.; Muskego-Norway supra. 6/ Moreover, said termination was unlawful even assuming arguendo that Town Board members other than Krause did not bear any union animus against Kellogg since Krause's active involvement was sufficient, in and of itself, to taint the Town Board's May 9 termination and to make it unlawful. See City of Monroe, supra.; Muskego-Norway, supra.

To rectify that violation, the Town shall make Kellogg whole by immediately offering him reinstatement to his former or substantially equivalent position and by paying him a sum of money at the applicable interest rate, including all benefits, that he would have earned from the time of his initial suspension and subsequent termination to the time of his reinstatement, minus any sums of money that he otherwise would not have received had he not been suspended and then terminated. In addition, the Town shall expunge all references to Kellogg's termination from his personnel file and it shall post the Notice marked Appendix "A", ante.

Dated at Madison, Wisconsin this 30th day of December, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/
Amedeo Greco, Examiner

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relied on Krause's testimony to this effect when he voted to terminate Kellogg.

6/ The Wisconsin Supreme Court reaffirmed this "in part" test in Employment Relations Department v. WERC, 122 Wis. 2d 132 (1985).