

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL NO. 139, Complainant,**

vs.

GREEN LAKE COUNTY, Respondent.

Case 69
No. 54035
MP-3166

Decision No. 28792-B

Appearances

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, P.O. Box 12993, Milwaukee, Wisconsin, 53212, by **Mr. John Brennan**, appearing on behalf of the Complainant.

Mr. John B. Selsing, Corporation Counsel, Green Lake County, 120 East Huron Street, Berlin, Wisconsin, 54923, appearing on behalf of the Respondent.

**ORDER AFFIRMING IN PART AND REVERSING IN PART
EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND REVERSING EXAMINER'S ORDER**

On April 11, 1997, Examiner Daniel J. Nielsen issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he determined that Respondent Green Lake County had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 3, Stats., by laying off Rose Lund. He ordered Respondent to recall Lund and make her whole for lost wages and benefits.

On April 21, 1997, Respondent Green Lake County filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats.

The parties thereafter filed briefs in support of and in opposition to the petition, the last of which was received June 3, 1997.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. Examiner Findings of Fact 1-15 are affirmed.

B. Examiner Finding of Fact 16 is modified to reflect that Jaworski advised Lund that he would discuss with Dissing whether to pursue waiver of AFSCME contract job posting provisions to ensure that Lund could fill the anticipated Employment Specialist position.

C. Examiner Findings of Fact 17-24 are affirmed.

D. Examiner Finding of Fact 25 is set aside and the following Finding is made:

25. Dissing and Jaworski were not hostile toward the Complainant Operating Engineers' use of the Commission's unit clarification procedures or toward Lund's participation in the unit clarification hearing.

E. Examiner Finding of Fact 26 is affirmed.

F. Examiner Finding of Fact 27 is set aside and the following Finding is made:

27. Jaworski's change of position at the March 13, 1996 Human Services Board meeting regarding creation of a Community Employment Specialist position was not motivated in part by hostility toward protected concerted activity.

G. Examiner Finding of Fact 28 is set aside and the following Finding is made:

28. The decision not to create the Community Employment Specialist position and to lay off Lund was based on Respondent's understanding of the fiscal and contractual implications of the Commission's unit clarification decision.

H. Examiner Conclusions of Law 1-4 are affirmed.

I. Examiner Conclusion of Law 5 is reversed and the following Conclusion is made:

5. Green Lake County did not violate Secs. 111.70(3)(a) 1 or 3, Stats., when it did not create the Community Employment Specialist position and then laid off Rose Lund.

J. The Examiner's Order is reversed and the following Order is made:

The complaint is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 18th day of December, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

GREEN LAKE COUNTY

**MEMORANDUM ACCOMPANYING ORDER AFFIRMING IN PART AND
REVERSING IN PART EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF
LAW AND REVERSING EXAMINER'S ORDER**

BACKGROUND

As amended, the complaint alleges Respondent County violated Secs. 111.70(3)(a)1 and 3, Stats., by laying off Rose Lund in retaliation for Complainant's successful effort to gain Lund's inclusion in the Complainant's professional unit through a WERC unit clarification.

Respondent denies any violation and asserts that it acted based on program and fiscal concerns as impacted by the result of the Commission's unit clarification decision.

THE EXAMINER'S DECISION

When determining that Respondent had committed the alleged prohibited practices, the Examiner reasoned as follows:

DISCUSSION

Under the Commission's long-standing MUSKEGO-NORWAY line of cases, 4/ the test of whether an employer's actions constitute discrimination in violation of Section 111.70(3)(a) 3 has four prongs:

1. The employee was engaged in protected activity;
 2. The employer was aware of the activity;
 3. The employer was hostile to the activity;
 4. The employer's conduct was motivated, in whole or in part, by hostility to the protected activity.
- A. Protected Activity and Employer Knowledge

The first two elements of the MUSKEGO-NORWAY test are clearly established in the record. Lund herself was not the moving party in the unit clarification, and did not actively seek placement in the Complainant's bargaining unit. The concerted activity here is that of the Complainant. However if the

purpose of an action taken against an employee is retaliation or discrimination for protected activity of others, the action is illegal notwithstanding the fact that the affected employee herself was not actively engaged in the protected activity. 5/ Thus for the purposes of this case, if the decision not to retain Lund was prompted by the Complainant's success in the unit clarification, Lund is treated as having been in the same shoes as those who actively engaged in the protected activity. As to the second element, the County concedes that its officers and agents were aware of the unit clarification petition, and knew that Lund's position was the object of the petition.

B. Hostility

The Respondent denies any hostility to the unit clarification, and denies that the decision to layoff Lund rather than going forward with the creation of the Community Employment Specialist position was motivated by such hostility. Much of the Respondent's argument is aimed at showing that there were legitimate economic reasons for reducing costs in the SEP and that the decision to layoff the Coordinator's position was arrived at well before the WERC's unit clarification decision was handed down. Those points are not in dispute. The Complainant's allegation is that there was in essence an agreement that Lund was to remain employed in a new position, and that this decision was changed in response to the unit clarification.

The evidence of hostility to the unit clarification by the County government as an overall entity is not particularly persuasive. The County did not appear at or take a position in the unit clarification hearing, in accordance with its established policy of letting the unions fight those issues out themselves. As for the Complainant's assertion that the County's refusal to pay Lund at the rate specified for the SEP Coordinator in the Operating Engineers' contract between the time her job was clarified into that unit and the time she was laid off constitutes evidence of hostility by the County, that is not conclusive as to hostility. The inclusion of the SEP Coordinator's position in the Operating Engineers' pay schedule was quite likely a surprise to the County, since the job had been included in the AFSCME bargaining unit for as long as that title had been in existence. 6/ This refusal to pay the higher rate may be interpreted as evidence of hostility, but standing alone it does little to establish that element.

While the County government as an overall entity may not have been hostile to the unit clarification, there is strong evidence that two of its principal agents in the Human Services Department were hostile. Lund testified that she spoke with

petition, and that his response to her was that she should "leave it alone" and that he "hated to see people get hurt." 7/ Significantly, although Dissing was present during this testimony and was later called as a witness by the Respondent, he did not contradict this testimony. These statements are not open to an innocent interpretation. They reflect obvious hostility to the effort to have her job placed in the professional employees' bargaining unit as well as an implied threat of retaliation.

As for Jaworski, the evidence of hostility is circumstantial but strong. Before the decision in the unit clarification case, he participated in the formulation of the new position description. He told Lund that he would seek to have the posting provisions of the labor agreement waived so that she could simply assume the job, and told her that it would carry the same rate of pay as the Coordinator's job. He and Lund discussed the presentation of the position description on the day of the March Human Services Board meeting, and he made no mention of problems or concerns with the proposal. He likewise made no mention of any such problems or concerns at the Human Services Board meeting, until Van Ness announced that Lund's position had been included in the professionals bargaining unit. He then spoke against the proposal that he had helped to draft, arguing, that the job coaching component of the job was much more than 75% and that the Board should simply retain the Job Coach and lay Lund off. The abruptness of Jaworski's change in direction is inexplicable, unless it was the direct result of Van Ness's announcement regarding the unit clarification.

In arriving at the conclusion that Jaworski's reversal of position was the result of hearing from Van Ness that the grievant had been placed in the professionals' unit, the Examiner has credited the testimony of Betty Bradley, a member of the Operating Engineer's bargaining, unit who attended the meeting at Lund's request. Bradley testified that Jaworski appeared startled by Van Ness's announcement and made a statement along the lines of "What? She's in the operators now?" Dissing testified that Jaworski was aware of the WERC decision before the meeting because he had told him about it. However, Lund testified on rebuttal that Jaworski made no mention of the unit clarification until the day after the meeting, when he congratulated her and asked why she hadn't told him about it. Perhaps Jaworski did not fully understand what Dissing told him. In any event, the evidence of Jaworski's reaction and his immediate reversal in position are consistent with surprise at the news of the clarification, and his conversation with Lund the next day is inconsistent with advance knowledge of the decision. 8/

Prior to knowing the result of the unit clarification, Jaworski was committed to creating a new position for Lund. Immediately after hearing of the WERC's decision, Jaworski spoke out against that same proposal and urged that Lund's position be laid off without any provision for her continued employment.

The only reasonable inference is that he was hostile to the Complainant's successful effort to clarify Lund's position into the professionals bargaining unit, and that is the inference that the Examiner draws. Thus the record evidence establishes that Dissing, and Jaworski were hostile to the clarification of Lund's position into the professional unit.

C. Motive

The Respondent argues, *inter alia*, that the decision to lay off the Coordinator and retain the Job Coach was made by the Human Services Board, not by Jaworski or Dissing. This is true, but Van Ness acknowledged in her testimony that the Board's decision was based upon the recommendation of Jaworski and Dissing. 9/ If that recommendation was motivated **in** part by anti-union animus, the fact that it was the Board rather than the managers who ultimately acted does not remove the taint of the illegal motive. Citizen Boards customarily accord deference to the judgment of staff in technical areas. This is demonstrated by the fact that Jaworski's reversal of position on how much job coaching was needed versus assessment and administration dissuaded the Board from acting, on his own recommendation in favor of a new position.

In determining whether a decision is motivated by unlawful animus, the Commission must determine whether the reasons given for that decision are genuine or are instead pretextual. 10/ Here the decision to abandon the new position in favor of retaining the job coach was alleged to have been based upon the percentage of job coaching duties required by the program. However, that figure cannot have changed between the beginning of the March Board meeting and the point in the meeting, at which Jaworski spoke against the proposal. Jaworski was the unit manager who oversaw this program, and he was intimately involved in crafting the new position description setting job coaching at 75% of the workload. Moreover, Lund had worked as both the Job Coach I and Job Coach II, and was conceded to be qualified to perform this function, so an increase in the job coaching component of the position should not have affected her suitability for the new position. It makes no sense whatsoever that Jaworski would very suddenly change his position in mid-meeting, on this basis.

It is possible that there were other reasons for Jaworski's change of heart, but the explanation ascribed to him by the Respondent, which is essentially that he simply changed his mind about the degree of job coaching involved in the position, must be held to be pretextual. Given this, and given that the two individuals shown to have been hostile to the unit clarification were the two that effectively recommended the elimination of Lund's job and the retention of the Job Coach, the Examiner concludes that the Respondent's actions were motivated, at least in part, by hostility to protected activity.

- 4/ MUSKEGO-NORWAY C.S.J.S.D. NO. 9 v. WERB, 35 Wis. 2d 540, 151 N.W. 2d 617 (1967).
- 5/ HOWARD JOHNSONS, 209 NLRB 1122, 86 LRRM 1148 (1974).
- 6/ At the hearing on this complaint, no one was able to give any clear explanation as to why this title was listed in the Operating Engineers' contract.
- 7/ Transcript, page 22.
- 8/ Although the choice of witnesses is a tactical decision, and should not normally weigh in the resolution of credibility disputes, I note that Jaworski played an obviously critical role in these transactions. He was available to the County as a witness but did not take the stand. Given that his testimony would obviously have been highly relevant to the resolution of the credibility issues, I infer from this that his testimony would have been adverse to the Respondent.
- 9/ Transcript, page 143.

POSITIONS OF THE PARTIES ON REVIEW

Respondent

Respondent contends that the layoff of Rose Lund was the unfortunate consequence of the County's long-planned decision to modify its Supported Employment Program based on client needs and financial concerns and of the WERC's unit clarification decision placing Lund in the professional employe unit represented by Complainant Local No. 139. The County argues it had no choice but to lay off Lund because the professional position she held by virtue of the Commission's decision was being vacated under the program modification and the position being maintained by the County was in the non-professional employe bargaining unit in which Lund

now had no contractual bumping rights. The County acknowledges Lund would have filled the new Supported Employment Program position but for the result of the WERC decision, but asserts it did not believe it could accomplish that result once the WERC placed Lund in the professional bargaining unit.

Respondent County denies that it or its agents were hostile to the WERC unit clarification process or the result reached. Respondent points out that it took no position in the unit clarification proceedings as to whether Lund should be placed in the professional or non-professional unit. Respondent contends the evidence relied on by the Examiner does not demonstrate Respondent's agents' hostility, but rather their surprise over and confusion about the WERC decision and its impact on the reorganization.

Given the foregoing, Respondent asks that the Examiner be reversed.

Complainant

Complainant asserts the Examiner correctly found Respondent laid off Lund at least in part out of hostility toward the result of the WERC unit clarification decision.

Complainant contends the WERC decision did not require Lund's layoff and argues that Respondent could have proceeded with its plans to create a new job in the non-professional AFSCME unit which Lund would fill. Instead, Complainant asserts Respondent's managers' hostility toward Lund's newly determined professional status caused Respondent to "flip-flop" in the middle of a meeting over the status of the newly created position Lund would have filled and ultimately to lay Lund off.

Complainant urges affirmance of the Examiner.

DISCUSSION

The ability of municipal employees and their bargaining representative to pursue unit clarification matters through our procedures is a right protected by Sec. 111.70(2), Stats., BROWN COUNTY, Dec. Nos. 28158-F, 28159-F (WERC, 12/96), AFF'D CIR. CT. BROWN COUNTY 9/97; KEWAUNEE COUNTY, Dec. No. 21624-B (WERC, 5/85); WINNEBAGO COUNTY, Dec. No. 16930-A (Davis, 8/79), AFF'D BY OPERATION OF LAW, Dec. No. 16930-B (WERC, 9/79). Action by a municipal employer which interferes with this right or which is motivated by hostility toward this right violates Secs. 111.70(3)(a)1 and 3, Stats.

In October 1994, Complainant International Union of Operating Engineers, Local No. 139, filed a unit clarification petition with the Commission seeking to move the Supported Employment

bargaining unit represented by AFSCME to the professional employe bargaining unit. Complainant represented. Respondent took no position in the unit clarification litigation. However, shortly after the unit clarification petition was filed, Lund asked Dissing, the Deputy Director of the Green Lake County Human Services Department, whether he supported the requested movement of her position to the professional unit. Lund testified Dissing told her that "if I were you, I would just, you know, leave it alone and I hate to see people get hurt." The Examiner found Dissing's comments reflected hostility toward the goal of the unit clarification petition and correctly noted that although Dissing testified in the complaint hearing before the Examiner, he did not contradict Lund's testimony.

In mid-1995, the County began to evaluate its existing Supported Employment Program based on projected declining case loads and funding decreases. In February 1996, the County Human Services Board met and reviewed various options which included laying off Lund from her Coordinator position, an option supported by Dissing. The Board chose to pursue development of a new job which would replace the existing Coordinator and Job Coach positions. The Board directed Dissing, Lund, and Jaworski (Manager of the Fox River Industries Unit) to develop the new position and report back to the Board.

Dissing, Lund, and Jaworski met and developed a job description for a new position of County Employment Specialist which would report to Jaworski. The new position combined the functions of Lund's Coordinator position and the Job Coach position. Job coaching would constitute 75 percent of the new position's duties with 15 percent spent performing assessments and 10 percent on administration. The incumbent Job Coach did not have the qualifications needed to do assessments while Lund was qualified to do job coaching. Thus, it was generally understood by County management and Lund that Lund would fill the new position.

During the Board's March 13, 1996, meeting, Dissing was presenting the proposal he, Lund, and Jaworski had developed. During the presentation, Human Services Department Director Van Ness noted that on March 6, 1996, the WERC had issued its unit clarification decision finding Lund to be a professional employe. Jaworski did not know the decision had been issued. Surprised by this information, he immediately indicated to the Board that he no longer supported the new position he had helped develop. Among other matters, he indicated his view that if the new job/Lund were in the professional unit, the pay would be higher than justified and that the new position/Lund should be in the non-professional AFSCME unit. The Board remanded the matter to the County Personnel Committee.

After the March meeting, Dissing and Jaworski put together a new proposal which did not include the new position but instead called for Lund's layoff and retention of the Job Coach, with assessments to be done by Jaworski or other professional staff.

The Board adopted the new proposal at its April 1996 meeting and Lund was then laid off.

The Examiner correctly holds that use of the Commission's unit clarification process is protected by Secs. 111.70(3)(a)1 and 3, Stats. However, we have reversed the Examiner's conclusion that Respondent violated these two statutes because we are satisfied that: (1) Respondent was not hostile to the Complainant's use of that process or to Lund's participation therein; and (2) Lund's layoff was caused by Respondent's understanding of the fiscal and contractual implications of the Commission's unit clarification decision.

In reaching our decision, we think it important to make the distinction between an action taken out of hostility toward the exercise of a protected right and an action taken in response to the result secured by the exercise of such a right. The first such action violates Secs. 111.70(3)(a)1 and 3, Stats., but the second action generally does not. For instance, if an employer lays off employees because the employees have filed a grievance alleging a violation of contract, the employer violates Secs. 111.70(3)(a)1 and 3, Stats. However, if the employer is not hostile toward the exercise of the right to file a grievance, the employer can legitimately advise the employees that if their position is upheld by an arbitration award, the fiscal implications for the employer will produce layoffs. 1/ To a large extent, the application of this distinction to the facts of this case is what causes us to reverse the Examiner.

As to the question of Respondent's motivation by hostility toward use of the unit clarification process, the Examiner correctly concluded that there is no persuasive evidence of hostility by the County's governmental structure toward the unit clarification proceeding. Indeed, the County did not appear at or take a position in the proceeding. However, as correctly found by the Examiner, if agents of Respondent (in this case, Human Services Deputy Director Dissing and Fox River Industries Manager Jaworski) were hostile toward use of the unit clarification process, and that hostility was at least a partial basis for Respondent's layoff of Lund, Respondent violated Secs. 111.70(3)(a)1 and 3, Stats. Thus, we turn to an examination of the record as to hostility by Dissing and Jaworski.

The Examiner made much of Dissing's 1994 response when Lund asked Dissing for his reaction to the filing of the unit clarification petition. Lund testified without contradiction from Dissing that Dissing stated:

"His response was that he just said, 'You know, if I were you, I would just, you know, leave it alone and I hate to see people get hurt.'"

We acknowledge that this comment standing alone creates a permissible inference of hostility toward use of our unit clarification process. But the comment does not stand alone. It must be considered in light of Dissing's subsequent good faith participation in efforts to

construct a new job for Lund in light of a reorganization precipitated not by the unit clarification process, but by declining service needs and funding shortfalls. Under all of the circumstances in this case, while it is a close question, we do not find the comment by Dissing sufficient to establish his hostility toward use of the unit clarification process.

As to Jaworski, the Examiner inferred 2/ hostility from Jaworski's March, 1996, mid-meeting change of position regarding creation of a new job for Lund. However, in our view, the change of position does not create an inference of hostility to the use of the unit clarification process, but rather reflects Jaworski's surprised reaction to the result of the Commission's unit clarification decision. As noted earlier, reaction to the result of the process (even if adverse to employe interests), is not illegal unless motivated by hostility to the process. We do not find any significant evidence of such illicit hostility by Jaworski. Instead, we see his surprised reaction to the Commission's decision and change of heart regarding a new position for Lund to reflect his view that the fiscal and service realities confronting Respondent could not be accommodated to the existence of a professional (and thus, in his view, more highly paid) position for Lund in Complainant's unit rather than the non-professional AFSCME unit job which he, Dissing and Lund had planned. While his position was clearly imprudently speculative (and perhaps even inaccurate) as to the necessary fallout from the Commission's decision, we do not find his reaction was reflective of, or motivated by, illicit hostility toward the unit clarification process itself.

Given all of the foregoing, we do not believe the Respondent's decision to back away from creation of a new position for Lund and her resultant layoff were motivated by illegal hostility.

Thus, we have reversed the Examiner and dismissed the complaint. 3/

Dated at the City of Madison, Wisconsin, this 18th day of December, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

ENDNOTES

1/ For instance, in CITY OF БЕЛОIT, Dec. No. 27779-B (WERC, 9/94), we concluded that the municipal employer did not violate MERA by advising employees of the potential negative consequences which would be produced if the union successfully bargained a contract including the proposal then being sought by the union. Such a comment does not reflect hostility toward the exercise of the right to bargain a contract but rather states the response to a result. So long as the response is based on the employer's understanding of the impact of a result on its operation, and not on hostility toward the exercise of the right to seek the result, no violation of law is present.

2/ To the extent Examiner Footnote 8 reflects his view that the Respondent's failure to call Jaworski as a witness warrants an adverse inference, we disagree. Jaworski was available to both parties and neither party elected to call him. While testimony of other witnesses regarding Jaworski's reactions and knowledge thus stand un rebutted, it is wrong to go further and conclude that Jaworski's testimony, if given, would have been adverse to Respondent. Adverse inferences are appropriate where a witness is called but refuses to testify, but not where the witness is never called at all.

3/ Even absent illicit hostility, it can be argued that Respondent nonetheless violated Sec. 111.70(3)(a)1, Stats., because Lund's layoff would inevitably chill the inclination of the employees/Complainant to use the Commission's unit clarification process. However, where, as here, the employer's action is based on good faith operational considerations, no violation of Sec. 111.70(3)(a)1, Stats. will be found. CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, Dec. No. 25849-B (WERC, 5/91).

