

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**WISCONSIN COUNCIL OF COUNTY
AND MUNICIPAL EMPLOYEES #40,
AFSCME, AFL-CIO, Complainant,**

vs.

CITY OF NEW LISBON, Respondent.

Case 7
No. 51894
MP-2968

Decision No. 28908-B

Appearances:

Mr. David White, Staff Representative, on behalf of the Union.

Mr. Fred D. Hollenbeck, Curran, Hollenbeck, & Orton, S.C., on behalf of the City.

**FINDINGS OF FACT,
CONCLUSION OF LAW, AND ORDER**

Amedeo Greco, Hearing Examiner: Complainant Wisconsin Council of County and Municipal Employees #40, AFSCME, AFL-CIO, herein "Union", filed a prohibited practices complaint with the Wisconsin Employment Relations Commission, herein "Commission", on December 2, 1994, alleging that the City of New Lisbon, herein "City", had committed a prohibited practice within the meaning of Section 111.70 of the Municipal Employment Relations Act, herein "MERA" by discriminating against employe Jon S. Wilson because of his concerted, protected activities. The Commission on November 11, 1996, appointed Richard B. McLaughlin to issue and make Findings of Fact, Conclusions of Law, and Order as provided for in Section 111.07(5), Wis. Stats. Hearing was subsequently held in New Lisbon, Wisconsin, on December 13, 1996. Thereafter, Hearing Examiner McLaughlin recused himself and the Commission appointed me to hear this matter. Hearing was again held in New Lisbon, Wisconsin, on October 27, 1997. Thereafter, the parties filed briefs that were received by May 7, 1998.

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, a labor organization under Section 111.70(1)(h), Wis. Stats., at all times material herein has represented certain employees employed by the City of New Lisbon. It maintains its principal office at 583 D'Onofrio Drive, Madison, Wisconsin. At all times material herein, Union Staff Representative David White has acted as its agent and on its behalf.

2. The City, a municipal employer under Section 111.70(1)(j), Wis. Stats., provides certain municipal services to its residents. It maintains its principal office at City Hall, New Lisbon, Wisconsin. At all times material herein, Earle Bailey Jr. and Erling Dahl have served as aldermen on the City of New Lisbon's City Council.

3. The Union and the City are signatories to a collective bargaining agreement which states in Article 3, Section H:

H. **Job Posting**. Notice of vacancies and new positions that the City decides to fill shall be posted for six (6) workdays. Postings shall be on employee bulletin board(s). The posting shall include job description, wage rate, and work schedule.

1. **Applications**. Interested employees shall sign the job posting. At the conclusion of the posting period, the City shall notify the Union and all employee applicants of the name and seniority date of each applicant. The City shall notify employees on layoff of postings and may advertise positions simultaneously with posting. Probationary employees shall not be eligible to post for positions.

2. **Job Award**. The position shall be awarded to the employee with the greatest seniority, provided said employee meets all of the City's stated qualifications for the position. The job award shall be made promptly after the completion of the posting period. (Emphasis added).

If there are no qualified applicants among current employees and employees on layoff, the City shall recall a qualified employee on layoff, if any exists, pursuant to this Article. If there are no qualified employee applicants or qualified employees on layoff, the City may fill the position from outside the bargaining unit.

4. Employee Jon S. Wilson was hired by the City in March, 1990, and served as a Powerhouse Worker II when the City laid him off on September 30, 1993. Earlier, Wilson filed a grievance on or about September 24, 1993, which asserted that the City had violated the contract by not offering him certain overtime work. Said grievance was denied by the City and then dropped. Wilson at one time also served on the Union's negotiations team.

5. The City on November 8, 1993, announced and posted the following notice:

JOB POSTING

The following bargaining unit work is posted as required by the current bargaining agreement between the City of New Lisbon and the New Lisbon City Employees.

Electric Worker

Wage: \$11.69 per hour

Hours of Labor: Set forth in the attached position description.

This position will be confirmed by the Common Council at their meeting of December 7, 1993.

6 day posting beginning 11/08/93

The job description for said Electrical Worker position (Joint Exhibit 2), stated in pertinent part:

...

Essential Duties and Responsibilities: Is responsible for the maintenance and operation of the electric utility's power generation units, the building in which these units are located and the grounds around the building. Is responsible for performing necessary lineman's work in the construction, repair or replacement of primary and secondary electric lines owned and operated by the electric utility. Records information on the production and distribution of electrical power. Records consumption of fuel oil, natural gas and other fuels and lubricants used in the production of electric power.

Peripheral Duties: Tests electric meters for accuracy pursuant to Wisconsin Public Service Commission order. Reads electric and water meters. Performs repairs on vehicles and other equipment as assigned. Performs such other tasks as may be assigned for the optimum functioning of the municipal utilities and the services provided by the City of New Lisbon municipal government.

Desired Minimum Qualifications:

- (A) Education and Experience:
1. Graduation from an accredited high school.
 2. Journeyman Lineman's certification from an accredited apprenticeship program.
 3. Knowledge of diesel and gasoline engines and their maintenance and repair
 4. Mechanical aptitude in the maintenance and repair of power equipment and of motor vehicles.
 5. Commercial Driver's License for a level of vehicles established by the City Supervisor.
 6. A combination of other education and experience for a period of at least two years in municipal utility operations, municipal services and mechanical operations.

Necessary Knowledge, Skills and Abilities:

1. Knowledge of stationary diesel operation, electrical principles, and electric generation and willingness to further education in these areas.
2. Knowledge of electric distribution system mechanics, including, but not limited to, linework, transformers, vehicle operation and maintenance, power equipment operation and maintenance.
3. Aptitude for fluid and electrical mechanics.
4. Good general and physical health.
4. Ability to read various dial and direct read meters, record meter readings and communicate data developed from meter readings.
5. Ability or willingness to learn electric meter testing, recording of test results and application of test results to customer meter readings, and to remove and replace A-base and socket type meters.
6. Ability to deal with a variety of tasks simultaneously and to communicate clearly.

Tools and Equipment Used:

Requires frequent use of a variety of common and specialized hand and power tools. Use of power operated lift, chainsaw, electric meter testing devices, air compressor and pneumatic tools and equipment, telephone, radio, and mechanical and power jacks will occur from time to time.

...

6. Thereafter, Wilson and fellow employe Edmund Robison, a Lineman, were the only employes who bid for said position. Robison was hired in August, 1983, and had about seven years more bargaining unit seniority than Wilson. Robison, a high school graduate, previously served a formal apprenticeship program to become a licensed journeyman lineman by attending school for four weeks a year for four years. In addition, he for years worked as an electrical worker in the City's generating plant and he has a Commercial Driver's License ("CDL"). Wilson did not have either a journeyman's certification or a high school diploma which were two of the listed qualifications in the Electrical Worker's job posting. Based upon his work in the Powerhouse, Wilson had considerable experience in working with certain kinds of motors.

7. Bailey and Dahl on behalf of the City subsequently interviewed Robison for the Electrical Worker position and recommended to the New Lisbon City Council that he be hired. It appears that both Bailey and Dahl informally spoke to Wilson at different times, but they did not formally interview him. Each believed that Wilson was less qualified for said position because he did not graduate from high school and because he did not have a journeyman's license certification from an accredited apprenticeship program - which were two of the listed qualifications for the Electrical Worker position. Their decision to recommend Robison over Wilson was based on their good faith belief that seniority should prevail pursuant to Article 3, Section H, of the contract, as well as legitimate business considerations and hence was devoid of any union animus. The New Lisbon City Council's December 7, 1993, decision to award said position to Robison also was based on legitimate business considerations and was devoid of any union animus.

Upon the basis of the above Findings of Fact, I hereby make and issue the following

CONCLUSION OF LAW

Respondent City of New Lisbon and its agents did not discriminate and/or retaliate against Jon Wilson because of his concerted, protected activities when they passed over him for the Electrical Worker position and they thus did not violate Sections 111.70(3)(a)1 or 3, or any other section, of the Municipal Employment Relations Act.

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

ORDER

IT IS ORDERED that the complaint allegations herein be, and they hereby are, dismissed in their entirety.

Dated at Madison, Wisconsin, this 9th day of June, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Amedeo Greco /s/

Amedeo Greco, Examiner

CITY OF NEW LISBON

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER**

POSITIONS OF THE PARTIES

The Union argues that the City violated Sections 111.70(3)(a) 1 and 3 of the Municipal Employment Relations Act by not considering Wilson for the Electrical Worker position and by not awarding him said position because of his concerted, protected activities. Proof of that, it claims, can be seen by the fact that Wilson was qualified for said position, as well as the conflicting statements offered by Aldermen Bailey and Dahl as to whether they interviewed Wilson and why Wilson was not selected. As a remedy, the Union asks for a traditional make-whole remedy and an award of back pay "for any losses he has suffered as a result of the violation of the law."

The City, in turn, asserts that Wilson was fairly considered for the Electrical Worker position; that he was unqualified for said position because he did not have a high school diploma or a licensed journeyman's certification; that its subsequent decision to award said position to Robison was not based on any union animus; and that the one-year statute of limitations in any event bars the Complaint.

DISCUSSION

To prevail, the Union must establish that: (1), Wilson was engaged in concerted, protected activities; (2), the City was aware of those activities; (3), the City bore animus against Wilson because of those activities; and (4), the City refused to award him the Electrical Worker position because of said animus. See TOWN OF SPIDER LAKE, DEC. NO. 28038-A (Greco, 12/94); AFFIRMED BY OPERATION OF LAW (WERC, 2/95).

As related in Finding of Fact No. 4, supra, Wilson was on the Union's negotiating committee; he filed a grievance in September, 1993, protesting an overtime assignment; and some City representatives must have known of such activities. Hence, the Union has met two parts of the four-part test set out in TOWN OF SPIDER LAKE, supra.

It utterly has failed, however, to show that the City bore animus against Wilson because of such activities. Thus, both Alderman Dahl and Alderman Bailey credibly testified they recommend that Robison be hired over Wilson because: (1), Robison was certified as a Lineman, whereas Wilson was not; and (2), Robison was senior to Wilson. Bailey thus credibly testified that he recommended Robison over Wilson: "Because we have a bargaining unit [sic] with the Union and when you have somebody from that local who is qualified for the position and has more seniority, why should I do different?" When asked the same question, Dahl stated that Robison had more

knowledge of electrical motors and that seniority was important because: "I was under the impression that seniority, when two people asked for a job, was - that - what- meant a lot."

I fully credit their testimony and find that they recommended Robison over Wilson because of legitimate business reasons which were totally devoid of any anti-union considerations and because Wilson's selection was mandated by Article 3, Section H, of the contract set forth in Finding of Fact No. 3, supra which states: "The position shall be awarded to the employee with the greatest seniority provided said employee meets all of the City's stated qualifications for the position." Indeed, by following the seniority principle set forth in Article 3, Section H, they recognized one of the most important principles set out in the contract -- one which almost all unions want vindicated in almost all situations. Moreover, a review of the entire record fails to establish any anti-union motive by the City when it subsequently selected Robison over Wilson for the Electrical Worker position.

The Union's claim of animus thus hangs by a single, slender thread - i.e., the fact that the Commission has previously ruled that the City violated its collective bargaining obligations and that it discriminatorily laid off one of its other employees. See CITY OF NEW LISBON, DEC. NO. 28935-A (Crowley, 7/97); AFFIRMED BY OPERATION OF LAW, DEC. NO. 28935-B (WERC, 10/97). That one thread, however, is insufficient proof of animus here because: (1), the Union has failed to establish any such anti-union motive in this case; (2), Wilson lacked the Lineman's certification and the high school diploma required under the posting; (3), Robison met all of the qualifications set forth in the job posting and was the more senior, qualified bidder; and (4), the City - through Alderman Bailey and Alderman Dahl - awarded the posted position to Robison, the most senior applicant, because of legitimate business considerations and because his selection was mandated by Article 3, Section H, of the contract.

Unions, of course, often maintain that seniority is the single most important factor in selecting employes under a contractual posting procedure. Here, though, the tables are turned upside down because: (1), the Union asserts that the junior employe was not properly considered and (2), the City asserts that seniority had to be followed under the contract, particularly since Robison was certified for the Electrical Worker position and Wilson was not. The City's position is well taken because the record shows that both Aldermen Bailey and Dahl followed the provisions of Article 3, Section H, of the contract when they recommended to the full City Council that Robison be hired over Wilson.

It is true, as the Union correctly points out, that Dahl and Bailey gave conflicting testimony as to when and how Wilson was interviewed; that they did not recognize that some of Wilson's past work history enables him to perform some of the Electrical Worker's duties; that Wilson perhaps should have been given more consideration in the interview process; and that Wilson may have had

more experience than Robison in performing certain power generator duties. However, none of that overcomes the twin flaws in the Union's case; i.e., that there is no evidence of union animus in this record and that Robison, as the more senior applicant, was entitled to the position under Article 3, Section H, of the contract.

For all these reasons, the Complaint must be dismissed.

Dated at Madison, Wisconsin, this 9th day of June, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Amedeo Greco /s/

Amedeo Greco, Examiner

