

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WEST CENTRAL EDUCATION ASSOCIATION, Complainant,

vs.

ELK MOUND AREA SCHOOL DISTRICT, Respondent.

Case 26
No. 62288
MP-3928

Decision No. 30650-A

Appearances:

Fred Andrist, Executive Director, West Central Education Association, 105 – 21st Street, North, Menomonie, Wisconsin 54751, on behalf of the Complainant.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by **Thomas B. Rusboldt**, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, on behalf of the Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On April 7, 2003, the West Central Education Association, hereinafter the Complainant, filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that the Elk Mound Area School District, hereinafter the Respondent, had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 3 of the Municipal Employment Relations Act (MERA), by its actions in terminating the employment of Francis Adams. On May 1, 2003, Respondent filed its Answer wherein it denied it committed the alleged prohibited practices and affirmatively alleged that Adams was a probationary employee.

No. 30650-A

The Commission appointed a member of its staff, David E. Shaw, as Examiner to conduct hearing and make and issue Findings of Fact, Conclusions of Law and Order in the matter. Hearing was held before the Examiner on September 5, 2003, in Elk Mound, Wisconsin. A stenographic transcript was made of the hearing and the parties completed the submission of post-hearing briefs by December 22, 2003.

Based upon consideration of the evidence and the arguments of the parties, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant West Central Education Association, hereinafter “Complainant” or “Union”, is a labor organization with its offices located at 105 – 21st Street, North, Menomonie, Wisconsin. At all times material herein, Complainant has been the certified exclusive collective bargaining representative for the bargaining unit consisting of “all regular full-time and regular part-time custodians, excluding confidential, seasonal, temporary, casual, professional, supervisory, and managerial employees” employed by Respondents. At all times material herein, Fred Andrist has been the Executive Director of Complainant.

2. Respondent Elk Mound Area School District, hereinafter “Respondent” or “District”, is a municipal employer with its offices located at 405 University Street, Elk Mound, Wisconsin. From October of 1979 until June 30, 2003, William Vincent was the Respondent’s District Administrator.

3. Francis Adams was hired by Respondent as a Maintenance Helper on or about October 10, 2001. Due to his prior experience, he was placed on the three-year step on the wage schedule. Adams had approximately 5½ years of prior maintenance experience. Adams’ immediate supervisor was Kenneth Simon, Head of Maintenance for Respondent. Simon reports to Vincent. There is also a Maintenance Assistant, Keith Hanson, that is a higher-rated position than Maintenance Helper.

4. Complainant and Respondent are parties to a collective bargaining agreement with a duration of July 1, 2000 to June 30, 2003. Said agreement contains the following provisions:

ARTICLE 2 – PROBATIONARY PERIOD

All employees shall serve a probationary period of one (1) year from the date of hire in the bargaining unit. During the probationary period, the employee shall be subject to dismissal for any reason without recourse. Upon completion of the probationary period, the employee shall be granted seniority rights from the employee’s date of hire.

...

ARTICLE 6 – DISCIPLINE AND DISCHARGE

Discipline, including discharge, is recognized as a management right of the District and may be exercised by the District, through its designated representatives, in regard to any employee who does not fulfill his/her responsibilities to the District as an employee or does not comply with District policies now or hereafter in effect.

The District may freeze an employee's salary in conjunction with any discipline for cause.

The District will not give a written reprimand, demote, suspend or discharge any non-probationary employee without just cause.

An employee shall have the right to inspect the entire contents of his or her personnel file as defined in §103.13, Wis. Stats. The employee may copy the file for a reasonable copying charge.

Said agreement also contains a grievance and arbitration provision culminating in final and binding arbitration.

5. From January 4, 2002 to February 6, 2002, Simon was off work due to having surgery. During this period, Adams assumed some of Simon's duties in addition to his own, such as opening the school buildings, doing snow removal and helping identify and address maintenance problems that arose during this period. In doing so, Adams worked a considerable amount of overtime and was paid accordingly under the parties' labor agreement. In the spring of 2002, Vincent indicated to Adams that he would be receiving a commendation for his work while Simon was off work. Adams indicated his displeasure and asked Vincent about getting extra pay or time off. Vincent responded to the effect that he was not going to make adjustments, that there is a contract. On May 20, 2002, Adams was given a plaque and letter of commendation, which read, in relevant part, as follows:

SUBJECT: Commendation – Special Recognition

Dear Mr. Adams:

The Board of Education wishes to commend you for your dedication and extra efforts in assisting the District in maintaining our facilities and grounds. In particular, your initiative to coordinate and keep things moving when our head of maintenance was unable to fulfill his duties due to surgery from January 4th to February 6th, 2002.

This was a difficult time for all but it was made easier by your efforts to take up the slack. As a relatively new employee this was a difficult challenge. In recognition of your attention to duty, we wish to extend our special recognition to you for the extra effort you gave at this time.

On behalf of the Board of Education

Sincerely,

*William J. Vincent /s/
William J. Vincent
District Administrator*

Adams indicated to Vincent that he did not want the letter and plaque and that he did not feel it was appropriate for what he had done. Adams comments to Vincent regarding the letter of commendation, both before and after he received the letter, were solely on Adams' own behalf, and did not constitute concerted activity.

6. Adams became a member of Complainant within a month or two of being hired by Respondent. At about the same time, Adams was asked to take over from Custodian Leo Langer as the local steward for Complainant and did so. In that capacity, Adams helped set up weekly meetings of the local union. These meetings were held in either the lunch room or the maintenance shop. The doors to the rooms were not closed during the meetings. In setting up these meetings, Adams would notify the other members of the local of the meeting and would discuss the location with them. While someone from the local had asked Simon if they could use the maintenance shop for their meetings, Adams had no conversations with Simon or anyone else in management in that regard. Adams had a mail box in the maintenance shop and someone from Complainant would place Complainant's newsletters in his box and Adams would distribute them to the other members of the local. Vincent would not ordinarily see the mail sent to Adams, but might on holiday breaks when the office is short staffed. If other members had problems or concerns, Adams would contact Andrist about them or he would have Andrist come and discuss them.

7. There were no grievances filed with Respondent during Adams' employ, nor were there contract negotiations between the parties during that period. While Vincent was normally notified of who is Complainant's local steward, there was no notification to Respondent's management of Adams' status as steward for the local and he had no contact or communication with management as steward or as a representative on behalf of Complainant. Vincent was unaware Adams had become Complainant's steward and believed that custodian Leo Langer was still the local steward.

8. Adams asked Simon once or twice what he thought about the Union and what the employees should do with it. Simon told Adams that was their choice to make. Adams did not exhibit strong feelings for or against the Union in these conversations with Simon, however, Simon believed that Adams was a member of the Union, since he believed Adams had to pay union dues under the terms of the parties' collective bargaining agreement.

While Adams had discussions with other employees in the bargaining unit regarding whether to continue having a union or changing union representation while he was employed by Respondent, management was not aware of or privy to those conversations.

9. In August of 2002, Vincent and Simon held a meeting of the Custodial/Maintenance staff. The purpose of the meeting was to let the staff know the status of the building addition that was being completed and to discuss goals for the new school year. At that meeting, Adams asked Vincent whether the staff would receive more pay or would more custodians be hired, given the building addition. Vincent responded to the effect that it was not the time or place for that issue. No more was said about the topic at the meeting. Adams' question to Vincent constituted concerted activity.

10. Summer is the busiest time for the custodial/maintenance staff, with more projects being done while school is not in session. In August of 2002, Adams was given the assignment of working on the facade of the school building. At times, Adams had to ask Simon how to perform aspects of the work. Simon assigned one or two seasonal employees to assist Adams and took steps to minimize interruptions of Adams' work. Both Vincent and Simon felt that Adams took too long to complete the work and needed too much assistance from Simon. Simon felt that Adams had to ask too many questions about how to do the work and needed his help too much in order to finish the job. Simon also felt this had been the case with other assignments Adams had been given. Vincent considered the summer period to be the test for Adams in assessing his abilities.

11. Vincent and Simon discussed Adams' progress on at least two occasions. Simon did not feel Adams was progressing fast enough, especially regarding the mechanical aspects of his job and discussed the possibility of terminating Adams with Vincent near the end of August.

On or about September 13, 2002, Vincent and Simon again discussed Adams' progress and Simon mentioned that the facade job was not going well. They discussed whether Adams would fit into the job, Simon opining that he did not think that would be the case. Vincent then directed Simon to terminate Adams' employment.

12. On September 13, 2002, Simon called Adams on the radio and told him to meet him. Adams met Simon at approximately 1:30 p.m., at which time Simon informed him that they did not need his assistance any longer and that he was terminated. Adams asked Simon

why he was being terminated, but Simon gave no reason, stating only something to the effect that he was told to let him go and that they felt it was better to do it that way.

13. Complainant filed a grievance on behalf of Adams challenging his termination. The parties proceeded to arbitration on the grievance before Arbitrator Sherwood Malamud. Respondent took the position that the Arbitrator did not have subject matter jurisdiction. On March 7, 2003, the Arbitrator issued his decision wherein he concluded that under the terms of the parties' collective bargaining agreement, he did not have subject matter jurisdiction based on Adams' having been a probationary employee at the time of his termination.

On April 7, 2003, Complainant filed the complaint in this matter with the Wisconsin Employment Relations Commission.

14. In 1997, Respondent's employees in the custodial/maintenance bargaining unit voted to be represented by the Teamsters Union for purposes of collective bargaining. In early 2000, a petition was filed with the Commission for an election to be held to determine whether those employees desired to remain represented by the Teamsters Union, or to be represented by Complainant or to not be represented. An election was scheduled by the Commission among those employees. During the pendency of that election, Vincent sent Respondent's custodial/maintenance employees the following letter:

TO: All Custodial Employees

FROM: Bill Vincent on behalf of the Board of Education

DATE: February 23, 2000

RE: **Election**

Just three years ago, our custodians decided to give a union a chance. A majority voted to join the Teamsters. The negotiations, which took almost a year, led to a three-year contract, which called for, among other things, dues payments to the Union. Now, some or all of you have apparently rethought the decision to unionize or at least the decision to be represented by the Teamsters. You have requested a second government-supervised secret ballot election. That election will be held by mail.

The election has three potential votes – you can vote for continuation of the Teamsters, or you can vote for the Teachers' union, or you can vote to give us a second chance by voting for NO union. Save your dues money.

Whether you pay dues to the Teamsters, the Teachers' Union, or save the money, the Board will attempt to treat you fairly consistent with our economic situation and our treatment of both unionized and non-unionized employees. We try to recruit and keep good employees. That requires a competitive wage and benefit package. The fact that you pay dues to the teachers' union or to the Teamsters to keep the money in your pocket simply doesn't affect our decision-making.

Yes, a union can force us to go to binding arbitration, but how often does that happen?

Do you really think bringing in a professional spokesperson resulted in an improvement of your wages and benefits? We don't think it was worth whatever you paid in Union dues. Why does the Board/Administrator care? We paid a lot of money to our lawyer. We would prefer to deal without outsiders. But, if you bring in your professional, we feel we have no option but to bring in one too. That costs us money too. Who gains? The outsiders.

We also think it is important to treat you as individuals – addressing your individual needs, desires, and circumstances. We can't do that when we have to treat you as part of the Union. We think you should give us a chance. We think you should vote NO.

Also during the pendency of the election, Vincent and Respondent's High School Principal, Jay Silvernail, held a meeting with Respondent's custodial/maintenance employees, during which Silvernail expressed his opinion regarding the lack of effectiveness of Complainant's Executive Director, Andrist, in negotiations with the Respondent's Board of Education.

As a result of the representation election, Complainant was certified by the Commission as the exclusive bargaining representative of the Respondent's employees in the bargaining unit set forth in Finding of Fact 1 above.

15. Following Complainant's certification as the exclusive bargaining representative of those employees, Andrist sent High School Principal Silvernail the following letter of April 26, 2000:

Dear Mr. Silvernail:

I have been told from at least two different sources that you are making statements about my effectiveness with the Board in negotiations to WECA-Elk Mound members. I believe it is an effort on your part to undermine my ability to represent them. I take that very seriously.

Please be aware that Wisconsin Statute 111.70 states in:

- (2) **RIGHTS OF MUNICIPAL EMPLOYEES.** Municipal employees shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing. . .

You are a representative or agent of the employer and the law describes your obligations and limitations in the following language:

- (3) **PROHIBITED PRACTICES AND THEIR PREVENTION.** (a)
It is a prohibited practice for a municipal employer individually or in concert with others:

1. To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2).

WCEA - Elk Mound and I expect you to comply with 111.70 of Wisconsin Statutes. Please cease and desist from any statements and actions that could be interpreted as interfering with, restraining, or coercing employees in their right of self-organization.

Please consider yourself placed on notice with this letter and that future action will be taken if you continue to pursue this course of action.

Sincerely,

WEST CENTRAL EDUCATION ASSOCIATION

Fred Andrist /s/
Fred Andrist
Executive Director

By letter of May 23, 2000, Respondent's labor counsel, Stephen Weld, responded to Andrist's April 26, 2000 letter on behalf of Respondent, wherein he stated, in relevant part,

Dear Fred:

This is in response to your letter of April 26 addressed to Principal Jay Silvernail of the Elk Mound High School. Because of the threats inherent in that communication, the District has referred it to me for response.

Just as you have the First Amendment right to express your concerns about the Elk Mound Board of Education, the Elk Mound administration and the quality of education in Elk Mound, so too do members of the administration and the Board of Education have the right to express concerns about the Union's tactics and antics as they impact on the Elk Mound School District. Prior to your arrival, the Elk Mound School District had a long history of amicable labor relations. Indeed, I can only recall one interest arbitration (the District won) and very few grievances. So, to portray the District, as you have, as being oppressive to employees is not accurate.

We can always do better, but Elk Mound, in part because of the esprit de corps built by the Board, administration, staff and parents working together, is highly thought of – one of the best K-12 districts in the area. People want to live in Elk Mound because of the quality of our education.

Unfortunately, members of the Board and Administration believe that, in your dual roles as Union advocate and Elk Mound resident and parent, you have distributed misinformation and otherwise attempted to destroy that esprit de corps.

When Mr. Silvernail recently discussed with members of the custodial group the possible switch from Teamster to WEAC/WCEA representation, he told them exactly what he believes – you are less than credible and appear to have a set of goals and objectives which are contrary, in his opinion, to the best interest of the Elk Mound School District and its students. Mr. Silvernail didn't threaten the custodial employees; he didn't promise anything – he simply gave his opinion.

The truth is you have managed to alienate a significant number of the members of the administration and Board of Education. That is not in the best interests of your members or the School District.

Very truly yours,

WELD, RILEY, PRENN & RICCI, S.C.

Steve /s/
Stephen L. Weld

Andrist responded to Weld's letter with a letter of June 2, 2000, wherein he defended his letter to Silvernail, indicated he felt he could prove that Silvernail's conduct constituted "interference" under State statutes, defended his view of the relationship that existed between the Respondent and its teaching staff as less than ideal, and responded to what he felt were Weld's charges as to his lack of credibility and trustworthiness, asserting it was a pattern of the Respondent's administration to attack a person's character rather than address the issues being raised.

16. On July 3, 2003, Keith Hanson, a Maintenance Assistant in the bargaining unit of Respondent's custodial/maintenance employees represented by Complainant, filed a petition for an election among those employees with the Wisconsin Employment Relations Commission. Hanson has not been a member of Complainant, nor of the bargaining unit's prior collective bargaining representative. Hanson had no conversations with anyone in Respondent's administration prior to filing the petition with regard to filing such a petition. Vincent was not aware of Hanson's intent to file such a petition at the time of his decision to terminate Adams.

17. Vincent was not aware of whether or not Adams was a member of Complainant. Except for Adams' question in the August, 2002 meeting of Vincent, Simon and the custodial/maintenance staff, Vincent and Simon were not aware of the lawful, concerted activities Adams engaged in, nor were they aware of Adams' status as a local steward for Complainant or the concerted activities he engaged in in that capacity.

18. Vincent, with Simon's recommendation, made the decision to terminate Adams' employment with Respondent based upon their views of his abilities and performance. In making the decision, neither Vincent, nor Simon, were motivated in any part by hostility toward Adams' having engaged in lawful, concerted activity.

Based upon the foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Adams' comments to Vincent regarding receiving a letter of commendation for his extra effort and work while Simon was off work do not constitute lawful, concerted activity within the meaning of Sec. 111.70(2), Stats.

2. Adams' question to Vincent in the August, 2002 meeting of Vincent, Simon and the Respondent's custodial/maintenance employees, as well as his activities as Complainant's steward, constitute lawful, concerted activity within the meaning of Sec. 111.70(2), Stats.

3. By Vincent's decision, and Simon's recommendation, to terminate Francis Adams' employment with Respondent, Respondent Elk Mound Area School District, through its agents and officers, did not interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats., and did not discriminate against Francis Adams in regard to tenure in his employment in violation of Sec. 111.70(3)(a)3, Stats.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

The complaint filed herein is dismissed in its entirety.

Dated at Madison, Wisconsin, this 11th day of May, 2004.

David E. Shaw /s/

David E. Shaw, Examiner

ELK MOUND AREA SCHOOL DISTRICT

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

POSITIONS OF THE PARTIES

Complainant

Complainant takes the position that the Respondent's decision to terminate Adams discriminated against him for engaging in protected activity. In that regard, Complainant first asserts that Adams was engaged in protected activity and that the Respondent was aware of it. It was obvious to the administration that Adams was a strong advocate for himself and others. On at least two occasions, Adams raised issues that even the administration acknowledges were union matters. The first occasion involved the letter of commendation and plaque Vincent proposed for Adams for his extra effort in filling in for his supervisor. Adams clearly articulated his displeasure with the decision to merely give him a letter of commendation and a plaque and District Administrator Vincent acknowledged that anything else would have to go through negotiations. The second occasion was the meeting held with the custodians at which Adams raised the issue of more pay or more help for the added building space. Adams raised the issue to Vincent in front of his co-workers, with Vincent again responding that the meeting was not the time or the place for that issue. The fact that the conversation then quickly moved to another topic suggests a chill from Vincent's response.

Complainant concedes that Adams was not an officer or a member of the bargaining team for the Union, as in a unit that small, there are no such officer positions and there were no negotiations going on at the time Adams was employed in the District. However, Adams was the steward and while no grievances occurred during his tenure, Complainant believes that the administration knew Adams was the steward.

Vincent testified that he normally walks the areas in an attempt to stay abreast of what is happening around the building. Adams testified that the Union held almost weekly meetings in the lunchroom or the maintenance shop with the door open. Vincent also testified that he occasionally takes care of the mail and goes through it. The Union regularly sends stewards and building representatives regular correspondence and newsletters for informational purposes. Vincent was aware of how the newsletter was distributed and it is inconceivable that an administrator who attempts to stay abreast of what is happening in the District would not know who to contact for the Union in the custodial bargaining unit. Complainant also believes that in a bargaining unit of five to seven people, just about everyone knows who is for or against the Union.

Complainant asserts that Respondent was hostile to the protected activity. The District and Vincent are clearly anti-union, as demonstrated by correspondence during the transition from the Teamster representation to Complainant's representation of the custodial unit and by testimony surrounding Adams' involvement in the Union. In the spring of 2000 election, Vincent sent a letter to all employees of the then-Teamster union encouraging them to vote for no representation. Complainant then sent a letter raising issue with comments made by the high school principal. Although that letter did not speak specifically about a meeting with custodial staff, it prompted a response from the District through its labor counsel, in which he specifically mentioned the meeting. Vincent's testimony corroborates the meeting occurred. That meeting demonstrates the anti-union climate into which Adams was hired the following October.

After Adams was hired, it was clear that he became a spokesman in the unit, as evidenced by his question at the custodial meeting, his facilitating weekly meetings of the Union and his receiving Union mail. He had also specifically raised two issues to Vincent, additional pay for stepping in for his supervisor and additional pay for custodians for the building additions. It was obvious to all that Adams would be a participant in the upcoming negotiations.

Complainant asserts that Respondent's conduct regarding Adams was motivated in whole or in part by hostility toward his protected activity. It is clear that Vincent wanted the Union out of the District and Vincent acknowledges he was part of the decision-making process to terminate Adams. Complainant does not expect the Respondent to forthrightly acknowledge that they terminated Adams because of his role in the union. In the Supreme Court's decision in *DEPARTMENT OF EMPLOYMENT RELATIONS V. WERC*, 122 WIS. 2D 132, 143 (1985) the Court acknowledged the difficulty in proving an illicit motive on the part of an employer, as an employee will not be privy to various management discussions regarding the employee's work performance, attitude or even his union activities, placing the employee at a distinct disadvantage challenging the actions of a discreet and purposeful employer. This case is an example of an employer offering a rationale for its decision that is a pretext designed to obscure its hostility towards the employee's protected activity. However, the playing field is somewhat evened by the "in part" test, inasmuch as the Respondent will be found to have violated the law even if the decision was motivated only in part by hostility toward Adams' role in the Union.

The District has hid behind Adams' probationary status in this case. However, there is significant record evidence that supports the Complainant's position. First, Vincent's answers were evasive and he made a deliberate effort to downplay the fact that Adams was commended for his job performance during his supervisor's absence in the spring of 2003. Further, when Vincent returned to the stand after a brief recess, he made a further attempt to marginalize his previous testimony regarding Adams' efforts. When Vincent was called by Respondent to testify, Vincent further minimized what Adams had done during his supervisor's absence.

Vincent referred to a timeframe of January 4 to the 6th, while Simon, the supervisor, acknowledged he was gone a considerable period of time. During that time, not only did Adams perform his own duties, but also assumed many of Simon's maintenance duties beyond just plowing snow and opening buildings. At no point was he told that his performance of those duties was unsatisfactory or that he should not perform them, rather, he was commended for doing them. Secondly, custodians were considering another election for representation and discussing this while Adams was employed by the District. A maintenance assistant, Keith Hanson, who is not a member of the Union, requested a petition for election. Considering that Hanson had been grandfathered out of the Union and that Vincent tried to stay abreast of things going on, it is conceivable that Vincent knew of Hanson's effort, even though he denied any knowledge of it. However, if Vincent had known of it and knew where Adams stood in regards to negotiations in the Union, Vincent could effectively swing the vote to the way he wanted in his February, 2000 letter to custodians.

Complainant asserts that the Respondent failed to meet its burden of proving its affirmative defense. The stated reason for Adams' termination is weak at best. Both Vincent and Simon were asked for reasons for terminating Adams and they could only point to the one example of his work on the façade. When asked for other examples, Simon could not think of any and acknowledged that once Adams did something, it did not have to be redone. Respondent points to the one situation of poor performance on the front of the building as a significant issue in their decision to terminate Adams, yet no one raised the issue with Adams despite Simon being on site several times. Though Respondent acknowledged that it is not uncommon for workers to be pulled away from a job, no one even inquired if this contributed to this job taking longer than anticipated. Further, Respondent recognizes that even experienced employees in the maintenance department are still learning. If Adams' job performance was such that the District was not satisfied with it, it would seem reasonable that someone would have mentioned it to him. Complainant believes that Adams' termination was based on something other than job performance.

Complainant concludes that the District has a long history of being anti-union and that it was into this climate that Adams was hired. Early in Adams' employment, he was called upon to take over some of the maintenance duties of an absent supervisor, even though a more experienced and higher-rated employee, Keith Hanson, was available. Adams was commended for his job. In that situation and in the August meeting, Adams took the position of being the go-to person on contractual issues and demonstrated qualities of a person that would make the Union a viable bargaining unit in the District. At that same time, a non-Union member was planning to have another representation election. In a district this size, most everyone knew where each custodian stood on the union issue and a swing of one vote could easily turn the employees from union to non-union. Complainant believes that Respondent took this opportunity to swing that vote. The Union seeks an order reinstating Adams to his former position with backpay at his former rate of pay, with interest and benefits, less any interim earnings he may have earned had the Respondent not discriminated against him.

In its reply brief, Complainant notes that the Respondent's brief points out the "good relations between the District and its unions with only one interest-arbitration. . .and very few grievances." Complainant notes that this statement was gleaned from a Union exhibit and is not the position of the Complainant. Further, that exhibit emphasized that Andrist had a different view from the District of the parties' history and emphasized that his filing cabinet is full of folders documenting things that have gone on there. The District also believes that the probationary status of Adams allows them to do what they want and not be held accountable for it. The District cannot violate Section 111.70(3)(a)1 and 3, Stats. and then hide behind Adams' probationary status, as probationary employees also have statutory rights. The District asserts that the Examiner is being asked to rely on conjecture unsupported by logic. Complainant would admit it has no direct evidence, but does not feel it is needed. It would be too much to expect for an employer to admit its wrongdoing and Complainant believes that it has demonstrated the necessary inferences, and that those inferences are supported by logic. This case involves the wrongful termination of a good employee whose only mistake was being a good union person in an anti-union climate. Last, Complainant finds the final insult to itself and Mr. Adams is the casual way in which Respondent has approached these proceedings which Complainant believes is just another example of its anti-union attitude.

Respondent

Respondent first notes that the Complainant has the burden of proving the necessary elements upon which to find a discriminatory discharge under MERA. The Complainant has the burden of proof to support its allegation by "substantial evidence in view of the entire record." While it is recognized and accepted that the proof may be based on inferences because only the employer can know its true motivation, "such inferences may not be based upon conjecture but must be drawn from established facts which logically support them." *MUSKEGO-NORWAY CONSOLIDATED SCHOOLS, JOINT SCHOOL DISTRICT NO. 9 v. WISCONSIN EMPLOYMENT RELATIONS BOARD*, 35 WIS. 2D 540, 562-563 (1967).

Respondent denies that the discharge of Adams was motivated in any way by his alleged union activities or by union animus. Complainant has failed to meet its burden of proving every element necessary to prove its charge. Adams was not engaged in protected concerted activities when he made the comments that he would rather have a bonus than a plaque or a letter for stepping in for his absent supervisor, or that custodians should get more pay. Such comments, in the context in which they were made, hardly rise to the level of protected concerted activity.

Complainant cannot even prove that the District was aware of protected concerted activities on the part of Adams, as the District was not made aware of any such activities. Adams never communicated with District Administrator Vincent or any other administrator or Board member as a Union representative or on a Union matter. Vincent testified he did not even know if Adams was a member of the Union. Adams' supervisor, Simon, testified that he

did not know of Adams' feelings for or against the union. Adams testified that he never told Simon that he was pro-union and he could not point to any communication or activity that specifically identified him as a Union member or leader to the District's administrators.

To prove knowledge of Adams' union activities, the Examiner is asked to rely on conjecture unsupported by logic and to conclude that Vincent committed perjury by testifying he was not aware of Adams' Union involvement. The Respondent asserts the Union's arguments that Vincent must have known because he walked the hallways and the Union had weekly open door meetings, and that Vincent occasionally goes through the mail and would have seen Union correspondence to Adams, and that "just about everyone knows who is for the Union and who is not," is speculative conjecture.

Complainant has likewise failed to show anti-union hostility on the part of the Respondent and has certainly failed to show any hostility toward Adams for supposed Union activities. Union Exhibits 1 through 4 show no more than an employer legitimately raising issues for the custodians to consider in deciding whether to retain union representation. To a greater extent, the correspondence exhibits a concern that Andrist's conduct was disruptive to a long history of amicable labor relations. Contrary to Complainant's bold assertion of an "anti-union climate", there have been good relations between Respondent and its unions with only one interest-arbitration and very few grievances. Respondent notes that Union Exhibits 1 through 4 are dated between February and June of 2000, 1½ years before Adams was hired and 2½ years before he was discharged.

Complainant argues Adams was dismissed because the District knew he was pro-union and hoped to swing the majority of the small unit away from Union participation, but there is no evidence that either the District knew of Adams' positions or that a single vote would make the difference. Again, the Examiner is asked to speculate.

The District's decision to discharge Adams was in no way based on anti-union hostility. Asked why he was discharged, Adams responded that he had first learned of the reason at the hearing and that he had been discharged because of performance issues. Adams could not say anymore than that Union participation "might have played a role" in his discharge. Asked why he thought so, Adams testified "I'm not sure" and he could give no explanation for why he may have been targeted for discharge because of union involvement.

Respondent asserts that, contrary to Complainant's assertion, the District did not have the burden of proving a legitimate basis for discharge, but that to the extent an employer can establish reasons for its actions which do not relate to hostility towards an employee's protected concerted activity, it weakens the strength of the inferences which the employee asks be drawn. DEPARTMENT OF EMPLOYMENT RELATIONS, *supra*, 122 WIS. 2D at 143. Here, Complainant has not met its *prima facie* burden of proving illicit motivation by direct evidence or by reasonable inference. Hence, the Respondent is not required to prove a legitimate basis

for the discharge. Even if Complainant had raised some reasonable inference to support its allegations, proof of non-hostile reasons for the discharge are only to weaken the strength of the inferences which the employee asks the Commission to draw.

Adams was a probationary employee. In a recent pair of decisions the Wisconsin Supreme Court strongly endorsed the use of probation, as an excellent means of examining candidates and securing the best service available. *KRAUSE V. CITY OF WAUKESHA POLICE AND FIRE COMMISSION*, 261 Wis. 2d 485 (2003) and *CITY OF MADISON V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION*, 261 Wis. 2d 423 (2003). As Adams' probationary period came to an end, Vincent and Simon evaluated his performance and concluded he did not have the desired mechanical aptitude for the job. He was also slow and needed too much help. While Complainant argued that Adams' performance during Simon's absence in the spring of 2002 proves his worth, Respondent is by no means arguing that Adams failed in all aspects of his job. He did put forth extra effort to cover some duties during Simon's absence and for this he was commended, which itself infers that the Respondent held no hostility towards Adams. The testimony and presentation of both Vincent and Simon suggests that Adams was a likable person toward whom they felt no hostility for any reason. They simply did not believe he had the necessary aptitudes for the position and discharged him as the end of his probation approached.

Respondent asserts that for these reasons the complaint must be dismissed.

DISCUSSION

Complainant alleges Respondent violated Secs. 111.70(3)(a)1 and 3, Stats. Complainant asserts that Vincent's and Simon's decision to terminate Adams' employment with Respondent was motivated, at least in part, by hostility towards his having engaged in lawful, concerted activity by his statement to Vincent when he was informed he would receive a letter of commendation, by his statement at the meeting with the Custodial/Maintenance staff in August of 2002, and by his activities on Complainant's behalf as Head Steward for the local bargaining unit.

Sec. 111.70(3)(a)3, Stats., provides that it is a prohibited practice for a municipal employer:

3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms of conditions of employment; but the prohibition shall not apply to a fair-share agreement.

In order to establish a violation of this section, a complainant must establish by a clear and satisfactory preponderance of the evidence all of the following elements:

1. The employee was engaged in lawful and concerted activities protected by MERA; and
2. The employer was aware of those activities; and
3. The employer was hostile to those activities; and
4. The employer's conduct was motivated, in whole or in part, by hostility toward the protected activities. MUSKEGO-NORWAY C.S.J.S.D NO. 9 V. WERB, 35 Wis. 2D 540 (1967); EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122 Wis. 2D 132 (1985); CITY OF MILWAUKEE, ET AL, DEC. NO. 29270-B (WERC, 12/98).

Evidence of hostility and illegal motive may be direct, such as with overt statements of hostility, or as is usually the case, inferred from the circumstances. See TOWN OF MERCER, DEC. NO. 14783-A (Greco, 3/77). If direct evidence of hostility or illegal motive is found lacking, then one must look at the total circumstances surrounding the case. In order to uphold an allegation of a violation, these circumstances must be such as to give rise to an inference of pretext which is reasonably based upon established facts that can logically support such an inference. MUSKEGO-NORWAY, *supra*, 35 Wis. 2D at 562-63.

It is irrelevant that an employer has legitimate grounds for its action if one of the motivating factors was hostility toward the employee's protected concerted activity. See LACROSSE COUNTY (HILLVIEW NURSING HOME), DEC. NO. 14704-B (WERC, 7/78). In setting forth the "in-part" test, the Wisconsin Supreme Court noted that an employer may not subject an employee to adverse consequences when one of the motivating factors is his or her union activities, no matter how many other valid reasons exist for the employer's actions. MUSKEGO-NORWAY, *supra*, 35 Wis.2D at 562.

Regarding the first two elements, Complainant cites both Adams' remarks to Vincent when told he was receiving a letter of commendation and a plaque for filling in for his supervisor, and his question to Vincent regarding additional pay for the custodial staff at Vincent's and Simon's August meeting with the Custodial/Maintenance staff, as examples of lawful, concerted activity on Adams' part of which Vincent was aware.

While Adams' remarks to Vincent that he was not pleased to merely receive a letter of commendation and a plaque for filling in for Simon and that he wanted some additional pay or time off, were lawful, they do not constitute "concerted" activity. Section 111.70(2), Stats., sets forth the rights of municipal employees under the Municipal Employment Relations Act (MERA), and states, in relevant part:

(2) RIGHTS OF MUNICIPAL EMPLOYEES. Municipal employees shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employees shall have the right to refrain from any and all such activities. . .

(Emphasis added).

As the Commission has stated:

“It is impossible to define ‘concerted’ acts in the abstract. Analysis of what a concerted act is demands an examination of the facts of each case to determine whether employee behavior involved should be afforded the protection of Sec. 111.70(2) of MERA, At root, this determination demands an evaluation of whether the behavior involved manifests and furthers purely individual or collective concern.”

CITY OF LACROSSE, DEC. NO. 17084-D (WERC, 10/83), AFF’D CIR. CT. CASE NO. 83-CV 821 (1985).

In this case, Adams’ remarks to Vincent that he wanted additional pay or additional time off instead of a letter of commendation and a plaque were on no one’s behalf but his own. Indeed, they could be interpreted as an attempt at individual bargaining. It appears that Vincent took the remarks that way, as he responded to the effect he was not going to make adjustments, that there is a contract and that it would have to be negotiated through the contract.

That is not the case with Adams’ questions to Vincent at the meeting with the Custodial/Maintenance staff in August of 2002. Adams’ question of whether they would receive more pay or the District would hire more custodians because of the added building space, did involve his acting in pursuit of employee economic interests on behalf of other employees. CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03).

Adams also engaged in lawful, concerted activity in his activities as a steward for Complainant; however, it is not apparent from the record that anyone in Respondent’s management was aware of Adams’ status as steward or his activities in that regard. Vincent testified that he thought Custodian Leo Langer was the steward for the custodial/maintenance bargaining unit and that he was not aware that Adams had taken over that role from Langer. Adams testified that there was never any communication made to anyone in management that identified himself as the steward or as a representative of Complainant and that he never went to Vincent or anyone in the administration or on Respondent’s Board of Education as a representative of Complainant, or had any communication with them that would identify him as a member of Complainant. (Tr. pp. 75-77).

It also appears Vincent and Simon were unaware of Adams' Union membership. Both Simon and Adams testified that Adams asked Simon about the Union a couple of times, but Adams conceded that Simon correctly characterized those discussions and that he did not indicate in those discussions strong feelings about the Union, one way or the other. (Tr. p. 86). He also conceded that it would not have been obvious in later discussions with Simon that he was pro-Union (Tr. p. 86). Simon testified that he assumed Adams was in the Union because he had seen the "folder" (collective bargaining agreement) that said the employees had to pay union dues. However, Simon testified he never had any discussions with Vincent about Adams with regard to any union involvement. (Tr. p. 55).

Complainant asserts that Vincent's knowledge of Adams' as pro-union and his role as steward and his activities in that regard is to be inferred. Complainant makes this inference based upon Vincent's acknowledgement that he makes a habit of walking around the school buildings to see what is going on and that he at times has looked through the mail before it is distributed. According to Complainant, Vincent would have seen Adams in one of the Union meetings held in the lunchroom or Maintenance Shop, as they never closed the door for those meetings. This would, however, require further inferences that Vincent would have been able to see the employees gathered by passing by the doorway and that he would realize that it was a "union meeting", as opposed to something else. As to Vincent's review of the mail, Vincent testified that it was "pretty rare" that he saw the mail when it first came in, and that on occasions such as Christmas break when staff is short in the office, the mail backs up, and that he might come in and go through the first class mail to see if there was anything and that if Adams had a letter addressed to him in there, he "probably" would see it. There is, however, no evidence in the record that this occurred, or that Adams received mail from Complainant addressed to him over the Christmas of 2002, so that Vincent would probably have seen it if he had gone through the mail during that time. The number of inferences necessary in order to reach the conclusion that Vincent was aware of Adams' status as steward or his activities on behalf of Complainant is too great to be extrapolated from the facts in this record. The evidence is also insufficient to support the inferences urged by Complainant that it was obvious to anyone that Adams was a leader in the local. The only lawful, concerted activity of Adams of which Vincent was aware, was the August meeting.

To establish the third element, hostility, Complainant relies almost exclusively on letters and events that took place surrounding the representation election that took place in this bargaining unit early in 2000. During the pendency of that election, Respondent, through Vincent and High School Principal Jay Silvernail, indicated management's belief that the custodial/maintenance employees were better off without a union and also questioned the effectiveness of Complainant's Executive Director, Andrist, as a bargaining representative. The evidence in the record regarding Respondent's communications and the exchange of letters between Respondent's labor counsel, Weld, and Andrist, is not sufficient to establish animus toward Respondent's employees engaging in their rights under Sec. 111.70(2), Stats., as campaign materials distributed by Respondent or statements made by Respondent's agents in an

effort to dissuade its employees from voting for union representation does not necessarily establish animus toward its employees engaging in lawful, concerted activity. DEPARTMENT OF EMPLOYMENT RELATIONS, DEC. NO. 13897-A (Davis, 4/82), *aff'd* DER v. WERC, 122 Wis. 2D 132 (1985). A municipal employer has the right to convey the opinion of its management that both it and its employees are better off without having a union represent the employees, as long as in doing so, that communication does not contain threats of reprisal or promises of benefit for engaging in protected activity or for refraining from doing so. ASHWAUBENON SCHOOL DISTRICT NO. 1, DEC. NO. 14774-A (WERC, 10/77); WESTERN WISCONSIN TECHNICAL INSTITUTE, DEC. NO. 12355-B (WERC, 8/74). As to the statements critical of Andrist, to the extent they display animus on Respondent's part, it is animus directed toward Andrist personally, and not toward Respondent's employees engaging in lawful, concerted activity.

It also must be noted that those communications occurred early in 2000, more than a year and a half before Adams was hired by Respondent in October of 2001 and almost two and a half years before he was terminated in September of 2002. They are simply too remote in time from the event in issue to establish Vincent's state of mind at that time.

Complainant also asserts that Vincent's response to Adams' question regarding more pay or more custodians due to the additional building space being added provides some evidence of hostility. It asserts that after Vincent responded that the meeting was not the time or place for that issue, the conversation quickly moved to another topic, suggesting a "chill in the air". Adams testified Vincent "seemed to be a little upset" (Tr. p. 73) or "seemed a little agitated." (Tr. p. 78), but did not explain why he thought that. Vincent acknowledged making the statement that it was not the time or place for it, and explained he did so because the purpose of the meeting was to look at goals for the year (Tr. p. 23). There is no evidence that whatever annoyance Vincent might have felt at Adams' question continued beyond that moment. Adams testified that he got along "good" with Vincent, both before and after that meeting. (Tr. p. 78). The evidence is again not sufficient to establish animus on Vincent's part.

Complainant also would imply hostility on Vincent's part, in that it asserts the Respondent could not prove it had a legitimate reason for terminating Adams' employment. This point, however, applies more to the fourth element, motive. DEPARTMENT OF EMPLOYMENT RELATIONS, *supra*, 122 Wis. 2D. at 142.

Complainant notes that Adams received the letter of commendation in May of 2002 and asserts he was never informed of any problems with his performance until he was terminated. Vincent acknowledged that he never said anything to Adams about his performance, as he would not ordinarily do so, but instead discussed his concerns about Adams' ability with Simon, Adams' supervisor. (Tr. pp. 10-11). Simon testified that on several occasions he had commented to Adams that he needed to get the job done faster or that something should have been done differently (Tr. p. 40). Simon also testified that in addition to Adams' taking too long to do a job, a lot of times Simon had to help him finish the job or had to answer Adams'

questions in order for him to finish the task because there was a lot he did not know about tools and materials and how to go about certain projects. (Tr. p. 40). While, as Complainant points out, Simon could not give specific examples beyond Adams' work on the façade, Adams conceded there were some tasks he had trouble doing because he did not have experience in them, and he had to ask Simon for help (Tr. 68-69).

It appears from the record that summer is the busiest time for the custodial/maintenance staff, with the bigger projects and maintenance to be performed. Vincent testified that summer was the "big test" for Adams in his view, because of all the various tasks to be performed (Tr.p. 36) This was Adams' first summer with the District and Simon testified that as the new school year approached they were trying to finish up projects and get things done that needed to be completed for the start of school. Vincent and Simon felt Adams was taking too long to complete the work on the façade and needed too much help from Simon. According to Simon, he and Vincent discussed Adams' progress approximately in late July or August and decided to wait and see how he progressed. Simon testified he had assigned summer help to assist Adams on the façade and tried to keep interruptions to a minimum so Adams could keep working on the project.

Either on the day of the termination or shortly before, Vincent and Simon again discussed whether Adams was progressing and Simon indicated the façade project was not going well. They discussed whether Adams would fit into the job, decided he would not, and Vincent directed Simon to terminate Adams. Simon testified that he had probably put off making the decision because Adams was "putting out effort." (Tr. p. 55). According to Simon, he gave Adams no reason for the decision to terminate him when Adams asked, because he felt the best way to handle these situations is to keep things to a minimum. (Tr. p. 59).

While Vincent and Simon did not do a particularly good job of supervising Adams, especially in terms of putting him on notice of performance problems, there were in fact, problems with Adams' performance, which even he conceded to some degree. It is also not unusual for management to be less assiduous with probationary employees in terms of the oversight and notice that would be required in a similar situation if a "just cause" standard was to be applied. This is not to say that a probationary employee, subject to summary discharge without recourse under a labor agreement, is not protected by MERA, however, poor management practices are not, in and of themselves, evidence of unlawful motive, but may be taken into account in weighing the strength of the inferences the Complainant asks the Examiner to draw. DEPARTMENT OF EMPLOYMENT RELATIONS, *supra*, 122 Wis. 2D at 143. In this case, there is no evidence that Simon, the individual most dissatisfied with Adams' performance and abilities, had any sort of animosity toward Adams; rather, it appears from his testimony that Simon liked Adams as a person. It also appears that Vincent relied on Simon's assessment of Adams, as well as his own observations of Adams' work on the façade, in making the decision to terminate Adams.

Complainant also asserts that a possible motive for Vincent's terminating Adams was to affect the number of pro-union votes in a representation election among Respondent's custodial/maintenance staff. While Complainant asserts that Vincent could have been aware of Hanson's intentions to file a petition for such an election, the evidence is to the contrary. Vincent testified he knew nothing about such a petition and Hanson testified he told no one in management about his intentions. Moreover, while it appears there were discussions among the custodial/maintenance employees about whether they should continue to have union representation while Adams was employed with Respondent, Hanson did not file the petition for an election until July 3, 2003, i.e., nine months after Adams was terminated. Again, the facts in the record do not support the inferences Complainant would have the Examiner draw.

In sum, Complainant has not established by a clear and satisfactory preponderance of the evidence that either Vincent or Simon were hostile toward Adams' having engaged in lawful, concerted activity, and that Vincent's decision to terminate Adams' employment was motivated, at least in part, by hostility in that regard. Thus, it has been concluded that the decision to terminate Adams was not discriminatory in violation of Sec. 111.70(3)(a)3, Stats.

As the Commission has recently concluded that it is appropriate to apply the same Sec. 111.70(3)(a)3, Stats., analysis to allegations of independent violations of Sec. 111.70(3)(a)1, Stats., in cases of alleged retaliation such as this, 1/ both the alleged violations of (3)(a)1 and (3)(a)3, have been dismissed.

1/ CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03), at p. 15.

Dated at Madison, Wisconsin, this 11th day of May, 2004.

David E. Shaw /s/

David E. Shaw, Examiner

DES/gjc
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