

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL UNION NO. 43, Complainant

vs.

TOWN OF DOVER, Respondent.

Case 2
No. 62134
MP-3904

Decision No. 30725-A

Appearances:

Ms. Andrea F. Hoeschen, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Teamsters Local Union No. 43, which is referred to below as the Union.

Mr. Victor J. Long, Long & Halsey Associates, Inc., 8330 Corporate Drive, Racine, Wisconsin 53406, appearing on behalf of the Town of Dover, which is referred to below as the Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On February 19, 2003, the Union filed a complaint of prohibited practices alleging that the Employer had violated Secs. 111.70(3)(a)1, 2 and 3, Stats., by acts based on its hostility toward Eric Hinson's exercise of lawful, concerted activity protected by Sec. 111.70(2), Stats. After informal attempts to resolve the matter proved unsuccessful, the Commission, on October 17, 2003, appointed Richard B. McLaughlin, a member of its staff, to act as Examiner. The Employer filed its answer to the complaint on November 5, 2003, and hearing was conducted in Kansasville, Wisconsin on December 4, 2003. Doreen M. Brown-Schwager filed a transcript of the hearing with the Commission on December 15, 2003. Each party filed a brief by January 7, 2004. On January 8, 2004, the Union filed a letter with the Commission, which states:

No. 30725-A

The union has no intention of filing a reply brief in the above-referenced matter. Indeed, I do not recall the parties making any provision with you for the filing of reply briefs. I feel compelled to point out, however, that on page 18 of the Town's brief the Town argues the probative value of Respondent Exhibit No. 4, which the parties expressly agreed and you confirmed was being admitted to evidence with the stipulation that it had no independent probative value. (Tr. 48-49). It was on the basis of that stipulation that I refrained from offering further evidence that would have demonstrated the lack of probative value of Respondent Exhibit 4. If the stipulation no longer governs how you intend to view Respondent Exhibit 4 in this case, I ask that you reopen the record for additional evidence.

In a letter to the parties dated January 9, 2004, I stated:

I enclose for Mr. Long a copy of Ms. Hoeschen's brief. It is my understanding that Mr. Long has already sent a copy of his brief to Ms. Hoeschen. It is my understanding that no reply briefs will be filed. If, however, Mr. Long has a response to Ms. Hoeschen's January 7, 2004 letter, he should file it by Friday, January 16, 2004.

I received no response to this letter.

FINDINGS OF FACT

1. The Employer is a municipal employer, which maintains its principal offices at 4110 South Beaumont Avenue, P.O. Box 670, Kansasville, Wisconsin 53139. The Employer provides a variety of services to the residents of the Township of Dover. The Employer maintains an administrative structure that includes a Roads Department and a Clerk/Treasurer's Department. At all times relevant to this matter, the Employer's Clerk/Treasurer was Merry Kris Demske. The Employer has administrative ties to the Eagle Lake Sewer Utility District (the District). The Employer and the District, for example, maintain common employment policies, set forth in a document entitled "Town of Dover and Eagle Lake Sewer Utility District Personnel Policies and Guidelines for Employees" (the Policy). At all times relevant to this matter, Jeff Bratz was the District's Sewer Superintendent. At all times relevant to this matter, the elected members of the Employer's Board of Supervisors were Thomas Lembcke, Larry Neau and Dean Larsen. At all times relevant to this matter, Lembcke served as the Chairman of the Town Board.

2. The Union is a labor organization, which maintains its principal offices at 1624 Yout Street, Racine, Wisconsin 53404-2160. Wes Gable is the Union's Business Agent and President.

3. In August of 2001, the Employer hired Eric Hinson into its Roads Department (the Department). At the time, Gregory Elblein was the Department's Superintendent. Elblein and Hinson were the Department's sole full-time employees. The Department utilizes part-time employees to perform certain duties at its landfill and to assist in certain temporary projects such as snow plowing. In May of 2002, Elblein quit. The Employer made Hinson Superintendent on an interim basis, then started an interview process to select a permanent Superintendent. Later that month, the Employer made Hinson the Superintendent and gave him a wage increase of \$1.00 per hour. On July 1, 2002, the Employer hired Mark Schmidt to fill the position occupied by Hinson prior to his promotion to Superintendent. From July 1, 2002 until February 14, 2003, Hinson and Schmidt were the Department's sole full-time employees. On February 14, 2003, the Employer's Town Board terminated Hinson's employment and made Schmidt the Superintendent. From that date through at least the hearing in this matter, Schmidt was the Department's sole full-time employee.

4. The Policy includes the following provisions:

Probationary Period.

All Employees of the Employer shall be on probation for a period of six (6) months from date of hire. . . . After thirty (30) days, such probationary Employee shall continue as a probationary Employee until the expiration of six (6) months. If an Employee proves unsatisfactory or unfit for continuance in the employ of the Town or District during the probationary period, the Employee may be terminated without cause and without the necessity of the Employer having to comply with disciplinary action as defined in the policies and guidelines.

. . .

Sick Leave.

Each full-time Employee shall earn and accumulate, when not used, one sick day with pay at his regular rate of pay for each one month of employment, commencing on the first day after the expiration of the probationary period and retroactive to the date of hire. . . .

It is the intent of sick leave to be used for long-term illnesses or injuries which cause a short-term disability. . . .

District/Town Owned Equipment.

Except as set forth below, no District or Town equipment will be used for personal use, including use of the District or Town computers. Personal use shall be deemed to be any use of equipment which does not benefit the town. Violation of this rule may result in disciplinary action. Discipline may take the form of oral reprimands, written warnings, demotions, suspensions or discharge from employment and will normally be progressive in nature but may not be depending upon the seriousness of the violation by the Employee.

Employees may make use of the Town's telephones to make and receive brief personal phone calls and for personal emergencies. Where possible, the Employee shall attempt to his/her (sic) break to make such calls, and under no circumstances will excessive use of the telephone for personal calls be tolerated. Further, Town Employees may utilize the Town copier and/or fax machine during their off hours, so long as they pay the same fees and costs charged to other citizens of the Town for use of this equipment.

. . .

Public Relations.

All employees are expected to be courteous, polite and respectful to all persons during their hours of employment. . . .

Disciplinary Action.

The Employer shall have the right to establish and amend reasonable rules and regulations for the conduct of the Town and/or District's business and of its Employees. Employees shall comply with all reasonable work rules. Said rules and regulations shall be in writing and shall be posted at a designated location where they shall be visible to all Employees. Violations of rules and regulations by any Employee shall be discussed with the Employee immediately. Discipline may take the form of oral reprimands, written warnings, demotions, suspensions or discharge from employment and will normally be progressive in nature but may not be depending upon the seriousness of the violation by the Employee. This provision shall not apply to probationary Employees who may be dismissed at any time without cause. . . .

Hinson received this document sometime in September or October of 2002.

5. Elblein gave Hinson a formal evaluation on February 6, 2002. The written evaluation noted that Hinson was “doing well in the new position created within the road department” and included Elblein’s recommendation that Hinson be taken off of probation and be considered “a regular employee with the Town of Dover.”

6. Sometime during February or March of 2002, Hinson contacted Gable regarding the possibility of having the Union represent the Employer’s employees. Hinson was concerned with the Employer’s implementation of policy changes including a reduction of benefits. At a Town Board meeting in March or April of 2002, Neau informed Hinson that he had heard a rumor concerning a unionization effort. Hinson did not confirm the rumor and indicated to Neau that he was only one person, and a union could do little for him. Neau, when employed as a teacher, had been represented by a union. In November of 2002, Hinson talked in some depth about his interest in unionization with Lembcke. Hinson did so because he believed Lembcke opposed some of the Board actions reflected in the Policy, and was more likely to be receptive to his concerns than the other Board Supervisors. Hinson did not speak further with Lembcke about his interest in the Union until the evening of February 13, 2003. Hinson initiated that conversation after receiving the notice for a Town Board meeting of February 14, 2003. The agenda included a reference to the Board’s intent to meet with Hinson in closed session at 1:30 p.m. Hinson and Lembcke discussed the basis for the meeting in limited detail. They also discussed the possibility of the Union representing Employer employees. Lembcke expressed hostility to the possibility of Union representation, and indicated that Hinson had “screwed up.” Shortly after he first contacted Gable, Hinson discussed his desire to pursue Union representation with Bratz. Bratz indicated he would not support such an effort. Hinson attempted to keep his interest in Union representation from becoming generally known. Hinson periodically discussed potential Union representation with Schmidt from the time the Employer hired Schmidt. Schmidt informed Hinson that he had been represented by a union in the past, and that union representation had benefits and liabilities. He never indicated a willingness to assist in bringing the Union in as a bargaining representative. Bratz discussed Hinson’s desire to bring in the Union with Schmidt.

7. Board members thought that Hinson performed well prior to his promotion. Each, however, came to doubt the quality of his performance in that position. At the Town Board meeting of December 9, 2002, the Board Supervisors evaluated Hinson’s performance in closed session. During that evaluation, no one mentioned Hinson’s interest in Union representation. Board supervisors raised the following general concerns: that Hinson was spending Town money on equipment and supplies too freely and in violation of Board policy; that Hinson needed to treat Board members with greater respect, and members of the public and fellow employees with greater courtesy; that Hinson could not order Schmidt to perform outside tree-trimming while Hinson remained in the truck because he did not like to work in the cold; that the Roads Department needed to perform more non-administrative work, including tree-trimming; and that Hinson had repaired a water pump in his personal vehicle on

Employer time at a Township facility. Demske prepared the minutes of that meeting. Those minutes state that Hinson's wages were increased from \$16.00 to \$16.35 per hour, and Schmidt's were increased from \$15.00 to \$15.30 per hour. The notes also state that Hinson and Schmidt "will remain on probation until otherwise notified." Hinson was not aware until that meeting that the Board considered him to be a probationary employee. The minutes also state that Lembcke made the following statement during Demske's evaluation:

We are not getting enough work out of the employees of the Town of Dover. Merry, you're one of them. Your workers are too. There's not enough work coming out of your office. There's not enough work coming out of Eric's department either. He was told the same thing.

The Employer did not reduce the December 9, 2002 evaluation to writing. The Board discussed purchasing policy at its November 13, 2002 meeting. During that meeting the Board approved the purchase of three furnaces for a total of \$3690. Hinson had secured Lembcke's approval for the purchase before accepting a bid. Board minutes for the November 13 meeting state the following:

Comment: Hinson was asked in the future to please present these planned equipment purchases at a regularly scheduled Board meeting for the full Board to review before proceeding with purchase.

At a Town Board meeting that started on the evening of January 13, 2003, the Board again discussed the purchase policy. Item 22 of the minutes for that meeting is headed "Response to annual review - Merry Kris Demske". Included in that item is the following statement: "No specific conclusions relative to the Roads Department agenda items were reached, but a \$300.00 threshold was set for purchasing by Town employees." Hinson did not attend the January 13, 2003 meeting. Demske told him of the \$300 limit sometime after the meeting.

8. At a Town Board meeting commencing at 1:30 p.m., on February 14, 2003, the Board entered closed session at 1:31 p.m. to consider personnel matters. Hinson was summoned into the meeting, and Lembcke informed him that it concerned the termination of his employment. Board Supervisors raised the following concerns: that Hinson had purchased personal items at a parts store using the Employer's account; that Hinson's department did not produce enough work, particularly tree-trimming; that Hinson had repaired fuel lines and a water pump in his personal truck on Employer time; that Hinson had exceeded the \$300 purchase limit set by the Board; that Hinson had taken Employer property and kept it as his personal property; and that Hinson had directed Schmidt to follow Hinson to Burlington in an Employer-owned truck so that Hinson could drop his truck at a repair shop. Lembcke referred to Hinson as a "square peg in a round hole." When informed of the personal purchases at a parts store, Hinson responded that he paid cash for each personal item, and never charged any

personal item to the Employer's account. When informed of production concerns, he responded that the administrative work required of a Superintendent took up an increasingly large part of his work time. He added that the concerns with tree-trimming reflected no more than that he had not gotten to some scheduled trimming until February 14, 2003. Hinson attempted to address each concern raised by Board members. Board minutes for this closed session read thus:

All actions of the closed session: Neau/Larsen to terminate employee, Eric Hinson, today [February 14, 2003], at this time. Comments: Eric Hinson was terminated at the Town of Dover. Board asked that he turn in all keys, all computer passwords, cell phones, two-way radios, any software, any Town tools in his possession, any personal charges on Town accounts, hard copies or xeroxes of privileged Town information (like Ordinance Books), and anything else that belonged to the Town of Dover should be turned in. Board directed Clerk to prepare Hinson's final check to include all vacation and sick days for which he is eligible. Clerk asked to review these materials to assure they were received. Carried. This portion of the meeting was concluded at 2:10 pm.

Board asked Mark Schmidt to meet with them. Subjects discussed were Hinson's termination, Schmidt's movement to Temporary Roads Foreman, and to advise Schmidt that he is still on probation.

Hinson returned to present all items asked for by the Board. Clerk asked if the Board was satisfied that all items had been received. They were. Hinson was advised of his eligibility for COBRA benefits.

Board took action to notify the Sheriff's Department that call lists for the Town needed to be changed.

Prior to this closed session, Hinson had not been formally disciplined in any way and had not been warned that his employment with the Employer was in jeopardy.

9. Gable faxed a letter to the Employer during the morning of February 14, 2003. The letter reads thus:

This letter is to inform you and the Town of Dover, its officials, representatives and agents that the undersigned Labor Organization has commenced an organizational campaign among all of your regular full-time and part-time employees of the Streets & Road Department and the Road Foreman for the Town of Dover . . .

You are further advised that pursuant to specific Wisconsin State Statutes, as amended, during the period of organization of employees, an employer may not discriminate against such employees as to terms and tenure of employment because they desire to form, join or assist a labor organization. If any such discrimination occurs, prompt action will be taken by the Union filing prohibited practice charges . . . We hope this will not be necessary and that during this period the rights of all parties will be protected.

No Board member reviewed this document prior to Hinson's termination. The Employer responded in a letter to Gable, dated February 25, 2003, from Peter Ludwig, which states:

This letter is in response to your February 14, 2003 correspondence in the above matter. Be advised that I represent the Town of Dover.

At this time, the Town of Dover has only one full-time roads employee. There are additional occasional employees, but they could not even be considered part-time. These additional workers are generally used for snow plowing, cleanup days, etc., but not on a regular basis.

Therefore, we do not believe there exists the basis to form a union in the Town of Dover for its sole roads employee. . . .

Hinson requested a letter of termination from the Employer. Ludwig responded in a letter to Hinson dated February 18, 2003, which states:

. . . This correspondence will confirm that, by unanimous vote of the Town of Dover Board, you were terminated effective February 14, 2003. This was a termination for cause. . . .

Hinson sought further elaboration from the Employer. Ludwig responded in a letter to Hinson dated February 28, 2003, which states:

Be advised I do not intend to substitute my interpretation of the cause or causes as given to you by the board at the termination meeting. I also believe there were additional causes which were not enumerated at the hearing, and which I am not competent to comment on at this time. . . .

A letter from Ludwig to Hinson dated March 13, 2003, states:

I am advised by the board that you are still in possession of certain town property. We would ask for the immediate return of the following items:

- drills;
- boots;
- coveralls;
- big pry bar;
- snowblower.

Please return these items to the town hall not later than March 24, 2003.

Hinson responded with a letter dated March 18, 2003, which states:

. . . please be advised: I do not have any drills belonging to the town of Dover. The boots and coveralls were approved through Tom Lemcke (sic) for replacement of mine that were ruined by the town. Yet, I will return these two items. I do not have a pry bar. The snowblower belongs to me, as I took it from the dumpster (sic) on clean up day. I used it at the town, as well as at my house. It never belonged to the town. I brought my personal lawn mower to the town hall to use for mowing – are you going to lay claim to that too? And furthermore; my brain is full of town sensitive material. Would you like that as well?

The Employer's information regarding Hinson's alleged misappropriation of tools rests on information passed from Bratz and Schmidt to Lembcke. No Employer representative asked Hinson about this property prior to the issuance of the March 13, 2003 letter.

10. Board members did not identify specific examples of Hinson's violating Employer purchasing policy during the December 9, 2002 evaluation. Neau's concern on the matter is traceable to Hinson's successful advocacy, during an open quorum meeting with Township residents, that the Employer should purchase a chain saw costing \$599, which had not been included in the budget. At the evaluation, Larsen posed the general issue of courtesy toward the public and other employees. He based his concern on a citizen complaint alleging that a part-time landfill employee hired by Hinson had rudely asked to see a dumping permit. Larsen brought the matter to Hinson's attention, and Larsen understood Hinson to take the position that employees could only be expected to be as courteous as the public they deal with. This response angered Larsen, who wrote a note to Lembcke stating his belief that Hinson "doesn't give a damn about any complaint." The part-time employee quit shortly after the incident underlying the resident complaint. Larsen voiced the concern regarding an October, 2002 clean-up day. Larsen raised the issue regarding Hinson's respect for Town Board members. He believed that Hinson had provoked an angry Town meeting involving residents of a subdivision who did not want Hinson to undertake ditch clean-up work that Hinson thought necessary. Larsen understood Hinson to take the position that he would not staff a

scheduled clean-up day at the landfill in response to the opposition voiced at the meeting concerning the ditch clean-up effort. Hinson staffed the landfill on the clean-up day, but Larsen perceived Hinson had deliberately confused the issue on staffing the clean up day to challenge the Board's authority. Lembcke and Larsen voiced the concerns raised with Hinson on December 9, 2002, regarding the amount of work and tree-trimming. These concerns trace to their own conclusions, discussions with Schmidt and Bratz, and complaints from unidentified citizens. Larsen voiced the concern regarding Hinson's repair of a water pump. He saw Hinson while Hinson was doing the work on a Friday afternoon, and questioned Hinson about it. Hinson responded that he was doing the work on his break times, and that he had broken the water pump while on Employer duties. Larsen did not inform Hinson that he was acting improperly at the time of the incident in October of 2002. He did, however, question a mechanic about the matter shortly after the incident, and became convinced that Hinson could not have completed the job on his break times. Larsen did, not however, immediately bring the matter to Hinson's attention. Rather, he brought the matter before the Board at its November 2002, meeting, then confronted Hinson about the matter during Hinson's December 9, 2002 evaluation. Shortly after the incident in October, Hinson phoned Lembcke to advise him that he had broken the water pump while on Employer duties and had used perhaps twenty minutes of Employer time to repair it. Lembcke informed him that the repairs should have been done on his own time.

11. After Hinson's termination, a Town Board member verified that Hinson had paid cash for personal purchases at a parts store, and that by using the Employer's account, he avoided paying sales tax. The Board member confirmed that Hinson did not charge any item to the Town, and that it was a policy of the parts store that was used with some frequency by a variety of the Employer's employees. Town Board members rested their concerns with the amount of tree-trimming performed by Hinson primarily on conversations with Schmidt. Hinson never exceeded the amount in the budget for any item he purchased or recommended for purchase. Subsequent to the Employer's January 13, 2003 meeting, Hinson did arrange for the purchase of a weed whacker and for chemicals that, in bulk, but not per unit, exceeded the \$300 limit. Hinson believed he had Lembcke's authorization for both items and that the chemicals did not fall within the policy, since they were not capital improvement items. Lembcke denies authorizing the purchases. No Employer member attempted to determine whether or not the items had been authorized prior to the Board's decision to terminate Hinson. The water pump repair mentioned in the termination meeting was the matter discussed at Hinson's December 9, 2002 evaluation. Hinson informed the Board that the repairs to his truck were necessitated by work done on Employer time, performing Departmental work. He asked and received Neau's permission to repair the fuel lines prior to the repairs. No Board member attempted to determine whether or not the repairs were necessary or authorized prior to the decision to terminate Hinson. Hinson believes it was appropriate for Schmidt to follow him to Burlington while he dropped his personal truck at a repair shop, since he had to make a purchase for the Town at a store in Burlington. Schmidt

denies that they stopped to make any such purchase. No Town Board member attempted to determine which of these two accounts had a basis in fact.

12. Hinson's contact with the Union concerning representation is lawful, concerted activity. Hinson's discussion concerning the merit of Union representation with Bratz, Schmidt and Lembcke is lawful, concerted activity. The Employer was aware, prior to its termination of Hinson, that Hinson had contacted the Union and that he had discussed Union representation with other employees. The Employer's termination of Hinson's employment was motivated, in part, by hostility toward Hinson's exercise of lawful, concerted activity.

CONCLUSIONS OF LAW

1. Hinson, while a Department employee, was a "Municipal employee" within the meaning of Sec. 111.70(1)(i), Stats.

2. The Employer is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

3. The Employer's termination of Hinson's employment was based in part on Hinson's exercise of lawful, concerted activity within the meaning of Sec. 111.70(2), Stats., in violation of Secs. 111.70(3)(a)1 and 3, Stats.

4. The Employer's termination of Hinson's employment did not dominate or interfere with the formation of a labor organization, and thus did not violate Sec. 111.70(3)(a)2, Stats.

ORDER

1. Those portions of the complaint alleging Employer violation of Sec. 111.70(3)(a)2, Stats., are dismissed.

2. To remedy its violation of Secs. 111.70(3)(a)1 and 3, Stats., the Employer, through its officers and agents, shall immediately:

- (a) Cease and desist from interfering with, restraining or coercing Hinson or any of its employees in the exercise of their rights guaranteed in Sec. 111.70(2), Stats.
- (b) Cease and desist from discriminating against Hinson or any of its employees for engaging in lawful, concerted activity.

- (c) Take the following affirmative action, which the Examiner finds will fulfill the purposes of the Municipal Employment Relations Act:
- (1) Offer to reinstate Hinson to his former position on a non-probationary basis, without loss of seniority and benefits.
 - (2) Make Hinson whole by paying him all wages and benefits he would have earned, less any amount he earned or received that he would not have received but for his termination, plus interest at the rate of twelve percent per annum on this amount from the date of his termination to the date he is reinstated or refuses reinstatement.
 - (3) Expunge from Hinson's personnel file(s) any reference to his termination on February 14, 2003.
 - (4) Notify employees by posting the Notice marked "Appendix A" in conspicuous places where its employees are employed. The Notice shall be signed by an official of the Town of Dover Board of Supervisors; shall be posted upon receipt of a copy of this Order; and shall remain posted for thirty days. Reasonable steps shall be taken by the Employer to insure that the Notice is not altered, defaced, or covered by other material.
 - (5) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply with it.

Dated at Madison, Wisconsin this 5th day of March, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

APPENDIX "A"

NOTICE TO EMPLOYEES OF THE
TOWNSHIP OF DOVER

As required by an Order of the Wisconsin Employment Relations Commission, and in order to fulfill the policies of the Municipal Employment Relations Act, we notify our employees that:

1. WE WILL immediately offer to reinstate Eric Hinson to his former position in the Roads Department of the Township of Dover on a non-probationary basis and we will make him whole for all wages and benefits lost as a result of his termination.
2. WE WILL NOT interfere with, restrain or coerce Eric Hinson or any other employee in the exercise of rights granted by the Municipal Employment Relations Act.
3. WE WILL NOT discriminate against Eric Hinson or any other employee for the exercise of rights granted by the Municipal Employment Relations Act.

Dated this _____ day of _____, 2004.

On Behalf Of The Board Of Supervisors For The Township of Dover

Name

Title

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

TOWN OF DOVER

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

THE PARTIES' POSITIONS

The Union's Brief

After a review of the evidence and governing precedent, the Union contends that the Employer knew of Hinson's "Union involvement before December 9", since he had spoken of it with Lembcke, who must have informed other Town Board members.

Hinson's testimony establishes that the Employer was "openly hostile" to "Union activity". Hinson testified that Lembcke stated that he "would do anything to keep a union out of the Town." Gable's February 14, 2004 demand for recognition prompted the Employer's attorney to assert "there was no basis for a union because the Town only had one roads employee." This legally inaccurate view manifests "an illegal incentive to terminate Hinson."

The evidence establishes that the Employer's purported reasons for the termination are a pretext. The evidence establishes that the Employer "accumulated as many reasons for termination as it could, regardless of whether the reasons had been grounds for discipline, had been previously communicated to Hinson, or had been thoroughly investigated." The Employer never put a basis for the termination in writing, and there is no persuasive evidence that anyone ever informed Hinson of the basis for termination. More specifically, the Union contends that the evidence shows no violation by Hinson of a purchasing policy. The policy did not exist in writing, and reflects no more than "the whim of the Board Chairman" whose whim "was to find a way to foreclose any unionizing effort." Assertions that Hinson did not do enough work rest on the testimony of the employee who took over Hinson's position after the termination. Nor will the record support an assertion that "Hinson took Town property home." Lembcke never asked for Hinson to return anything. Nor will the record support the assertion that the Employer extended Hinson's probation period. Town policies set the probation period at six months, and Hinson had been employed for sixteen months "when the Town purported to 'extend' his probationary period." There is no support in Town policies for this assertion, and no Employer representative informed Hinson of the extension. Against this background, the extension "was simply an attempt to lay the groundwork for terminating Hinson for his union activities."

The Union concludes that the record establishes a violation of MERA and that the Commission should order the "Town to reinstate Hinson and make him whole" in addition to "any other remedy it finds appropriate."

The Employer's Brief

The Employer asserts that Hinson's testimony regarding the basis "for pursuing unionization" has no evidentiary support. Beyond this, it affords no basis to believe he brought the effort to anyone's attention but Lembcke's, and no basis to understand the basis for the hostility Hinson attributes to Lembcke. Schmidt's testimony confirms that Hinson's organizational effort was unknown to Town Supervisors.

Performance issues marred Hinson's tenure. The Board evaluated his performance at the December 9, 2002 meeting. Citizen complaints played a significant role in that evaluation. Hinson's attitude toward the residents of the Lorimar Estates development produced a crowded Town Board meeting. At the same meeting, Hinson "made it perfectly clear that if he wasn't in charge of clean-up day there wouldn't be a clean-up day." Hinson, without notice to any Board member, changed his attitude and led the clean-up day effort. His conduct, however, manifests "a lack of courteous behavior and proper public relations" in violation of Town policies. Also violative of Board policies was Hinson's unauthorized purchase of supplies in violation of a \$300 limit set at the January 2003 Board meeting. While aware of the policy, Hinson purchased a weed whacker without the Board's approval, and purchased chemicals well above the limit without any authorization. The evidence shows other policy violations, including personal use of Town computers, e-mail and the Town garage. Hinson also violated Town policy by driving his personal truck to Burlington for repair, while using Schmidt as his driver to return to the Town. He also inappropriately claimed a snow blower from clean-up day as personal property.

These policy violations "demonstrate that there was adequate cause to terminate Mr. Hinson's employment." The Town's small size and administrative structure make it understandable that the policy violations did not result in a formal written record. Rather, the Town's counseling efforts were informal, unless the effort involved a Town Board meeting such as that of December 9, 2002. Whether or not these violations establish just cause for discharge, they "are sufficient to justify the termination" which is not governed by a just cause standard in any event. Relevant precedent establishes no more than that "the Town show that it had legitimate business reasons" for the termination. The evidence establishes that it did.

The evidence shows no reason to believe two of the three Town Supervisors were aware of "Mr. Hinson's union activity" and no reason to believe that Lembcke was motivated by anything beyond his concern with Hinson's poor job performance. Since the termination "was a reasonable business decision", and since it had nothing to do with "his union activities", it follows that "the complaint should be dismissed."

DISCUSSION

The Alleged Violation of Sec. 111.70(3)(a)3, Stats.

Sec. 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to “encourage or discourage a membership in any labor organization by discrimination in regard to . . . tenure or other terms or conditions of employment.” To prove a violation of this section the Union must, by a clear and satisfactory preponderance of the evidence [see Sec. 111.07(3), Stats., made applicable by Sec. 111.70(4)(a), Stats.], establish that: (1) Hinson was engaged in activity protected by Sec. 111.70(2), Stats.; (2) the Employer was aware of the activity; (3) the Employer was hostile to the activity; and (4) the Employer terminated Hinson, at least in part, based upon hostility to his exercise of protected activity. *MUSKEGO-NORWAY C.S.J.S.D. NO. 9 v. WERB*, 35 WIS.2D 540 (1967), as discussed in *EMPLOYMENT RELATIONS DEPT. v. WERC*, 122 WIS.2D 132 (1985).

The first element questions whether Hinson engaged in protected activity. As the Commission stated in *CITY OF LACROSSE, DEC. NO. 17084-D (WERC, 10/83) AT 4-5, AFF'D, CIR. CT. CASE NO.-83-CV 821 (1985)*:

The MERA does not refer to “protected” activities. Sec. 111.70(2) of the MERA identifies certain rights of municipal employees . . . “to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .” The rights thus identified are enforced by Secs. 111.70(3) and 111.70(4) of MERA. Protected activity is, then, a shorthand reference to those lawful and concerted acts identified and enforced by the MERA.

There is no dispute that Hinson is a municipal employee covered by Sec. 111.70(2), Stats. Nor is there any dispute that his contact with the Union and discussions with other employees concerning Union representation constitute lawful, concerted activity. Thus, the Union has established the first element.

The application of the second element is not, in my opinion, significantly in doubt. It does, however, preface the difficulties posed by this record. It is evident that Lembcke was aware of Hinson’s interest in Union representation not later than November of 2002. Less evident, but established by the evidence, is that Hinson and Lembcke had a conversation on the evening prior to Hinson’s termination. Hinson testified the discussion involved significant hostility on Lembcke’s part to any organizational effort among the Employer’s employees. Whether or not his testimony on the depth of Lembcke’s hostility is accurate, the existence of the conversation and its subject matter is not disputed and affirms Lembcke’s awareness of Hinson’s interest in Union representation.

More problematic is the awareness of other Town Board members concerning Hinson's interest in Union representation. The evidence does not establish that the Board considered Gable's February 14, 2003 letter prior to the meeting. Gable acknowledged that this contact was his first with the Board as a body. Neau questioned Hinson about his interest in a union at a Town Board meeting in March or April of 2002. Hinson disavowed any interest in Union representation, and Neau concluded that there was no organizational effort. The degree of Board knowledge of Hinson's activity is thus disputed, and prefaces the more troublesome application of the remaining elements to the application of Sec. 111.70(3)(a)3, Stats.

On balance, the evidence establishes Employer hostility to Hinson's interest in Union representation. The statement of this conclusion should not obscure the difficulty of drawing it from the evidence. The evidence clearly establishes that the Board shared a common view that Hinson was not appropriately deferential to them and to Town residents. The Board viewed their hostility to his exercise of Departmental authority as a power struggle. This is not necessarily synonymous with hostility toward his exercise of lawful, concerted activity. The evidence does not unequivocally establish such hostility. Gable's fax referring to an organizational campaign reflects less an ongoing campaign than an effort to shield Hinson from adverse Board action. The campaign was a muted one. Hinson initially did not want his efforts known to the Board, and he had little success convincing Bratz or Schmidt to join it. Beyond this, each Board member testified plausibly that their decision to terminate focused on work performance issues.

There is some evidence to support a conclusion that the Employer terminated Hinson to subvert an organizational campaign. The evidence indicates Hinson openly discussed his interest in Union representation with Lembcke in November of 2002 and February 13, 2003. An adverse evaluation followed one conversation and a termination followed the other. The ostensibly more damning evidence is traceable to Hinson's account of his conversation with Lembcke on February 13, 2003. Hinson was a credible witness, but his testimony that Lembcke expressed flagrant hostility to a Union organizational campaign the day before terminating the Union's main contact is less than fully persuasive. Lembcke's testimony was credible in significant part, and as the Employer points out, Hinson originally approached Lembcke as a reliable confidant. Hinson's testimony makes it hard to understand why Lembcke was a confidant in November of 2002 and obtusely and stridently anti-Union roughly three months later.

The issue regarding hostility is not, however, limited to whether the Board terminated Hinson to subvert an ongoing organizational campaign. In fact, the hostility established in the record is subtler. Rather than an issue of one-on-one credibility between Lembcke and Hinson, the issue is whether Hinson's known interest in the Union played a role in the power struggle that culminated in his termination. The evidence establishes that at least in part, it did. The testimony of Board members that they saw the termination being a reflection of their concern with Hinson's performance need not be disregarded to conclude that his interest in the Union played a role. Neau's testimony establishes that he is not hostile to unions as an institutional

matter, and that he was not aware of an ongoing organizational campaign. More significantly here, it establishes that he thought the issue of an organizational campaign warranted inquiry at a Board meeting. Nor should the nature of the inquiry be understated. As he put it: "I confronted Eric, and Eric told me no . . . I pretty much accepted that he was not being involved in the union" (Transcript at 111). Hinson's desire to pursue or not to pursue representation is protected by Sec. 111.70(2), Stats. That Neau considered the point worth "confronting" Hinson about at a Board meeting indicates a level of Board concern with its authority that is potentially significant under Sec. 111.70(3)(a)3, Stats. That Neau remembered that a rumor prompted his concern as well as the source of the rumor underscores that Hinson's interest was significant to him. When addressed at a Board meeting, it became significant to the Board as a whole.

This incident sets the background to future events. Neau's inquiry was virtually contemporaneous with Hinson's first contact with Gable. It is evident that Hinson's concern for secrecy was in vain. Bratz and Schmidt were conduits for information for the Board. Avowed Board concerns with tree-trimming, amount of work issues or improper use of Town property are traceable directly to Bratz' or Schmidt's direct contact with Board members. It is unpersuasive to conclude that these employees somehow guarded Hinson's contact with them concerning the Union while they freely communicated their personal concerns with Hinson to the Board.

The Employer's conduct toward Hinson confirms that their hostility toward his interest in the Union played a role in labeling him "a square peg in a round hole." That the Union had not mounted an effective organizational campaign at the time of the termination cannot obscure that the termination eliminated the sole known source for such a campaign. Thus, the Employer gained something from the termination it could not gain from any other action. Against this background, it is significant that the decision to terminate is effectively impossible to account for in the absence of the inference of proscribed hostility.

There is no evidence the Board considered any form of action other than termination, and little evidence that it took any effective action to modify whatever it viewed as the deficiencies in Hinson's work performance. The Board never offered Hinson or the Union a consistent or substantiated basis for the termination. Ludwig's letter of February 18, 2003 explains the termination as an action for "cause" without explaining the cause. The assertion that Hinson was probationary presumes that his promotion in May of 2002 to Department Superintendent was a "hire" into the position, which prompted a new probation period. Even with the benefit of this assumption, Hinson would have been non-probationary under the Policy on "the expiration of six (6) months." The Board did not act to continue his probationary status until its December 9, 2002 meeting, in violation of the Policy. Under the Policy regarding non-probationary employees, the Employer was to "normally" use progressive discipline and "immediately" discuss rule violations. It never disciplined Hinson, and seldom immediately discussed with Hinson the bulk of the allegations made against him. Rather, Board members uncritically accepted information from Bratz or Schmidt. Hinson's views, when sought, were not

investigated. Board concerns regarding citizen complaints form a limited exception to this. Lembcke and Larsen did promptly discuss incidents with Hinson that involved citizen complaints. However, even here the evidence manifests a pattern by which intra-Board discussions concerning Hinson assumed a life of their own. Lembcke's testimony concerning the Naton incident is more strident than Naton's. Similarly, Larsen's description of a complaint concerning the landfill grew in stridency as he discussed it with Lembcke.

The record concerning the basis for the Employer's termination decision is virtually impenetrable. Finding of Fact 7 attempts to isolate the concerns raised during Hinson's evaluation, and Finding of Fact 8 attempts to isolate the concerns raised during the termination meeting. Finding of Fact 10 attempts to isolate the evidentiary basis for the concerns identified in the evaluation and Finding of Fact 11 does so for the concerns identified at the termination. There is little, if any, persuasive evidentiary support for any Board allegation against Hinson, except those turning on the personal reaction of Board members to Hinson.

Consideration of the allegations raised at hearing makes the basis for these avowed concerns even more opaque. Considerable testimony surrounded Hinson's exceeding the \$300 purchase limit, yet the record shows little evidence to support this. He did not exceed the budget for any item. The invoice for the weed whacker is dated February 18, 2003. Evidence of salt and chemical purchases preceding the discharge was not brought up to Hinson at the time of the discharge. Lembcke, contrary to Hinson, denies authorizing any of the purchases, but the Employer kept the weed whacker. The Employer offered evidence concerning Hinson's alleged abuse of e-mail. The evidence, accepted only as an offer of proof, was generated in the month following the discharge, and was not tied to any concern raised to Hinson or considered by a Town Board member prior to the termination. The Employer's post-termination assertion that Hinson stole Town property confirms a consistent pattern by which concerns traceable to Bratz and Schmidt became the basis for Employer action, which was unaccompanied by any attempt to substantiate the concerns. Each Board member testified to a far wider range of concerns than were ever voiced to Hinson.

In sum, the evidence indicates individual Board members thought Hinson was not appropriately deferential to the Board or to complaining citizens. However, it falls short of establishing why the Board extended a probationary period that no longer existed under the Policy, then terminated Hinson without warning or any meaningful attempt to address the alleged shortcomings in his work performance. The evidence establishes that the Board was aware that Hinson had an interest in Union representation, and warrants the inference that the Board was hostile to this interest. The termination was not motivated to destroy a viable organizational campaign, but reflects Employer determination to rid itself of an employee it perceived as a poor fit in the Department. Hinson's known interest in the Union was an appreciable part of this perception, and thus a motivating part of the basis for the termination decision.

This conclusion thus establishes a District violation of Sec. 111.70(3)(a)3, and derivatively, of Sec. 111.70(3)(a)1, Stats. Before addressing the issue of remedy, it is necessary to touch on certain arguments posed by the parties. The Union asserts that Ludwig's letter of February 25, 2003 is a misstatement of Commission case law that betrays the real basis for the termination. Whether or not this assertion is true, the letter catches the essence of the evidence. The evidence does not establish that the Employer acted to subvert a viable organizational campaign, but does warrant the inference that it acted to rid itself of the source of such a campaign.

The Employer notes the difficulty in concluding Hinson's testimony regarding his conversations with Lembcke can account for a flagrantly anti-union attitude. There is a marked change from Hinson's initial discussions with Lembcke to that of February 13, 2003. The depth of animus Hinson attributes to Lembcke during that conversation is difficult to reconcile with other conversations, and bears a troublesome similarity to Gable's faxing the February 14, 2003 letter prior to the termination meeting. Each appears a belated attempt to cloak Hinson with the protection of Sec. 111.70(3)(a)3, Stats. However, in other respects, Hinson's testimony is remarkably candid and corroborated by other sources. His account of the Naton incident is essentially the same as Naton's and Schmidt's. As noted above, Lembcke's is more strident. I do not find Lembcke to lack credibility as a witness. For example, his view that Hinson showed an inappropriate aversion to the cold may explain why Hinson was the sole witness to wear a coat through the bulk of the hearing, and is consistent with other witness testimony on the point. On significant points, Lembcke's and Hinson's testimony converge. Their testimony regarding Hinson's personal purchases in a tax-exempt fashion exemplify this. Lembcke did not attempt to contradict Hinson. Each witness showed respect for fact. More to the point, Lembcke's testimony reflects his identification of his personal views with the exercise of Employer authority. That he viewed Hinson as a "square peg in a round hole" reflects his honest view that the Employer was, as of February 14, 2003, better off without him. The strength of his identification of his personal view with Employer authority, however, obscures the impact of Hinson's interest in Union representation in the determination. The issue regarding hostility is not whether Lembcke or any other Board member was virulently anti-union. The issue is whether Hinson's known interest in the Union played a role in the termination decision.

The Order entered above includes a cease and desist order, notice posting and make-whole relief. These elements of a remedial order are traditional, and do not require extensive discussion. Interest on the make-whole portion of the Order is required under Sec. 804.04(4), Stats., as noted in *WILMOT UNION HIGH SCHOOL*, DEC. NO. 18820-B (WERC, 12/83), citing *ANDERSON V. LIRC*, 111 WIS. 2D. 245 (1983), and *MADISON TEACHERS, INC. V. WERC*, 115 WIS.2D 623 (CT. APP. IV, 1983). The reinstatement of Hinson to his former position on a non-probationary basis reflects that the Employer's extension of his probationary period at its December 9, 2002 meeting was in violation of the Policy.

The Order dismisses the alleged violation of Sec. 111.70(3)(a)2, Stats. The allegation appears in the complaint, but the Union did not specifically address the allegation at hearing or in its brief. The evidence establishes that the Union's first contact with the Board came with Gable's February 14, 2003 fax. There is no basis to find a violation of this section on this record.

Dated at Madison, Wisconsin this 5th day of March, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

RBM/gjc
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