

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 2494, AFSCME, AFL-CIO, Complainant,

vs.

COUNTY OF WAUKESHA, Respondent.

Case 174
No. 63231
MP-4013

Decision No. 30799-B

Appearances:

Jack Bernfeld and **Laurence Rodenstein**, Staff Representatives, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appearing on behalf of Local 2494, AFSCME, AFL-CIO.

Scott C. Beightol, Michael, Best & Friedrich, LLP, Attorneys at Law, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, and **James H. Richter**, Labor Relations Manager, Waukesha County, Waukesha County Government Center, 1320 Pewaukee Road, Waukesha, Wisconsin 53188, appearing on behalf of Waukesha County.

ORDER ON REVIEW OF EXAMINER'S DECISION

On November 3, 2004, Examiner Coleen A. Burns issued Findings of Fact, Conclusions of Law and Order in the above-captioned matter, holding that the Respondent County of Waukesha (County) did not violate Sec. 111.70(3)(a)1, 2, or 3, Stats., when the County eliminated the position of Elizabeth Pantelis, President of Complainant Local 2494, AFSCME, AFL-CIO (the Union) during the budgetary process in the fall of 2002. On November 5, 2004, the Union filed a timely petition for review of the Examiner's decision, pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. Both parties filed written argument regarding the Union's petition, the last of which was received on January 6, 2005.

Dec. No. 30799-B

Having reviewed the record and considered the arguments of the parties, and for the reasons set forth in the Memorandum that follows, we affirm the Examiner's decision and her Order dismissing the complaint.

ORDER

The Examiner's Findings of Fact, Conclusions of Law, and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 14th day of February, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

County of Waukesha

MEMORANDUM ACCOMPANYING ORDER

Summary of the Facts

As indicated in the Order, above, we affirm the Examiner's Findings of Fact, which were not challenged by either party on review. Those findings can be summarized in salient part as follows.

The Union represents a bargaining unit of County employees, including clerical, maintenance and custodial employees employed at the County Courthouse. At relevant times, Elizabeth Pantelis was employed by the County as a Clerk Typist II and as such was a member of the bargaining unit. Since September 2002, she had also been President of the Union.

At all relevant times, the County maintained a salary system for managerial and other non-represented employees that provided discretionary merit pay raises as well as periodic performance "bonuses" that were not incorporated into the employee's base salary. This salary system had replaced an earlier step-based system similar to that contained in the Union's collective bargaining agreement.

In late 2002, the Union was in the process of preparing for an interest arbitration to resolve the 2002-03 collective bargaining agreement. A major issue during the negotiations and in the arbitration was the County's proposal for employees to increase their contributions toward health insurance premiums and/or toward medical costs. In early November 2002, at Pantelis' request, the County supplied the Union with a list of the performance award bonuses given to management and other non-represented employees in the preceding year, which totaled some \$250,000. Pantelis distributed this list at a November 5, 2002 Union meeting, at which discussion also took place regarding the upcoming interest arbitration and County-proposed health insurance contribution increase. The next day, November 6, several County managers and supervisors contacted County Human Resources Director James Richter to express concern about employees having access to the performance bonus information and about some employees articulating that the bonuses were being used to offset the non-represented employees' increases in insurance costs. Richter contacted Pantelis, who confirmed the discussion at the Union meeting but denied that the Union was the source of any misunderstandings about the performance bonus program. Nonetheless, Richter sent Pantelis a letter on November 6 stating in part as follows:

. . .

The non-represented award performance information was requested and supplied to you. As I understand that information was communicated to employees at the Local's meeting and copies were provided to 10-15 employees.

I want to express my concern in regards to how the information was presented and distributed. I clearly understand that you have a right to request and be provided the information. Additionally, I also understand that it would be inappropriate for us to inquire as to the purpose for the request or what you intend to do with the data. However, based on the comments I have received there clearly was not a full discussion, presentation or understanding of the non-represented performance award program. I shared with you some of the comments that I had been hearing; your response was they were not accurate and the statements were not made at the meeting.

I believe the County and the Union share an obligation to provide as complete and accurate information to employees as possible. I also believe there was no intention by the union to embarrass any employees or create a conflict between coworkers, or employees and their supervisors. This obligation to provide accurate information is especially true when dealing with such sensitive information as a person's salary, even if it is a public record. It is my belief that the union did not meet their obligation in this circumstance.

. . .

You indicated that initially you provided 10-15 sets of the data to employees; what we do not know is how many other copies have been distributed over the course of the past day or two. My concern is that employees are now being provided information without the knowledge of why the program was created, how the program works, or how it is administered. This lack of information and understanding only leads to rumors, misconceptions and inaccuracies. It also has the unfortunate potential to create conflicts in the workplace between co-workers, and between employees and their supervisors.

It would be my hope that in the future, the Local will carefully consider their responsibilities in providing accurate information to employees and others and will ensure that a complete and accurate picture is presented. Misinformation and inappropriate rumors reflect on both the County and the Union.

Pantelis was upset at the content of Richter's letter and responded with her own sharply worded letter dated November 8, 2002.

Thereafter, Pantelis and the Union continued to express concern about the performance bonus plan in Union meetings, contract negotiations, and informal conversations with management. On December 20, 2002, Pantelis requested and received a copy of an audit that the County had made of the bonus plan in the year 2000. In early 2003, Pantelis met with

County Board Chairman Jim Dwyer to discuss the plan, its costs, and operation. In roughly the same time frame, Pantelis encountered the Chair of the County Board's Personnel Committee, to whom she expressed her displeasure with the plan and questioned whether he supported it. During that conversation, Pantelis also questioned whether County Executive Daniel Finley would win re-election if the public were aware of the bonuses. Also in roughly the same time frame, Pantelis stated to Norm Cummings, the County's Director of Administration and Richter's immediate supervisor, that the funds used for the performance bonuses could be used to defray represented employees' health insurance costs. Cummings responded that such would be tantamount to a social program in which management and non-represented employees would be funding union employees' health insurance. On April 10, 2004, Pantelis requested copies of the materials, including department head recommendations, that were submitted to justify the 2003 performance bonus awards. Cummings responded by e-mail on April 24, denying her request on the ground that such materials are exempt from the public records law and commenting, "Since the employee does not have access to the information, it certainly can be presumed that you do not have access."

In late spring or early summer 2003, the County began its FY 2004 budget process with County Executive Finley providing all County departments with budgetary targets. Kathy Nickolaus had taken office as County Clerk in January 2003 and headed the department in which Pantelis, along with another Clerk Typist II and an Account Clerk, were employed. The budgetary targets for Nickolaus' department did not include any staff reductions. Nickolaus submitted her proposed budget, which met the budgetary target but also proposed certain new initiatives, including issuing passports and dog licenses, and printing a public directory. When she met with Finley and members of his budget staff about the budget, Finley told Nickolaus that the County's fiscal restraint policy required departments to adhere to "core functions," i.e., those required by law, and he discouraged her from including the new initiatives on that ground, even though Nickolaus' budget suggested that they would generate about \$50,000 in new income. Finley did not comment on staffing levels. Members of the budget staff reported Finley's remarks to Cummings, who headed the County's budgetary team. Cummings telephoned Nickolaus to reiterate Finley's disapproval of the proposed initiatives and also questioned Nickolaus about whether her staff was underutilized, in light of her proposed additional duties. Nickolaus responded that she intended to absorb the additional work herself.

In early August 2003, the County was required to revise its budget targets downward because of the State fiscal crisis and a political need to maintain a tax freeze. Cummings and his team prepared a list of recommended reductions in excess of \$300,000 to the previously prepared budget, including the elimination of a Computer Coordinator position in the District Attorney's office and the elimination of one of the two Clerk Typist II positions in Nickolaus' office. At the time Cummings prepared this recommendation, he was not aware that Pantelis held the position that would be eliminated from the Clerk's office. Finley accepted Cummings'

recommendations and telephoned Nickolaus to advise her that the recommended budget would not include any of her initiatives and would eliminate one position. Nickolaus responded that the eliminated position would be that held by Pantelis, who was least senior, and Finley said he knew that. Nickolaus asked why Finley was eliminating a position and Finley replied only, "Because I can."

In mid-August, Richter learned that Pantelis' position might be abolished and encouraged her to apply for vacancies. Pantelis chose not to do so at that time, because she hoped that Nickolaus would succeed in keeping the position within the budget. During this period of time Nickolaus met with the County Board's Personnel and Finance Committees, hoping to persuade them to retain her initiatives and Pantelis' position. During one of these meetings, the County Treasurer and Nickolaus inaugurated a plan to fill a vacant full time position in the Treasurer's office and share it 50% with Nickolaus' office. When presented with this plan shortly thereafter, Finley approved it, stating that it met his goal of position elimination. Pantelis rather quickly was offered the shared position but declined on the ground that the contract required it to be posted. The County then posted the position as a hybrid Clerk Typist I/II, but Pantelis did not apply. She viewed the hybrid position as a demotion, even though the County was willing to red-circle her pay. Although the County informed her that such special arrangements had been made in the past for individuals facing layoff, Pantelis did not want to appear to be accepting special treatment. Nickolaus eventually succeeded in having the Board approve the passport duties as a pilot program, with projected annual revenues of about \$21,500.

On approximately September 19, 2003, Pantelis telephoned Finley to discuss the proposed budget and learned that about 20 positions (some union and some non-union) were being abolished, another 20 positions were being created, but her own position would be abolished. Pantelis questioned why Finley did not utilize a hiring or wage freeze or eliminate performance award bonuses as alternatives to layoff. Finley responded that no one would be laid off and that Pantelis would simply not be working in the County Clerk's office. Towards the latter part of September 2003, the Union and the County agreed upon a severance plan for laid off employees.

By letter dated November 6, 2003, addressed to a County Board member, Pantelis expressed appreciation for that Board member's role in investigating a bonus program in the City of Waukesha, advised the Board member of the facts regarding the County's performance award bonus system, questioned the fairness of continuing those bonuses in light of the accelerating costs of health care, and asked the Board member to investigate Waukesha County's bonus program.

Ultimately Pantelis was the only individual laid off by the County. The incumbent of the position eliminated in the District Attorney's office retired (as the County had previously been aware he would) and then returned on a half-time basis. Pantelis sought to bump a less

senior bargaining unit member in another department but was refused because the contract did not permit that. She also applied unsuccessfully for several vacancies, for some of which she did not meet the minimum qualifications. She did not apply for several other vacancies for which she would have been qualified.

Pantelis was laid off effective January 1, 2004. Some time later that month she applied for, was offered, and accepted a Clerk Typist II position in the County Sheriff's Department. Owing in part to the severance package, Pantelis lost no pay or benefits as a result of her layoff.

DISCUSSION

As the Examiner properly noted, a successful claim of discrimination in violation of Section (3)(a)3 requires adequate evidence of the following four elements: (1) that the employee was engaged in lawful concerted activities; (2) that the employer was aware of those activities; (3) that the employer bore animus towards those activities; and (4) that the employer took adverse action against the employee at least in part out of animus toward those activities. VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03) at 18, citing MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERC, 35 WIS.2D 540 (1967); EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122 WIS.2D 132 (1985).

In the instant case, there is no dispute regarding the first two elements: the County was well aware of Pantelis' lawful concerted activities on behalf of the Union in her capacity as President, including the spotlight she brought to the County's performance award bonus program. Instead, as is typical, the controversy centers upon the County's reasons for selecting Pantelis' position for elimination in the fiscal 2004 budget. If the record establishes that the County was motivated even in part by hostility to Pantelis' protected activity, the Union will prevail. The "in part" test is deliberately designed to ease the Union's burden to show improper motive, since it is "far easier for an employer to document alleged [reasons] than for the employee to monitor or have access to the employer's intra-management discussions about its motives." D.C. EVEREST AREA SCHOOL DIST., DEC. NO. 29946-M (WERC, 6/04) at 37, citing ERD v. WERC, 122 WIS.2D 132, 142 (SUP. CT. 1985).

While the Commission may infer motive from a logical and experienced assessment of the circumstances even in the absence of direct evidence, VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03) at 19, such an inference must rest upon more than suspicion or speculation. In this case, for example, some circumstances do arouse suspicion about the County's action in abolishing Pantelis' position, but ultimately, we conclude, nothing of substance connects that suspicion to Pantelis' Union activity. The circumstances include the following: Pantelis was the Union President, she engaged in a series of irksome activities around publicizing the bonuses a number of management officials had received, the record

reflects some resulting vexation on the part of both Human Resources Director Richter and Director of Administration Cummings, 1/ Pantelis was the only one among several hundred County employees to be laid off as a result of the ostensible budget crunch, and the decision to abolish her position occurred within a few months of her irksome activities. In addition, the County's proffered reason, the budget situation, is not an entirely satisfactory explanation for selecting Pantelis' position rather than any other position, given that the County created as many positions as it abolished and apparently abolished no filled positions other than Pantelis'. 2/ The County sheds little light on the deliberations leading to its decision to focus on Pantelis' position, other than to say that it seemed logical since Nickolaus had proposed several new initiatives without seeking additional staff. All in all, the County's proffered explanation does not pack a solid punch.

1/ As the Examiner noted, Richter's letter to Pantelis dated November 6, 2002 reasonably can be read to display some annoyance at her distributing and discussing the bonus information at a Union meeting. Likewise, we view Cummings' comment to Pantelis that using the bonus money to defray unit employees' health insurance costs as well as the tone of his April 21 e-mail denying her request for the underlying documentation as reflecting some measure of annoyance.

2/ The record reflects that County officials were aware, prior to proposing elimination of the computer position at the District Attorney's office, that the incumbent in that position was about to retire.

The Union would bolster the foregoing circumstances by attributing animus to County Executive Finley toward Pantelis' Union activity. The Union points to Finley's arrogant response to Nickolaus, "Because I can," as so deficient in terms of providing explanation or detail as to suggest improper motives. The Union also construes Finley's remark to Pantelis, to the effect that she'd be working "just not in the Clerk's office," as did the Examiner, as so insensitive and spiteful as to bespeak hostility. Further, the Union urges us to draw an adverse inference from Finley's failure to testify, to the effect that he was indeed angered by Pantelis' publicizing of the bonus program, which gave him authority and discretion, and that County Supervisor Paulson had further inflamed Finley by informing him of Pantelis' remark about the effect the bonus controversy would have upon Finley's ability to get re-elected.

While the picture the Union draws regarding Finley is possible, the evidence is simply too sparse and the requisite inferences too layered to allow us to find it as fact. First, we do not think Finley's remarks are most reasonably construed to reflect hostility, at least not toward Pantelis. More likely, given the context, the first remark reflected some friction with Nickolaus. The second remark seems facially inoffensive and, while it could have been intended as mocking, sneering, or insensitive, it could just as easily have been intended to

reassure Pantelis about her future employment. More importantly, the record indicates that Cummings, not Finley, initiated the elimination of Pantelis' job, by including it in the budget he recommended to Finley in September 2003. Moreover, when Richter sought Finley's approval for the job-sharing plan developed by Nickolaus and the County Treasurer as a way to keep Pantelis employed, Finley had no problem, remarking only that it served his overall goal of position elimination. Since the record thus lacks affirmative evidence of Finley's animus which might call for rebuttal, no adverse inference is warranted from the Respondent's decision not to call him as a witness.

Nor do the other circumstances outlined above bear scrutiny. As to timing, the bulk of Pantelis' activity surrounding the bonus issue occurred well before the County's initial budget preparations in early summer. Even then, while the initial budget draft recommended the abolition of some positions, Pantelis' was not among them. To the extent the subsequent redrafted budget seems to have somewhat inexplicably targeted Pantelis' position, and to the extent hostility could inferentially account for such targeting, this record suggests that the hostility and the targeting were directed at Nickolaus and her "non-core" initiatives, rather than at Pantelis. For example, Cummings, at the time he initiated the recommendation, was unaware that Pantelis would be affected by eliminating the position. Moreover, County officials in general, including Richter, made considerable efforts to minimize the effect on Pantelis. Pantelis viewed some of those efforts as designed to undermine her in the view of her constituency and her view conceivably could be accurate, but such a conclusion is not compelled or even supported by the record. On the contrary, it appears that County officials acted in good faith in developing and offering Pantelis the shared position and in encouraging her to apply for the several other vacancies for which she was eligible. While not necessarily inconsistent with unlawful motives, we also note that Pantelis' layoff was very brief, resulted in no economic losses, and ended when the County offered her a job in the Sheriff's Department that she found acceptable.

For the foregoing reasons, we affirm the Examiner's holding that the Union has not produced sufficient evidence to establish that the County decided to eliminate the position held by Elizabeth Pantelis out of hostility toward her Union activity, and the allegations of a violation of Secs. 111.70(3)(a)3 and derivatively (3)(a)1, Stats., are dismissed.

The Union also argues that the County unlawfully interfered with the internal administration of the Union, in violation of Sec. 111.70(3)(a)2, Stats., by targeting the Union president for layoff. It is well established that the purpose of subsection (3)(a)2 (and its analogs in the private sector) is to curtail employer favoritism toward a particular union or toward a particular leadership cadre within the union, so as to undermine bargaining unit employees' free choice of representatives. Thus, in cases finding "domination," the employer has essentially obliterated a union's ability to act independently of the employer's interests. RACINE UNIFIED S. D., DEC. NO. 15915-B (HOORNSTRA, 11/77). SEE GENERALLY, GORMAN

AND FINKIN, BASIC TEXT ON LABOR LAW, 2D ED. (WEST 2004) at 263-65. In cases of “interference,” the employer has not totally subjugated the union to the employer’s will, but has “exercised some lesser form of influence in the determination of union policy.” ID. at 265. Examples of interference within the proscription of (3)(a)2 would be negotiating with one of the rival unions during the pendency of an election petition, DANE COUNTY, DEC. NO. 5915-B (WERC, 10/73), selecting the individuals to serve on a committee dealing with working conditions, or having a supervisor serve in a significant Union position, PROFESSIONAL POLICEMEN’S PROTECTIVE ASSOCIATION OF MILWAUKEE, DEC. NO. 12448-A (WERC, 10/74). While laying off the Union president could contribute to a finding of unlawful interference, perhaps if found to be part of a wider pattern of employer intermeddling in the Union leadership, such circumstances are wholly lacking here. Accordingly, this allegation is also dismissed.

For the foregoing reasons, the Examiner’s decision is affirmed and the complaint is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 14th day of February, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Susan J. M. Bauman /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner